

**Draft Proposal for a Ninth Council Directive  
pursuant to Article 54(3)(g) of the EEC Treaty  
relating to links between undertakings and in particular to groups**

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,

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

Whereas:

The coordination provided for in Article 54(3) (g) and in the General Programme for the abolition of restrictions on freedom of establishment, which was begun by Directives 68/151/EEC<sup>1</sup>, 77/91/EEC<sup>2</sup>, 78/660/EEC<sup>3</sup>, 78/855/EEC<sup>4</sup>, 82/891/EEC<sup>5</sup> and 83/349/EEC<sup>6</sup> must proceed with particular urgency as far as public limited liability companies are concerned because their activities play a predominant role in the economy of the majority of Member States.

A growing number of public limited liability companies are linked with each other and with other undertakings through capital holdings. Having regard to the economic importance of such companies, it is necessary in the interest not only of shareholders, creditors and employees but also for the general public that clear insight be afforded into their ownership and power structures by means of the most extensive disclosure measures possible. The national laws of Member States concerning notification and disclosure of holdings must therefore be coordinated to guarantee a minimum degree of equivalence in this respect in the Community.

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<sup>1</sup> First Council Directive of 9 March 1968 on co-ordination 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 No L 65 of March 14, 1968, p. 8.

<sup>2</sup> Second Council Directive of 13 December 1976 on co-ordination 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 78 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. OJ No L 26 of 31 January 1977, p. 1.

<sup>3</sup> 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 No L 222 of 14 August 1978, p. 11.

<sup>4</sup> Third Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies. OJ No L 295 of 20 October 1978, p. 36

<sup>5</sup> Sixth Council Directive of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies. OJ No L 378 of 31 December 1982, p. 47.

<sup>6</sup> Seventh Council Directive of 13 June 1983 based on Article 65(3)(g) of the Treaty on consolidated accounts. OJ no L 193 of 18 July 1983, p. 1.

Many public limited Liability companies are linked with other undertakings in such a way that they are all subject to unified control by a single undertaking and are managed collectively as a single entity.

In our modern economy, based as it is on the division of labour, such arrangements, known as groups, are the most important means of cooperation available to undertakings at the national as well as international level.

It is essential that the economic and financial relationships within such groups should be transparent. This is why by virtue of Directive 83/349/EEC of 13 June 1983<sup>7</sup>, the annual accounts of the various participant companies must be consolidated in order to give a true and fair view of the group's assets and liabilities, financial position and profit and loss.

Directive ..... of .....<sup>8</sup> will ensure procedures for informing and consulting the employees of undertakings.

Statutory provisions on economically independent public limited liability companies contain large areas where satisfactory rules on cooperation between such companies in groups do not exist. In the majority of Member States, therefore, legal reality no longer coincides with company law as enacted.

Coordination of national provisions on the structure of groups of companies is necessary to ensure a minimum degree of equivalence within the Community. In view of the fact that the legal systems of most Member States still contain no provisions on the structure of groups, coordination by stages appears appropriate.

The first stage of such coordination should be the incorporation into the Law of Member States of provisions concerning groups formed by means of a control contract. This will give legal status to the power to manage the group. Interested parties will be properly protected. Member States will also be given an opportunity to enact provisions for groups to be based on other criteria. Such methods of constituting groups must however provide guarantees identical to those laid down for contract based groups.

Where an undertaking has directly or indirectly acquired 90% or more of a company's capital a special situation exists on account of the shareholding. The creation of a group relationship in law ought therefore to be facilitated by taking the actual situation into account and avoiding excessive formalism. A unilateral declaration by the undertaking constitutes the most appropriate means to that end.

It must not be possible to make a public limited liability company economically subservient to a parent undertaking except within the legal framework of one of these group structures. In such a framework the interests of a subsidiary company which is part of the group should be subordinate to those of the group. Even detrimental measures should be legally permissible in so far as they are in the interests of the group.

The shareholders, creditors and employees of public limited liability companies dependent on a group must, moreover, be suitably protected. Shareholders must be afforded the choice of remaining in the company or of receiving a consideration in respect of their shares. If they remain in the company, the guarantees granted to them must be independent of the financial results of their company.

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<sup>7</sup> Seventh Council Directive based on Article 54(3)(g) of the Treaty on consolidated accounts. OJ No L 193 of 18 July 1983, p. 1.

<sup>8</sup> Amended proposal for a Directive on the information and consultation of employees. OJ No C 217 of 12 August 1983.

Where 90% or more of the capital of a company has been acquired by an undertaking, the outside shareholders must be entitled to withdraw from the company. This right appears to be the counterpart of the right enjoyed by the undertaking to compel such shareholders to dispose of their shares.

Creditors of the subsidiary company in a group must be protected against any detriment by the imposition of a secondary liability on the undertaking.

As regards employees, there must be a guarantee in their favour that their rights to participate in the decision making process of a public limited liability company are not endangered as a result of its incorporation in a group.

Horizontal groups should be permitted in the Member States as a form of transnational cooperation.

Competition rules remain fully applicable to the legal forms envisaged for groups by the present directive.

Where a company is subject to the influence of an undertaking, special legal provisions are necessary to protect interests, in that company.

Special protective measures are also indispensable in cases where the company could suffer damage by virtue of interference by this undertaking.

HAS ADOPTED THIS DIRECTIVE:

## **SECTION 1**

### **Scope**

#### **Article 1**

Companies for the purposes of this Directive means the following:

— in Belgium:

la société anonyme  
de naamloze vennootschap;

— in Denmark:

aktieselskabet;

— in France:

la société anonyme;

— in Germany:

die Aktiengesellschaft;

— in Greece

η ανώνυμη εταιρία;

— in Ireland:

the public company limited by shares,  
the public company limited by guarantee and having a share capital;

— in Italy:  
la società per azioni;

— in Luxembourg:  
la société anonyme;

— in the Netherlands:  
de naamloze vennootschap;

— in the United Kingdom:  
the public company limited by shares,  
the public company limited by guarantee and having a share capital.

## **SECTION 2**

### **Definitions**

#### **Article 2**

- 1 For the purposes of this Directive, a subsidiary undertaking is one I in which another undertaking (the parent undertaking):
  - a) has a majority of the shareholders' or members' voting rights, or
  - b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, same time a shareholder, or member, or
  - c) is a shareholder or member and a majority of the members of the administrative, management or supervisory body who have held office during the financial year have been appointed solely as a result of the exercise of its rights, or
  - d) is a shareholder or member and controls alone, pursuant to an agreement with other shareholders or members of the undertaking (subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking. --\_
- 2 For the purposes of applying paragraph 1, the voting rights and rights of appointment or removal of any other subsidiary undertaking as wet1 as those of any person acting in his own name but on behalf of the parent undertaking or another subsidiary undertaking, must be added to those of the parent undertaking.
- 3 For the purposes of applying paragraph 1, the rights mentioned in paragraph 2 must be reduced by the rights:
  - a) attaching to shares held on behalf of a person who is neither the parent undertaking nor a subsidiary undertaking or held in connection with the granting of loans as part of normal business activities, provided that the voting rights are exercised in the interests of the person providing the security,
  - b) attaching to shares held by way of security, provided that such rights are exercised in accordance with instructions received, or held in connection with the granting of loans as part of normal business activities, provided that the

voting rights are exercised in the interests of the person providing the security.

- 4 For the purposes of applying paragraph 1 (a)(c) and (d), the total of the shareholders' or members' voting rights in the subsidiary undertaking must be reduced by the voting rights attaching to shares held by that undertaking itself, by another undertaking which is its subsidiary or by a person acting in his own name but on behalf of those undertakings.

#### **Article 2a**

Any reference in this Directive to the management body and the supervisory body of a company organized on the dualist system mentioned in Article 2(1) of [the proposed Fifth Directive]<sup>9</sup> shall be taken in the case of a company organized on the monist system mentioned in that Article, to refer respectively to the executive members and the non-executive members of the administrative body of the company.

### **SECTION 3**

#### **Notification and disclosure of shareholdings**

##### **Article 3**

- 1 Where a natural or legal person acquires directly or indirectly more than 10% of the subscribed capital of a company, it shall notify the total amount of the holding and the voting rights attaching thereto to the company in writing within two weeks from the date of acquisition of those shares which increased the holding to more than 1%.

Each further acquisition of shares of the company which raises the holding beyond successive steps of 5% shall be notified in the same way.

A similar notification shall be made each time the holding falls below the percentage of 10% or below each step of 5%.

- 2 Shares held by persons in their own names but on behalf of another person shall be regarded as shares belonging to the latter. Where such latter person is an undertaking shares held by a subsidiary, or held by other persons in their own name but on behalf of a subsidiary, shall also be regarded as belonging to the undertaking.

##### **Article 4**

- 1 A shareholder may not exercise the rights attaching to shares the holding of which is to be notified in accordance with Article 3(1) until such notification is made.
- 2 Where, contrary to the provisions of paragraph 1, voting rights have been exercised at the general meeting and the result of the vote has been influenced thereby, the resolution adopted as a result shall be void or may be declared void. The rights of third parties acquired in good faith shall not be affected thereby. An action to have the resolution found or declared void may be brought by any shareholder who contests the entitlement of another shareholder to take part in the vote.

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<sup>9</sup> Amended Proposal for a fifth Directive concerning the structure of public limited liability companies, COM(83) 185 final of 12 August 1983.

- 3 Such action shall be brought within a time limit which shall be fixed by Member States at not less than three months and not more than one year from the date on which the applicant became aware or ought to have become aware of the notifiable holding. Article 46 of [the proposed Fifth Directive] shall apply.
- 4 The company may require the repayment of dividends to which, by virtue of paragraph 1, a shareholder was not entitled.
- 5 Member States shall also provide for appropriate penalties where notification is not made in accordance with Article 3(1).

#### **Article 5**

Holdings notified pursuant to Article 3 (1) shall be mentioned by the company receiving such notification in the notes to its annual accounts.

Notifications made for the first time, and the notification of subsequent modifications bringing the amount of a holding above or below the threshold levels of 10% 25%, 50%, 75% or 90% of the company's capital, shall moreover be disclosed forthwith by the company in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.

The name of the shareholder making such notification, the amount of the holding notified and voting rights attaching thereto shall be indicated in the notes on the annual accounts and in the publication.

Member States may waive mention of the notification in the notes on the annual accounts and, where appropriate, its publication, where such mention or publication would place the shareholder concerned or the company at a significant disadvantage. The management body or person who took such decision shall record it in the notes to the annual accounts.

### **SECTION 4**

#### **Protection of a company subject to the influence of an undertaking**

#### **Article 6**

Articles 7 to 12 shall not apply where an undertaking is authorized, by virtue of Article 24, 35 or provisions pursuant to Article 38 to exercise management powers over a company.

#### **Article 7**

- 1 Where a company is a subsidiary undertaking within the meaning of Article 2, its management body shall each year prepare a special report.
- 2 The special report shall give an overall picture which makes it possible to assess the extent and intensity of the relationship which existed, directly or indirectly, between the subsidiary company and the parent undertaking during the preceding financial year.

To this end, the report shall, in particular, take into account:

- a) the importance to the company of agreements concluded by it in the preceding financial year with the parent undertaking, another of its subsidiaries or a third undertaking on the initiative or in the interests of the parent undertaking; and
  - b) significant measures which the company has taken or failed to take on the initiative or in the interests of the parent undertaking or one of its subsidiaries.
- 3 a) Nonetheless, agreements or measures of the type referred to in paragraph 2 (a) and (b) which
- are wholly or partly detrimental to the company, or
  - involve a particular risk for the company, or
  - differ substantially in extent and subject matter from the business which the company normally transacts,
- shall be individually specified in the special report together with their nature and the identity of each of the parties and the capacity in which they acted. Detriment may, in particular, result from agreement on or the imposition of conditions which differ from those which independent undertakings would have agreed between themselves.
- The special report shall also specify the actual or foreseeable effects of such agreements or measures on the position of the company's employees.
- b) Where a number of business operations are consolidated in a single transaction which is not customary in business relations between independent undertakings, those operations shall be dealt with separately for the purposes of the information required to be given under subparagraph (a) above.
  - c) Where benefits have been granted to compensate for the detriment suffered, the management body of the company may notify this separately. They shall not be dealt with in the special report and shall not be subject to examination pursuant to Article. 7(4) and 7(5),
- 4 The person responsible for auditing the accounts of the company shall examine the accuracy of the particulars contained in the special report in order to determine whether there are grounds for coming to substantially different assessment from that reached by the management body. The result of the examination shall be recorded in a separate note in the report. Where the auditor establishes that the particulars given are incomplete, he shall state this fact in the note.
- 5 The special report together with the note shall be available to every shareholder from at least the date on which the notice concerning the general meeting at which the annual accounts and the appropriation of the annual results are to be considered is published or despatched. It shall be published at the same time as the annual accounts and in like manner.

### **Article 8**

- 1 On application by a shareholder, or by a creditor of the company who is unable to obtain satisfaction therefrom or by the competent employees' representatives within

the company, the court or authority competent under national law may appoint one or more special auditors where the special report provided for in Article 7 contains particulars as specified in paragraph 3 of that Article or where facts are alleged which give rise to the presumption that the company has at the instigation of that undertaking or a subsidiary of that undertaking suffered detriment.

- 2 Before appointing the special auditors, the court or authority shall invite the management or supervisory body and the person responsible for auditing the accounts of the company to appear and to express their observations.
- 3 The special auditor shall ascertain whether the company has suffered detriment as a result of agreements or measures or its failure to take measures and whether it appears that these may result from interference by the undertaking or a subsidiary of that undertaking. He shall take account of benefits granted to the company that offset any detriment and shall assess the latter in relation to them.
- 4 The special auditor shall be entitled to obtain all information and documents necessary to carry out his task both from the company and from the parent undertaking, from other subsidiaries of the parent undertaking and from any third undertaking involved, and to carry out all necessary investigations.
- 5 The special auditor shall prepare a written report on the results of his investigation. The management body of the company shall disclose a summary of this report together with the conclusions contained therein in the manner prescribed by the Law of each Member State in accordance with Article 3 of Directive 68/151/EEC.
- 6 The costs of the examination or any advance payments in respect of those costs shall be borne by the company.
- 7 These provisions shall be without prejudice to national provisions governing procedures for a special audit of the company prescribed for other purposes.

#### **Article 9**

- 1 Any undertaking which conducts itself towards a company as a de facto member of the management body shall be liable to the company for any damage resulting from such interference and attributable to mismanagement, under the same conditions as if the undertaking were a member of the management body of the company and consequently obliged to ensure that the interests of the company are safeguarded.
- 2 For the purposes of paragraph 1, any undertaking which directly or indirectly exercises a decisive influence over decision-making by the management body of a company shall be regarded as a de facto member of the management body of that company.
- 3
  - a) Any person who, under the law governing the undertaking, is responsible for its management shall, together with it, bear joint and several unlimited liability. He may, however, be relieved of liability if he proves that the act giving rise to the damage is not attributable to him.
  - b) Where members of the management body of the company are also liable, they shall bear joint and several liability with the undertaking and the persons liable pursuant to subparagraph (a).

## **Article 10**

- 1 Proceedings under Article 9 may be brought by the company, by any shareholder acting on its behalf or by the competent employees' representatives within the company acting on its behalf.
- 2 Such proceedings may also be brought by any creditor of the company who is unable to obtain satisfaction therefrom, without prejudice to the provisions governing arrangements, compositions, bankruptcy, winding up and similar proceedings.

## **Article 11**

- 1 The court or authority competent under national law may also, if the conditions of Article 9 are satisfied and the persons mentioned in Article 8(1) so request, order one or more of the following measures, if it considers this necessary to protect the company, its shareholders or its employees:
  - a) suspension from office of one or more members of the management or supervisory body of the company or any other measure under national law having the same effect;
  - b) prohibition of further performance of contracts that are damaging and revocation of measures that are damaging without prejudice to the rights of third parties acquired in good faith;
  - c) imposition of a requirement that the undertaking shall offer to purchase the shares of shareholders of the company in the manner and under the conditions laid down in Articles 15 and 17. The management body of the company shall disclose the offer in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC within one month from the date of receipt of the report referred to in Article 17. It shall also state that the experts' report referred to in Article 17 shall be sent free of charge to shareholders on request. Shareholders shall be entitled within one month from the date of publication of the offer to request the court to examine whether the offer is appropriate. Article 22 (2) shall apply. Shareholders shall be entitled within three months from the date of publication of the offer to require acquisition of their shares. Article 23 (2) shall apply.
- 2 Before ordering the measures provided for in paragraph 1, the court or authority shall invite the members of the management or supervisory body of the company, the undertaking and, where appropriate, the special auditor to appear and to express their observations.

## **Article 12**

The period within which proceedings may be brought pursuant to Article 9 shall be not less than three years from the date of the act causing the damage or, if the act has been concealed, from the date of its discovery.

## **SECTION 5**

### **The control contract instituting a vertical group**

#### **Article 13**

A company may, by written contract, submit to management by another undertaking. This undertaking is hereafter called the other party to the contract.

#### **Article 14**

- 1 The contract shall offer every outside shareholder of the company the choice between
  - a) the acquisition of his shares as provided for in Article 15, or
  - b) the annual equalization payment provided for in Article 16.
- 2 Outside shareholder means any shareholder of the company with the exception of the other party to the contract and the following undertakings:
  - a) the parent undertaking of the other party to the contract;
  - b) any third undertaking linked with the other party to the contract by reason of a control contract or unilateral declaration within the meaning of Article 33.
  - c) any undertaking belonging to the same group as the other party to the contract within the meaning of Article 38;
  - d) any third undertaking which is wholly owned by the other party to the contract;

where such undertakings hold shares in the company.

#### **Article 15**

- 1 The other party to the contract shall offer to acquire for cash the shares of every outside shareholder of the company.
- 2 However, where the other party to the contract is also a company and is not a subsidiary of another undertaking, it may offer instead of cash either to acquire the shares of outside shareholders in exchange for shares or convertible or ordinary debentures of that company or the choice between cash and such an exchange.
- 3 Where the other party to the contract is a public limited liability company which has not been formed under the law of a Member State or of the European Economic Community and is not a subsidiary of another undertaking, it may offer the outside shareholders the choice between cash and an exchange of their shares for shares or convertible or ordinary debentures of that company.
- 4 Where the other party to the contract is a subsidiary undertaking, it may likewise make to outside shareholders an offer in accordance with paragraph 2 relating to shares or convertible or ordinary debentures of its parent company, provided that such company is not a subsidiary of another undertaking.

- 5 Where the other party to the contract is a parent undertaking of a public limited liability company which has not been formed under the law of a Member State or of the European Economic Community, it may likewise make an offer to outside shareholders in accordance with paragraph 3 relating to shares or convertible or ordinary debentures of its parent company, provided that the company is not a subsidiary of another undertaking.

#### **Article 16**

- 1 The other party to the contract shall also offer the outside shareholders of the company an appropriate annual equalization payment. To this end it shall undertake to make them an annual payment of an amount equal at least to that which, having regard to the previous earnings and the future prospects of the company, could probably be distributed as the average earnings per share.
- 2 Where the other party to the contract is also a company and is not a subsidiary of another undertaking, it may offer the outside shareholders, instead of the annual payment referred to in paragraph 1 either an annual payment of an amount corresponding to the earnings of its own shares or the choice between the two payments.
- 3 Where the other party to the contract is an independent public limited liability company not formed under the law of a Member State or of the European Economic Community, it may also offer the outside shareholders the choice between the annual payment referred to in paragraph 1 and that referred to in paragraph 2.
- 4 Where the other party to the contract is a subsidiary undertaking it may offer the outside shareholders instead of the annual payment referred to in paragraph 1 an annual amount calculated by reference to the earnings per share of its parent company, provided that such company is not a subsidiary of another undertaking
- 5 Where the other party to the contract is a subsidiary undertaking of an independent public limited liability company not formed under the law of a Member State or of the European Economic Community, it may offer the outside shareholders the choice between the annual payment referred in paragraph 1 and that referred to in paragraph 4.
- 6 The ratio between the shares of the companies concerned shall in the cases referred to in paragraphs 2 to 5 be calculated in the same way as for a share exchange in the event of a merger.
- 7 In calculating the earnings pursuant to paragraphs 1 to 5, appropriations of the annual profits to optional reserves shall be taken into consideration only in so far as this is justified in accordance with sound business practice.

#### **Article 17**

- 1 The management body of the company shall appoint one or more independent experts nominated or approved by a judicial or administrative authority and instruct them to prepare a report on the appropriateness of the offers. The experts may be the persons responsible for auditing the accounts of the company.

Articles 53, 54, 57 and 62 of [the proposed Fifth Directive] shall apply in respect of these experts.

- 2 In their report, the experts shall in particular state whether the offers of the other party to the contract are in accordance with Articles 15 and 16 and whether or not, in their opinion, they are appropriate. Such statement shall at least:
  - a) indicate the method or methods used to arrive at the payment offered for acquisition of shares, share exchange ratio and equalization payment;
  - b) state whether such method or methods are adequate in the case in question, indicate the values arrived at using each such method and give an opinion on the relative importance attributed to such methods in arriving at the values decided on.
- 3 The report shall also describe any special valuation difficulties which have arisen.
- 4 Each expert shall be entitled to obtain from the companies concerned any relevant information and documents and to carry out all necessary investigations.

#### **Article 18**

The management body of the company shall draw up a report stating the reasons for the conclusion of the control contract and the probable effects thereof. This report shall also include an opinion on the report made by the experts under Article 17 and its conclusions.

#### **Article 19**

- 1 The contract shall be subject to approval by the supervisory body and the general meeting of the company. The approval of the supervisory body shall be recorded in writing. Articles 10 and 21(p) of [the proposed Fifth Directive] shall not apply.
- 2 The management body of the company shall, pursuant to Article 24 of [the proposed Fifth Directive] convene a general meeting of the company to pass a resolution on the conclusion of the contract.
- 3 The contract shall be reproduced in the notice published to convene the meeting or the notice sent to the shareholders. The approval of the supervisory body shall be indicated. The convening notice shall also state that the shareholders can obtain on request and free of charge copies of the expert's report and the report of the management body.
- 4 Article 39(1) and (2) of [the proposed Fifth Directive] apply in respect of the resolution of the general meeting. Article 34(d) of [the Fifth Directive], shall not apply.

#### **Article 20**

- 1 The management body of the company shall within two months of the passing of the resolution by the general meeting disclose the contract and the records of the approval of the supervisory body and the resolution of approval, of the general meeting in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.
- 2 Member States shall make provision for appropriate penalties for any failure to satisfy this requirement of disclosure.

## **Article 21**

- 1 Where the other party to the contract is also a company, Articles 17 to 20 shall also apply in respect of it.
- 2 Paragraph 1 shall not apply where the balance sheet total and the turnover of the company are relatively insignificant by comparison with those of the other party to the contract. Member States may in this connection establish fixed criteria.

## **Article 22**

- 1 Any outside shareholder may within one month of the publication of the contract pursuant to Article 20 apply to the court for an examination of whether the consideration offered for acquisition of the shares and the annual equalization payment are appropriate. Where the other party to the contract is also obliged to effect disclosure pursuant to Article 21, this period shall commence on the date on which the second publication is made.
- 2 The Member States shall determine the judicial procedure in accordance with the following principles:
  - a) the court may appoint independent experts at the expense of the company; such experts shall be under the same obligations and enjoy the same rights as experts appointed pursuant to Article 17;
  - b) where the consideration for acquisition or the annual equalization payment are held to be clearly inappropriate, they may be increased by the court;
  - c) the decision of the court shall have the authority of a final judgment in respect of all shares of the same class as those in respect of which a decision by the court was applied for;
  - d) in cases provided for in subparagraph (b), the decision of the court shall be disclosed by the management body of the company in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC after it has acquired the force of a final judgment.
  - e) the costs of proceedings must not be borne by the applicant except in so far as is reasonable.
- 3 If an increased consideration for acquisition or annual equalization payment is ordered by the court, the other party to the contract may terminate the contract without notice within one month from the date on which the decision of the court has acquired the force of a final judgment.

## **Article 23**

- 1 Any outside shareholder shall be entitled to require the acquisition of his shares within three months of publication pursuant to Article 20. Where the other party to the contract is also obliged to effect disclosure pursuant to Article 21, the period shall commence on the date on which the second publication is made. Acquisition of the shares may however be suspended where application to the court pursuant to Article 22 has been made.

- 2 Where an increased consideration is ordered by the court in accordance with Article 22 and the contract is not terminated, any outside shareholder who has not exercised his rights within the period laid down in paragraph 1 shall be entitled to do so within one month from the date of publication of the decision of the court pursuant to Article 22 (2) (d). Outside shareholders whose shares have already been acquired shall be entitled to claim the increased consideration within the same period of one month.
- 3 Where the contract is terminated in accordance with Article 22(3), the increased consideration shall be payable only to outside shareholders who were party to the application or who exercised their rights prior to the date of termination. The other party to the contract may propose that outside shareholders whose shares have already been acquired shall receive the increased consideration. Failing this it shall return the shares in question on the same terms as those on which they were acquired.
- 4 The two parties to the contract shall be jointly and severally liable for payment for the shares in cash. The other party to the contract shall be liable for any exchange of shares.
- 5 Outside shareholders who have not exercised their rights pursuant to paragraph 1 shall receive the annual equalization payment.
- 6 The two parties to the contract shall be jointly and severally liable for payment of the annual equalization payment.

#### **Article 24**

- 1 a) From the time, of publication pursuant to Article 20, the company shall be subject to management by the other party to the contract. The latter may issue instructions to the management body of the company and such instructions shall be complied with by that body.  

The first sentence of paragraph 2 of Article 10(a) and the first sentence of paragraph 2 of Article 21(9) of [the proposed Fifth Directive] shall not apply. Where the other party to the contract is also subject to a requirement of disclosure pursuant to Article 21, it may exercise management powers or issue instructions only when the second publication has been effected.
- b) Articles 15 to 17 of the second Directive<sup>10</sup> shall not apply to transactions of the company which must be effected by virtue of an instruction pursuant to subparagraph (a).
- 2 If any instruction relates to a measure which requires the approval of the supervisory body of the company and the latter withholds its approval, the requirement of approval shall cease upon repetition of the instruction. Where, however, the employees of the company participate in its decision-making process, a reiterated instruction may not be complied with if the interests of the employees of the company receiving the instruction are not safeguarded in an equivalent manner at the level of, the other party to the contract, and a body representing them at that level has not approved the repetition of the instruction.

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<sup>10</sup> Directive 77/91/EEC of 13 December 1976, OJ No L 26 of 31 January 1977, p 1.

## **Article 25**

The other party to the contract shall exercise its management powers and its rights to issue instructions pursuant to Article 24 with the care of a conscientious director and in the group interest.

## **Article 26**

- 1 In exercising management powers and its right to issue instructions the other party to the contract shall be liable for any damage that the company may sustain as a result of any negligent failure by that party to fulfil its obligations under Article 25.
- 2 Proceedings to enforce such liability may be brought in the name of and on behalf of the company by one or more outside shareholders of the company who satisfy the conditions laid down in Article 16 of [the proposed Fifth Directive]. In effecting the calculation referred to in Article 16 (a) of that Directive, shares belonging directly or indirectly to the other party to the contract shall be deducted.
- 3 The period within which the proceedings referred to in this Article may be brought shall be not less than three years from the date of the act causing the damage or, if the act has been concealed, from the date of its discovery. Article 16(2) of [the proposed Fifth Directive] shall apply.

## **Article 27**

The members of the management body of the company shall not be liable for damage which the company may sustain arising from acts or omission by them consequent on the exercise by the other party to the contract of its management powers and its right to issue instructions. They shall bear the burden of proof thereof.

## **Article 28**

- 1 Where the other party to the contract has its registered office within the Community, it shall, during the life of the contract and irrespective of its legal form, publish approved annual accounts, annual reports and audit reports. The preparation of the annual accounts, the audit and the disclosure shall be in conformity with the principles applicable to public limited liability companies under the provisions laid down by law, regulation or administrative action adopted by the Member State in which the other party to the contract has its registered office for the purpose of implementing the Fourth Directive on the annual accounts of certain types of companies<sup>11</sup>. Save where it must be mentioned in the liabilities side of the balance sheet, the guarantee securing the obligations of the company under Article 29 of this Directive shall be mentioned separately and in full in the notes on the annual accounts.
- 2 As from the end of the financial year following that in which the contract has been concluded the other party to the contract shall not be entitled to exercise the rights arising under the contract until such time as it complies with the requirements of paragraph 1, and with regard to the group or subgroup to which the parties to the contract belong, the obligations concerning consolidated accounts, annual reports, audit and disclosure are fulfilled, in accordance with the provisions laid down by law,

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<sup>11</sup> 1) Directive 78/660/EEC of 25 July 1978. OJ No L 222 of 14 August 1978, p. 11.

regulation or administrative action adopted for the purpose of implementing the Seventh Directive concerning consolidated accounts<sup>12</sup>.

#### **Article 29**

- 1 The other party to the contract shall be liable for any obligations of the company arising prior to the conclusion of the contract or during the contractual period. Nevertheless, proceedings may be brought against it only after the creditor has addressed a written demand to the company.
- 2 The other party to the contract may however be relieved of such liability if it proves that failure by the company to fulfil the obligation is attributable to reasons which are not the result of any interference by it or a failure on its part to intervene.
- 3 The guarantee arising from the liability provided for in paragraph 1 may be invoked from the date of publication pursuant to Article 20 or, where the other party to the contract is also required to effect disclosure pursuant to Article 21, from the date of the second publication.

#### **Article 30**

- 1 The company shall upon expiry of the contract be entitled to require the other party thereto to make good any diminution in the value that the company has sustained during the contractual period. When determining the diminution the company's capital together with reserves, the profit or loss and the profit or loss carried forward at the date of publication pursuant to Article 20 and such amounts at the end of the contractual period shall be taken into consideration.
- 2 The other party to the contract may however be relieved of this obligation if it proves that the diminution in the company's value during the contractual period was not the result of interference by it or a failure on its part to intervene.

#### **Article 31**

- 1 The contract may be amended only in accordance with Articles 19 to 21.
- 2 The offers to outside shareholders laid down in the contract may however be amended only with their agreement.

#### **Article 32**

- 1 The contract may be terminated by mutual consent of the parties only at the end of a financial year. Termination shall be subject to the approval of the supervisory body and of the general meeting of the company. The procedure shall be that laid down in Article 19. Termination of the contract shall not have retrospective effect.
- 2 Member States shall lay down in their national laws the conditions and manner in which the contract may be unilaterally terminated and shall ensure that the following principles are observed:
  - a) notice of unilateral termination shall be given by registered letter;

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<sup>12</sup> Directive 83/349 EEC of 13 June 1983. OJ Na L 193 of 18 July 1983, p 1.

- b) where the contract has been concluded for an unspecified period it may be terminated only with three months notice. A different period of notice may be stipulated in the contract;
  - c) the contract may at any time be terminated by order of the court where there are serious grounds for so doing;
  - d) where the contract is terminated or an application under subparagraph (c) is made by the company, the approval of the supervisory body of the company shall be required.
- 3 A contract concluded without the guarantees provided for in Article 14, owing to the absence of outside shareholders, shall terminate automatically on the accession of any such shareholder.
- 4 The management body of the company shall disclose the termination of the contract in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.
- 5 Proceedings referred to in Article 29 shall become time-barred at the latest five years from the day on which termination of the contract is published. Proceedings referred to in Article 30 shall become time-barred five years after the same day.
- 6 The entry into force of the unilateral declaration made by the other party to the contract shall automatically terminate the contract and render applicable the provisions of Section 6 on relations within the group.

## **SECTION 6**

### **The unilateral declaration instituting a vertical group**

#### **Article 33**

- 1 Where an undertaking has acquired directly or indirectly 90% or more of the capital of a company it may make a unilateral declaration to the management body of the company, which shall entail the formation of a group. Where there are outside shareholders the declaration shall make provision for the compulsory acquisition of their shares and shall lay down the terms thereof.
- 2 The management body of the company shall within two months following the date of receipt of the 'unilateral declaration disclose it in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.

#### **Article 34**

- 1 Articles 14(1)(a) and (21, 15, 17, 18, 21, 22 and 23 (2) shall apply by analogy to the acquisition of the shares of the outside shareholders.
- 2 The publication referred to in Article 33 (2) shall effect an automatic transfer to the undertaking of the shares of the outside shareholders. The certificates relating to such shares shall, until they have been delivered to the undertaking, constitute evidence merely of the holders' entitlement to the cash payment or share exchange.

### **Article 35**

Following the publication referred to in Article 33(2), Articles 24 to 30 shall apply by analogy.

### **Article 36**

- 1 Where in a group established on the basis of a control contract the other party to the contract has upon expiry of the period referred to in Article 23 (1) or (2), acquired directly or indirectly 90% or more of the capital of the company, it shall be entitled to require the remaining outside shareholders to transfer their shares to it on the terms published in accordance with Article 20 or Article 22(2)(d). It shall notify the company within one week of the expiry of the period referred to in Article 23 (1) or (2) whether it intends to exercise this right. Such notification shall constitute a unilateral declaration within the meaning of Article 33.
- 2 The management body of the company shall forthwith disclose this notification, with an indication of the amount of the cash payment or share exchange ratio, in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/IEC.
- 3 Where the other party to the contract has not exercised its right to acquire the shares of the outside shareholders, any outside shareholder may within one month of expiry of the period provided for in paragraph 1 require the acquisition of his shares on the terms published in accordance with Article 20 or Article 22(2)(d).

### **Article 37**

- 1 The group relationship shall end
  - a) with the withdrawal of the unilateral declaration.
  - b) when the undertaking no longer holds all the shares of the company.
- 2 Where the undertaking, no longer holds all the shares of the company, the undertaking shall immediately notify the company of this fact.
- 3 The management body of the company shall forthwith disclose the end of the group relationship in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.
- 4 Article 32(5) shall apply by analogy.

### **Article 37a**

The Member States may exclude the application of Articles 33 to 37 to companies which have instituted a system enabling employees to participate in their capital.

## **SECTION 7**

### **Other legal structures instituting a vertical group**

#### **Article 38**

Without prejudice to the provisions contained in Articles 13 to 37a, Member States may introduce into their national laws other provisions concerning the establishment of a group on condition that they afford guarantees identical to those contained in Articles 14 to 32.

## **SECTION 8**

### **Special protection of outside shareholders**

#### **Article 39**

Where an undertaking has acquired directly or indirectly 90 % or more of the capital of a company, any outside shareholder may require that this undertaking acquire his shares for a cash payment. The outside shareholder shall address his request to the company which shall forward it to the undertaking. The latter shall make an offer to the outside shareholder within a reasonable period. It shall inform him whether and, if so, on what terms it has acquired, pursuant to this Article, shares belonging to other outside shareholders during the year preceding the offer. Where the outside shareholder rejects the offer, the competent court shall at his request fix the amount of consideration for the acquisition. Such a request must be submitted within one month of receipt of the offer. The management body of the company shall disclose the decision of the court which has acquired the force of a final judgement in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.

## **SECTION 9**

### **The contract instituting a horizontal group**

#### **Article 49**

An independent company and one or more other independent undertakings may, by means of a written contract, agree to a central and unified management without any party to the contract becoming a subsidiary of another.

#### **Article 41**

- 1 The contract shall require approval by the supervisory body and the general meeting of the company. The procedure shall be that laid down in Article 19. The management body of the company shall submit a report setting out the reasons for concluding the contract and its probable effects.
- 2 The contract shall be disclosed by the management body of the company in the manner prescribed by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC.
- 3 Paragraphs 1 and 2 shall apply also in respect of amendments to the contract.

- 4 Article 32(1), (2) and (4) shall apply by analogy in respect of termination of the contract.

## **SECTION 10**

### **Transitional and final provisions**

#### **Article 42**

The rules in Articles 4 and 5 shall apply to natural or legal persons who, on the date of notification of this Directive, hold directly or indirectly more than 10% of the subscribed capital of a company. Such persons shall be required, within three months of the incorporation of the Directive into national law, to notify the company in writing.

#### **Article 43**

For the purpose of applying Article 39, the Member States shall lay down a transitional period not exceeding six years.

#### **Article 44**

If, as a result of the application of any national provision adopted as a result of this Directive, all shares in the capital of a company are acquired by a single person or a small number of persons, any provisions of national law which require the company to be wound up for that reason shall not apply.

#### **Article 45**

- 1 Member States shall bring into force not later than ..... at the latest any amendments to their laws, regulations or administrative provisions necessary to comply with the provisions of the Directive and shall notify the Commission thereof forthwith.
- 2 Member States shall also notify the Commission, in sufficient time for it to be in a position to give its view on the subject, of any draft provisions to be laid down by law, regulation or administrative action which they propose adopting subsequently in respect of the matters covered by this Directive.

#### **Article 46**

This Directive is addressed to the Member States.

## ANNEX

### Directives and draft Directives mentioned in this document

First Council Directive 68/151/EEC of 9th March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by the 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 No L. 65 of 14th March 1968, p. 8. English Special Edition 1968(1), p. 41.

Second Council Directive 77/91/EEC of 13th December 1976 on co-ordination 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.

OJ No L 26 of 31st January 1977, p. 1.

Third Council Directive 78/855/EEC of 9th October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies.

OJ No L 295 of 20th October 1978, p. 36.

Fourth Council Directive 78/660/EEC of 25th July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies.

OJ No L 222 of 14th August 1978, p. 11.

Sixth Council Directive 82/89/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty concerning divisions of public limited liability companies.

OJ No L 378 of 31 December 1982, p. 47.

Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts. OJ No L 193 of 18 July 1983, p. 1.

Amended Proposal for a fifth Directive based on Article 54(3)(g) of the Treaty concerning the structure of public limited liability companies and the powers and obligations of their organs.

COM83(185) final of 12 August 1983. OJ No C 240 of 9 September 1983, p. 2

Amended Proposal for a Directive based on Article 100 of the Treaty on the information and consultation of employees. OJ No C 217 of 12 August 1983, p. 3.