

WORKING DOCUMENT
PREPARED BY THE COMMISSION'S SERVICES
FOR USE IN THE DISCUSSIONS OF
THE LEGAL COMMITTEE OF THE
EUROPEAN PARLIAMENT
ON THE PROPOSAL FOR A FIFTH DIRECTIVE
ON "COMPANY LAW"

- I. (1) The purpose of this document is to facilitate the deliberations of the Legal Committee on the provisions of the directive under consideration relating to the structure of public companies and employee participation.

The original proposal for a directive was divided into five chapters :

- Chapter I : Structure of the Company (Article 2)
- Chapter II : The Management Organ and the Supervisory Organ (Articles 3 to 21)
- Chapter III : General Meeting (Articles 22 to 47)
- Chapter IV : The Adoption and Audit of the Annual Accounts (Articles 48 to 63)
- Chapter V : General Provisions (Articles 64 and 65)

- (2) Until now, the Legal Committee of the European Parliament has limited itself to a discussion of two aspects of Chapters I and II of the legislation envisaged, namely, company structure and employee participation. This discussion took place on the basis of the "green paper" published by the Commission of the European Communities in 1975.
- (3) To bring the conclusions of the discussions on the "green paper" into consideration, the Legal Committee has expressed its intention of turning to the formulas of the proposal for a fifth directive with a view to preparing Parliament's Opinion. To this end, the Commission's services have prepared a new draft of Chapters I and II and have added a new Chapter II A. These drafting suggestions are limited to the changes strictly necessary by reason of their relationship to the problems treated in the "green paper", and do not prejudice in any way the consideration of other problems in the proposed directive which have not as yet been discussed in the Legal Committee.
- II. (1) For this reason, the annexed text has left completely unchanged Chapters III (General Meeting) and IV (The Adoption and Audit of the Annual Accounts) and V (General Provisions) of the initial proposal for a directive, since the subjects treated in these Chapters have nothing to do with the "green paper".
- (2) The scope of application (Article 1) should be amended to define the forms of company covered under the laws of Denmark, Ireland and the United Kingdom.
- (3) In relation to the subjects treated in Chapter I (Structure of the Company), the annexed text introduces the distinction between the rules to apply during a transitional period and the rules to apply at the end of this period (Article 2).
- (4) During the transitional period, the national legislatures will have the choice between the introduction of a mandatory dualist system (in which the company's administration is carried out by a management organ and a supervisory organ) and the introduction of optional dualist and unitary systems (in the latter, there is a single administrative organ).

- (5) As for the content of the Community regime after the end of the transitional period, it is provided, in conformity with the "green paper", that all public companies shall be organized according to a dualist system, with employee participation in the appointment of members of the supervisory organ in accordance with the provisions of Chapter II.
- (6) Dualist systems have already been made the subject of Chapter II of the original proposal for a directive. This chapter is maintained virtually unchanged, save for certain important modifications to Articles 3 (powers and duties of organs) and 4 (employee participation).
- (7) On the other hand, since unitary systems are to continue only until the end of the transitional period, they need not be made the object of so many rules as those provided in Chapter II for dualist systems. As to unitary systems, the directive might be limited so as to deal only with those problems linked with employee participation. Chapter II A contains provisions of such a kind.
- (8) Chapter II A proposes to apply to members of the administrative organ those rules of Chapter II applying to dualist systems which deal with the following matters :
 - (a) powers and duties of organs (Article 21 a);
 - (b) employee participation (Article 21 b);
 - (c) appointment for a fixed period (Article 21 c);
 - (d) right to information (Article 21 d);
 - (e) decisions on important questions (Article 21 e);
 - (f) dismissal (Article 21 f).
- (9) In relation to employee participation during the transitional period, it is provided, in accordance with the "green paper", that the Member States can choose from among four solutions :
 - (a) a unitary system with employee participation in the appointment of members of the administrative organ;
 - (b) a unitary system without such participation, but combined with an institution representative of the employees;
 - (c) a dualist system with employee participation in the appointment of members of the supervisory organ;
 - (d) a dualist system without such participation, but combined with an institution representative of the employees.
- (10) In conformity with the "green paper", the new draft includes certain important amendments to the original proposal in relation to the four systems indicated above :

- (a) an obligation on all members of company organs to exercise their functions in the company's interest, taking into account the interests of shareholders and employees (Article 3(1)(c); Article 21 a (1)(b));
 - (b) equality of rights and duties for all members of company organs (Article 3 (1)(b); Article 21 a (1)(a));
 - (c) an obligation of confidentiality (Article 3 (1)(c); Article 21 a (1)(b)). This obligation applies equally to the institution representative of the employees (Article 4(7); Article 21 a (1)(b)).
- (11) Employee participation is required only when the number of employees exceeds a certain threshold. The original proposal provided for 500. If a higher limit is envisaged, this should not exceed 2,000. Moreover, the article in question is drafted in such a way that the Member States can always fix a lower threshold (Article 4(3); Article 21 (b) (4)).
- (12) In conformity with the "green paper", it is provided that employee participation shall not be introduced contrary to the wishes of a majority of employees (Article 4(4); Article 21 (b)(4)).
- III. The directive does not contain comprehensive and detailed rules such as one finds in national company laws. On the contrary, it deals with a fixed number of points in a limited way, leaving to the national legislature the task of regulating many problems for itself in a manner which is suited to national circumstances.

Article 1

Scope of application

1. The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company :
 - in Germany die Aktiengesellschaft,
 - in Belgium de naamloze vennootschap
la société anonyme,
 - in Denmark aktieselskaber
 - in France la société anonyme,
 - in Ireland public companies limited by shares and
public companies limited by guarantee
having a share capital,
 - in Italy la società per azioni,
 - in Luxembourg la société anonyme,
 - in the Netherlands de naamloze vennootschap,
 - in the United Kingdom public companies limited by shares and
public companies limited by guarantee
having a share capital.

2. It shall be permissible for the Member States not to apply the provisions of this Directive to cooperatives whose legal form is that of one of the types of company indicated in the foregoing paragraph. To the extent that the laws of the Member States make use of this possibility, they shall require these companies to include the word "co-operative" on all the documents to which reference is made in Article 4 of Directive No. 68/151/EEC of 9 March 1968 (1).

(1) OJ No. L 65/8, 14.3.68.

CHAPTER I

Structure of the Company

Article 2

1. The Member States shall make provision for the general meeting of shareholders in accordance with Chapter III of this directive and for the drawing up and audit of annual accounts in accordance with Chapter IV.
2. They shall further provide that the company shall be organized according to a dualist system (management organ and supervisory organ) in accordance with the provisions of Chapter II of this Directive. However, during a transitional period of five years, they may permit the company to have a choice between a dualist system and a unitary system (administrative organ) in accordance with the provisions of Chapter II A.

CHAPTER II

Management Organ and Supervisory Organ (Dualist Systems)

Article 3

1. (a) The company shall be managed by a management organ under the supervision of a supervisory organ.
 - (b) All members of the management and supervisory organs shall have the same rights and duties, without prejudice to provisions which make it possible for the functions of these organs to be allocated among their members.
 - (c) All the members of the management and supervisory organs shall carry out their functions in the interest of the company, having regard to the interests of the shareholders and the employees. They shall exercise a proper discretion in respect of information of a confidential nature concerning the company. They shall respect this obligation even after they have ceased to hold office.
 - (d) The members of the management organ shall be appointed by the supervisory organ. However, the members of the first management organ may be appointed in the statutes or in the instrument of constitution.
2. Where the management organ has several members, the supervisory organ shall specify which member of the management organ is responsible for questions of personnel and employee relations.
 3. The provisions of this Article shall be without prejudice to national laws under which the appointment or dismissal of any member of the management organ cannot be effected against the wishes of a majority of the members of the supervisory organ who were appointed by the employees or by their representatives.

Article 4

1. The members of the first supervisory organ may be appointed in the statutes or the instrument of constitution.
2. The number of members of the supervisory organ shall be divisible by three and greater than the number of members of the management organ.
3. In companies employing less than a number of persons which the Member States cannot fix at more than 500, the members of the supervisory organ shall be appointed by the general meeting.
4. In companies employing a number of persons which equals or exceeds the number fixed in accordance with paragraph 3, the laws of the Member States shall make provision for employee participation in the appointment of members of the supervisory organ in accordance with paragraphs 5 or 6, unless a majority of the employees have expressed themselves as being opposed to such participation. However, for the transitional period referred to in Article 2(2), the laws of the Member States may provide for the constitution of a representative institution in accordance with paragraph 7, instead of regulation in accordance with paragraphs 5 or 6.
5. The members of the supervisory organ shall be appointed by the general meeting as regards a maximum of two thirds and by employees or their representatives as regards a minimum of one third.
6. The members of the supervisory organ shall be appointed by that organ. However, the general meeting or the representatives of the employees may object to the appointment of a proposed candidate on the ground either that he lacks the ability to carry out his duties or that if he were appointed, there would, having regard to the interests of the company, the shareholders and the employees, be unbalance in the composition of the supervisory organ. In such cases, the appointment shall not be made unless the objection is declared unfounded by an independent body existing under public law.
7. An institution representing the company's employees shall have the same rights in relation to the management organ as are conferred on the members of the supervisory organ by Article 11. In addition, in the cases referred to in Article 12 (1), the institution representing the employees must be consulted before the supervisory organ considers whether to grant authorization. The law, the statutes or the instrument of constitution may subject other operations to this obligation of consultation. The second and third sentences of Article 3(1)(c) shall apply to the members of the institution representing the employees.
8. To the extent that the employees or their representatives participate in the appointment of members of the supervisory organ in accordance with paragraphs 5 or 6, or to the extent that an institution representing the employees must be constituted according to paragraph 7, the Member States shall ensure that the following principles are respected :
 - (a) the relevant members of the supervisory organ or the representatives of the employees shall be elected through a system incorporating proportional representation and the secret ballot;
 - (b) a free expression of opinion must be guaranteed;
 - (c) all employees must be able to participate in the elections;
 - (d) minorities must be protected.

Article 5

1. Only natural persons may be appointed as members of the management organ.
2. Where the laws of the Member States provide that legal persons may be members of the supervisory organ, those legal persons shall designate a permanent representative who shall be subject to the same conditions and obligations as if he were personally a member of the supervisory organ, but without prejudice to the liability of the legal person which he represents.

Article 6

No person may be at the same time a member of the management organ and of the supervisory organ.

Article 7

The members of the management organ and of the supervisory organ shall be appointed for a specified period not exceeding six years. They shall be eligible for reappointment.

Article 8

The management organ and the supervisory organ shall not fix the remuneration of their own members.

Article 9

1. The members of the management organ shall not, without the authorization of the supervisory organ, carry on within another undertaking any activity, whether remunerated or not, for their own account or for account of any other person.
2. The general meeting shall be informed each year of the authorizations given.
3. A natural person shall not be a member of the supervisory organ or a member of the administrative organ of more than ten companies.

Article 10

1. Every agreement to which the company is party and in which a member of the management organ or of the supervisory organ has an interest, even if only indirect, must be authorized by the supervisory organ at least.
2. Where a member of the management organ or supervisory organ becomes aware that such circumstances as are described in paragraph 1 obtain, he shall inform those two organs thereof. The interested member shall not take part either in the discussion or decision relating to the relevant agreement within the management organ or the discussion or decision relating to the giving of the authorization required under paragraph 1 within the supervisory organ.
3. The general meeting shall be informed each year of the authorizations given under paragraph 1.
4. Want of authorization by the supervisory organ or irregularity in the decision giving authorization shall not be adduced as against third parties save where the company proves that the third party was aware of the want of authorization or of the irregularity in the decision, or that in view of the circumstances he could not have been unaware thereof.

Article 11

1. The management organ shall not less than every three months send to the supervisory organ a report on the progress of the company's affairs.
2. The management organ shall within three months following the end of each financial year present to the supervisory organ the draft annual accounts and draft annual report within the meaning of Articles 2 and 43 of Directive No. of (1).
3. The supervisory organ may at any time request from the management organ a special report on the affairs of the company or on certain aspects thereof.
4. The supervisory organ or one third of the members thereof shall be entitled to obtain from the management organ all information and relevant documents and to undertake all such investigations as may be necessary. The supervisory organ may authorize one or more of its members or one or more experts to exercise these powers.
5. Each member of the supervisory organ shall be entitled to examine all reports, documents and information supplied by the management organ to the supervisory organ.

(1) OJ No. C 7, 28.1.72.

Article 12

1. The authorization of the supervisory organ shall be obtained for decisions of the management organ relating to :
 - (a) the closure or transfer of the undertaking or of substantial parts thereof;
 - (b) substantial curtailment or extension of the activities of the undertaking;
 - (c) substantial organizational changes within the undertaking;
 - (d) establishment of long-term cooperation with other undertakings or the termination thereof.
2. The law or the statutes may provide that the authorization of the supervisory organ must be obtained also for the effecting of other operations.
3. The provisions of Article 10 (4) shall apply as regards third parties.

Article 13

1. The members of the management organ may be dismissed by the supervisory organ.
2. The members of the supervisory organ may be dismissed at any time by the organs or persons who appointed them and under the same procedures. However, the members of the supervisory organ who were appointed by it under Article 4 (6) may be dismissed only where proper grounds for dismissal are found to exist by judgment of the court in proceedings brought in that behalf by the supervisory organ, the general meeting or the employees' representatives.

Article 14

1. The laws of the Member States shall make such provision relating to the civil liability of the members of the management organ and of the supervisory organ as to ensure that, at minimum, compensation is made for all damage sustained by the company as a result of breaches of law or of the statutes or of other wrongful acts committed by the members of those organs in carrying out their functions.
2. Each member of the organ in question shall be jointly and severally liable without limit. He may however exonerate himself from liability if he proves that no fault is attributable to him personally.
3. The provisions of the preceding paragraphs shall apply even where the powers vested in the organ have been allocated among its members.
4. The authorization given by the supervisory organ shall not have the effect of exempting the members of the management organ from civil liability.
5. Furthermore, any discharge, instruction or authorization given by the general meeting shall not have the effect of exempting the members of the management organ or of the supervisory organ from civil liability.

Article 15

1. Proceedings on behalf of the company to enforce the liability referred to in Article 14 shall be commenced if the general meeting so resolves.
2. Neither the law nor the statutes may require for the passing of a resolution in that behalf a majority greater than an absolute majority of votes of the shareholders present or represented.

Article 16

It shall be provided that proceedings on behalf of the company to enforce the liability referred to in Article 14 shall also be commenced if so requested by one or more shareholders :

- (a) who hold shares of a certain nominal value or proportional value which the Member States shall not require to be greater than 5 % of the capital subscribed; or
- (b) who hold shares of a certain nominal value or proportional value which the Member States shall not require to be greater than 100 000 units of account. This figure may vary up to not more than 10 % for purposes of conversion into national currency.

Article 17

The bringing of proceedings on behalf of the company to enforce the liability referred to in Article 14 shall not be made subject, whether by law, the statutes or any agreement :

- (a) to prior resolution of the general meeting or other organ of the company;
or
- (b) to prior decision of the Court in respect of wrongful acts of the members of the management organ or of the supervisory organ, or in respect of the dismissal or replacement of members thereof.

Article 18

1. Renunciation by the company of the right to bring proceedings on behalf of the company to enforce the liability referred to in Article 14 shall not be implied :
 - (a) from the sole fact that the general meeting has approved the accounts relating to the financial year during which the acts giving rise to damage occurred;
 - (b) from the sole fact that the general meeting has given its discharge to the members of the management organ or of the supervisory organ in respect of that financial year.
2. For renunciation to take place the following conditions must be satisfied :
 - (a) an act giving rise to damage must actually have occurred;
 - (b) the general meeting must expressly resolve to renounce; the resolution shall in no way affect the right conferred by Article 16 on one or more shareholders who satisfy the requirements of that Article, provided they voted against the resolution or made objection thereto which was recorded in the minutes.
3. This Article shall apply to all compromises relating to the bringing of proceedings to enforce the liability aforesaid which have been agreed between the company and the member whose liability is in question.

Article 19

1. Proceedings on behalf of the company to enforce the liability referred to in Article 14 may also be brought by a creditor of the company who is unable to obtain payment from it.

2. Action by the creditor under the preceding paragraph shall in no way be affected by such renunciation or transactions as are referred to in Article 18.

Article 20

1. The member States shall make such provision relating to the civil liability of the members of the management organ and of the supervisory organ as to ensure that compensation is made for all damage sustained personally by shareholders and third parties as a result of breaches of law or of the statutes or of other wrongful acts committed by the members of those organs in carrying out their duties.

2. The provisions of Article 14 (2) to (5) shall apply.

Article 21

The period in which action to enforce the liability referred to in Article 14, 19 or 20 may be brought shall not be less than three years from the date of the act giving rise to damage or, if the act has been discovered, from the time when it has become known.

CHAPTER II A

Administrative Organ (Unitary Systems)

Article 21 a

1. (a) All members of the administrative organ shall have the same rights and duties, without prejudice to provisions making it possible for the functions of this organ to be allocated among its members.

(b) All members of the administrative organ shall carry out their functions in the interest of the company, having regard to the interests of the shareholders and the employees. They shall exercise a proper discretion in respect of information of a confidential nature concerning the company. They shall respect this obligation even after they have ceased to hold office.

2. Where the administrative organ has several executive members, a majority of the non-executive members shall specify which executive member is responsible for questions of personnel and employee relations.

Article 21 b

1. The members of the first administrative organ may be appointed in the statutes or the instrument of constitution.
2. The number of members of the administrative organ must be divisible by three.
3. In companies having less than a number of employees which the Member States cannot fix at more than 500, the members of the administrative organ shall be appointed by the general meeting.
4. In companies employing a number of persons which equals or exceeds the number fixed in accordance with paragraph 3, the Laws of the Member States shall make provision for employee participation in the appointment of members of the administrative organ in accordance with paragraph 5, unless a majority of the employees have expressed themselves as being opposed to such participation. However, for the transitional period referred to in Article 2(2), the Laws of the Member States may provide for the constitution of a representative institution in accordance with paragraph 6 instead of regulation in accordance with paragraph 5.
5. The members of the administrative organ shall be appointed by the general meeting as regards a maximum of two thirds and by the employees or their representatives as regards a minimum of one third.
6. An institution representing the company's employees shall have the same rights in relation to the administrative organ as are conferred on the non-executive members in relation to the executive members of the administrative organ by Article 21 d. In addition, in the cases referred to in Article 21 e, the institution representing the employees must be consulted before the administrative organ considers the operation proposed. The law, the statutes or the instrument of constitution may subject other operations to this obligation of consultation. The second and third sentences of Article 21 a(1)(b) shall apply to members of the institution representing the employees.
7. To the extent that the employees or their representatives participate in the appointment of members of the administrative organ in accordance with paragraph 5, or to the extent that an institution representing the employees must be constituted according to paragraph 6, the Member States shall ensure that the following principles are respected :
 - (a) the relevant members of the administrative organ or the representatives of the employees shall be elected through a system incorporating proportional representation and the secret ballot;
 - (b) a free expression of opinion must be guaranteed;
 - (c) all employees must be able to participate in the elections;
 - (d) minorities must be protected.

Article 21 c

The members of the administrative organ shall be appointed for a specified period not exceeding six years. They shall be eligible for reappointment.

Article 21 d

When the administrative organ includes non-executive members, they shall have the following rights to information in relation to the executive members :

1. The executive members of the administrative organ shall not less than every three months present to the non-executive members of that organ a report on the progress of the company's affairs.
2. The executive members of the administrative organ shall within three months following the end of each financial year present to the non-executive members the draft annual accounts and draft annual report within the meaning of Articles 2 and 43 of Directive No. ... of ... (1)
3. The non-executive members of the administrative organ may at any time request from the executive a special report on the affairs of the company or on certain aspects thereof.
4. The non-executive members of the administrative organ shall be entitled to obtain from the executive members of this organ all information and relevant documents and to undertake all such investigations as may be necessary. A majority of the non-executive members may authorize one or more of these members or one or more experts to exercise these powers.
5. Each non-executive member of the administrative organ shall be entitled to examine all reports, documents and information supplied by the executive members to other non-executive members of that organ.

(1) OJ No. C 7, 28.1.72.

Article 21 e

1. The administrative organ shall not be able to delegate power to decide on the following operations :
 - (a) the closure or transfer of the undertaking or of substantial parts thereof;
 - (b) substantial curtailment or extension of the activities of the undertaking;
 - (c) substantial organizational changes within the undertaking;
 - (d) establishment of long-term cooperation with other undertakings or the termination thereof.
2. The law of the statutes may prohibit delegation of the power to decide on other operations.

Article 21 f

The members of the administrative organ may be dismissed at any time by the same organs or persons who appointed them and under the same procedures.