

II

(Acts whose publication is not obligatory)

COUNCIL

THIRD COUNCIL DIRECTIVE

of 9 October 1978

based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies

(78/855/EEC)

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 ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas the coordination provided for in Article 54 (3) (g) and in the general programme for the abolition of restrictions on freedom of establishment ⁽⁴⁾ was begun with Directive 68/151/EEC ⁽⁵⁾;

Whereas this coordination was continued as regards the formation of public limited liability companies and the maintenance and alteration of their capital with Directive 77/91/EEC ⁽⁶⁾, and as regards the annual accounts of certain types of companies with Directive 78/660/EEC ⁽⁷⁾;

Whereas the protection of the interests of members and third parties requires that the laws of the Member States relating to mergers of public limited liability

companies be coordinated and that provision for mergers should be made in the laws of all the Member States;

Whereas in the context of such 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 the protection of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is at present regulated by Directive 77/187/EEC ⁽⁸⁾;

Whereas creditors, including debenture holders, and persons having other claims on the merging companies must be protected so that the merger does not adversely affect their interests;

Whereas the disclosure requirements of Directive 68/151/EEC must be extended to include mergers so that third parties are kept adequately informed;

Whereas the safeguards afforded to members and third parties in connection with mergers must be extended to cover certain legal practices which in important respects are similar to merger, so that the obligation to provide such protection cannot be evaded;

⁽¹⁾ OJ No C 89, 14. 7. 1970, p. 20.

⁽²⁾ OJ No C 129, 11. 12. 1972, p. 50; OJ No C 95, 28. 4. 1975, p. 12.

⁽³⁾ OJ No C 88, 6. 9. 1971, p. 18.

⁽⁴⁾ OJ No 2, 15. 1. 1962, p. 36/62.

⁽⁵⁾ OJ No L 65, 14. 3. 1968, p. 8.

⁽⁶⁾ OJ No L 26, 31. 1. 1977, p. 1.

⁽⁷⁾ OJ No L 222, 14. 8. 1978, p. 11.

⁽⁸⁾ OJ No L 61, 5. 3. 1977, p. 26.

Whereas to ensure certainty in the law as regards relations between the companies concerned, between them and third parties, and between the members, the cases in which nullity can arise must be limited by providing that defects be remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced,

HAS ADOPTED THIS DIRECTIVE :

Article 1

Scope

1. The coordination measures laid down by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company :

- Germany :
die Aktiengesellschaft,
- Belgium :
la société anonyme / de naamloze vennootschap,
- Denmark :
aktieselskaber,
- France :
la société anonyme,
- Ireland :
public companies limited by shares, and public companies limited by guarantee having a share capital,
- Italy :
la società per azioni,
- Luxembourg :
la société anonyme,
- the Netherlands :
de naamloze vennootschap,
- the United Kingdom :
public companies limited by shares, and public companies limited by guarantee having a share capital.

2. The Member States need not apply this Directive to cooperatives incorporated as one of the types of company listed in paragraph 1. In so far as the laws of the Member States make use of this option, they shall require such companies to include the word 'cooperative' in all the documents referred to in Article 4 of Directive 68/151/EEC.

3. The Member States need not apply this Directive in cases where the company or companies which are being acquired or will cease to exist are the subject of bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies, judicial arrangements, compositions and analogous proceedings.

CHAPTER I

Regulation of merger by the acquisition of one or more companies by another and of merger by the formation of a new company

Article 2

The Member States shall, as regards companies governed by their national laws, make provision for rules governing merger by the acquisition of one or more companies by another and merger by the formation of a new company.

Article 3

1. For the purposes of this Directive, 'merger by acquisition' shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.

2. A Member State's laws may provide that merger by acquisition may also be effected where one or more of the companies being acquired is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

Article 4

1. For the purposes of this Directive, 'merger by the formation of a new company' shall mean the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.

2. A Member State's laws may provide that merger by the formation of a new company may also be effected where one or more of the companies which are ceasing to exist is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

CHAPTER II

Merger by acquisition

Article 5

1. The administrative or management bodies of the merging companies shall draw up draft terms of merger in writing.
2. Draft terms of merger shall specify at least :
 - (a) the type, name and registered office of each of the merging companies ;
 - (b) the share exchange ratio and the amount of any cash payment ;
 - (c) the terms relating to the allotment of shares in the acquiring company ;
 - (d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement ;
 - (e) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company ;
 - (f) the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them ;
 - (g) any special advantage granted to the experts referred to in Article 10 (1) and members of the merging companies' administrative, management, supervisory or controlling bodies.

Article 6

Draft terms of merger must be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC, for each of the merging companies, at least one month before the date fixed for the general meeting which is to decide thereon.

Article 7

1. A merger shall require at least the approval of the general meeting of each of the merging companies. The laws of the Member States shall provide that this decision shall require a majority of not less than two thirds of the votes attaching either to the shares or to the subscribed capital represented.

The laws of a Member State may, however, provide that a simple majority of the votes specified in the first subparagraph shall be sufficient when at least half of the subscribed capital is represented. Moreover,

where appropriate, the rules governing alterations to the memorandum and articles of association shall apply.

2. Where there is more than one class of shares, the decision concerning a merger shall be subject to a separate vote by at least each class of shareholders whose rights are affected by the transaction.

3. The decision shall cover both the approval of the draft terms of merger and any alterations to the memorandum and articles of association necessitated by the merger.

Article 8

The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company if the following conditions are fulfilled :

- (a) the publication provided for in Article 6 must be effected, for the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which are to decide on the draft terms of merger ;
- (b) at least one month before the date specified in (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 11 (1) at the registered office of the acquiring company ;
- (c) one or more shareholders of the acquiring company holding a minimum percentage of the subscribed capital must be entitled to require that a general meeting of the acquiring company be called to decide whether to approve the merger. This minimum percentage may not be fixed at more than 5 %. The Member States may, however, provide for the exclusion of non-voting shares from this calculation.

Article 9

The administration or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio.

The report shall also describe any special valuation difficulties which have arisen.

Article 10

1. One or more experts, acting on behalf of each of the merging companies but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of merger and draw up a written report to the shareholders. However,

the laws of a Member State may provide for the appointment of one or more independent experts for all the merging companies, if such appointment is made by a judicial or administrative authority at the joint request of those companies. Such experts may, depending on the laws of each Member State, be natural or legal persons or companies or firms.

2. In the report mentioned in paragraph 1 the experts must in any case state whether in their opinion the share exchange ratio is fair and reasonable. Their statement must at least :

- (a) indicate the method or methods used to arrive at the share exchange ratio proposed ;
- (b) state whether such method or methods are adequate in the case in question, indicate the values arrived at using each such method and give an opinion on the relative importance attributed to such methods in arriving at the value decided on.

The report shall also describe any special valuation difficulties which have arisen.

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

Article 11

1. All shareholders shall be entitled to inspect at least the following documents at the registered office at least one month before the date fixed for the general meeting which is to decide on the draft terms of merger :

- (a) the draft terms of merger ;
- (b) the annual accounts and annual reports of the merging companies for the preceding three financial years ;
- (c) an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date ;
- (d) the reports of the administrative or management bodies of the merging companies provided for in Article 9 ;
- (e) the reports provided for in Article 10.

2. The accounting statement provided for in paragraph 1 (c) shall be drawn up using the same methods and the same layout as the last annual balance sheet.

However, the laws of a Member State may provide that :

- (a) it shall not be necessary to take a fresh physical inventory ;

(b) the valuations shown in the last balance sheet shall be altered only to reflect entries in the books of account ; the following shall nevertheless be taken into account :

- interim depreciation and provisions,
- material changes in actual value not shown in the books.

3. Every shareholder shall be entitled to obtain, on request and free of charge, full or, if so desired, partial copies of the documents referred to in paragraph 1.

Article 12

Protection of the rights of the employees of each of the merging companies shall be regulated in accordance with Directive 77/187/EEC.

Article 13

1. The laws of the Member States must provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.

2. To this end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

3. Such protection may be different for the creditors of the acquiring company and for those of the company being acquired.

Article 14

Without prejudice to the rules governing the collective exercise of their rights, Article 13 shall apply to the debenture holders of the merging companies, except where the merger has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

Article 15

Holders of securities, other than shares, to which special rights are attached, must be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired, unless the alteration of those rights has been approved by a meeting of the holders of such securities, if such a meeting is provided for under national laws, or by the holders of those securities individually, or unless the holders are entitled to have their securities repurchased by the acquiring company.

Article 16

1. Where the laws of a Member State do not provide for judicial or administrative preventive supervision of the legality of mergers, or where such supervision does not extend to all the legal acts required for a merger, the minutes of the general meetings which decide on the merger and, where appropriate, the merger contract subsequent to such general meetings shall be drawn up and certified in due legal form. In cases where the merger need not be approved by the general meetings of all the merging companies, the draft terms of merger must be drawn up and certified in due legal form.

2. The notary or the authority competent to draw up and certify the document in due legal form must check and certify the existence and validity of the legal acts and formalities required of the company for which he or it is acting and of the draft terms of merger.

Article 17

The laws of the Member States shall determine the date on which a merger takes effect.

Article 18

1. A merger must be publicized in the manner prescribed by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC, in respect of each of the merging companies.

2. The acquiring company may itself carry out the publication formalities relating to the company or companies being acquired.

Article 19

1. A merger shall have the following consequences *ipso jure* and simultaneously:

- (a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;
- (b) the shareholders of the company being acquired become shareholders of the acquiring company;
- (c) the company being acquired ceases to exist.

2. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

- (a) by the acquiring company itself or through a person acting in his own name but on its behalf;

or

- (b) by the company being acquired itself or through a person acting in his own name but on its behalf.

3. The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights and obligations by the acquired company to be effective as against third parties. The acquiring company may carry out these formalities itself; however, the laws of the Member States may permit the company being acquired to continue to carry out these formalities for a limited period which cannot, save in exceptional cases, be fixed at more than six months from the date on which the merger takes effect.

Article 20

The laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the members of the administrative or management bodies of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the merger.

Article 21

The laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the experts responsible for drawing up on behalf of that company the report referred to in Article 10 (1) in respect of misconduct on the part of those experts in the performance of their duties.

Article 22

1. The laws of the Member States may lay down nullity rules for mergers in accordance with the following conditions only:

- (a) nullity must be ordered in a court judgment;
- (b) mergers which have taken effect pursuant to Article 17 may be declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;
- (c) nullification proceedings may not be initiated more than six months after the date on which the merger becomes effective as against the person alleging nullity or if the situation has been rectified;

- (d) where it is possible to remedy a defect liable to render a merger void, the competent court shall grant the companies involved a period of time within which to rectify the situation;
- (e) a judgment declaring a merger void shall be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC;
- (f) where the laws of a Member State permit a third party to challenge such a judgment, he may do so only within six months of publication of the judgment in the manner prescribed by Directive 68/151/EEC;
- (g) a judgment declaring a merger void shall not of itself affect the validity of obligations owed by or in relation to the acquiring company which arose before the judgment was published and after the date referred to in Article 17;
- (h) companies which have been parties to a merger shall be jointly and severally liable in respect of the obligations of the acquiring company referred to in (g).

2. By way of derogation from paragraph 1 (a), the laws of a Member State may also provide for the nullity of a merger to be ordered by an administrative authority if an appeal against such a decision lies to a court. Subparagraphs (b), (d), (e), (f), (g) and (h) shall apply by analogy to the administrative authority. Such nullification proceedings may not be initiated more than six months after the date referred to in Article 17.

3. The foregoing shall not affect the laws of the Member States on the nullity of a merger pronounced following any supervision other than judicial or administrative preventive supervision of legality.

CHAPTER III

Merger by formation of a new company

Article 23

1. Articles 5, 6, 7 and 9 to 22 shall apply, without prejudice to Articles 11 and 12 of Directive 68/151/EEC, to merger by formation of a new company. For this purpose, 'merging companies' and 'company being acquired' shall mean the companies which will cease to exist, and 'acquiring company' shall mean the new company.

2. Article 5 (2) (a) shall also apply to the new company.

3. The draft terms of merger and, if they are contained in a separate document, the memorandum or draft memorandum of association and the articles or draft articles of association of the new company shall be approved at a general meeting of each of the companies that will cease to exist.

4. The Member States need not apply to the formation of a new company the rules governing the verification of any consideration other than cash which are laid down in Article 10 of Directive 77/91/EEC.

CHAPTER IV

Acquisition of one company by another which holds 90 % or more of its shares

Article 24

The Member States shall make provision, in respect of companies governed by their laws, for the operation whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company which is the holder of all their shares and other securities conferring the right to vote at general meetings. Such operations shall be regulated by the provisions of Chapter II, with the exception of Articles 5 (2) (b), (c) and (d), 9, 10, 11 (1) (d) and (e), 19 (1) (b), 20 and 21.

Article 25

The Member States need not apply Article 7 to the operations specified in Article 24 if the following conditions at least are fulfilled:

- (a) the publication provided for in Article 6 must be effected, as regards each company involved in the operation, at least one month before the operation takes effect;
- (b) at least one month before the operation takes effect, all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 11 (1) (a), (b) and (c) at the company's registered office. Article 11 (2) and (3) must apply;
- (c) Article 8 (c) must apply.

Article 26

The Member States may apply Articles 24 and 25 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if

all the shares and other securities specified in Article 24 of the company or companies being acquired are held by the acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

Article 27

In cases of merger where one or more companies are acquired by another company which holds 90 % or more, but not all, of the shares and other securities of each of those companies the holding of which confers the right to vote at general meetings, the Member States need not require approval of the merger by the general meeting of the acquiring company, provided that the following conditions at least are fulfilled :

- (a) the publication provided for in Article 6 must be effected, as regards the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which is to decide on the draft terms of merger ;
- (b) at least one month before the date specified in (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 11 (1) (a), (b) and (c) at the company's registered office. Article 11 (2) and (3) must apply ;
- (c) Article 8 (c) must apply.

Article 28

The Member States need not apply Articles 9 to 11 to a merger within the meaning of Article 27 if the following conditions at least are fulfilled :

- (a) the minority shareholders of the company being acquired must be entitled to have their shares acquired by the acquiring company ;
- (b) if they exercise that right, they must be entitled to receive consideration corresponding to the value of their shares ;
- (c) in the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a court.

Article 29

The Member States may apply Articles 27 and 28 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company if 90 % or more, but not all, of the shares and other securities referred to in Article 27 of the company or

companies being acquired are held by that acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

CHAPTER V

Other operations treated as mergers

Article 30

Where in the case of one of the operations referred to in Article 2 the laws of a Member State permit a cash payment to exceed 10 %, Chapters II and III and Articles 27, 28 and 29 shall apply.

Article 31

Where the laws of a Member State permit one of the operations referred to in Articles 2, 24 and 30, without all of the transferring companies thereby ceasing to exist, Chapter II, except for Article 19 (1) (c), Chapter III or Chapter IV shall apply as appropriate.

CHAPTER VI

Final provisions

Article 32

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive within three years of its notification. They shall forthwith inform the Commission thereof.

2. However, provision may be made for a delay of five years from the entry into force of the provisions referred to in paragraph 1 for the application of those provisions to unregistered companies in the United Kingdom and Ireland.

3. The Member States need not apply Articles 13, 14 and 15 as regards the holders of convertible debentures and other convertible securities if, at the time when the laws, regulations and administrative provisions referred to in paragraph 1 come into force, the position of these holders in the event of a merger has previously been determined by the conditions of issue.

4. The Member States need not apply this Directive to mergers or to operations treated as mergers for the preparation or execution of which an act or formality

required by national law has already been completed when the provisions referred to in paragraph 1 enter into force.

Done at Luxembourg, 9 October 1978.

Article 33

This Directive is addressed to the Member States.

For the Council

The President

H.-J. VOGEL
