

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(91) 363 final - SYN 317

Brussels, 20 October 1991

Amended proposal for a

COUNCIL DIRECTIVE

AMENDING DIRECTIVE 77/91/EEC ON THE
FORMATION OF PUBLIC LIMITED LIABILITY COMPANIES
AND THE MAINTENANCE AND ALTERATION OF THEIR CAPITAL

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

EXPLANATORY MEMORANDUM

I. Background

The Second Council Directive on company law, Directive 77/91/EEC,¹ harmonizes the safeguards required by Member States of companies 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.

With regard to capital, the Directive deals inter alia with the question of the acquisition by a company of its own shares.

Following its communication of 10 May 1990² on the removal of certain obstacles to takeover and other general bids the Commission presented to the Council on 8 January of this year a proposal for a Directive amending the Second Directive.³

The purpose of that amendment was to extend the Second Directive's arrangements concerning the acquisition of own shares to cover the acquisition of a company's shares by its subsidiaries.

The Economic and Social Committee delivered its opinion on 3 July.⁴

Parliament's opinion was delivered on 10 July.⁵

The present amended proposal for a Directive, which the Commission has adopted on the basis of Article 149(3) of the Treaty, is designed to take account of those opinions.

1 OJ L 26, 31.1.1977, p. 1.

2 SEC(90) 901 final, 10.5.1990.

3 OJ C 8, 12.1.1991, p. 5; with explanatory memorandum, COM(90) 631.

4 Not yet published.

5 Not yet published.

II. Commentary

Article 24a

This article provides that a subsidiary company may acquire shares in its parent company only under the same conditions as those under which the latter can acquire its own shares.

For the purposes of this rule, the definition of subsidiary company was based on the criteria applied by other Community instruments, namely Directive 83/349/EEC on consolidated accounts⁶ and Directive 88/627/EEC on the information to be published when a major holding in a listed company is acquired or disposed of.⁷

Under Article 24a(2) of the original proposal a company is deemed a subsidiary of another company (the parent company) if the latter fulfils one of the following conditions vis-à-vis the former:

- (a) it holds a majority of the voting rights; or
- (b) it has the right to appoint or remove a majority of the directors of the company, in which it is at the same time a shareholder; or
- (c) it has the right to control alone a majority of the voting rights pursuant to an agreement entered into with other shareholders or to a provision in the statutes of the former company.

In the present amended proposal, as in the abovementioned Directives, it is made clear that even as regards the third criterion, criterion (c), the parent company must be a shareholder in its subsidiary, that is to say it must have a participating interest in its capital.

Moreover, at Parliament's request, the definition of subsidiary company has been broadened so as to include companies over which the parent company exercises indirect control through other subsidiaries. To this end, a new subparagraph has been added to Article 24a(2) according to which, in calculating the parent company's rights as regards voting, appointment and removal, account must also be taken of the rights of any other subsidiary company and of those of persons acting in their own name but on behalf of the parent company or of any other subsidiary. This new subparagraph corresponds to similar provisions in the two Directives referred to above.

⁶ OJ L 193, 18.7.1983, p. 1.

⁷ OJ L 348, 17.12.1988, p. 62.

In keeping with Parliament's wishes as indicated above, it must also be ensured that a company does not use a "sub-subsidiary" (a subsidiary of a subsidiary) to circumvent the safeguards provided for in the Second Directive in connection with the acquisition of own shares. To that end, a new paragraph 3 has been added to Article 24a. By virtue of this new paragraph "sub-subsidiaries" are also deemed subsidiaries of the parent.

ORIGINAL PROPOSAL

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 proposal from the Commission,

In cooperation with the European Parliament,

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

Whereas in order to maintain the subscribed capital and ensure equal treatment of shareholders, Directive 77/91/EEC¹ limits the right of a company to acquire its own shares;

Whereas the restrictions on the acquisition of own shares apply not only to acquisitions made by the company itself but also to those made by a person acting in his own name but on the company's behalf;

Whereas a subsidiary company does not enjoy true independence in determining its line of action; whereas in order to prevent a company from using a subsidiary to make such acquisitions without regard to the restrictions imposed in that respect, the arrangements concerning the acquisition by a company of its own shares should be extended to cover the acquisition of a company's shares by a subsidiary,

¹ OJ L 26, 31.1.1977.

AMENDED PROPOSAL

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Unchanged

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,¹

Having regard to the opinion of the Economic and Social Committee,²

Unchanged

Unchanged

Unchanged

¹ Opinion of 10 July 1991 (not yet published).
² Opinion of 3 July 1991 (not yet published)

HAS ADOPTED THIS DIRECTIVE:

Unchanged

Article 1

Article 1

The Directive 77/91/EEC of the Council is amended as following: a new Article 24a is added after Article 24.

Council Directive 77/91/EEC is amended as follows: (rest unchanged)

"Article 24a

"Article 24a

1. A subsidiary company may acquire shares in its parent company only to the extent that the latter may acquire its own shares by virtue of provisions adopted pursuant to Articles 19 to 24. For the purposes of those provisions, acquisitions of shares in the parent company by its subsidiaries shall be deemed to have been made by the parent company.

1. Unchanged

2. For the purposes of paragraph 1, "subsidiary company" means any company in which another company (the parent company):

2. Unchanged

(a) holds a majority of shareholders' or members' voting rights; or

Unchanged

(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 in or member of that company; or

Unchanged

(c) has the right to control alone a majority of shareholders' or members' voting rights pursuant to an agreement entered into with other shareholders in or members of that company or to a provision in its statutes."

is a shareholder in or member of that company and controls alone a majority of shareholders' or members' voting rights pursuant to an agreement entered into with other shareholders in or members of that company or to a provision in its statutes."

For the purposes of this paragraph, the parent company's rights as regards voting, appointment and removal shall include the rights of any other subsidiary company and those of any person acting in his own name but on behalf of the parent company or of any other subsidiary company.

3. For the purposes of paragraph 1, where a subsidiary of the parent company itself has subsidiaries, the latter shall also be deemed subsidiaries of the parent company.

Article 2

1. Member States shall adopt before ... the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

Unchanged

2. The date of entry into force which Member States lay down for these provisions shall be not later than ...

Unchanged

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Unchanged

4. When Member States adopt the provisions, the latter shall contain a reference to this Directive or shall be accompanied by such a reference at the time of their official publication. The methods of making such a reference shall be laid down by the Member States.

Unchanged

Article 3

This Directive is addressed to the Member States.

Unchanged

Article 2

Article 3

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DOCUMENTS

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