

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(88) 153 final - SYN 63

Brussels, 28 March 1988

Amended Proposal for an

ELEVENTH COUNCIL DIRECTIVE

on company law concerning disclosure requirements in respect of branches
opened in a Member State by certain types of companies governed by
the law of another State

(submitted by the Commission to the Council on the basis of
Article 149(3) of the EEC Treaty)

I. Explanatory memorandum

1. The proposal for an Eleventh Directive based on Article 54 of the EEC Treaty concerning disclosure requirements in respect of branches was first submitted to the Council on 29 July 1986.¹

2. The Economic and Social Committee and the European Parliament delivered their opinions on 24 September 1987² and 18 November 1987³ 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.

¹ OJ No C 203, 12.8.1986, p. 12.
² O.J. C 319, 30.11.1987
³ EP 117.884, 18.11.1987.

AMENDED PROPOSAL

for an Eleventh Council Directive based on Article 54
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

II. Text of the proposal

Initial proposal

Amended proposal

THE COUNCIL OF THE EUROPEAN
COMMUNITIES,

Unchanged

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 co-operation with the
European Parliament,

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

Initial proposal

Amended proposal

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,¹ covering limited liability companies and continued in the field of accounting by the Fourth Council Directive 78/660/EEC² on annual accounts of certain types of companies, the Seventh Council Directive 83/349/EEC³ on consolidated accounts and by the Eighth Council Directive 84/253/EEC⁴ on the approval of persons performing the statutory audits of accounting documents;

¹OJ No L 65, 14.3.1968, p. 9.

²OJ No L 222, 14.8.1978, p. 11.

³OJ No L 193, 18.7.1983, p. 1.

⁴OJ No L 126, 12.5.1984, p. 20.

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Whereas these Directives apply to companies as such 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 their 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;

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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, and 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 or representation 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;

Amended proposal

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;

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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;

Unchanged

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,

Unchanged

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HAS ADOPTED THIS DIRECTIVE:

Unchanged

I

I

Branches of companies from
other Member States

Unchanged

Article 1

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.

Unchanged

Article 2

Article 2

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

Unchanged

(a) the address of the branch;

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

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- (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;
- (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;

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Unchanged

- (ba) the existence of other branches in the same Member State, together with the particulars referred to in (a) and (b);
- (da) the winding-up of the company and the appointment of liquidators, particulars concerning them and their

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(e) the accounting documents covered
by Article 3;

powers in accordance with
Article 2(1)(j) of
Directive 68/151/EEC;

Unchanged

(f) the closure of the branch.

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

Unchanged

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

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.

1. Unchanged

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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. Those 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.

2. Unchanged

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

Article 4

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

Unchanged

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branch is kept together with the number of the branch in that register.

II

II

Branches of companies from
third countries

Unchanged

Article 5

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.

Unchanged

Article 6

Article 6

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

Unchanged

(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;

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(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;

(ca) 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 memorandum and articles of association if they are contained in a separate instrument with all amendments to these documents;

Unchanged

(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

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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;

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

(i) the closure of the branch.

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.

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

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

2. Unchanged

Article 7

1. Unchanged

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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.

2. Unchanged

3. The documents covered by paragraphs 1 and 2 must have been drawn up and audited pursuant to the law which governs the company and in accordance with the relevant provisions of such legislation or, in default thereof, in accordance with the accounting principles generally accepted in the State in question.

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.

4. Unchanged

Article 8

Article 8

Member States shall prescribe that letters and order forms used by the branch shall state the register in which

Member States shall prescribe that letters and order forms used by the branch state the register in which

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the file in respect of the branch is kept together with the number of the branch in that register.

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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.

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III

III

Transitional and final provisions

Unchanged

Article 9

Article 9

Member States shall provide for appropriate penalties in the 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.

Unchanged

Article 10

Article 10

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

Unchanged

Article 11

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.

Unchanged

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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 shall not apply until 1 January 1992.

3. Member States shall communicate to the Commission the texts of the main provisions 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;

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Article 12

1. Unchanged

2. Member States shall 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 of national law which they adopt in the field covered by this Directive.

Article 13

Unchanged