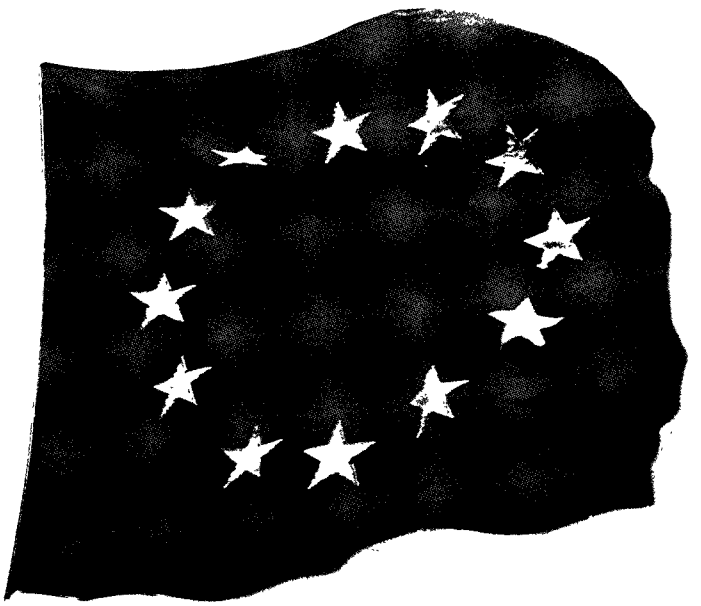
Bulletin
of the European Communities
Supplement 5/88

Disclosure requirements for branches
Amended proposal for an 11th Directive

Single-member private limited companies
Proposal for a 12th Directive



Commission of the European Communities EN

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Bulletin
of the European Communities

Supplement 5/88

Proposal for an 11th Council Directive based on Article 54(3)(g) of the EEC Treaty concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State

(Presented to the Council on 29 July 1986, amended on 5 April 1988)

Supplement based on COM(86) 397 final and COM(88) 153 final

Proposal for a 12th Council Directive on company law concerning single-member private limited companies

(Presented to the Council on 19 May 1988)

Supplement based on COM(88) 101 final

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Contents

Introduction

The purpose of the company law coordination programme under Article 54 of the EEC Treaty is to make equivalent throughout the Community the safeguards required of companies or firms for the protection of the interests of members and others. The proposal for an 11th Directive, concerning disclosure requirements in respect of branches, first presented to the Council in 1986 and amended in 1988, is part of this programme. It is designed to make it easier for businesses to exercise their right of establishment by setting up branches. The proposal for a 12th Directive, presented in 1988, relates to a quite specific aspect of company law, namely the introduction of single-member private limited companies.

Important company law papers are regularly published as *Supplements to the Bulletin.* Recent issues have included:

The structure of public limited companies. Amended proposal for a fifth Directive (Supp. 6/83).

Cross-border mergers of public limited companies. Proposal for a 10th Directive (Supp. 3/85).

European Economic Interest Grouping (EEIG) (Supp. 3/87).

Statute for the European Company (Supp. 3/88).

Disclosure requirements for branches

Explanatory memorandum

1. This proposal for an 11th Directive based on Article 54(3)(g) of the EEC Treaty forms part of the framework concerning the coordination of safeguards in respect of companies. Its aim is to facilitate the exercise of the right of establishment by the creation of branches.

2. The freedom of establishment provided for in Articles 52 and 58 of the Treaty applies not only to natural persons but also to companies and firms. This is of particular importance to undertakings, since, unless they belong to a single proprietor, they all have the legal form of companies and firms.

3. As long as a company is unable to transfer its registered office to another Member State or to merge with a company established there, [1] it can, unlike a natural person, exercise its right of establishment only by creating a subsidiary company or opening a branch. There is a fundamental difference, however, between a subsidiary company and a branch. [2]

4. In this respect the following distinctions can be made between a branch and a subsidiary company:

(a) A subsidiary company has a legal personality of its own separate from that of its parent company. A branch, however, that forms an integral part of the undertaking which created it does not have a separate legal personality.

(b) A subsidiary company concludes contracts with third parties in its own name, whereas a branch, when concluding such contracts, acts on behalf of the undertaking of which it forms part.

(c) A subsidiary company is liable for the commitments it enters into with its own assets; in the case of commitments entered into by a branch on behalf of the undertaking to which it belongs, however, liability extends to all the assets of that undertaking and not only to those which have been entrusted to the branch to carry on its activities.

(d) These assets are the property of the undertaking and not of the branch set up by it. A subsidiary company, on the other hand, may own such assets.

5. There are also appreciable differences between branches and subsidiaries in respect of the coordination of company law. These harmonization measures, which have hitherto been concentrated on limited liability companies, [3] cover all companies of the relevant types and therefore apply equally to subsidiary companies created by undertakings from other Member States. By contrast, the setting up of branches has not yet been the subject of coordination.

6. There may be no need for such coordination where branches are set up within a Member State and the undertaking to which the branch belongs is also governed by the law of that State. While a majority of

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[1] See the proposal for a 10th Directive concerning cross-border mergers of public limited companies (OJ C 23, 25.1.1985; Supplement 3/85 — Bull. EC).

[2] In its judgment in Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183, concerning Article 5 (5) of the Convention of 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments, the Court of Justice gave the following definition of a branch: The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.

[3] First Council Directive of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968).
Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978).
Seventh Council Directive of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983)
Eighth Council Directive of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ L 126, 12.5.1984).

Member States have also enacted legislation in this field, the branches which are of particular importance for the Community's internal market are those which are set up beyond frontiers through the exercise of the freedom of establishment. It is this subject alone which is dealt with below.

7. The coordination of company law has in particular the aim of facilitating and safeguarding the exercise of the right of establishment in its various forms. However, the fact that coordination is limited to companies, particularly in the field of disclosure, means that there is a certain discrepancy between protection in relation to companies which operate in other Member States by opening branches and those which operate by creating subsidiary companies.

8. The disclosure of information on subsidiary companies is in each Member State governed according to uniform rules of Community law. By contrast, there are no rules governing disclosure in respect of branches of companies from other Member States. And yet the Member State in which a branch is set up has a particular interest in such disclosure. In practice a branch is intended to be a permanent establishment from which business is transacted regularly. This explains why almost all Member States have introduced special rules relating to disclosure in respect of such branches, which rules however differ sharply. While some Member States have adopted very liberal arrangements, others have imposed very strict and far-reaching requirements. These differences have the effect of impeding the exercise of freedom of establishment.

9. The aim of this proposal is to ensure the protection of persons who deal with companies by way of a branch. In this context measures concerning disclosure in the Member State of the branch are unavoidable. Such disclosure may be effected without great administrative cost by relying on the system already established in respect of limited liability companies within the Community. Thus the coordination foreseen by this Directive is confined to disclosure in respect of the branches of such limited liability companies.

10. The disclosure requirements must relate in the first instance to the branch itself. Further, it must be clear of which company the branch is part and where the company is registered. All the information on the company as a whole will be available on that register. It therefore seems unnecessary to require in addition the disclosure of those documents and particulars on the register of the branch. However, the disclosure of persons having the power of representation must be an exception.

11. Particular problems exist concerning accounting. Certain Member States have adopted provisions which in respect of the opening of branches require the publication of the accounts of the company of which the branch is a part. Others go further and require in addition the disclosure of annual accounts relating to the branch itself. Serious doubts exist as to the economic meaning of such accounts and as to their usefulness as information for third parties. Further, these provisions would appear to have lost any justification following the coordination at Community level of the provisions concerning the drawing up, auditing and disclosure of the accounts of limited liability companies. The relevant accounts must therefore also be considered equivalent in respect of the exercise of rights of establishment. Thus disclosure in the register of the branch should be confined to specific accounting documents in respect of the company. By these means the Directive will lead to the removal of the regulation which has been rendered superfluous as a result of harmonization.

12. If discrimination is to be avoided, the Directive cannot be restricted to branches of limited companies from other Member States; it must as set out in Chapter II also cover branches of companies of a comparable nature from third countries. The differences of those provisions from those in respect of branches of companies from the Community result in particular from the fact that the harmonization measures of the Community do not cover such companies. However, the provisions of this Directive in respect of such companies must be considered as of a minimum nature.

Commentary on the articles

I. Branches of companies of Member States

Article 1

The coordination is limited to the disclosure of branches of foreign companies. The scope of application of Chapter I covers only branches of companies which are subject to the law of another Member State. The definition of company is not based on the broad definition in Article 58 of the Treaty of Rome but covers only those companies for which a uniform disclosure procedure was introduced by Directive 68/151/EEC of 9 March 1968. [1]

A file is opened in a public register for every limited liability company. All documents and particulars which must be disclosed must be kept on the file or entered in the register. It is open to the public. Copies of the documents and particulars kept or entered may be obtained by post on demand. The cost of such copies must not exceed their administrative cost. In addition, they must be published in a national gazette, at least in the form of a reference to the document which has been deposited in the file or entered in the register. [2]

This disclosure procedure is extended by the present Directive to branches which are set up in a Member State by a limited company which is governed by the law of another Member State. The law of the Member State by which the company is governed may further require that disclosure of such branches be effected in its company register.

Article 2

The requirement that there should be disclosure in the appropriate register for the branch covers in the first instance facts which concern the branch itself. This applies first of all to the address of the branch (a) and further to the name of the branch if it differs from that of the company (c). This applies, for example, where the branch uses the company's name but makes an addition which refers to the branch. Finally, the closure of the branch must be disclosed (f).

For third parties that deal with the company it is important to know the identity of the persons who whether as a body constituted pursuant to law or as members of any such body have the authority to represent the company. Although disclosure of such persons on the register of the company is already imposed by the first Directive (Article 1(1)(d)), it is preferable to repeat the disclosure on the register of the branch. Where in respect of the branch's activities permanent representatives have been designated, their identity must also be available to the public. Where there is more than one person, it should be indicated whether each may act individually or whether they must act jointly (d). The Member State in which the branch has been opened may require the deposit of the certified signature of the persons who have the authority to represent the company in dealings with third parties (paragraph 2).

However, the disclosure requirement concerning documents and particulars which relate to the company to which the branch belongs is already covered by Article 2 of the first Directive. Apart from the disclosure of accounting documents, which are covered by Article 3 of this Directive, these cover: the instrument of constitution and Memorandum and Articles of Association; the amount of the capital subscribed in the context of an authorized capital; any transfer of the seat of the company; the winding up of the company; any declaration of nullity of the company by the courts; the appointment and identities of liquidators of the company; the termination of the liquidation and striking-off the register. In view of the provisions of the first Directive it seems unnecessary to require the disclosure of the above documents and particulars which concern the company as a whole also on the register of a branch set up by that company in another Member State. The register of the branch

[1] OJ L 65, 14.3.1968. For subsequent amendments of the scope of application by reason of the accession of (1) Denmark, Ireland and the United Kingdom, (2) Greece, and (3) Spain and Portugal, see the relevant Acts concerning the conditions of accession and the adjustments to the Treaties, published in OJ L73, 27.3.1972 (Annex I, III H), OJ L 291, 19.11.1979 (Annex I, IIIc) and OJ L 302, 15.11.1985 (Annex I).

[2] Article 3 of the first Directive.

must however set out details of the register and the number in it under which the company is entered (b).

The disclosure of the documents and particulars required by this Article provides wholly adequate protection for those persons who deal with a company via a branch. To require the disclosure of further documents and particulars would erect unwarranted barriers to the exercise of the right of establishment by setting up a branch. Separate provisions covering accounting documents are the subject of Article 3.

Article 3

The laws of the Member States show great disparity in respect of their disclosure requirements of accounting documents of the company on the register of the branch. While in this field some Member States require no disclosure, some require the disclosure on the register of the branch of the accounting documents of the company of which the branch forms part, while others require in addition the disclosure of accounts relating to the branch itself.

The starting point of the provisions of this directive is that harmonization has been effected in respect of the provisions on annual accounts by the fourth Directive, [1] on consolidated accounts by the seventh Directive, [2] and on the approval of the persons authorized to audit such accounts by the eighth Directive. [3] The accounting documents drawn up and audited in compliance with these Community rules must be considered as offering equivalent protection to shareholders and third parties. Further, the relevant accounts must equally be published in the register of the company pursuant to the provisions of the first Directive. [4]

These disclosure requirements do not appear, however, in all aspects satisfactory in respect of the setting up of a branch in another Member State. This Directive provides as a rule for the additional publication of the annual accounts and report in the register of the branch (paragraph 1). These documents are of particular interest to the creditors of the company. By way of exception, the Member States need not apply the provisions of the fourth Directive on the content, auditing and disclosure of the annual accounts to companies which are subsidiaries. [5] This is conditional in particular on the agreement of all the shareholders of the subsidiary, the guarantee by the parent of the commitments of the subsidiary and the inclusion of the subsidiary in the consolidated accounts drawn up in accordance with the seventh Directive. In these circumstances this Directive provides for the disclosure of those consolidated accounts in the register of the branch (paragraph 2).

It is important to ensure that the Member State of the branch cannot impose any further conditions in respect of the disclosure of these accounting documents. However, the possibility must remain to require disclosure of these documents in its official language together with the certification of the translation (paragraph 3).

Article 4

This article provides that the letters and order forms used by the branch shall state not only the register of the company (see Article 4 of the first Directive), together with the number of the company, but also the same indications in respect of the branch.

II. Branches of companies from third countries

Article 5

The rules governing the disclosure in respect of branches must apply in essence also to branches set up by companies from third countries, where such companies have a legal form comparable with that of a limited company falling under the first Directive. In practical terms it is impossible to define the different forms of companies in third countries. In this respect it is necessary to use the test of comparability.

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[1] OJ L 222, 14.8.1978
[2] OJ L 193, 18.7.1983.
[3] OJ L 126, 12.5.1984.
[4] Articles 47 of the fourth Directive and 38 of the seventh.
[5] Article 57 of the fourth Directive as amended by Article 43 of the seventh Directive.

Article 6

Further provisions are required in respect of the setting up of branches of companies from third countries. Such companies are not as such covered by the Community measures of harmonization. It is therefore not possible in respect of certain documents and particulars which concern the company as a whole to refer to disclosure in a register of the company. Thus it is necessary to provide for the disclosure of a series of documents and particulars in the register of the branch. These are, however, only minimum provisions given that for these companies there is no harmonized system of disclosure as exists for the companies of the Member States. Indents (b), (c), (d), (e) and (h) refer to disclosure concerning the company as such, in particular of the instrument of constitution and its Memorandum and Articles of Association, of its legal type and the law by which it is governed. Indents (a), (f), (g), (i) and paragraph 2 correspond to the same provisions of Article 2.

Article 7

In respect of branches opened by companies of third countries, disclosure is required of the annual accounts and the annual report established by these companies (paragraph 1). It is possible that the third country does not require the drawing up of annual accounts and that only consolidated accounts are available. In this event the requirement of disclosure covers those consolidated accounts where they have been drawn up by the companies in question (paragraph 2). The annual or consolidated accounts referred to above are those covered by the law of the State by which the company is governed. They must be drawn up and audited in accordance with the relevant legislation of that State. However, in default of such provisions they must be in accordance with the accounting principles generally accepted in that country (paragraph 3). The Member State in which the branch was opened may require the disclosure of these accounting documents in its official language and the certification of their translation (paragraph 4).

Article 8

This provision concerns the letters and order forms used by the branch and corresponds to Article 4 of the Directive. However, it does not require the matters required by Article 4 of the first Directive [1] given that the latter does not apply to companies of third countries.

III. Transitional and final provisions

Article 9

By analogy with Article 6 of the first Directive the Member States must provide appropriate penalties in the case of breaches of the provisions of this Directive concerning disclosure.

Article 10

The Member States must determine the persons who must carry out the disclosure requirements of this Directive as has been required in respect of disclosure in respect of the company by Article 5 of the first Directive.

Article 11

The fourth Directive on annual accounts (Article 1(2)) [2] and the seventh Directive on consolidated accounts (Article 40) [3] provide, pending subsequent coordination, for derogations in respect of banks, other financial institutions and insurance companies. It is necessary to extend these exemptions also to the present Directive in so far as they relate to the drawing up, auditing and disclosure of accounting documents on the registers of branches. For the remainder, the provisions of this Directive should apply to the branches of companies carrying on business in the fields set out above.

[1] OJ L 65, 14.3.1968.
[2] OJ L 222, 14.8.1978.
[3] OJ L 193, 18.7.1983.

Article 13

The Contact Committee set up by the fourth Directive (Article 52), [1] which is also responsible for matters arising in connection with the seventh Directive (Article 40) [2] and the eighth Directive (Article 29) [3] is also to cover the same field in respect of the present Directive.

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Explanatory memorandum to the amended proposal

1. The proposal for an 11th Directive based on Article 54 of the EEC Treaty concerning disclosure requirements in respect of branches was first presented to the Council on 29 July 1986. [4]

2. The Economic and Social Committee and the European Parliament delivered their opinions on 24 September 1987 [5] and 18 November 1987 [6] respectively.

3. The object of this amended proposal is essentially to take account of those opinions. The amendments relate to the following aspects: particulars concerning the object of the activities of the branch, the existence of other branches in the same Member State, the dissolution of the company and the appointment and powers of the liquidators, transfers of the location of the branch, the equivalence or the compliance with Community accounting directives of the accounting documents of companies from third countries which open branches in the Community, disclosure of particulars relating to branches in the register in which the company is recorded.

4. In Article 11, however, the Member States' right not to apply the provisions of Article 3 and 7 to branches opened by insurance companies has been maintained. Special rules in regard to accounting are required in respect of that sector, and these will form the subject of a subsequent Commission proposal.

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Amended proposal for an 11th Council Directive based on Article 54(3)(g) of the Treaty concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State [7]

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,

Having regard to the opinion of the European Parliament, [6]

Having regard to the opinion of the Economic and Social Committee, [5]

Whereas in order to facilitate the exercise of the freedom of establishment in respect of companies covered by Article 58 of the Treaty, Article 54(3)(g) and the general programme on the suppression of restrictions on the freedom of establishment require coordination of the safeguards required of companies and firms in the Member States for the protection of the interests of members and others;

Whereas hitherto this coordination has been effected in respect of disclosure by the adoption of the first Council Directive 68/151/EEC of 9 March 1968 covering li-

[1] OJ L 222, 14.8.1978.
[2] OJ L 193, 18.7.1983.
[3] OJ L 126, 12.5.1984.
[4] OJ C 203, 12.8.1986; Bull. EC 7/8-1986, points 2.1.16 and 3.5.1.
[5] OJ C 319, 30.11.1987; Bull. EC 9-1987, point 2.4.27.
[6] OJ C 345, 21.12.1987; Bull. EC 11-1987, point 2.1.109.
[7] The amendments made to the original proposal are shown in italic in the consolidated text reproduced in this Supplement.

mited liability companies [1] and continued in the field of accounting by the fourth Council Directive 78/660/EEC of 25 July 1978 on annual accounts of certain types of companies, [2] the seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts [3] and the eighth Council Directive 84/253/EEC of 10 April 1984 on the approval of persons performing the statutory audits of accounting documents; [4]

Whereas these Directives apply to companies as such and also to their subsidiary companies but do not cover their branches; whereas the opening of a branch, as well as the creation of a subsidiary company, is one of the possibilities currently open to companies in exercising their rights of establishment in another Member State;

Whereas in respect of branches the lack of coordination, in particular concerning disclosure, gives rise to disparity in respect of protection of shareholders and third parties between companies which operate in other Member States by opening branches and those which operate by creating subsidiary companies and it is appropriate to eliminate such disparities in order to ensure an equivalent level of protection for those concerned;

Whereas in this field the divergence among the laws of the Member States interferes with the exercise of the right of establishment and it is therefore necessary to eliminate such divergence to guarantee the exercise of the said right;

Whereas to ensure the protection of persons who deal with companies by way of a branch, measures in respect of disclosure are required in the Member State in which the branch is situated; whereas the economic and social influence of a branch may be comparable to that of a subsidiary company, so that to that extent the public interest in disclosure is comparable; whereas to effect such disclosure it is necessary to make use of the procedure already instituted for limited liability companies within the Community;

Whereas the said disclosure with an exception in respect of those having powers of representation and the winding-up of the company may be confined to information concerning the branch itself together with a reference to the register of the company of which the branch is part, given that, pursuant to Community rules, all information covering the company as such is available on that register;

Whereas national provisions in respect of disclosure of accounting documents relating to the branch can no longer be justified following the coordination of national law in respect of the drawing up, statutory audit and disclosure of the accounting documents of the company; whereas in consequence it is sufficient to disclose, on the register of the branch, the annual accounts of the company and, in default of those, the consolidated accounts in which the company is included;

Whereas to avoid any discrimination arising out of the country of origin of the company, the Directive should also cover branches created by companies governed by the law of third countries and based on legal forms comparable with limited liability companies; whereas for these branches it is necessary to apply certain provisions different from those applying to branches of companies governed by the law of other Member States given that the Directives set out above do not apply to companies of third countries,

Has adopted this Directive:

I. Branches of companies from other Member States

Article 1

Documents and particulars relating to a branch set up in a Member State by a company which is subject to the law of another Member State and to which Directive 68/151/EEC applies shall be disclosed according to the law of the Member State of the branch in compliance with Article 3 of the said Directive.

Article 2

1. The compulsory disclosure provided for in Article 1 shall cover the following documents and particulars:

[1] OJ L 65, 14.3.1968.
[2] OJ L 222, 18.8.1978.
[3] OJ L 193, 18.7.1983.
[4] OJ L 126, 12.5.1984.

(a) the address of the branch;

(aa) the object of the activities of the branch;

(b) the register in which the company file mentioned in Article 3 of Directive 68/151/EEC is kept, together with the registration number in that register;

(bb) the existence of other branches in the same Member State, together with the particulars referred to in (a) and (b);

(c) the name of the branch if that is different from the name of the company;

(d) the appointment, termination of office and particulars of the persons who, either as a body constituted pursuant to law or as members of any such body and those who as permanent representatives of the company for the activities of the branch, are authorized to represent the company in dealings with third parties and in legal proceedings. It must be stated whether the persons authorized to represent the company may do so alone or must act jointly;

(dd) the winding-up of the company and the appointment of liquidators, particulars concerning them and their powers in accordance with Article 2(1) (j) of Directive 68/151/EEC;

(e) the accounting documents covered by Article 3;

(f) the closure of the branch *and transfers of its location.*

2. The Member State of the place of the branch may require the deposit in the register of the branch of the certified signature of the persons referred to in paragraph 1(d).

Article 3

1. The compulsory disclosure of accounting documents provided for by Article 2 (1)(e) shall be limited to the annual accounts and annual report of the company. These documents must have been drawn up and audited in accordance with the law of the Member State by which the company is governed in compliance with Directives 78/660/EEC and 84/253/EEC.

2. Paragraph 1 shall not apply where, pursuant to Article 57 of Directive 78/660/EEC, the provisions thereof concerning the content, auditing and publication of the annual accounts do not apply to a company which is a subsidiary company within the meaning of Directive 83/349/EEC. In this event the compulsory disclosure provided for in Article 1 shall cover the consolidated accounts and the consolidated annual report of the parent undertaking of the company. These documents must have been drawn up and audited in accordance with the law of the Member State by which the parent undertaking is governed in compliance with Council Directives 83/349/EEC and 84/253/EEC.

3. The Member State in which the branch was created may stipulate that the documents and particulars referred to in paragraphs 1 and 2 must be published in its official language and that their translation must be certified.

Article 4

Member States shall prescribe that letters and order forms used by the branch shall state, in addition to the information prescribed by Article 4 of Directive 68/151/EEC, the register in which the file in respect of the branch is kept together with the number of the branch in that register.

II. Branches of companies from third countries

Article 5

Documents and particulars concerning a branch set up in a Member State by a company which is not governed by the law of a Member State but which is of a legal form comparable with the types of company to which Directive 68/151/EEC applies shall be published according to the law of the Member State of the branch in accordance with Article 3 of the said Directive.

Article 6

1. The compulsory disclosure provided for in Article 5 shall cover at least the following documents and particulars:

(a) the address of the branch;

(aa) the object of the activities of the branch;

(b) the law of the State by which the company is governed;

(c) where the said law so provides, the register in which the company is recorded and the registration number of the company in that register;

(cc) the existence of other branches in the same Member State, together with the particulars referred to in (a), (aa) and (c);

(d) the instruments of constitution, and the memorandum and articles of association if they are contained in a separate instrument together with all amendments to these documents;

(e) the legal form of the company, its seat, its name and its object and the amount of subscribed capital if these matters are not shown in the documents covered by subparagraph (d);

(f) the name of the branch if that is different from the name of the company;

(g) the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body and those who as permanent representatives of the company for the activities of the branch are authorized to represent the company in dealings with third parties and in legal proceedings. It must be stated whether the persons authorized to represent the company may do so alone or must act jointly;

(gg) the winding-up of the company and the appointment of liquidators, particulars concerning them and their powers;

(h) the accounting documents referred to in Article 7;

(i) the closure of the branch *and transfers of its location.*

2. The Member State of the place of the branch may require the deposit in the register of the branch of the certified signature of the persons referred to in paragraph 1 (g).

Article 7

1. The compulsory disclosure of accounting documents provided for by Article 6(1)(h) shall apply to at least the annual accounts and annual report of the company.

2. Where the company produces consolidated accounts and a consolidated annual report instead of annual accounts and an annual report the compulsory disclosure provided for in Article 5 shall cover such consolidated accounts and the consolidated annual report.

3. *The documents covered by paragraphs 1 and 2 must have been drawn up in accordance with Directives 78/660/EEC and 83/349/EEC respectively, or so as to be equivalent to annual accounts or consolidated accounts and an annual report or a consolidated annual report drawn up according to the Directive concerned; they must also have been audited pursuant to the law which governs the company.*

4. Article 3(3) shall apply.

Article 8

Member States shall prescribe that letters and order forms used by the branch state the register in which the file in respect of the branch is kept together with the number of the branch in that register. *If the law governing the company requires an entry in a register, that register and the number of the entry shall also be stated.*

IIa. Disclosure of particulars in respect of branches in the register in which the company is recorded

Article 8a

The particulars of branches, irrespective of their location, opened by companies subject to the law of a Member State and to which Directive 68/151/EEC applies, shall be disclosed by those companies in accordance with Article 3 of the said Directive.

III. Transitional and final provisions

Article 9

Member States shall provide for appropriate penalties in case of failure to disclose the matters set out in Articles 1, 2, 3, 5, 6 and 7 and of omission from commercial documents of the compulsory particulars provided for in Articles 4 and 8.

Article 10

Each Member State shall determine by which persons the disclosure formalities provided for in this Directive are to be carried out.

Article 11

Pending subsequent coordination, Member States need not apply the provisions of Articles 3 and 7 to the branches of banks, other financial institutions and insurance companies.

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive by 1 January 1990. They shall forthwith inform the Commission thereof.

2. Member States may stipulate that the provisions referred to in paragraph *1 apply from 1 January 1991.*

3. Member States shall communicate to the Commission the texts of the provisions [1] of national law which they adopt in the field covered by this Directive.

Article 13

The Contact Committee set up pursuant to Article 52 of Directive 78/660/EEC shall also:

(a) facilitate, without prejudice to the provisions of Articles 169 and 170 of the Treaty, the harmonized application of this Directive, through regular meetings dealing, in particular, with practical problems arising in connection with its application;

(b) advise the Commission, if necessary, on any necessary additions or amendments to this Directive.

Article 14

This Directive is addressed to the Member States.

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[1] The original proposal read: 'Member States shall communicate to the Commission the texts of the *main* provisions ...'.

Single-member private limited companies

Explanatory memorandum

Background

The programme to coordinate company law through directives based on Article 54 of the Treaty of Rome aims to achieve safeguards which, for the protection of the interests of members and others, are required of companies and firms. To date harmonization has been reached in respect of disclosure, [1] annual accounts, [2] consolidated accounts [3] and the approval of auditors, [4] for all companies, and in addition, in the case of public limited companies only, in requirements relating to formation and capital [5] and to mergers [6] and divisions [7] of companies. The Directive now submitted concerns only one very specific aspect of private limited companies, namely the introduction of the single-person company.

The Community action programme for small and medium-sized enterprises, [8] approved by the Council on 3 November 1986, implies the development of proposals in the area of company law in order to encourage the creation and development of small firms. The European Council has also insisted, on several occasions, on the need to promote the spirit of enterprise in the Community. Promoting the access of individual entrepreneurs to the status of company, which represents the best framework for business development in the internal market, falls within this policy. The Council resolution of 22 December 1986 on the action programme on employment growth [9] also underlines the need to encourage single-person businesses. With respect to single-member companies the present legal position is that certain Member States allow such companies to be formed, while others maintain the requirement that there be more than one member, and if all the shares come to be held by a single shareholder require either the winding up of the company or the joint liability of the sole member.

The Member States which allow single-member companies to be formed are Denmark (since 1973), Federal Republic of Germany (1980), France (1985), the Netherlands (1986) and Belgium (1987). In Luxembourg, draft legislation has been before Parliament since 1985.

Provisions for single-member companies do not exist in Spain, Greece, Italy, Ireland or the United Kingdom. Single-member companies are also not allowed in Portugal, but legislation for single-person businesses with limited liability was introduced in 1986.

Amongst those Member States which recognize single-member companies, Denmark, Germany and the Netherlands allow such companies to be formed not only by natural persons but also by artificial persons, while Belgium does not allow an artificial person to be the sole member. France has an intermediate position, allowing single-member

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[1] First Council Directive of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC: OJ L 65, 14.3.1968).

[2] Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC: OJ L 222, 14.8.1978).

[3] Seventh Council Directive of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (83/349/EEC: OJ L 193, 18.7.1983).

[4] Eighth Council Directive of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (84/253/EEC; OJ L 126, 12.5.1984).

[5] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, 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 (77/91/EEC: OJ L 26, 31.1.1977).

[6] 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: OJ L 295, 20.10.1978).

[7] 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: OJ L 378, 31.12.1982).

[8] OJ C 287, 14.11.1986; Bull. EC 10-1986, point 1.3.1; Bull. EC 11-1986, point 2.1.22.

[9] OJ C 340, 31.12.1986; Bull. EC 12-1986, point 2.1.138.

companies to be formed by artificial persons but prohibiting the creation of one single-member company by another (this is also envisaged in the Luxembourg proposal).

In order to harmonize this national legislation, the Directive would require that provision be made for single-member companies throughout the Community. This arrangement is useful particularly in order to facilitate the formation or continuation in business of the companies, often small companies, which have only one owner. On the one hand, the requirement that there be more than one member means that an individual businessman must secure the cooperation of a second member, often nothing more than a front man, which adds to the cost and complication of running the company. On the other hand, the company form, leaving aside the number of members, provides a legal framework which under existing Community measures and the present Directive provides a series of equivalent safeguards, particularly regarding disclosure and the drawing up and auditing of accounts, which allow the company's funds to be kept separate from the sole member's private assets and liabilities.

The sole trader is encouraged to take the risk of setting up a business in company form. This allows him to limit his liability to the funds devoted to a specific activity, not neglecting the need for the protection of third parties with regard to such single-member companies. The Directive would therefore lay down rules specifically for single-member companies. For the rest the ordinary law on limited liability companies would apply.

Commentary on the articles

Article 1

The Directive applies only to private limited companies. This does not rule out the possibility of introducing the single-member companies equally as for public limited companies on the condition that the rules of the Directive are followed (see Article 6).

Article 2

The purpose of this article is to ensure that all Member States make provision in their legislation for private limited companies with one member only. Such a company may be set up as a one-member company, but it may also arise later, as the result of a concentration of all the shares in the hands of a single shareholder. The legal provisions which derive from the requirement that there be more than one member could not be maintained in force. Article 11(2) (f) of Directive 68/151/EEC, [1] of 9 March 1968 which allows the courts to order the nullity of a company where contrary to the national law governing the company the number of members is less than two, no longer serves any purpose in the case of private limited companies.

To facilitate verification of the fact that a company has only one member and to safeguard transparence when shares are transferred, the Directive requires that the shares of the single-member company be nominative.

The purpose of introducing the single-member company is to supply the individual entrepreneur with a structure of organization which allows him to limit his liability.

For this reason, it is necessary to limit single-member companies as far as possible to natural persons and to small and medium-sized companies. In this way, with the aim of avoiding the creation of chains of companies, the Directive prohibits single-member companies whose single member is an artificial person from being the sole member of another company. On the other hand, certain limitations are established about artificial persons which are sole members of a company. The Directive permits Member States to choose between two options.

The first option is to provide for full responsibility of the artificial person for the obligations of the company which were entered into during its sole membership. However, in the case of an artificial person which be-

[1] OJ L 65, 14.3.1968.

comes the sole member of an existing company, the Member States can provide a more flexible solution. If the situation is regularized within a year, the fact that in this period of time the company had a single member should be of no consequence.

On the other hand, if after one year the artificial person has not found another member, the sole member is responsible for all the company's obligations entered into from the moment of becoming the sole member.

The second option is to fix a minimum capital for these single-member companies and to require that the companies and the artificial persons which are the sole members are, at their balance-sheet dates, small or medium-sized companies in the sense of Article 27 of Directive 78/660/EEC with regard to annual accounts. [1] When the single-member company or the artificial person which is the single shareholder exceeds the size of a medium-sized company in the sense of the Directive and if the situation is not regularized within a year following the balance-sheet date, the sole member is fully responsible for the obligations of the company arising after that date.

The Directive does not repeat the laws of some countries (France, Belgium and Luxembourg) which forbid natural persons being the sole member of many companies, which could be an obstacle to an individual entrepreneur carrying out different activities.

Article 3

The fact that a company has only one member may be of interest to those dealing with it. It must therefore be disclosed. Where a company has only one member at the time of its formation this will be ensured by the disclosure of the statutes or act of incorporation pursuant to Article 2(1) (a) of Directive 68/151/EEC. However, where a company becomes a single-member company after its formation, this Directive would require that the information be entered in the register, but does not require that it be published in a national gazette.

Article 4

In a single-member company it is the sole member who exercises the powers of the general meeting. Those powers have not yet been harmonized at Community level. It is thus for the Member States to determine the powers of the general meeting. As a rule those powers can be delegated to other persons. Delegation of that kind does not seem appropriate in the case of a single-member company, and the Directive would prohibit it.

To date there has been no harmonization either of the form to be taken by decisions adopted by a general meeting. But for single-member companies, where there is no control in the form of another member, this gap has to be filled. Under the Directive therefore, the decisions taken by the sole member in his capacity as general meeting must be recorded in minutes. The Directive avoids laying down the effects of failure to comply with this rule. It will be for Member States to make provision for the penalties which seem to them appropriate, for example the nullity or the possibility of cancelling the sole member's decisions.

Article 5

Any agreement between any company, single-member or multimember, and one of the members of the company carries the risk of a conflict of interest, and legislation has been enacted on the subject in all Member States. But the danger is clearly much greater in the case of the single-member company. As with decisions taken by the sole member in his capacity as general meeting, there is a need for a measure of clarity with regard to these agreements too. The Directive therefore requires that these agreements must also be drawn up in writing.

But there are circumstances in which the interests involved are even more difficult to distinguish. This is the case where for the conclusion of such an agreement the company is represented by the sole member acting as manager. In that case the Directive requires that such an agreement be author-

[1] OJ L 222, 14.8.1978.

ized by the statutes or instruments of incorporation, documents which are accessible to any interested party at the companies register pursuant to Directive 68/151/EEC. [1]

Article 6

The Directive must take account of the fact that certain Member States accept the one-member company not only for private limited companies but also for public limited companies. To avoid different degrees of protection for members and others across the Community, it is necessary to impose legislation for single-member companies on Member States to satisfy the demands of this Directive.

Article 7

The Directive cannot afford to overlook the fact that for theoretical reasons certain Member States are reluctant to accept the idea of a one-member company. Such Member States may nevertheless provide for limited liability for sole traders; this has already been done in one Member State. But Member States choosing this arrangement must provide safeguards covering such traders which are equivalent to those required by Community law, in particular the Directives concerning advertising, annual accounts and consolidated accounts of private limited companies. Otherwise, different theoretical approaches which in practice have the same results in terms of the risks run by a sole trader and by the sole member of a company would ultimately provide varying measures of protection for similar interests throughout the Community.

*
* *

Proposal for a 12th Council Directive on company law concerning single-member private limited companies [2]

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 certain safeguards which, for the protection of the interests of members and others, are required by Member States of companies of firms within the meaning of the second paragraph of Article 58 of the Treaty should be coordinated with a view to making such safeguards equivalent throughout the Community;

Whereas in this field Council Directives 68/151/EEC of 9 March 1968, [1] 78/660/EEC of 25 July 1978 [3] and 83/349/EEC of 13 June 1983 [4] concerning disclosure, the validity of commitments, nullity, annual accounts and consolidated accounts apply to all companies, while Council Directives 79/91/EEC of 13 December 1976, [5] 78/855/EEC of 9 October 1978 [6] and 82/891/EEC of 17 December 1982 [7] on formation and capital, mergers and divisions apply only to public limited companies;

Whereas the action programme for small and medium-sized enterprises was approved by the Council on 3 November 1986; [8]

Whereas reforms in the legislation of certain Member States in the last few years, permitting single-member private limited companies, have created divergences between the laws of the Member States;

Whereas it is important to provide a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Community;

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[1] OJ L 65, 14.3.1968.
[2] OJ C 173, 2.7.1988; Bull. EC 3-1988, point 2.1.93.
[3] OJ L 222, 14.8.1978.
[4] OJ L 193, 18.7.1983.
[5] OJ L 26, 31.1.1977.
[6] OJ L 295, 20.10.1978.
[7] OJ L 378, 31.12.1982
[8] OJ C 287, 14.11.1986; Bull. EC 10-1986, point 1.3.1; Bull EC 11-1986, point 2.1.22.

Whereas a private limited company may be a single-member company from the time it is formed, or may become so because its shares have come to be held by a single shareholder; the shares of a single-member company should be nominative and certain conditions should be established for companies with a legal person as their sole member;

Whereas the fact that all the shares have come to be held by a single shareholder should be disclosed;

Whereas decisions taken by the sole member in his capacity as general meeting should be recorded in writing;

Whereas agreements between the sole member and the company should likewise be recorded in writing,

Has adopted this Directive:

Article 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 Belgium: *la société privée à responsabilité limitée/de personenvennootschap met beperkte aansprakelijkheid*;

In Denmark: *anpartsselskaber*;

in the Federal Republic of Germany: *die Gesellschaft mit beschränkter Haftung*;

in Greece: *η εταιρία περιορισμένης ευθύνης*;

in Spain: *la sociedad de responsabilidad limitada;*

in France: *la société à responsabilité limitée;*

in Ireland: *the private company limited by shares or by guarantee*;

in Italy: *la società a responsabilità limitata;*

in Luxembourg: *la société à responsabilité limitée*;

in the Netherlands: *de besloten vennootschap met beperkte aansprakelijkheid*;

in Portugal: *a sociedade por quotas*;

in the United Kingdom: *the private company limited by shares or by guarantee.*

Article 2

1. A company may have a sole member, either when it is formed or when all the shares come to be held by a single person (single-member company). Shares in such a company shall be nominative.

2. A single-member company whose sole member is a legal person may not be the sole member of another company.

3. Where the sole member is a legal person, Member States shall provide that either:

(a) the legal person has unlimited liability for the company's obligations arising during the period of the person's sole membership. However, Member States may provide that where a legal person becomes a sole member, because all the shares come to be held by a single person, that liability is not incurred unless another member has not been found within one year;

or

(b) a minimum capital is fixed for the single-member company and both the company and the sole member are companies which at their balance-sheet dates do not exceed the limits of two of the three criteria in Article 27 of Directive 78/660/EEC of 25 July 1978. [1] If one of the companies exceeds the limits and the situation is not regularized in the year following the balance-sheet date, the sole member shall have unlimited liability for the obligations of the single-member company arising after the balance-sheet date.

[1] OJ L 222, 14.8.1978.

Article 3

Where a company becomes a single-member company because all its shares come to be held by a single person, that fact shall be recorded in the file or entered in the register within the meaning of Article 3(1) and (2) of Directive 68/151/EEC of 9 March 1968. [1]

Article 4

1. The sole member shall exercise the powers of the general meeting of the company, and may not delegate them.

2. Decisions taken by the sole member in the field referred to in paragraph 1 shall be recorded in minutes.

Article 5

1. Agreements between the sole member and the company shall be drawn up in writing.

2. The possibility of any agreement between the sole member and the company represented by that member must be provided for in the statutes or instrument of incorporation of the company.

Article 6

Where a Member State allows the formation of a single-member public limited company, the rules of this Directive shall apply.

Article 7

A Member State may decide not to apply this Directive where its legislation provides that an individual businessman may set up an undertaking whose liability is limited to a sum devoted to a stated activity, on condition that safeguards are laid down for such undertakings which are equivalent to those imposed by Community law on the companies to which this Directive applies.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 1990. They shall inform the Commission thereof.

2. Member States may provide that in the case of companies already in existence on 1 January 1990 this Directive shall not apply until 1 January 1991.

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.

Article 9

This Directive is addressed to the Member States.

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[1] OJ L 65, 14.3.1968.

European Communities — Commission

Disclosure requirements for branches
Single-member private limited companies

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As part of its company law coordination programme the Commission has transmitted to the Council proposals for an 11th Directive, concerning disclosure requirements in respect of branches, and a 12th Directive, concerning single-member private limited companies.

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