

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

(68/151/EEC)

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 General Programme for the abolition of restrictions on freedom of establishment¹, and in particular Title VI thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament²;

Having regard to the Opinion of the Economic and Social Committee³;

Whereas the co-ordination provided for in Article 54 (3) (g) and in the General Programme for the abolition of restrictions on freedom of establishment is a matter of urgency, especially in regard to companies limited by shares or otherwise having limited liability, since the activities of such companies often extend beyond the frontiers of national territories;

Whereas the co-ordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, such companies is of special importance, particularly for the purpose of protecting the interests of third parties;

Whereas in these matters Community provisions must be adopted in respect of such companies simultaneously, since the only safeguards they offer to third parties are their assets;

Whereas the basic documents of the company should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company;

Whereas the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid;

Whereas it is necessary, in order to ensure certainty in the law as regards relations between the company and third parties, and also between members, to limit the cases in which nullity can arise and the retro-active effect of a declaration of nullity, and to fix a short time limit within which third parties may enter objection to any such declaration;

HAS ADOPTED THIS DIRECTIVE:

Article 1

The co-ordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company:

— *In Germany:*

die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien, die Gesellschaft mit beschränkter Haftung;

— *In Belgium:*

de naamloze vennootschap,	la société anonyme,
de commanditaire vennootschap op aandelen	la société en commandite par actions,
de personenvennootschap met beperkte aansprakelijkheid;	la société de personnes à responsabilité limitée;

¹ OJ No 2, 15.1.1962, p. 36/62.

² OJ No 96, 28.5.1966, p. 1519/66.

³ OJ No 194, 27.11.1964, p. 3248/64.

— *In France:*

la société anonyme, la société en commandite par actions, la société à responsabilité limitée;

— *In Italy:*

società per azioni, società in accomandita per azioni, società a responsabilità limitata;

— *In Luxembourg:*

la société anonyme, la société en commandite par actions, la société à responsabilité limitée;

— *In the Netherlands:*

de naamloze vennootschap, de commanditaire vennootschap op aandelen.

the balance sheet shall give particulars of the persons who are required by law to certify it.

However, in respect of the *Gesellschaft mit beschränkter Haftung*, *société de personnes à responsabilité limitée*, *personenvennootschap met beperkte aansprakelijkheid*, *société à responsabilité limitée* and *società a responsabilità limitata* under German, Belgian, French, Italian or Luxembourg law, referred to in Article 1, and the *besloten naamloze vennootschap* under Netherlands law, the compulsory application of this provision shall be postponed until the date of implementation of a Directive concerning co-ordination of the contents of balance sheets and of profit and loss accounts and concerning exemption of such of those companies whose balance sheet total is less than specified in the Directive from the obligation to make disclosure, in full or in part, of the said documents. The Council will adopt such a Directive within two years following the adoption of the present Directive;

SECTION I

Disclosure

Article 2

1. Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:

- (a) The instrument of constitution, and the statutes if they are contained in a separate instrument;
- (b) Any amendments to the instruments mentioned in (a), including any extension of the duration of the company;
- (c) After every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date;
- (d) The appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:
 - (i) are authorised to represent the company in dealings with third parties and in legal proceedings;
 - (ii) take part in the administration, supervision or control of the company.

It must appear from the disclosure whether the persons authorised to represent the company may do so alone or must act jointly;

- (e) At least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorised capital, unless any increase in the capital subscribed necessitates an amendment of the statutes;
- (f) The balance sheet and the profit and loss account for each financial year. The document containing

- (g) Any transfer of the seat of the company;

- (h) The winding up of the company;

- (i) Any declaration of nullity of the company by the courts;

- (j) The appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company;

- (k) The termination of the liquidation and, in Member States where striking off the register entails legal consequences, the fact of any such striking off.

2. For purposes of paragraph 1 (f), companies which fulfil the following conditions shall be considered as *besloten naamloze vennootschappen*:

- (a) They cannot issue bearer shares;
- (b) No bearer certificate of registered shares within the meaning of Article 42 (c) of the Netherlands Commercial Code can be issued by any person whatsoever;
- (c) Their shares cannot be quoted on a stock exchange;
- (d) Their statutes contain a clause requiring approval by the company before the transfer of shares to third parties, except in the case of transfer in the event of death and, if the statutes so provide, in the case of transfer to a spouse, forebears or issue; transfers shall not be in blank, but otherwise each transfer shall be in writing under hand, signed by the transferor and transferee or by notarial act;

- (e) Their statutes specify that the company is a *besloten naamloze vennootschap*; the name of the company includes the words '*Besloten Naamloze Vennootschap*' or the initials 'BNV'.

Article 3

1. In each Member State a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein.

2. All documents and particulars which must be disclosed in pursuance of Article 2 shall be kept in the file or entered in the register; the subject matter of the entries in the register must in every case appear in the file.

3. A copy of the whole or any part of the documents or particulars referred to in Article 2 must be obtainable by application in writing at a price not exceeding the administrative cost thereof.

Copies supplied shall be certified as 'true copies', unless the applicant dispenses with such certification.

4. Disclosure of the documents and particulars referred to in paragraph 2 shall be effected by publication in the national gazette appointed for that purpose by the Member State, either of the full or partial text, or by means of a reference to the document which has been deposited in the file or entered in the register.

5. The documents and particulars may be relied on by the company as against third parties only after they have been published in accordance with paragraph 4, unless the company proves that the third parties had knowledge thereof. However, with regard to transactions taking place before the sixteenth day following the publication, the documents and particulars shall not be relied on as against third parties who prove that it was impossible for them to have had knowledge thereof.

6. Member States shall take the necessary measures to avoid any discrepancy between what is disclosed by publication in the press and what appears in the register or file.

However, in cases of discrepancy, the text published in the press may not be relied on as against third parties; the latter may nevertheless rely thereon, unless the company proves that they had knowledge of the texts deposited in the file or entered in the register.

7. Third parties may, moreover, always rely on any documents and particulars in respect of which the disclosure formalities have not yet been completed, save where non-disclosure causes them not to have effect.

Article 4

Member States shall prescribe that letters and order forms shall state the following particulars:

- the register in which the file mentioned in Article 3 is kept, together with the number of the company in that register;
- the legal form of the company, the location of its seat and, where appropriate, the fact that the company is being wound up.

Where in these documents mention is made of the capital of the company, the reference shall be to the capital subscribed and paid up.

Article 5

Each Member State shall determine by which persons the disclosure formalities are to be carried out.

Article 6

Member States shall provide for appropriate penalties in case of:

- failure to disclose the balance sheet and profit and loss account as required by Article 2 (1) (f);
- omission from commercial documents of the compulsory particulars provided for in Article 4.

SECTION II

Validity of obligations entered into by a company

Article 7

If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed.

Article 8

Completion of the formalities of disclosure of the particulars concerning the persons who, as an organ of the company, are authorised to represent it shall constitute a bar to any irregularity in their appointment being relied upon as against third parties unless the company proves that such third parties had knowledge thereof.

Article 9

1. Acts done by the organs of the company shall be binding upon it even if those acts are not within

the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof.

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.

3. If the national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on several persons acting jointly, that law may provide that such a provision in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by Article 3.

SECTION III

Nullity of the company

Article 10

In all Member States whose laws do not provide for preventive control, administrative or judicial, at the time of formation of a company, the instrument of constitution, the company statutes and any amendments to those documents shall be drawn up and certified in due legal form.

Article 11

The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:

1. Nullity must be ordered by decision of a court of law;
2. Nullity may be ordered only on the following grounds:
 - (a) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;

- (b) that the objects of the company are unlawful or contrary to public policy;
- (c) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company;
- (d) failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up;
- (e) the incapacity of all the founder members;
- (f) that, contrary to the national law governing the company, the number of founder members is less than two.

Apart from the foregoing grounds of nullity, a company shall not be subject to any cause of non-existence, nullity absolute, nullity relative or declaration of nullity.

Article 12

1. The question whether a decision of nullity pronounced by a court of law may be relied on as against third parties shall be governed by Article 3. Where the national law entitles a third party to challenge the decision, he may do so only within six months of public notice of the decision of the court being given.

2. Nullity shall entail the winding up of the company, as may dissolution.

3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up.

4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.

5. Holders of shares in the capital shall remain obliged to pay up the capital agreed to be subscribed by them but which has not been paid up, to the extent that commitments entered into with creditors so require.

SECTION IV

General provisions

Article 13

Member States shall put into force, within eighteen months following notification of this Directive, all

amendments to their laws, regulations or administrative provisions required in order to comply with provisions of this Directive and shall forthwith inform the Commission thereof.

The obligation of disclosure provided for in Article 2 (1) (f) shall not enter into force until thirty months after notification of this Directive in respect of *naamloze vennootschappen* under Netherlands law other than those referred to in the present Article 42 (c) of the Netherlands Commercial Code.

Member States may provide that initial disclosure of the full text of the statutes as amended since the formation of the company shall not be required until the statutes are next amended or until 31 December 1970, whichever shall be the earlier.

Member States shall ensure that they communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 9 March 1968.

For the Council

The President

M. COUVE de MURVILLE