

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(90) 629 final - SYN 3

Brussels, 13 December 1990

Second
Amendment to the proposal for a
Fifth Council Directive
based on Article 54
of the EEC Treaty
concerning
the structure of public limited companies
and the powers and obligations of their organs

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

EXPLANATORY MEMORANDUM

I. General

1. The proposal for a Fifth Company Law Directive, concerning the structure of public limited companies and the powers and obligations of their organs, was first presented to the Council on 9 October 1972.¹ The Economic and Social Committee delivered its opinion on 19 September 1974.² Parliament delivered its opinion on 14 June 1982.³

The Commission amended its proposal to take account of these opinions on 19 August 1983,⁴ and the amended proposal has been before the Council since then.

2. The Commission is now amending its proposal for the second time. This second amended proposal is not intended as a general revision of the proposal as it has stood since 1983. Its scope is much narrower. The amendments it makes derive mainly from the Commission's announced policy of eliminating obstacles to takeover bids.
3. The Commission does not wish to encourage takeover bids as ends in themselves. Its standpoint is rather that takeover bids may generally be viewed in a positive light in so far as they encourage the selection by market forces of the most competitive companies and the restructuring of European companies which is indispensable to meet international competition. The scope for takeover bids should be comparable from one Member State to another.
4. In certain Member States takeover bids resisted by the board of the target company ("hostile" bids) have in fact no chance of success because of the defensive measures which the board of a target company is free to take under national law in order to keep control of the company in the hands of "friendly" shareholders.
5. In a communication to the Council of 10 May 1990 the Commission described the measures it intended to propose in order to eliminate obstacles to takeover bids.⁵

1 OJ C 131, 13.12.1972, p. 49.

2 OJ C 109, 19.9.1974, p. 9.

3 OJ C 149, 14.6.1982, p. 17.

4 OJ C 240, 9.9.1983, p. 2.

5 SEC(90)901 final, 10.5.1990.

6. The general purpose of these measures is to secure a larger measure of democracy in companies and wider participation by the shareholders in the life of the company. Greater shareholder power is particularly important in the event of a takeover bid. The new measures should ensure that the fate of the target company can be decided by all of its shareholders freely and in full knowledge of the facts.
7. The measures announced are aimed at obstacles of two kinds. The first category relates to the maintenance of the company's capital, and the second to shareholders' voting rights.

As regards the maintenance of the company's capital, obstacles can arise as a result of:

- (a) the power of the directors to acquire the company's own shares while a takeover bid is in progress; and
- (b) the possibility that a company may use a subsidiary to acquire the parent company's shares without complying with the safeguards laid down in Community law for such transactions.

As regards shareholders' voting rights, obstacles to takeover bids can derive from:

- (a) a disproportion between a shareholder's holding in the company capital and his voting rights; and
- (b) difficulties in bringing about changes in the management of the company.

There are provisions of Community company law already adopted or proposed which go a long way towards removing these obstacles, but they need to be supplemented in certain respects.

8. As far as maintenance of the capital is concerned there are the amended proposal for a Thirteenth Company Law Directive, on takeover bids,⁶ and the Second Company Law Directive (77/91/EEC), on the formation of public limited liability companies and the maintenance and alteration of their capital.⁷

When the proposal for a Thirteenth Directive was amended, the wording of Article 8, which prevents the board of a target company from taking defensive measures while a bid is open, was changed to make it clear that such defensive measures include the acquisition of the company's own shares. This would represent an exception to the rules in the Second Directive, which allow a company to acquire its own shares in certain cases by decision of the board alone; in the event of a takeover bid such acquisition would now require the authorization of the general meeting of shareholders, which would have to be given after the bid was launched.

⁶ OJ C 240, 26.9.1990, p. 7.

⁷ OJ L 26, 31.1.1977, p. 1.

As regards the acquisition of shares in a parent company by its subsidiaries, the Commission has proposed a new directive which would amend the Second Directive so that the restrictions it imposes on the acquisition of a company's own shares would also apply to acquisitions by subsidiaries.

9. Obstacles relating to the exercise of voting rights by shareholders fall within the amended proposal for a Fifth Directive, which already contains important provisions in this respect.

The provisions concerned are the following:

- (a) Article 33, which lays down the principle that a shareholder's voting rights are to be proportionate to his holding in the subscribed capital;
- (b) Articles 4 and 21b, which deal with the appointment of the members of the supervisory organ (in the two-tier system) or of the administrative organ (in the one-tier system);
- (c) Article 36, which deals with the majority required for decisions of the general meeting.

A number of changes are needed to these articles in order to strengthen the position of the shareholders with regard to the exercise of their voting rights; this amended proposal is designed to make those changes.

II. Commentary on the articles

Article 33

Proportionality between the shareholder's stake in the capital and his voting rights

This principle is laid down in Article 33(1).

There are two exceptions provided for in paragraph 2(a) and (b); clauses in the memorandum and articles of association may allow

- (1) restriction or exclusion of the right to vote in respect of shares which carry special advantages; and
- (2) restriction of votes in respect of shares allotted to the same shareholder.

Recourse to these exceptions may have consequences contrary to the principle of equal treatment of shareholders, putting the power to make decisions in the hands of a minority of shareholders.

In order to strengthen the position of all the shareholders regarding the exercise of their voting rights, it is proposed that the scope of the first exception should be limited and that the second exception should be removed.

The first exception permitted by the Directive would allow companies to issue preference shares to meet particular financing requirements. The restriction or exclusion of voting rights in respect of preference shares is always offset by special advantages conferred on their holders. The advantages may relate to the distribution of profits (a prior claim to dividends, or a higher rate of dividend, for example), or to the distribution of the assets in the event of liquidation.

But if there is no limit to the issue of such shares voting rights may come to be concentrated in the hands of a small number of shareholders friendly to the board. To ensure a balance between the advantages and disadvantages of the preference share system, the new amendment would restrict the preference shares issued to a fixed percentage of the total volume of shares. On the model of legislation in several Member States, it is proposed that this ceiling should be 50% of the subscribed capital.

In addition, if the company fails to comply with its obligation to grant the promised special advantages within a given time, which may not exceed three consecutive years, such shares would automatically acquire the right to vote.

The second exception to the "one share one vote" principle would have allowed restrictions on the number of votes which may be cast by a single shareholder, provided the restriction applied at least to all shareholders of the same class.

Unlike the restriction of voting rights in respect of preference shares, this kind of restriction is offset by no advantages whatsoever. The only purpose of clauses in the memorandum or articles which impose such restrictions seems to be to protect small shareholders against big shareholders. Since the first amended proposal was put forward, however, such clauses have grown steadily more common, and in many cases form an insurmountable barrier to the takeover of a company. It no longer appears reasonable to deprive a shareholder of his voting rights without any compensation. Nor does the Directive leave minority shareholders unprotected. Safeguards are laid down for their benefit regarding proceedings to enforce liability brought on behalf of the company (Articles 16 and 18), the convening of the general meeting (Article 23), the inclusion of new items on the agenda of the general meeting (Article 25) and the dismissal of the auditors (Article 55).

Articles 4 and 21b

Appointment of members
of the supervisory organ or administrative organ

The Directive incorporates the principle that the membership of the organs of the company cannot be decided without reference to the general meeting.

But it may be that the general meeting's power to exercise its right to appoint members of the company organs is restricted by clauses in the articles or memorandum which give the holders of one category of shares an exclusive right to nominate candidates for such appointments.

Such clauses do not deprive the general meeting of its power of appointment. But that power would be appreciably restricted if the requirement that the general meeting choose from among candidates nominated in this way were to apply to a majority of the places on the company organs.

The second amended proposal would therefore expressly prohibit such clauses. A new paragraph to that effect is inserted into Articles 4 and 21b, dealing with the appointment of the members of the supervisory organ, in the two-tier system, and of the administrative organ, in the one-tier system.

Article 36

Majority required in general meeting

This provision specifies the majority normally required for resolutions for the general meeting, namely an absolute majority of votes cast by all the shareholders present or represented.

As currently drafted, however, the Article allows the law or the memorandum or articles of association to require a greater majority for any class of decision.

Thus shareholders holding a majority of votes could nevertheless be prevented from appointing or dismissing members of the company organs.

In order to ensure that the powers of majority shareholders do include the power to decide the composition of the organs, it is proposed that the Directive should stipulate that neither the law nor the memorandum or articles of association may require majorities greater than the absolute majority for this purpose.

A new paragraph to that effect is accordingly inserted into Article 36.

FIRST AMENDED PROPOSAL

Second

Amended proposal for a Fifth Directive founded on Article 54(3)(g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs

Amendment to the proposal for a Fifth Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Unchanged

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54(3)(g) thereof,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission,¹

Having regard to the amended proposal from the Commission,

Having regard to the opinion of the European Parliament,²

In cooperation with the European Parliament,

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

Unchanged

First to twelfth recitals unchanged

A new recital is inserted between the twelfth and thirteenth, as follows:

Whereas the position of shareholders regarding the exercise of their voting rights should be strengthened in order to ensure a wide measure of participation in the life of the company; whereas voting rights should accordingly be proportionate to the shareholder's stake in the company capital, and limits should be imposed on the

1 OJ C 131, 13.12.1972, p. 49.
2 OJ C 149, 14.6.1982, p. 17.
3 OJ C 109, 19.9.1974, p. 9.

1 OJ C 240, 9.9.1983, p. 2.

issue of preference shares without voting rights; whereas the freedom of the general meeting to appoint members of the organs of the company should not be reduced by giving particular categories of shareholders an exclusive right to put forward nominations; whereas the majority required for such resolutions on the part of the general meeting should be no greater than the absolute majority;

Fourteenth and Fifteenth recitals unchanged

HAS ADOPTED THIS DIRECTIVE:

Unchanged

Articles 1 to 3 unchanged

Article 4

Article 4

Paragraphs 1 to 4 unchanged

A new paragraph 5 is inserted, as follows:

5. The memorandum or articles of association may not confer on the holders of a particular category of shares an exclusive right to put forward nominations for a majority of those members of the supervisory organ whose appointment is a matter for the general meeting.

Articles 4a to 21a unchanged

Article 21b

Article 21b

Paragraphs 1 to 4 unchanged

A new paragraph 5 is inserted, as follows:

5. The memorandum or articles of association may not confer on the holders of a particular category of shares an exclusive right to put forward nominations for a majority of those members of the administrative organ whose appointment is a matter for the general meeting.

Articles 21c to 32 unchanged

Article 33

1. The shareholder's right to vote shall be proportionate to the fraction of the subscribed capital which the shares represent.

2. Notwithstanding paragraph 1, the laws of the Member States may authorize the memorandum and the articles of association to allow:

(a) restriction or exclusion of the right to vote in respect of shares which carry special advantages;

(b) restriction of votes in respect of shares allotted to the same shareholder, provided the restriction applies at least to all shareholders of the same class.

3. Any shareholder who, at the date of the general meeting, has not paid up calls made by the company at least one month earlier may not exercise his right to vote.

Article 33

1. Unchanged

2. Notwithstanding paragraph 1, the laws of the Member States may authorize the memorandum and the articles of association to allow restriction or exclusion of the right to vote in respect of shares which carry special pecuniary advantages. Such shares may not be issued for an amount exceeding 50% of the subscribed capital. Where the company has not fulfilled the obligations arising in respect of such shares for a period which may not exceed three consecutive accounting years, the holders of those shares shall acquire voting rights in proportion to the fraction of the subscribed capital which those shares represent, and the voting rights thus acquired shall be equivalent to those of the other shareholders.

3. Unchanged

Articles 34 and 35 unchanged

Article 36

1. Resolutions of the general meeting shall be passed by absolute majority of votes cast by all the shareholders present or represented, unless a greater majority or other additional requirements are prescribed by the law or the memorandum or articles of association.

2. Paragraph 1 shall not apply to the appointment of members of the company organs or of the persons responsible for auditing the accounts of the company.

Article 36

1. Unchanged

2. Unchanged

3. For resolutions appointing or dismissing members of the administrative, management or supervisory organ, neither the law nor the memorandum or articles of association may require a majority greater than the absolute majority of votes cast by all the shareholders present or represented.

-
-
-

Articles 37 to 63d unchanged

Article 64

paragraphes 1 to 3 unchanged.

Article 64

A new paragraph 4 is inserted:
4. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 65 unchanged.

ISSN 0254-1475

COM(90) 629 final

DOCUMENTS

EN

08

Catalogue number : CB-CO-90-640-EN-C
ISBN 92-77-67139-4

PRICE

1 - 30 pages: 3.50 ECU

per additional 10 pages: 1.25 ECU

Office for Official Publications of the European Communities
L-2985 Luxembourg