

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(86) 397 final

Brussels, 23 July 1986

Proposal for an
ELEVENTH 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

(submitted to the Council by the Commission)

COM(86) 397 final

Explanatory memorandum

1. This proposal for an eleventh directive based on Article 54 (3)(g) of the 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 the Treaty applies not only to natural persons but also to companies and firms⁽¹⁾. 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,⁽²⁾ 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⁽³⁾.

(1) Articles 52 and 58

(2) See the proposal for a Tenth Directive in respect of the cross-border mergers of public limited companies (OJ C 23 of 25 January 1985).

(3) In its judgment of 22.11.1978 (Case 33/78) concerning Article 5 (5) of the Convention of 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgements the Court of Justice of the European Communities 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."

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 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⁽¹⁾, 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 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

(1) First Directive 68/151/EEC of 9.3.1968 (O.J. L 65 of 14.3.1968) on disclosure;
Fourth Directive 78/660/EEC of 25.5.1978 (O.J. L 222 of 14.8.1978) on annual accounts;
Seventh Directive 83/349/EEC of 13.6.1983 (O.J. L 193 of 18.7.1983) on consolidated accounts;
Eighth Directive 84/253/EEC of 10.4.1984 (O.J. L 126 of 12.5.1984) on the approval of the persons responsible for statutory audits.
By contrast, the Second Directive 77/91/EEC of 13.12.1976 (O.J. L 26 of 31.1.1977) on company capital; the Third Directive 78/855/EEC of 9.10.1978 (O.J. L 295 of 20.10.1978) on mergers and the Sixth Directive 82/891/EEC (O.J. L 378 of 31.12.82) on divisions only apply

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 farreaching 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 regulation which has been rendered superfluous as a result of harmonisation.

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 harmonisation

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⁾.

(1) Article 1:

- Amendment of the scope of application by reason of the accession of Denmark, Ireland and the United Kingdom to the European Communities: Act concerning the conditions of accession and the adjustments to the Treaties (Annex I, III H) OJ L 73 of 27.3.1972 p. 89
- Amendment of the scope of application by reason of the accession of Greece to the European Communities. Act concerning the conditions of accession and the adjustments to the Treaties (Annex I, III C) OJ. L of 19.11.1979 p. 89
- Amendmend of the scope of application by reason of the accession of Spain and Portugal: Act concerning the conditions of accession and adjustments to the Treaties (Annex 1) OJ. L 302 of 15.11.85, p. 157

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.⁽¹⁾

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 the 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(e).

(1) Article 3.

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⁽¹⁾ 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:

- (1) the instrument of constitution and Memorandum and Articles of association;
- (2) the amount of the capital subscribed in the context of an authorised capital;
- (3) Any transfer of the seat of the company;
- (4) The winding up of the company;

(1) Article 1(1)(d)

- (5) Any declaration of nullity of the company by the courts;
- (6) The appointment and identities of liquidators of the company,
- (7) 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 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 Article 2 of this directive in the register of the branch provide wholly adequate protection for those persons who deal with a company via a branch. Therefore it should not be possible to require the disclosure of further documents and particulars. The exercise of the right of establishment by setting up a branch would otherwise be unnecessarily burdensome.

Separate provisions cover accounting documents which are the subject of Article 3 of this directive.

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, certain 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 the branch itself.

The starting point of the provisions of this directive is that harmonisation has been effected in respect of the provisions on annual accounts by the Fourth Directive, on consolidated accounts by the Seventh Directive, and on the approval of the persons authorized to audit such accounts by the Eighth Directive.

As a result by the said directives 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⁽¹⁾.

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⁽²⁾.

(1) Article 47 Fourth Directive
Article 38 Seventh Directive

(2) Article 57 Fourth Directive as substituted by Article 43 of the Seventh Directive.

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 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 is impossible to define the different forms of companies in third countries. In this respect it is necessary to use the test of comparability.

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 harmonisation. 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 harmonised system of disclosure as exists for the companies of the Member States.

The indents (b), (c), (d) (e) and (h) refer to disclosure of 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. The 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.

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 with Article 4 of the First Directive. However it does not require the matters required by Article 4 of the First Directive given that it 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⁽¹⁾ and the Seventh Directive on consolidated accounts⁽²⁾ 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.

Article 13

The Contact Committee set up by the Fourth Directive⁽³⁾, which is also responsible for matters arising in connection with the Seventh⁽⁴⁾ and Eighth⁽⁵⁾ Directives is also to cover the same field in respect of the present Directive.

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- (1) Article 1 (2)
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 - (2) Article 40
 - (3) Article 52
 - (4) Article 47
 - (5) Article 29

Proposal for an
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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

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⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee⁽²⁾,

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⁽³⁾ covering limited liability companies⁽³⁾ and continued in the field of accounting by the Fourth Council Directive 78/660/EEC⁽⁴⁾ on annual accounts of certain types of companies, the Seventh Council Directive 83/349/EEC⁽⁵⁾ on consolidated accounts and by the Eighth Council Directive 84/253/EEC⁽⁶⁾ on the approval of persons performing the statutory audits of accounting documents,

(1)

(2)

(3)

(4) OJ No L 65, 14.3.1968, p. 8

(5) OJ No L 222, 14.8.1978, p. 11

(6) OJ No L 193, 18.7.1983, p. 1

(6) OJ No L 126, 12.5.1984, p. 20

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, 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 of 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;

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:

(a) the address 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;

(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;

(e) the accounting documents covered by Article 3;

(f) 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(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 1 shall cover at least the following documents and particulars:

(a) The address 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;

(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;

(h) 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.

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 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.

4. Article 3(3) shall apply.

Article 8

Member States shall prescribe that letters and order forms used by the branch shall state the register in which the file in respect of the branch is kept together with the number of the branch in that register.

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 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;

(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.

Done at

For the Commission