

## SIXTH COUNCIL DIRECTIVE

of 17 December 1982

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

(82/891/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 <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

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

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

Whereas that 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 <sup>(6)</sup>, as regards the annual accounts of certain types of companies with Directive 78/660/EEC <sup>(7)</sup>, and as regards mergers of public limited liability companies with Directive 78/855/EEC <sup>(8)</sup>;

Whereas Directive 78/855/EEC dealt only with mergers of public limited liability companies and certain operations treated as mergers; whereas, however, the Commission proposal also covered division operations; whereas the opinions of the European Parliament and of the Economic and Social Committee were in favour of the regulation of such operation;

Whereas, because of the similarities which exist between merger and division operations, the risk of

the guarantees given with regard to mergers by Directive 78/855/EEC being circumvented can be avoided only if provision is made for equivalent protection in the event of division;

Whereas the protection of the interests of members and third parties requires that the laws of the Member States relating to divisions of public limited liability companies be coordinated where the Member States permit such operations;

Whereas, in the context of such coordination, it is particularly important that the shareholders of the companies involved in a division 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 <sup>(9)</sup>;

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

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

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

Whereas to ensure certainty in the law as regards relations between the companies involved in the division, between them and third parties, and between the members, the cases in which nullity can arise must be limited by providing that defects be

<sup>(1)</sup> OJ No C 89, 14. 7. 1970, p. 20.

<sup>(2)</sup> OJ No C 129, 11. 12. 1972, p. 50 and OJ No C 95, 28. 4. 1975, p. 12.

<sup>(3)</sup> OJ No C 88, 6. 9. 1971, p. 18.

<sup>(4)</sup> OJ No 2, 15. 1. 1962, p. 36/62.

<sup>(5)</sup> OJ No L 65, 14. 3. 1968, p. 8.

<sup>(6)</sup> OJ No L 26, 31. 1. 1977, p. 1.

<sup>(7)</sup> OJ No L 222, 14. 8. 1978, p. 11.

<sup>(8)</sup> OJ No L 295, 20. 10. 1978, p. 36.

<sup>(9)</sup> OJ No L 61, 5. 3. 1977, p. 26.

remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced,

HAS ADOPTED THIS DIRECTIVE:

#### *Article 1*

1. Where Member States permit the companies referred to in Article 1 (1) of Directive 78/855/EEC coming under their laws to carry out division operations by acquisition as defined in Article 2 of this Directive, they shall subject those operations to the provisions of Chapter I of this Directive.

2. Where Member States permit the companies referred to in paragraph 1 to carry out division operations by the formation of new companies as defined in Article 21, they shall subject those operations to the provisions of Chapter II of this Directive.

3. Where Member States permit the companies referred to in paragraph 1 to carry out operations, whereby a division by acquisition as defined in Article 2 (1) is combined with a division by the formation of one or more new companies as defined in Article 21 (1), they shall subject operation to the provisions of Chapter I and Article 22.

4. Article 1 (2) and (3) of Directive 78/855/EEC shall apply.

### CHAPTER I

#### **Division by acquisition**

##### *Article 2*

1. For the purposes of this Directive, 'division by acquisition' shall mean the operation whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division (hereinafter referred to as 'recipient companies') and possibly a cash payment not exceeding 10% of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.

2. Article 3 (2) of Directive 78/855/EEC shall apply.

3. In so far as this Directive refers to Directive 78/855/EEC, the expression 'merging companies' shall mean 'the companies involved in a division', the expression 'company being acquired' shall mean 'the company being divided', the expression 'acquiring company' shall mean 'each of the recipient companies' and the expression 'draft terms of merger' shall mean 'draft terms of division'.

##### *Article 3*

1. The administrative or management bodies of the companies involved in a division shall draw up draft terms of division in writing.

2. Draft terms of division shall specify at least:

- (a) the type, name and registered office of each of the companies involved in the division;
  - (b) the share exchange ratio and the amount of any cash payment;
  - (c) the terms relating to the allotment of shares in the recipient companies;
  - (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 divided shall be treated for accounting purposes as being those of one or other of the recipient companies;
  - (f) the rights conferred by the recipient companies 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 8 (1) and members of the administrative, management, supervisory or controlling bodies of the companies involved in the division;
  - (h) the precise description and allocation of the assets and liabilities to be transferred to each of the recipient companies;
  - (i) the allocation to the shareholders of the company being divided of shares in the recipient companies and the criterion upon which such allocation is based.
3. (a) Where an asset is not allocated by the draft terms of division and where the interpretation of these terms does not make a decision on its allocation possible, the asset or

the consideration therefor shall be allocated to all the recipient companies in proportion to the share of the net assets allocated to each of those companies under the draft terms of division.

- (b) Where a liability is not allocated by the draft terms of division and where the interpretation of these terms does not make a decision on its allocation possible, each of the recipient companies shall be jointly and severally liable for it. Member States may provide that such joint and several liability be limited to the net assets allocated to each company.

#### Article 4

Draft terms of division must be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC <sup>(1)</sup> for each of the companies involved in a division, at least one month before the date of the general meeting which is to decide thereon.

#### Article 5

1. A division shall require at least the approval of a general meeting of each company involved in the division. Article 7 of Directive 78/855/EEC shall apply with regard to the majority required for such decisions, their scope and the need for separate votes.

2. Where shares in the recipient companies are allocated to the shareholders of the company being divided otherwise than in proportion to their rights in the capital of that company, Member States may provide that the minority shareholders of that company may exercise the right to have their shares purchased. In such case, they shall be entitled to receive consideration corresponding to the value of their shares. In the event of a dispute concerning such consideration, it must be possible for the consideration to be determined by a court.

#### Article 6

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

- (a) the publication provided for in Article 4 must be effected, for each recipient company, at least one month before the date fixed for the general meeting of the company being divided which is to decide on the draft terms of division;
- (b) at least one month before the date specified in point (a), all shareholders of each recipient company must be entitled to inspect the documents specified in Article 9 (1) at the registered office of that company;
- (c) one or more shareholders of any recipient company holding a minimum percentage of the subscribed capital must be entitled to require that a general meeting of such recipient company be called to decide whether to approve the division. This minimum percentage may not be fixed at more than 5%. Member States may, however, provide for the exclusion of non-voting shares from this calculation.

#### Article 7

1. This administration or management bodies of each of the companies involved in the division shall draw up a detailed written report explaining the draft terms of division and setting out the legal and economic grounds for them, in particular the share exchange ratio and the criterion determining the allocation of shares.

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

It shall disclose the preparation of the report on the consideration other than in cash referred to in Article 27 (2) of Directive 77/91/EEC <sup>(2)</sup> for recipient companies and the register where that report must be lodged.

3. The administrative or management bodies of a company being divided must inform the general meeting of that company and the administrative or management bodies of the recipient companies so that they can inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of division and the date of the general meeting of the company being divided which is to decide on the draft terms of division.

<sup>(1)</sup> OJ No L 65, 14. 3. 1968, p. 9.

<sup>(2)</sup> OJ No L 26, 31. 1. 1977, p. 1.

*Article 8*

1. One or more experts acting on behalf of each of the companies involved in the division but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of division 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 of the companies involved in a division 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. Article 10 (2) and (3) of Directive 78/855/EEC shall apply.

3. Member States may provide that the report on the consideration other than in cash referred to in Article 27 (2) of Directive 77/91/EEC and the report on the draft terms of division drawn up in accordance with paragraph 1 shall be drawn up by the same expert or experts.

*Article 9*

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

- (a) the draft terms of division;
- (b) the annual accounts and annual reports of the companies involved in the division 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 division, 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 companies involved in the division provided for in Article 7 (1);
- (e) the reports provided for in Article 8.

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 10*

Member States may permit the non-application of Articles 7 and 8 (1) and (2), and of Article 9 (1) (c), (d) and (e) if all the shareholders and the holders of other securities giving the right to vote of the companies involved in a division have so agreed.

*Article 11*

Protection of the rights of the employees of each of the companies involved in a division shall be regulated in accordance with Directive 77/187/EEC (1).

*Article 12*

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

2. To that end, the laws of Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary and where those creditors do not already have such safeguards.

(1) OJ No L 61, 5. 3. 1977, p. 26.

3. In so far as a creditor of the company to which the obligation has been transferred in accordance with the draft terms of division has not obtained satisfaction, the recipient companies shall be jointly and severally liable for that obligation. Member States may limit that liability to the net assets allocated to each of those companies other than the one to which the obligation has been transferred. However, they need not apply this paragraph where the division operation is subject to the supervision of a judicial authority in accordance with Article 23 and a majority in number representing three-fourths in value of the creditors or any class of creditors of the company being divided have agreed to forego such joint and several liability at a meeting held pursuant to Article 23 (1) (c).

4. Article 13 (3) of Directive 78/855/EEC shall apply.

5. Without prejudice to the rules governing the collective exercise of their rights, paragraphs 1 to 4 shall apply to the debenture holders of the companies involved in the division except where the division 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.

6. Member States may provide that the recipient companies shall be jointly and severally liable for the obligations of the company being divided. In such case they need not apply the foregoing paragraphs.

7. Where a Member State combines the system of creditor protection set out in paragraph 1 to 5 with the joint and several liability of the recipient companies as referred to in paragraph 6, it may limit such joint and several liability to the net assets allocated to each of those companies.

#### Article 13

Holders of securities, other than shares, to which special rights are attached, must be given rights in the recipient companies against which such securities may be invoked in accordance with the draft terms of division, at least equivalent to the rights they possessed in the company being divided, 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.

#### Article 14

Where the laws of a Member State do not provide for judicial or administrative preventive supervision of the legality of divisions or where such supervision does not extend to all the legal acts required for a division, Article 16 of Directive 78/855/EEC shall apply.

#### Article 15

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

#### Article 16

1. A division must be published 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 companies involved in a division.

2. Any recipient company may itself carry out the publication formalities relating to the company being divided.

#### Article 17

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

(a) the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided; such transfer shall take effect with the assets and liabilities being divided in accordance with the allocation laid down in the draft terms of division or in Article 3 (3);

(b) the shareholders of the company being divided become shareholders of one or more of the recipient companies in accordance with the allocation laid down in the draft terms of division;

(c) the company being divided ceases to exist.

2. No shares in a recipient company shall be exchanged for shares held in the company being divided either:

(a) by that recipient company itself or by a person acting in his own name but on its behalf; or

(b) by the company being divided itself or by 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 a company being divided to be effective as against third parties. The recipient company or companies to which such assets, rights or obligations are transferred in accordance with the draft terms of division or with Article 3 (3) may carry out these formalities themselves; however, the laws of Member States may permit a company being divided to continue to carry out these formalities for a limited period which may not, save in exceptional circumstances, be fixed at more than six months from the date on which the division takes effect.

#### *Article 18*

The laws of Member States shall at least lay down rules governing the civil liability of members of the administrative or management bodies of a company being divided towards the shareholders of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the division and the civil liability of the experts responsible for drawing up for that company the report provided for in Article 8 in respect of misconduct on the part of those experts in the performance of their duties.

#### *Article 19*

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

- (a) nullity must be ordered in a court judgment;
- (b) divisions which have taken effect pursuant to Article 15 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 division 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 division void, the competent court shall grant the companies involved a period of time within which to rectify the situation;

(e) a judgment declaring a division 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 division void shall not of itself affect the validity of obligations owed by or in relation to the recipient companies which arose before the judgment was published and after the date referred to in Article 15;

(h) each of the recipient companies shall be liable for its obligations arising after the date on which the division took effect and before the date on which the decision pronouncing the nullity of the division was published. The company being divided shall also be liable for such obligations; Member States may provide that this liability be limited to the share of net assets transferred to the recipient company on whose account such obligations arose.

2. By way of derogation from paragraph 1 (a), the laws of a Member State may also provide for the nullity of a division 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 15.

3. The foregoing shall not affect the laws of the Member States on the nullity of a division pronounced following any supervision of legality.

#### *Article 20*

Without prejudice to Article 6, Member States need not require the division to be approved by the general meeting of the company being divided where

the recipient companies together hold all the shares of the company being divided and all other securities conferring the right to vote at general meetings of the company being divided, and the following conditions, at least, are fulfilled:

- (a) each of the companies involved in the operation must carry out the publication provided for in Article 4 at least one month before the operation takes effect;
- (b) at least one month before the operation takes effect, all shareholders of companies involved in the operation must be entitled to inspect the documents specified in Article 9 (1), at their company's registered office. Article 9 (2) and (3) shall also apply;
- (c) one or more shareholders of the company being divided holding a minimum percentage of the subscribed capital must be entitled to require that a general meeting of the company being divided be called to decide whether to approve the division. This minimum percentage may not be fixed at more than 5%. Member States may, however, provide for the exclusion of non-voting shares from this calculation;
- (d) where a general meeting of the company being divided, required for the approval of the division, is not summoned, the information provided for by Article 7 (3) covers any material change in the asset and liabilities after the date of preparation of the draft terms of division.

## CHAPTER II

### Division by the formation of new companies

#### *Article 21*

1. For the purposes of this Directive, 'division by the formation of new companies' means the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly-formed company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies, and possibly a cash payment not exceeding 10% of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.

2. Article 4 (2) of Directive 78/855/EEC shall apply.

#### *Article 22*

1. Articles 3, 4, 5 and 7, 8 (1) and (2) and 9 to 19 of this Directive shall apply, without prejudice to Articles 11 and 12 of Directive 68/151/EEC, to division by the formation of new companies. For this purpose, the expression 'companies involved in a division' shall refer to the company being divided and the expression 'recipient companies' shall refer to each of the new companies.

2. In addition to the information specified in Article 3 (2), the draft terms of division shall indicate the form, name and registered office of each of the new companies.

3. The draft terms of division 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 each of the new companies shall be approved at a general meeting of the company being divided.

4. Member States may provide that the report on the consideration other than in cash as referred to in Article 10 of Directive 77/91/EEC and the report on the draft terms of division as referred to in Article 8 (1) shall be drawn up by the same expert or experts.

5. Member States may provide that neither Article 8, nor Article 9 as regards the expert's report, shall apply where the shares in each of the new companies are allocated to the shareholders of the company being divided in proportion to their rights in the capital of that company.

## CHAPTER III

### Division under the supervision of a judicial authority

#### *Article 23*

1. Member States may apply paragraph 2 where division operations are subject to the supervision of a judicial authority having the power:

- (a) to call a general meeting of the shareholders of the company being divided in order to decide upon the division;
- (b) to ensure that the shareholders of each of the companies involved in a division have received or can obtain at least the documents referred to in Article 9 in time to examine them before the

date of the general meeting of their company called to decide upon the division. Where a Member State makes use of the option provided for in Article 6 the period must be long enough for the shareholders of the recipient companies to be able to exercise the rights conferred on them by that Article;

- (c) to call any meeting of creditors of each of the companies involved in a division in order to decide upon the division;
  - (d) to ensure that the creditors of each of the companies involved in a division have received or can obtain at least the draft terms of division in time to examine them before the date referred to in (b);
  - (e) to approve the draft terms of division.
2. Where the judicial authority establishes that the conditions referred to in paragraph 1 (b) and (d) have been fulfilled and that no prejudice would be caused to shareholders or creditors, it may relieve the companies involved in the division from applying:
- (a) Article 4, on condition that the adequate system of protection of the interest of the creditors referred to in Article 12 (1) covers all claims regardless of their date;
  - (b) the conditions referred to in Article 6 (a) and (b) where a Member State makes use of the option provided for in Article 6;
  - (c) Article 9, as regards the period and the manner prescribed for the inspection of the documents referred to therein.

#### CHAPTER IV

##### Other operations treated as divisions

###### *Article 24*

Where, in the case of one of the operations specified in Article 1, the laws of a Member State permit the cash payment to exceed 10 %, Chapters I, II and III shall apply.

###### *Article 25*

Where the laws of a Member State permit one of the operations specified in Article 1 without the com-

pany being divided ceasing to exist, Chapters I, II and III shall apply, except for Article 17 (1) (c).

#### CHAPTER V

##### Final provisions

###### *Article 26*

1. The Member States shall bring into force before 1 January 1986, the laws, regulations and administrative provisions necessary for them to comply with this Directive provided that on that date they permit the operations to which this Directive applies. They shall immediately inform the Commission thereof.

2. Where, after the date mentioned in paragraph 1, a Member State permits division operations, it shall bring into force the provisions mentioned in that paragraph on the date on which it permits such operations. It shall immediately inform the Commission thereof.

3. However, provision may be made for a period 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.

4. Member States need not apply Articles 12 and 13 as regards the holders of convertible debentures and other securities convertible into shares if, at the time when the provisions referred to in paragraph 1 or 2 come into force, the position of these holders in the event of a division has previously been determined by the conditions of issue.

5. Member States need not apply this Directive to divisions or to operations treated as divisions 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 or 2 enter into force.

###### *Article 27*

This Directive is addressed to the Member States.

Done at Brussels, 17 December 1982.

*For the Council*

*The President*

H. CHRISTOPHERSEN