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SECRETARIAT

Proposal for a third Council directive to co-ordinate the safeguards which Member States require of companies as defined in Article 58, paragraph 2, of the Treaty in order to protect the interests of members and other parties in mergers of joint-stock companies

(submitted by the Commission to the Council on 16 June 1970)

COM(70) 633
12 June 1970

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EXPLANATORY MEMORANDUM

I. INTRODUCTION

Article 54(3 g) of the Treaty stipulates that the safeguards which Member States require of companies to protect the interests of members and of third parties shall be coordinated, with a view to making them equivalent. Coordination work began with Directive No. 68/151 of 9 March 1968[1] applying to joint-stock companies, companies limited by shares, and private limited liability companies. For these types of company, the safeguards have been harmonized in the following three fields:

(1) Disclosure of important information on the company;

(2) Validity of commitments entered into by company organs; and

(3) Annulment of the formation of limited companies.

Continuing its work towards the coordination of company law, the Commission first dealt with joint-stock companies. This is economically the most important and legally the most elaborate type of company. Coordinating the arrangements governing it will make it easier subsequently to coordinate the safeguards in the other types of company.

On 9 March 1970 the Commission submitted to the Council a proposal for a second directive,[2] designed to coordinate the guarantees required in respect of the founding of joint-stock companies and the maintenance and alteration of their capital.

The present proposal for a third directive will help to achieve coordination of the safeguards required in the case of mergers between joint-stock companies subject to *the laws of one and the same Member State.* Co-ordination in this field will at the same time facilitate the conclusion of an agreement, prepared on the basis of Article 220 of the Treaty, on mergers between companies subject to *the laws of different Member States.*

II. COMMENTS ON THE ARTICLES

Article 1

As pointed out in the Introduction, paragraph 1 of this Article specifies that the directive applies to joint-stock companies only.

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1 *Journal officiel* No. L 65, 14 March 1968.
2 *Ibid.* No. C 48, 24 April 1970.

Under the law of certain Member States, co-operative societies may be set up in the form of joint-stock companies. These co-operative societies are nevertheless not subject to all the rules normally applying to joint-stock companies, special arrangements having been made for them in many cases. To take account of these special features, paragraph 2 of this Article allows Member States to refrain from applying the directive to co-operative societies set up in the form of joint-stock companies.

CHAPTER I

Article 2

Paragraph 1 of this Article binds all Member States to pass municipal legislation on mergers and when doing so to distinguish between two types of merger:

(1) Mergers involving the acquisition of one company by another; and

(2) Mergers involving the formation of a new company which absorbs the merging companies (consolidation).

The criteria for mergers in the form of acquisition of one company by another are set out expressly in paragraph 2 of this Article. They are:

(i) Prior existence of at least two companies;

(ii) Legal transfer of the whole of the assets and liabilities of the company acquired to the company acquiring;

(iii) Dissolution, without liquidation, of the company acquired as a result of the implementation of the merger;

(iv) Allotment of shares of the acquiring company to the shareholders of the company acquired;

(v) Possibility of assigning, over and above shares, a balance in cash which may, however, not exceed 10% of the nominal value of the shares, or, where shares with no nominal value are involved, 10% of the book value. As the volume of these cash payments remains small, they do not modify the features of the merger. In practice, such cash payments are useful to help fix the share exchange ratio in as simple a manner as possible.

The criteria listed above are also to be found in paragraph 3 of this Article concerning mergers involving the formation of a new company.

From this definition of a merger it follows that the transactions mentioned below are not considered to be mergers within the meaning of this directive because they satisfy only some, instead of all, of the criteria mentioned above:

(i) The splitting-up of a company. Although in this case all of the assets of the company are transferred, they go to several companies;

(ii) The bringing-in of a branch of business. In this case, the transfer covers not the whole of the assets but only part of them;

(iii) Any other transactions under which a company transfers to one or more companies the whole or part of its assets while receiving consideration which is not limited to shares and a cash payment amounting to 10% of the nominal value or the book value of the allotted shares;

(iv) The transfer of the whole of the assets of a company, as a result of dissolution without liquidation, to another company which holds all the shares of the company acquired. In this case no allotment of shares to the shareholders of the company acquired takes place.

Even where the transactions listed do not constitute mergers within the meaning of this directive, they are none the less akin to mergers in many legal and economic respects. In order to ensure that there is no evasion of the safeguards required for mergers, it would appear indispensable that the rules laid down for mergers should be applied to these transactions also, though in a slightly amended form. The relevant special provisions are to be found in Chapters IV and V of this directive.

These special rules on transactions treated like mergers must be clearly distinguished from the following transactions, which satisfy none of the criteria of a merger and which for this reason do not fall within the scope of the directive:

(i) The transfer of the assets of one company to another, if it does not cover all of the first company's assets and liabilities, does not give rise to dissolution without liquidation of the company acquired and does not involve, as consideration, the allotment of shares to the shareholders of this company;

(ii) The conversion of a company into another type of company. This does not involve several companies but affects *one and the same* company.

In accordance with paragraph 4 of this Article, mergers within the meaning of this directive may not be prohibited on the grounds that the merging companies are already in liquidation. There is, however, a limit to the application of this principle. A merger between companies is prohibited if one of them has already begun to distribute its assets among its shareholders.

CHAPTER II

The provisions of this Chapter are confined to mergers by acquisition. Mergers by the formation of a new company are dealt with in Chapter III.

Article 3

A merger necessarily presupposes an agreement between the merging companies. In practice, such agreement is achieved by the same methods in all Member States.

The managements of the companies involved negotiate with each other the terms of the merger transaction as it will be put to the general meetings of the companies. The general meetings must then approve the merger and take the measures necessary to implement it. Arrangements must then be made to disclose or register the merger and protect creditors.

Although the way in which mergers are prepared and implemented is much the same in all Member States, there are serious divergences in the legal classification of the various transactions.

In some Member States the managements are required to conclude a merger contract or at least draw up a draft contract before the general meetings rule on the matter. Under other legal systems the agreement between the managements is not subject to special conditions and all that the law does is to give the general meetings the power to decide on the merger. Finally, in other Member States, a merger contract may not be concluded by the managements until the merger has been approved by the general meetings of the companies involved.

There appears to be no need completely to eliminate these divergences between the laws of the Member States for members and other parties to be protected. It is sufficient for co-ordination to be confined to ensuring that the essential terms of the merger are laid down, in good time before a decision by the general meetings, in a special document available to the shareholders and other parties involved.

Under paragraph 1 of this Article, the managements are therefore required to draw up a "merger plan". This "neutral" concept has been chosen to take into account the differences in the legal classification of the agreement reached by the managements of companies.

The directive cannot, however, be limited to making the drawing up of a merger plan compulsory. As proposed in paragraph 2 of this Article, it must also provide a uniform rule as to the minimum content of the merger plan.

This minimum content includes in particular mention of the share exchange ratio (paragraph 2(b)). This information is supplemented by the report on the merger plan to be drawn up by the management of each of the merging companies, in accordance with Article 5, paragraph 1, of this directive. In this connection reference must also be made to the obligation, deriving from Article 5, paragraph 2, of this directive, to have a report drawn up by independent experts with a view to checking whether the terms governing the exchange of shares are sound.

Practical needs must be considered in the particulars about the date from which the shares allotted by the acquiring company give a right to dividends (paragraph 2(c)) and from which the transactions of the company acquired are deemed to be effected on behalf of the company acquiring (paragraph 2(d)). The current practice in both cases is to make this date coincide with the end of a trading year.

The particulars referred to in paragraph 2(e) must be supplied only if the company acquired has issued shares conferring special rights (for instance in respect of voting rights or the distribution of profits), or securities other than shares (these are listed in Articles 13 and 14 of the directive). In these cases, the merger plan must provide adequate information on the rights accorded by the acquiring company to the holders of these securities.

After laying down the minimum content of the merger plan, paragraph 3(a) of this Article specifies that the plan must be published. This must be done in conformity with the rules of Directive No. 68-151 of 9 March 1968. Furthermore, under paragraph 3(b), the merger plan must be available to the shareholders of each of the merging companies no later than one month before the date on which the general meeting of one of the companies is to vote on the merger.

Article 4

This Article lays down the principle that the general meeting of each of the merging companies must approve the merger. As Member States' laws on the rules governing general meetings have not yet been co-ordinated (this will be done in a later directive on the structure of the joint-stock company), this directive can, as regards the conditions governing attendance and the majority needed for the merger, only refer to the laws of the individual Member States. In the circumstances, a limit has been fixed which the Member States may not lower. This limit is calculated either on the basis of the votes attaching to the shares represented at the meeting or on the basis of the capital represented. In addition, the rules on amendment of the articles of association must be applied.

Article 5

The particulars supplied in the merger plan are not sufficient as a means of informing the shareholders. As a result, paragraph 1 requires the management of each of the merging companies to draw up a report explaining the merger plan and in particular the ratio to govern the exchange of shares, a specially important point for the shareholders.

For the shareholders to be protected, the soundness of the share exchange ratio must be checked by independent experts. As stipulated by paragraph 2 of this Article, these experts must draw up a report showing whether or not they consider the share exchange ratio to be sound. However, this finding by itself is not sufficient. The report must in addition supply the particulars and reasons stipulated under points (a) to (c), without which it is impossible to check the findings at which the experts have arrived.

The essential point in the choice of the experts is that they should be independent as well as experienced. This is why only persons who have been approved or designated by an administrative or judicial authority to exercise this type of activity may be called in. Article 8 of the proposal for a second directive contains a similar rule concerning the persons who, upon the foundation of a joint-stock company, must draw up the report on the transfer of assets in kind.

Persons responsible for auditing the accounts of the company in respect of which the report must be drawn up may also be appointed as experts. A similar rule can be found in Article 23(3) of the proposal for a second directive in respect of the valuation of contributions in kind made when the capital of a joint-stock company is increased.

To be able to do their work, the experts are, in conformity with paragraph 3 of this Article, given the power to investigate and to check any particulars and documents they need to draw up the report.

To avoid any misunderstanding it should be stressed that an expert report must be drawn up separately for each of the merging companies. This is absolutely necessary if shareholders are to receive objective and balanced information. The possibility for merging companies to choose *one single* expert to draw up an overall report for the two companies is therefore ruled out.

In accordance with paragraph 3 of this Article, the reports of the experts and those of the company boards must be made available to the shareholders at the latest by the date when, in accordance with Article 3, paragraph 3, of this directive, the merger plan also has to be submitted, i.e. no later than one month before the general meeting of the company is to decide on the merger (paragraph 3(a)).

In order that they be informed as completely as possible on the position of the merging companies shareholders must also have access within the same time-limits to the balance-sheets, profit and loss accounts and annual reports for the last three trading years (paragraph 3(b)). The last balance-sheet must, however, not date too far back. If more than six months have passed between the drawing-up of the balance-sheet and the date of the merger plan, an accounting statement (a sort of provisional balance-sheet) must also be made available to the shareholders (paragraph 3(c)). Paragraph 4 of this Article specifies in detail what particulars this statement must supply. The accounting statement must not be drawn up before the first day of the second month preceding the date of the merger plan.

Article 6

Mergers affect not only the shareholders and creditors but also the workers of the companies involved. Article 15 of this directive provides that the acquiring company succeeds to rights and obligations arising from contracts of employment concluded with the company acquired. In addition, it also appears necessary to lay down, in the interest of the workers, certain minimum safeguards ensuring that they are informed and consulted on the consequences of the merger.

To this end paragraph 1 of this Article specifies that the managements of each of the merging companies are required, over and above the obligation they have to draw up the report on the merger plan called for under Article 5, paragraph 1, of this directive and intended for the information of the shareholders, to draw up another report on the effects of the merger on the workers and for the information of the latter.

As laid down in paragraph 2 of this Article, this report must be submitted to the workers and the body representing them, at the time of submission of the report for the shareholders, i.e. at the latest one month before the general meeting of the company employing the workers decides on the merger.

Paragraph 3 of this Article also requires the administrative organs of each of the companies merging to give the body representing the workers an opportunity of discussing this report before the general meeting decides on the merger. If the body representing the workers expresses views in writing, these must also be brought to the knowledge of the general meeting deciding on the merger.

Article 7

A merger consists in particular in the shareholders of the company acquired receiving shares of the acquiring company. The acquiring company is therefore often obliged to increase its capital. The aim of this Article is to ensure that the laws of the Member States concerning increases in capital effected in cases of merger comply with the provisions of the proposal for a second directive that broadly cover increases in capital. However, as brought out in paragraph 2 of this Article, this rule does not apply to all provisions of the proposed directive above mentioned. On the contrary, in three points set out explicitly, the Member States remain free to adopt any divergent rules they consider appropriate, in the light of the special features of increases in capital in the case of mergers.

Article 8

In some Member States there is no preventive administrative or judicial control of mergers, any more than of the establishment of new companies. Where, under these legal systems, a merger is deemed to be completed as soon as the general meetings of the merging companies have voted on it, this Article provides that the minutes of the meetings must be made in the form of an official record drawn up by a notary. This notary must not confine himself to putting the minutes on official record, since he has a clearly defined duty of supervision. If the merger is implemented only by the management of the company signing a legal document subsequently to the decision of the general meetings, this document must also be drawn up by a notary. A rule is thus introduced similar to the one provided for by Article 10 of Directive No. 68-151 of 9 March 1968 in respect of the control of the memorandum and articles of association of a company. Moreover, this obviously does not prevent a Member State from combining control exercised by notaries with control exercised by judicial or administrative authorities.

Article 9

In the preceding comments on Article 3 it has already been pointed out that the laws of the Member States do not put the same legal interpretation on the various transactions involved in preparing and implementing a merger. There are also considerable divergences on the date on which the merger is deemed to have taken place.

Under one system, the merger is complete at the moment when the last general meeting decides on the issue. Under another system, the merger is complete when the merger contract, after having been approved by the two general meetings, is concluded. Here it is therefore a disputed point whether the entry in the companies register — incidentally indispensable — is constitutive or declaratory in effect. Under a third system, completion of the merger is explicitly a matter of entry of the merger in the companies register.

There appears to be no absolute need to introduce uniform rules on this point in the Community. No misunderstandings should, however, arise about the date on which the merger is complete. For this reason paragraph 1 of this Article requires the Member States to determine clearly when a merger is complete. On the other hand, it is indispensable that a uniform definition should be drawn up for the whole of the Community of the legal effects produced by the completion of a merger. This clause is contained in paragraph 2. The legal effects listed there are produced *ipso jure*; there is no need for other legal acts.

The rule on the transfer of assets (paragraph 2(a)) is closely related to Article 15 of this directive. On the position of the shareholders of the company acquired, the directive confines itself to laying down that they immediately become shareholders of the acquiring company (paragraph 2(b)). It is always possible for the Member States to fix the practical details of the share exchange procedure. The company acquired ceases to exist without there being any need for liquidation (paragraph 2(c)).

Article 10

Mergers require publication, which must be carried out in accordance with the rules laid down in Directive No. 68-151 of 9 March 1968 (paragraph 1 of this Article).

This arrangement makes full allowance for the divergences between the laws of the Member States. Where the Member States allow a merger to be completed by decision of the two general meetings, these decisions must be published. If the completion of a merger depends on the establishment of a specific document, following approval by the two general meetings, such document must be published. Lastly, if under the law of a Member State the criterion is the entry of the merger in the companies register, such entry must be made public.

The legal effects of the merger vis-à-vis third parties are laid down in Article 3, paragraphs 5 to 7, of the Directive of 9 March 1968.

Article 11

The legal arrangements to protect creditors who did business with one of the merging companies vary from one Member State to another. Some give creditors a right of objection blocking the merger as long as the objections are not withdrawn or a court has not rejected them by a final ruling. Other legal systems also provide for a right of objection but do not allow this to prevent the implementation of a merger; the merger may not, however, be relied upon as against creditors who have not been paid off or at least have not been given security for their claim. A third type of legal system confines itself to giving creditors a right to be refunded or given security, so that the exercise of this right in no way affects the implementation of the merger.

There appears to be no need for full standardization of these rules on the protection of creditors. The national provisions on procedure in particular should be left untouched. Paragraph 1 of this Article merely lays down the principle that creditors have a right to obtain security for their claim. The laws of the Member States may not rule out the exercise of this right unless the creditors have already received security or the solvency of the company is such that provision of security does not appear to be necessary.

Some legal systems apply the rules on the protection of creditors both to creditors of the company acquired and to creditors of the company acquiring. The second sub-paragraph of this Article provides only for the protection of creditors of the company acquired. Normally, these are in particular need of being protected, for the merger entails the dissolution of the company acquired and the transfer of the whole of its assets to the company acquiring. The position of the creditors of the company acquiring is in general not comparable; this company continues to exist and no new debtors are thrust upon its creditors.

Although the obligations of the company acquired are transferred to the company acquiring, this does not constitute a reason for treating the creditors of the latter on the same footing as those of the former. In this respect, the merger should be considered to be no different from the acquisition of assets by a debtor by way of general assignment. The mere fact that the debtor who acquires assets also takes over the debts that go with them does not give the creditor a right to ask for additional security for his claim.

Arrangements may furthermore be made to exclude from the application of these rules any creditors of the company acquired whose claim arose at a time when the creditors knew or should have known about the proposed merger. The criterion used here is the time when the merger plan was published. These rules, however, afford no more than a minimum protection. There is consequently no prohibition on Member States taking into consideration a later date as regards the time when the claim arose, for instance entry in the companies register or publication of such entry.

Article 12

The protection of creditors provided for in the preceding Article must in general also be extended to debenture-holders, in accordance with paragraph 1 of this Article. Paragraph 2, however, lays down major derogations from this principle.

The laws of some Member States contain certain special rules on the meeting of debenture-holders. In so far as these rules specify that the merger also depends on approval by this meeting, they are not affected by the directive. On the other hand, the directive concludes from the approval of this meeting that the debenture-holders do not need the protection elsewhere afforded to creditors. However, as regards the laws of other Member States where this form of debenture-holder meeting is unknown, withdrawal of the protection afforded to creditors is envisaged only if the holders of these securities individually approve the merger (paragraph 2(a)).

Lastly, the directive lays down the general rule that the protection afforded to creditors may be refused to debenture-holders if they have the possibility of obtaining redemption of their debentures ahead of schedule (paragraph 2(b)).

Articles 13 and 14

These Articles lay down rules specifically applying to holders of the securities explicitly indicated. Their rights must not be weakened by merger. To this end, paragraph 1 of Articles 13 and 14 specifies that the holders of such securities of the company acquired must be given equivalent rights in the acquiring company. The details must be set out in the merger plan, in accordance with Article 3, paragraph 1(e), of this directive.

Paragraph 2 of Articles 13 and 14 lists the conditions under which these securities may be modified.

Article 15

In accordance with paragraph 1 of this Article, implementation of the merger involves the transfer to the acquiring company of the whole of the assets and liabilities of the company acquired. The formalities normally applying to the transfer of certain property need not be complied with. In principle this applies also with regard to third parties. However, where the law of a Member State provides that the transfer of certain property is effected only by inscription in a register (for instance real property in the land register) and protects third parties who relied in good faith on entries in this register, such rules continue to apply.

Article 16

Paragraph 1 of this Article requires the Member States to lay down rules concerning the tortious liability of the members of the management of the company acquired as regards compensation for loss suffered by shareholders as a result of wilful or negligent acts committed by these persons in preparing and implementing the merger.

The directive leaves Member States free to regulate the details of such liability. Paragraph 2 merely calls for compliance with the two important principles set out below:

(i) firstly, the right to compensation must be granted to each shareholder individually. This principle, however, does not rule out adoption of special provisions concerning arrangements by shareholders to have themselves represented collectively to exercise their rights, and concerning the distribution among them of sums received (paragraph 2(a));

(ii) secondly, it is specified, in the interests of the protection of the shareholders, that the members of the management of the company acquired are jointly and severally liable. A member may be discharged of this liability only if no blame attaches to him. But in this case the onus of proof falls on him paragraph 2(b).

Article 17

There is no need to emphasize the importance attaching to the report by the expert on the soundness of the share exchange ratio to be drawn up under Article 5, paragraph 2, of this directive. Experts who have caused a loss to the shareholders of the company acquired through wilful or negligent acts committed in the performance of their duties must therefore be held liable in the same way as laid down in Article 16 in respect of the management of the company acquired.

Article 18

Annulment of a merger may result first from the fact that the decision of the general meeting of one of the merging companies has been annulled subsequently to the merger. Secondly, those cases where one of the legal documents drawn up during the implementation of the merger is not valid should be recalled. The rules on the grounds for annulment vary from one Member State to another and cannot be harmonized by this directive. Rules on the annulment of decisions of general meetings can be laid down in a general framework only and not in respect of mergers alone. The intention is to do this in a subsequent directive on the structure of joint-stock companies. Nor, given the considerable differences in the procedures used, is it appropriate to deal in the directive with the problem of the validity of the legal documents drawn up during implementation of the merger. To protect members and other parties, however, it is possible and indeed sufficient to adopt uniform arrangements ruling out the annulment of mergers as far as possible.

In the interests of certainty in legal relations, paragraph 1(a) of this Article lays down the principle that a merger may only be annulled by a court decision. In other words, nobody may invoke nullity in the absence of a judgment. The provisions of this Article are modelled on those of Article 11 of Directive No. 68-151 of 9 March 1968, which also requires in all cases that the formation of a company may only be annulled by a court decision.

For the rest, a distinction must be made between cases where a merger has already been completed and those where it has not yet been carried through. If the merger has not yet been completed, the proposed transaction can be called off without great difficulty. In these cases, the directive therefore leaves arrangements in the Member States untouched.

The situation is different, however, where the merger has already been carried through. Here the principle is that a merger may no longer be annulled. Only one derogation is admitted: the merger may be annulled if there has been no judicial or administrative control or no document drawn up by a notary, provided that *restitutio in integrum* is still possible and there are safeguards for the rights acquired in good faith by third parties (paragraph 1(b)).

Two other rules apply to all cases where a merger is annulled. The first rule is to help speed up clarification of the problem by stipulating that an action for annulment may be brought only within six months from the date from which implementation of the merger creates legal effect vis-à-vis the party claiming annulment (paragraph 1(c)). The intention also is to limit annulment by a court to cases where it is indispensable. To this end the court must always grant the companies involved a time-limit in which to remedy the defects attaching to the merger and annul the merger only after the time-limit accorded has expired without appropriate action having been taken (paragraph 1(d)). A similar rule is contained in Article 5, paragraph 2, of the proposal for a second directive concerning the dissolution by court order of one-man companies.

As regards the effects of the court decision annulling a merger, paragraph 1 (e) reproduces the provisions of Article 12, paragraph 1, of Directive No. 68-151 of 9 March 1968, in which it is stipulated that a court decision of this type may not be invoked against anybody as long as it has not been published in accordance with Article 3 of the same directive.

Paragraph 2 of the Article, lastly, requires the Member States to lay down sanctions other than annulment which are imposed if a merger suffers from a defect of form or substance and if, under the provisions of this directive, it may not be annulled.

CHAPTER III

Article 19

The provisions of Chapter II of this directive apply only to mergers by acquisition; paragraph 1 of this Article declares them to apply by analogy to mergers by the formation of a new company. Otherwise, this Article does no more than provide for the necessary adaptation of these rules to the special features of this type of merger.

In the case of such a merger, some of the rules of Chapter II may thus apply to the merging companies while being inapplicable to the company that results from the merger.

This is true of the rules concerning the merger plan (Article 3), the powers of the general meeting (Article 4), the reports drawn up by the company organs and the experts (Articles 5 and 6), the drawing up of certain documents by a notary (Article 8), the protection of creditors (Articles 11 and 12), and the liability of the company organs and the experts (Articles 16 and 17). On the other hand, the rules on the implementation of the merger (Article 9, paragraph 1), publication of the merger (Article 10) and the granting of equivalent rights for special securities (Articles 13 and 14) also apply to the company that results from the merger.

It should be emphasized that Article 18 does not apply. The formation of the new company is, on the contrary, governed by the provisions of Directive No. 68-151 of 9 March 1968. It follows that the formation of a new company as a result of merger may too only be annulled for one of the reasons listed exhaustively in Article 11 of the directive just referred to.

CHAPTER IV

Article 20

Under this Article the Member States are required to lay down rules on transactions by means of which a company transfers the whole of its assets, as a result of dissolution without liquidation, to another company which holds all the shares of the acquired company. If under the legal system of a Member State there are securities other than shares that confer a right of vote in the general meeting, these securities must also be held by the acquiring company.

The transactions described do not involve the allotment of shares; this is why they are not mergers within the meaning of this directive but must be treated as if they involved merger by acquisition. To this end, save a few exceptions of minor importance, the transactions are made subject to the provisions of Chapter II of this directive.

The exceptions take account of the special features of the transactions. There being no allotment of shares, the merger plan cannot in cases of this type give the particulars normally to be supplied on the subject (Article 3, paragraph 2 b and c). Similarly, the provision on the increase in a company's capital (Article 7) does not apply to the acquiring company, as it already holds all shares of the company acquired. Article 9, paragraph 2 (b) does not apply for the same reason.

Instead, paragraph 4 of this Article specifies that completion of the transactions entails the cancellation of the shares of the company acquired. Lastly, the provisions on the liability of the organs of the company acquired and of the experts (Articles 16 and 17) do not apply either.

On the other hand, Article 4 of this directive continues to apply, which means that even in the case of the transactions involved, approval by the general meeting of the two companies is still necessary.

It is not possible for the acquiring company to waive this requirement, because the transfer of the assets involves the transfer of obligations of the company acquired, which may have serious consequences for the acquiring company. Similarly, the requirement that the general meeting of the company acquired must give its approval cannot be waived, even if the acquiring company holds all the shares in the company acquired.

Special emphasis should be placed on the fact that, contrary to the procedure followed in case of a genuine merger, only the competent organ of the acquiring company need explain the transaction in a report (paragraph 2). Similarly, the experts' report also is drawn up only for the acquiring company (paragraph 3).

Article 21

In addition to mergers as defined by Article 2 and to the transactions governed by Article 20, the legal systems of the Member States may also authorize other transactions that are in many respects similar to mergers. These are transactions which consist in pooling the assets of two or more companies and which involve the allotment of shares as partial or full consideration. Such transactions may be effected between two already existing companies, as well as for the benefit of new companies yet to be set up; the comments on Article 2 provide guidance on this point.

The aim of this Article is to apply to these transactions, dealt with on the same footing as mergers, the appropriate rules among those applying to mergers in the strict sense of the term and laid down by this directive.

Article 22

Various provisions of the directive lay down obligations for the management of the company. Paragraph 1 of this Article specifies what must be understood by "management" under the laws of the Member States. Paragraph 2 defines the nature of the "supervisory board". Lastly, paragraph 3 determines the concept of the body representing the staff in the six member countries within the meaning of Article 6.

PROPOSAL FOR A DIRECTIVE

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal of the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas the co-ordination provided for in Article 54, paragraph 3 (g) and in the general programme for the removal of restrictions on freedom of establishment was begun with Directive No. 68/151/CEE of 9 March 1968;[1]

Whereas this co-ordination was continued with Directive No. ... of ... [2] harmonizing the rules adopted by the various Member States concerning the formation of a joint-stock company and the maintenance and alteration of its capital;

Whereas to protect the interests of members and other parties it is imperative to co-ordinate the laws of the Member States on mergers between joint-stock companies and to require the Member States which so far have no legislation on mergers to introduce it;

Whereas in the framework of this co-ordination it is particularly important for shareholders of the merging companies to be informed adequately and as objectively as possible and to have their rights protected appropriately;

Whereas it is also indispensable that the staff of the merging companies should be informed and consulted about the repercussions of the merger on them;

Whereas the creditors, whether debenture-holders or not, and the holders of other securities of the company acquired must be protected with a view to ensuring that they do not suffer from the implementation of the merger;

Whereas the publication requirements of Directive No. 68/151/CEE of 9 March 1968 must be extended to the transactions involved in a merger so that third parties are adequately informed of them;

Whereas it is necessary to extend the safeguards afforded under the merger procedure to members and other parties to certain legal transactions which in major points are akin to mergers so as to ensure that this protection cannot be evaded;

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1 *Journal official* No. L 65, 14 March 1968.
2 *Ibid.* No. C 48, 24 April 1970.

Whereas it is necessary, with a view to ensuring certainty in the legal relations between the companies involved, between these companies and third parties, and between members, to limit the number of grounds on which a merger may be annulled, while establishing the principle that defects attaching to a merger may be remedied wherever this is possible, and to fix a short period of time within which annulment may be claimed,

HAS ADOPTED THE PRESENT DIRECTIVE

Scope

Article 1

1. The co-ordination measures laid down in this directive shall apply to Member States' statutory and administrative provisions relating to the following types of company:

— Germany : die Aktiengesellschaft

— Belgium : la société anonyme
de naamloze vennootschap

— France : la société anonyme

— Italy : la società per azioni

— Luxembourg: la société anonyme

— Netherlands : de naamloze vennootschap

2. The Member States shall be free to refrain from applying the provisions of this directive to co-operative societies established in one of the forms of companies listed in the preceding paragraph.

CHAPTER I

Merger by acquisition and merger by formation of a new company

Article 2

1. For companies coming under their legislation Member States shall lay down rules on merger by acquisition and merger by formation of a new company.

2. For the purposes of this directive, merger by acquisition shall be deemed to be a transaction by which one company transfers to another company, in

consequence of dissolution without liquidation, the whole of its assets and liabilities by allotting to the shareholders of the company acquired shares in the acquiring company and, where applicable, by payment in cash of a balance not exceeding 10% of the nominal value of the shares allotted or, in the absence of a nominal value, of their book value.

3. For the purposes of this directive, merger by the formation of a new company shall be deemed to be a transaction by which several companies, in consequence of dissolution without liquidation, transfer to a company which they form the whole of their assets and liabilities by means of allotment of shares in this company to the shareholders of the merging companies and, where applicable, payment in cash of a balance not exceeding 10% of the nominal value of the shares allotted or, in the absence of a nominal value, of their book value.

4. A merger may take place even if, in the case covered by paragraph 2, the company acquired and, in the case of paragraph 3, one or all of the merging companies are in liquidation, provided they have not yet begun to distribute their assets among their shareholders.

CHAPTER II

Merger by acquisition

Article 3

1. The management of each of the merging companies shall draw up a merger plan in writing.

2. The merger plan shall state at least the following particulars:

(i) Type, name and registered office of the merging companies;

(ii) Share exchange ratio and, where relevant, the amount of the cash payment;

(iii) Procedure for the transfer of the shares of the acquiring company and the date from which these shares give a right to dividends;

(iv) Date from which the transactions of the company acquired are deemed to be effected on behalf of the acquiring company;

(v) Rights accorded by the acquiring company to shareholders with special rights and to holders of the securities referred to in Articles 13 and 14, or the measures proposed for their benefit.

3. The merger plan must:

(i) Be published in accordance with the procedure laid down in Articles 3, 5 and 6 of Directive No. 68/151/CEE of 9 March 1968;

(ii) Be made available to the shareholders of each of the merging companies no later than one month before the date on which the general meeting is to vote on the merger.

Article 4

1. Mergers shall require the approval of the general meeting of each of the merging companies, with the individual Member States' rules on attendance and majority applying. In no case may the majority be lower than two thirds of the votes attaching to the shares represented at the meeting or of the company capital represented at the meeting. The rules on amendment of the articles of association shall also apply.

2. The general meetings shall discuss the approval of the merger plan and any amendment of the articles of association that its implementation may require.

Article 5

1. The management of each of the merging companies shall draw up a detailed report explaining and justifying the merger plan and more particularly the share exchange ratio from a legal and economic point of view.

2. In addition, for each of the merging companies one or more independent experts designated or approved by a judicial or administrative authority shall check the merger plan and draw up a report for the shareholders. The experts may be persons who are responsible for auditing the accounts of the company.

Each expert shall have the right to obtain from the merging companies all pertinent information and documents and to make all necessary inquiries.

In their report the experts must state whether or not the share exchange ratio is sound. This statement must be supported by the following particulars at least:

(i) A comparison between the net assets of the two companies on the basis of their true values;

(ii) A comparison between the profitability of the two companies, account being taken of the future outlook;

(iii) The criteria applied to value net assets and profitability.

The report shall in addition mention any special difficulties that may have been encountered concerning valuation.

3. The following documents shall be made available to the shareholders of each of the merging companies no later than one month before the general meeting is to vote on the merger:

(i) The reports on their companies, provided for under paragraphs 1 and 2;

(ii) The balance-sheets, profit and loss accounts and annual reports of the merging companies for the last three trading years;

(iii) If the last balance-sheet covers a trading year which ended more than six months before the date of the merger plan, an accounting statement drawn up on the first day of the second month preceding this date.

4. The accounting statement provided for under paragraph 3(c) above shall be established by the same methods and on the same pattern as the last annual balance-sheet.

However:

(i) No new true inventory shall be made;

(ii) The valuations contained in the last balance-sheet shall be modified only in line with movements in book entries; account shall, however, be taken of:

— Amounts set aside in the meantime for depreciation or placed to reserves;

— Major changes in true values not reflected in book entries.

Article 6

1. The management of each of the merging companies shall draw up a detailed report explaining and justifying the merger, the legal, economic and social effects it will have on the staff of the company and the measures to be taken with regard to the staff.

2. This report shall be made available to the staff and the body representing it in each of the merging companies at the latest one month before the general meeting is to vote on the merger.

3. Before the general meeting discusses the merger, the report shall be discussed in each company between the management and the body representing the staff. This body may express its opinion in writing and this opinion must be available to the general meeting called to decide on the merger.

Article 7

1. If, as a result of the merger, the acquiring company increases its capital, this transaction shall be governed by the rules of Directive No. .... of ....[1]

[1] *Journal officiel* No. C 48, 24 April 1970.

2. The Member States shall, however, be free to refrain from applying the provisions of this directive concerning valuation of contributions in kind (Article 8), increases in capital through money brought in for shares issued previously and to be paid up in full (Article 21, paragraphs 1 and 2), and the right to preferential subscription (Article 25).

Article 8

In those Member States whose laws provide for no judicial or administrative control of the decisions of general meetings on merger or of any other document evidencing the implementation of the merger, the minutes of these meetings or the documents evidencing implementation of the merger shall be drawn up by a notary. In this case the notary shall check and certify the existence and regularity of the merger plan and of the legal acts and formalities performed by the company which has commissioned him.

Article 9

1. The laws of the Member States shall fix the date on which the merger is deemed to be completed as between the merging companies, with regard to the shareholders and vis-à-vis other parties.

2. Completion of the merger shall have the following legal effects:

(i) The assets of the company acquired are transferred to the acquiring company in accordance with the provisions of Article 15.

(ii) The shareholders of the company acquired automatically become shareholders of the acquiring company.

(iii) The company acquired ceases to exist.

3. No shares of the acquiring company shall, however, be issued in exchange for shares in the company acquired held by the acquiring company, and these latter shares shall be cancelled.

Article 10

For each of the merging companies, the merger shall require publication in accordance with the rules laid down in Articles 3, 5 and 6 of Directive No. 68-151 of 9 March 1968.

Article 11

1. The laws of the Member States shall fix the rules governing the rights of creditors other than debenture-holders to obtain security for their debts.

Such laws may make it possible for the company to be discharged of this obligation if the creditors already have adequate security or if the solvency of the acquiring company is such that they incur no damage. They may also provide that the company be authorized to repay the debts ahead of schedule instead of providing security.

2. The protection provided for in this Article must be granted at least to all creditors of the company acquired whose claims arose prior to the publication of the merger plan.

It may, however, be dispensed with for creditors whose claims are secured on property which is subject to administrative control laid down by a special law.

Article 12

1. The provisions of Article 11 shall apply to creditors holding debentures of the company acquired, without prejudice to the rules on the collective exercise of their rights.

2. The laws of the Member States may, however, dispense with this protection if they require:

(i) That the merger must be approved by the general meeting of the debenture-holders or by these individually, or

(ii) That the debenture-holders have a right to demand redemption of their debentures ahead of schedule.

Article 13

1. Without prejudice to Article 12, the laws of the Member States shall ensure that holders of debentures convertible into shares, debentures exchangeable against shares, debentures giving preferential rights to subscribe for shares in the company or giving a right to a share in profits, and holders of other subscription rights shall be given rights in the acquiring company equivalent to those they enjoyed in the company acquired.

2. The laws of the Member States may, however, dispense with this protection if they provide that modification of these rights shall be approved either by the general meeting of the holders of these securities or by the holders individually.

Article 14

1. The laws of the Member States shall ensure that, without prejudice to the voting right which they may have in the general meeting of the company acquired, the holders of *parts bénéficiaires* which represent no capital and the

holders of *jouissance* shares or dividend-right certificates *(Genusscheine)* of the company acquired, are given rights in the acquiring company equivalent to those they enjoyed in the company acquired.

2. These laws may, however, dispense with such protection if they make modification of these rights subject to approval by the holders' general meeting or by the holders individually or if they allow the latter to obtain redemption of their securities.

Article 15

Completion of the merger shall automatically entail the general assignment, as between the merging companies and with regard to other parties, of the whole of the assets and liabilities of the company acquired to the acquiring company, without prejudice to the protection of third parties who, acting in good faith, entered into contracts in reliance on entries in public registers recording the transfer of property.

Article 16

1. The laws of the Member States shall lay down rules governing the tortious liability of the members of the administrative and supervisory organs of the company acquired in order to ensure that compensation be made for any loss suffered by the shareholders of this company as a result of wilful or negligent acts committed by these organs in preparing and implementing the merger

2. The arrangements for liability laid down in the preceding paragraph must comply with the following principles:

(i) The liability is towards the individual shareholders of the company acquired. The laws of the Member States may, however, lay down rules on arrangements by these shareholders to have themselves represented collectively for this purpose and on the distribution of damages recovered.

(ii) The members of each of the appropriate organs of the company acquired are jointly and severally liable. Members may, however, free themselves of this liability if they prove that no blame for any wilful or negligent act attaches to them personally.

Article 17

1. The laws of the Member States shall lay down rules on the tortious liability of the experts responsible for drawing up, on behalf of the company acquired, the report referred to in Article 5, second paragraph, with a view

to ensuring that the shareholders of this company receive compensation for loss suffered through wilful or negligent acts committed by these experts in the performance of their duties.

2. Article 16, paragraph 2 shall apply to the liability laid down in the preceding paragraph.

Article 18

1. The laws of the Member States shall lay down rules on the annulment of mergers only in compliance with the following conditions:

(i) A merger may be annulled only by a court decision.

(ii) Mergers already carried through may be annulled only if there has been no judicial or administrative control or no document drawn up by a notary, and if *restitutio in integrum* is still possible and the rights acquired in good faith by third parties are safeguarded.

(iii) An action for annulment may be brought only within six months from the date from which completion of the merger creates legal effects vis-à-vis a party claiming annulment.

(iv) Where it is possible to remedy a defect liable to entail annulment of a merger, the appropriate court shall grant the companies involved a time-limit within which to remedy such defect.

(v) The effects on third parties of a court decision annulling a merger shall be governed by Article 12(1) of Directive No. 68-151 of 9 March 1968.

2. The laws of the Member States shall lay down the sanctions other than annulment to be imposed where a merger suffers from a defect of form or substance but may not be annulled.

CHAPTER III

Merger by formation of a new company

Article 19

1. Except for Articles 7 and 18, the provisions of Chapter II of this directive shall also apply to mergers by the formation of a new company.

Each of the merging companies shall be considered to be a company acquired and the new company shall be deemed to be the acquiring company, in accordance with the following rules:

(i) Article 9, paragraph 1 and Articles 10, 13, 14 and 15 shall apply to the merging companies and to the new company;

(ii) Articles 3, 4, 5, 6, 8, 11, 12, 16 and 17 shall apply to the merging companies only;

(iii) The effects defined in Article 9, paragraph 2 shall become operative at the time of the formation of the new company.

2. The memorandum of association and, where they are the subject of a separate document, the articles of association of the new company shall be appended to the merger plan and approved by the general meeting of each of the merging companies.

3. The Member States shall be free to refrain from applying to the formation of the new company the rules on the valuation of contributions in kind laid down by Article 8 of Directive No. .... of ....[1]

CHAPTER IV

Acquisition of a company by another company holding all shares in it

Article 20

1. For companies coming under their legislation, the Member States shall lay down rules on the transactions through which a company dissolves without liquidation and transfers the whole of its assets and liabilities to another company which holds all its shares and all other securities that confer a right of vote in the shareholders' general meeting. These transactions shall be subject to the provisions of Chapter II of this directive, except for Articles 3, paragraph 2(b) and (c), 5, paragraphs 1 and 2, Articles 7 and 9, paragraph 2(b), 16 and 17.

2. The management of the acquiring company shall draw up a detailed report explaining and justifying, from a legal and economic point of view, the transaction referred to in paragraph 1.

3. A detailed report on the effects of the transaction on the acquiring company shall be drawn up by one or more independent experts designated or approved by a judicial or administrative authority. These experts may be persons who are responsible for auditing the accounts of the acquiring company.

Each expert shall have a right to obtain from the merging companies all pertinent information and documents and to make all necessary inquiries.

4. Completion of the transaction shall entail the cancellation of the shares of the company acquired and of the other securities mentioned in paragraph 1.

[1] *Journal officiel* No. C 48, 24 April 1970.

CHAPTER V

Other transactions akin to a merger

Article 21

1. Where the Member States lay down, for the companies coming under their legislation, rules on transactions other than those defined by Articles 2 and 20 of this directive through which a company transfers to one or more companies, already existing or yet to be formed, all or part of its assets in return for the allotment to its shareholders of shares in the beneficiary company or companies as full or partial consideration for this transfer, the provisions of Chapters II and III of this directive shall apply, with the exception of Articles 6 and 9 paragraph 2.

2. For the purpose of the preceding paragraph, the company transferring its assets shall be considered to be the company acquired, the existing companies to which the assets are transferred to be the acquiring companies, and the companies to be formed and to which the assets are transferred to be new companies, in accordance with the following distinctions:

(i) Articles 3, 4, 5, 6, 8, 16, 17 and 18 shall apply to the acquiring and the acquired companies. Where the transaction is for the benefit of one or more new companies, the memorandum of association and — if they are the subject of a separate document — the articles of association of these companies shall be appended to the merger plan and approved by the general meetings of the companies acquired.

Article 5 need not be applied, however, if the shareholders of the company acquired have the right to obtain consideration covering the value of their shares and if, in case of dispute, this consideration is determined by the court;

(ii) Article 9, paragraph 1 and Article 10 shall apply to the acquiring companies, the companies acquired and the new companies;

(iii) Where the transaction automatically entails the transfer, both as between the companies involved and vis-à-vis third parties, of all or part of the liabilities of the company acquired to the acquiring company or the new company, Articles 11, 12 and 15, paragraphs 2 to 4 shall apply;

(iv) Where the company acquired has issued debentures convertible into shares, debentures exchangeable against shares, debentures giving preferential rights to subscribe for shares in the company, debentures giving a right to a share in profits, securities giving a subscription right, *parts bénéficiaires*, *jouissance* shares or dividend-right certificates (*Genusscheine*), and where the rights attaching to these securities are transferred to the acquiring or new companies, Articles 13 and 14 shall apply;

(v) Where the transaction automatically entails the transfer, both as between the companies involved and vis-à-vis third parties, of all or part of the assets of the company acquired to the acquiring company or the new company, Article 15, paragraphs 2 to 4 shall apply.

CHAPTER VI

General and final provisions

Article 22

1. For the purposes of Articles 3, 5, 6, 16 and 20, the term "management" shall, without prejudice to the possibility of approval by a supervisory organ being required by the laws of Member States, be understood to refer:

— in Germany : to der Vorstand

— in Belgium : to le conseil d'administration
or het bestuur

— in France : to le conseil d'administration
or le directoire

— in Italy : to il consiglio di amministrazione

— in Luxembourg: to le conseil d'administration

— in Netherlands : to het bestuur

2. For the purposes of Article 16, the term "supervisory organ" shall be understood to refer:

— in Germany : to der Aufsichtsrat

— in France : to le conseil de surveillance

— in Netherlands : to de commissarissen

3. For the purpose of Article 6 the term "body representing the staff" shall be understood to refer:

— in Germany : to der Betriebsrat

— in Belgium : to le conseil d'entreprise
or de ondernemingsraad

— in France : to le comité d'entreprise

— in Italy : to la commissione interna d'azienda

— in Luxembourg: to la délégation ouvrière principale

— in Netherlands : to de ondernemingsraad

Article 23

The Member States shall within 18 months of the date of promulgation of this directive make all changes in their statutory and administrative provisions that are necessary to give effect to its provisions and shall immediately inform the Commission accordingly.

The Governments of the Member States shall communicate to the Commission, for its information, the texts of draft laws and regulations, together with a statement explaining their purpose, in the field covered by this directive. This communication must be made no later than six months before the date envisaged for the entry into force of the draft.

Article 24

The present directive is addressed to the Member States.