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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24.9.2008  
COM(2008) 576 final

2008/0182 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and  
Directive 2005/56/EC as regards reporting and documentation requirements in the case  
of merger and divisions**

(presented by the Commission)

{SEC(2008) 2486}

{SEC(2008) 2487}

## EXPLANATORY MEMORANDUM

### **1. CONTEXT OF THE PROPOSAL**

#### **1.1. General context**

In 2006, the Commission adopted an updated simplification programme<sup>1</sup> with a view to measuring administrative costs and reducing administrative burdens that unnecessarily hamper the economic activities of European businesses. The Action Programme and its objective to reduce 25% of administrative burdens by the year 2012 were endorsed by the Spring European Council in March 2007<sup>2</sup>.

As a consequence, the Commission adopted, in July 2007, a communication setting out its proposals for simplifying the areas of company law, accounting and auditing.<sup>3</sup> Furthermore, in March 2007 and April 2008, two fast-track proposals were presented by the Commission in order to achieve a rapid reduction of administrative burdens through minor changes of the EU acquis. The first one was adopted in November 2007.<sup>4</sup> The second proposal<sup>5</sup> that takes up certain elements considered in the July 2007 Communication is still under consideration in the European Parliament and the Council. Other simplification possibilities presented in the Communication and additional proposals received during the consultation process are presented in this proposal.

#### **1.2. Justification and objectives of the initiative**

The objective of the initiative is to contribute to enhancing the competitiveness of EU companies by reducing administrative burdens imposed under the European Company Law Directives where this can be done without major negative impact on other stakeholders.

The initiative focuses on the Third Directive (Council Directive 78/855/EEC<sup>6</sup>) concerning mergers of public limited liability companies and the Sixth Directive (Council Directive 82/891/EEC<sup>7</sup>) concerning the division of public limited liability companies that deal with the modalities of domestic mergers and divisions. In addition, in relation to the Cross-border mergers Directive (Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies<sup>8</sup>) two points need to be aligned with the changes made to the regimes for domestic mergers. Furthermore, mainly technical changes need to be made to Second Directive (Council Directive 77/91/EEC<sup>9</sup>) on coordination 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

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<sup>1</sup> COM(2006)689 final, OJ C 78, 11.4.2007, p. 9

<sup>2</sup> Presidency Conclusions of the Brussels European Council - doc. 7224/07 Concl 1

<sup>3</sup> COM(2007)394, not published in the Official Journal.

<sup>4</sup> Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies, OJ L300, 17.11.2007, p. 47.

<sup>5</sup> COM(2008)194 (not yet published in the Official Journal)

<sup>6</sup> OJ L 295, 20.10.1978, p. 36.

<sup>7</sup> OJ L 378, 31.12.1982, p. 47.

<sup>8</sup> OJ L 310, 25.11.2005, p. 1.

<sup>9</sup> OJ L 26, 31.1.1977, p. 1.

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.

The Third and the Sixth Directives currently contain a number of detailed reporting requirements that companies involved in a merger/division have to comply with and which impose considerable costs on them. In certain situations, the conjunction with the Second Directive can lead to a further increase in costs. Furthermore, the means provided for in the directives to inform shareholders about the details of the transactions were designed 30 years ago and therefore do not take into account today's technological possibilities. This leads to unnecessary costs and an excessive use of paper that can be avoided. Finally, changes in other directives during the last years and in particular to the Second Directive in the area of creditor protection have led to certain inconsistencies between the different directives.

## **2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT**

### **2.1. Consultation of interested parties**

The proposal and the impact assessment that accompanies it are based on a broad consultation process which followed the adoption of the July 2007 Communication.

The Competitiveness Council adopted, on 22 November 2007, conclusions welcoming the simplification initiative.<sup>10</sup> In the European Parliament, a report was adopted on 21 May 2007 that reflects broad support for the initiative to simplify European company law and reduce administrative burdens.<sup>11</sup> With a view to possible further modifications to the Third and the Sixth Directives, the report confirms that more updating is necessary but recalls that the interests of all stakeholders, including investors, owners, creditors and employees, must be duly taken into account and that the harmonisation in that area should not be deprived of substance.

In addition, eighteen Member States' governments, the government of one EEA country and 110 stakeholders reacted to the invitation, in the Communication, to submit comments on the proposals in writing, by mid-October 2007. These contributions from governments and stakeholders originated from 23 countries in total, including 22 Member States. A report on the reactions received from Member States and stakeholders between July and December 2007 is available on the website of the Directorate-General for Internal Market and Services (DG MARKT) at [http://ec.europa.eu/internal\\_market/company/simplification/index\\_en.htm](http://ec.europa.eu/internal_market/company/simplification/index_en.htm).

The High Level Group of Independent Stakeholders, in its report adopted on 10 July 2008, welcomes the efforts by the Commission to review the reporting requirements in the Third and the Sixth Directives and calls for ambitious legislative proposals which realize as much as possible the reduction potential identified for these two directives whilst protecting both shareholders' and creditors' interests.

The main source of information on which the Impact Assessment is based is the large scale measurement of administrative costs, carried out by a consortium of contractors which delivered its complete final report on 31 July 2008. This report is based on the EU Standard

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<sup>10</sup> Council document 15222/07 DRS 48

<sup>11</sup> A6-0101/2008

cost model. Where the measurement could not provide sufficient or representative figures, additional information obtained mainly from Member States was used to supplement or correct the data.

## **2.2. Impact Assessment**

The Impact Assessment shows that there is a significant potential for savings for companies in the areas mentioned above.

### *2.2.1. Reporting requirements*

The reporting requirements in the Third and the Sixth Directives consist of (1) the obligation to produce a written report by the management on the legal and economic grounds of the merger/division; (2) an independent expert's report that examines in particular the proposed share exchange ratio; and (3) an accounting statement where the annual accounts are older than six months at the time the draft terms of merger or division are drawn up. These documents have to be submitted to the general meeting of shareholders that decides on the merger or the division.

With a view to the management report and the accounting statement, the Impact Assessment recommends to introduce the possibility of a unanimous waiver, as was done by Directive 2007/63/EC with a view to the expert's report. This would avoid a negative impact on the interests of the shareholders while achieving some savings for the companies involved.

In addition, it is proposed to abolish the requirement for an accounting statement where the company has set up a half-yearly financial statement under the Transparency Directive<sup>12</sup>.

The total burden savings of these measures are estimated at about 7.12 mio €/year.

### *2.2.2. Measures with a view to companies that are set up or increase their capital in the context of a merger or division*

In cases where the operation is linked to either setting up a new company or an increase in the capital of the receiving company, currently there is a duplication of requirements for experts' reports due to the rules of the Sixth Directives on the one hand and the Second Directive on the other. In the case of mergers and public offers, the Second Directive contains a Member State option to exempt companies from the report on contributions in kind required by that directive.

The Impact Assessment recommends that this Member State option be extended to the cases of divisions. The potential burden savings of these proposed measures are estimated to lie at between 3.26 – 9.43 mio €/year, depending on how many Member States will make use of the option to be granted.

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<sup>12</sup> Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 1

### *2.2.3. Measures concerning simplified mergers and divisions between parent companies and subsidiaries*

Currently, Member States have the possibility to grant exemptions from the need to hold a general meeting and from certain reporting and information requirements where the merger or division take place between parent companies and their subsidiaries. However, only a few of the Member States make full or almost full use of these options.

The conclusion of the Impact Assessment is that Member States should be required to grant the possibility of simplified mergers/divisions to their companies. The potential cost savings, under this option, are estimated to lie around 153.5 mio €year.

### *2.2.4. Publication and documentation duties*

Under the rules of the Third, the Sixth and the Directive on Cross-border Mergers, companies have to file the draft terms of merger or division with the companies register and publish these draft terms in the national gazette or on a central electronic platform. Furthermore, the Third and the Sixth Directives provide that shareholders must be given the possibility to access certain documents at the place of the company's registered office and to receive free copies of these documents. However, today's means of modern information technology allow for an easier and cheaper access to the information and have therefore already been used in more recent directives, such as the Shareholders' rights Directive.<sup>13</sup>

The Impact Assessment therefore recommends allowing companies to use their Internet site for publishing the information. This scenario is estimated to offer a savings potential of over 3.5 mio €year.

### *2.2.5. Protection of creditors*

Recent changes to the Second Directive<sup>14</sup> have, inter alia, led to clarifying the creditor protection rules under that directive in the sense that creditors have to show credibly that an operation concerning the company's capital jeopardises their claims if they want to obtain securities. For reasons of coherence, the Impact Assessment recommends that the rules of the Third and the Sixth Directives be adapted along these lines.

No material impact on companies' costs is expected from this option.

## **3. LEGAL ELEMENTS OF THE PROPOSAL**

### **3.1. Legal Basis**

The legal base for the proposal is Article 44(2)(g) of the Treaty.

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<sup>13</sup> Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p. 17

<sup>14</sup> Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital, OJ L 264, 25.9.2006, p. 32.

### 3.2. Subsidiarity and proportionality

Action at EU level is necessary to deal with these problems because the reporting and documentation requirements addressed in the proposal derive from EU law. In some areas covered by the proposal, Member States already have the possibility to reduce the requirements weighing on companies. However, as shown in the impact assessment accompanying this proposal and in a report on a broad scale measurement of administrative costs carried out for the Commission, a considerable number of Member States so far do not make use of these possibilities, despite of their important potential for cost savings. In order to make sure that all companies can benefit from these alleviations, action at EU level is necessary.

The proposed modifications are limited to what is necessary in order to remove the unnecessary administrative burdens in the areas concerned and are proportionate to this objective.

## 4. SIMPLIFICATION

This proposal is foreseen in the Simplification Rolling Programme for adoption by the Commission in 2008<sup>15</sup>. Significant simplification benefits are being brought about. Reporting requirements are reduced by providing greater flexibility to Member States and companies in order to decide which reports are really needed in each specific case. Rules leading to double reporting are removed, eliminating unnecessary costs to companies. Publication and information duties are adapted to technological developments, which will also have beneficial consequences for the environment. The creditor protection rules in the Third and the Sixth Directives are brought into line with recent changes to the rest of the Company law *acquis*. The total potential burden savings of these measures is estimated to be as high as €172 million per year.

## 5. COMMENTS ON SPECIFIC ARTICLES

### 1. Article 1: Amendment of the Third Directive

1.1. Under point 1, the list of companies to which the Third Directive and – via a reference in its Article 1(1) - also the Sixth Directive apply is adapted in order to reflect a change in the national law of Finland.

1.2. Point 2, introduces an alternative, for companies, to the publication mechanism of the First Directive. Instead of filing the draft terms of merger with the register they can be published on the company's website or another website (in particular where the company has the possibility to use the website e.g. of a business association). However, in order to allow shareholders and other stakeholders to locate the document, a reference and a link have to be published on the central electronic platform that should be introduced as a mandatory tool in Art. 3(4) of the First Directive by the directive that was proposed by Commission proposal of 17 April 2008<sup>16</sup>. With a view to the fact that certain provisions (as for example Art. 13 Third

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<sup>15</sup> COM(2008)33, not published in the Official Journal, p. 23

<sup>16</sup> See footnote 5.

Directive and Art. 12 Sixth Directive with a view to the creditor protection) refer to the date of publication, this date has to be published on the central electronic platform as well.

- 1.3. Point 3 adapts Article 8 (b) to the proposed change in Article 11 (4) according to which also in the case of the other documents that so far do not need to be entered into the register but have to be made available to shareholders, the company can use its Internet site.
- 1.4. Point 4 adapts, in its new paragraph 2, this provision to the parallel provision of Art. 7(3) Sixth Directive according to which the management has the obligation to inform the general meeting about changes that have occurred between the time when the draft terms of merger were drawn up and the time of the general meeting. An exemption from both the reporting requirement established in paragraph 1 of the article as well as the information obligation should apply where shareholders of all companies involved have so agreed.
- 1.5. The changes to Article 11 that are proposed in point 5 aim at ensuring that:
  - A company does not need to set up an accounting statement:
  - where it is subject to the obligation, under the Transparency Directive, to draw up half-yearly financial reports and has effectively done so;
  - where all shareholders agree that they do not need it.
  - That copies of the documents set out in paragraph 1 of that article can also be sent by electronic mail if the shareholder generally has agreed to using this way of communication, e.g. by providing the company with his/her e-mail address. Although the current text does not exclude that the copy be in electronic form, so far is not clear under which conditions the electronic means can be used by the company. Currently, the shareholder could always insist on receiving a paper copy which would not be the case any more if the provision is changed as suggested;
  - That, instead of making the documents available at the place of its registered office, the company can post it on its website. This possibility facilitates the procedure for the company and makes the documents more easily accessible for non-resident shareholders and, where the company allows open access to that site, also for creditors. Where the documents can be downloaded from the site, there is also no need to provide for a right of shareholders to obtain an individual copy, taking into account that the process of sending (even in electronic form) creates unnecessary costs to the company.
- 1.6. In point 6, it is proposed to align the mechanism of the creditor protection under the Third Directive with the mechanism that was introduced into the Second Directive by Directive 2006/68/EC.
- 1.7. Point 7 is the consequence of the proposal, in Article 4(2) and (3), to centralise all provisions on exemptions from the reporting requirement under the Second Directive in that directive itself.

1.8. Points 8 to 12 aim at making the current Member State options, in Articles 24 to 29 Third Directive, to allow for simplified mergers mandatory for Member States. Point 11, furthermore, aims at simplifying the current wording of Article 27.

## 2. Article 2: Amendment of the Sixth Directive

Most modifications that are proposed in this article mirror those proposed for the Third Directive. For the explanation of the changes, reference therefore can be made to point 1 above. Only on the possibility of shareholders to waive the reporting requirements, the technique of the proposals under points 3 and 5 (with a view to Article 9(1)(c)) differs slightly from that used in the case of the Third Directive, given that in the Sixth Directive, these possibilities for waivers are centralised in Article 10.

Furthermore, under point 8, it is proposed to delete point (c) of Article 20, taking into account that in the situation described by Article 20 all shareholders are involved in the establishment of the draft terms of division. Therefore, there is no need to provide them with the minority right to call for a general meeting, as currently the case.

## 3. Article 3: Amendment of the Cross-border mergers Directive

Point 1 of Article 3 mirrors the changes proposed for the Third and the Sixth Directives with a view to the disclosure of the draft terms of merger.

The addition, to Article 15(2) proposed in point 2 aims at taking account of the fact that, with the changes proposed in Article 1 and 2, Member States, in future, should not be able any more to require the reports referred to in that provision in all cases.

## 4. Article 4: Amendment of the Second Directive

4.1. Point 1 contains the same change as the one proposed for the Third Directive.

4.2. Points 2 and 3 aim at centralising the exemption possibility, for Member States, from the requirement for an expert report on contributions in-kind in the Second Directive. At the same time, also an exemption possibility with a view to divisions is proposed, in order to align these rules with those on mergers. Although there is no obligation, in the directives on mergers and divisions, to make the expert reports required by these directives available to creditors (contrary to the report referred to in Article 10 Second Directive) creditors will in practice have access to it, in particular where the report is posted on the internet.

However, where shareholders make use of the possibility to waive the expert report under the Third, the Sixth or the Cross-border mergers Directive the obligation to draw up a report on the contribution in-kind should continue to apply, in order to allow for a sufficient degree of creditor protection.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of merger and divisions**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(2) thereof,

Having regard to the proposal from the Commission<sup>17</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>18</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>19</sup>,

Whereas:

- (1) The European Council agreed, at its meeting on 8 and 9 March 2007, that administrative burdens on companies should be reduced by 25% by the year 2012 in order to enhance the competitiveness of companies in the Community.
- (2) Company law has been identified as one area that contains a high number of information obligations for companies, some of which seem outdated or excessive. It is therefore appropriate to review those obligations and, where appropriate, to reduce the burdens weighing on companies within the Community to the minimum that is necessary to ensure the protection of the interests of other stakeholders.
- (3) The scope of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination 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<sup>20</sup> and of the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of

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<sup>17</sup> OJ C , , p. .

<sup>18</sup> OJ C , , p. .

<sup>19</sup> OJ C , , p. .

<sup>20</sup> OJ L 26, 31.1.1977, p. 1.

public limited liability companies<sup>21</sup> should be adapted in order to reflect changes in the company law of Finland.

- (4) Company websites offer, in certain cases, an alternative to the publication using the companies registers. Companies should therefore have the possibility to use their websites for the publication of the draft terms of mergers and division and of other documents that have to be made available to shareholders and creditors in the process.
- (5) There is no need to impose the requirement to draw up an accounting statement in cases where an issuer of listed securities publishes half-yearly financial statements, in accordance with the rules of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC<sup>22</sup>.
- (6) An independent expert report as provided for under Directive 77/91/EEC is often not needed where an expert report has to be drawn up also under the rules of Directive 78/855/EEC and the Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies<sup>23</sup>. Member States should therefore have the possibility to dispense companies from the reporting requirement under the Second Directive in these cases or to provide that both reports may be established by the same expert.
- (7) Mergers between parent companies and their subsidiaries have a reduced economic impact on shareholders and creditors. The same applies to certain divisions, in particular when companies are split in new companies that are owned by the shareholders in the proportion to their rights in the company being divided. In these cases, the reporting requirements deriving from Directives 78/855/EEC and 82/891/EEC should therefore be reduced.
- (8) Since the objectives of this Directive, namely reducing administrative burdens relating in particular to publication and documentation obligations of public-limited liability companies within the Community, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (9) Directives 77/91/EEC, 78/855/EEC, 82/891/EEC and 2005/56/EC should therefore be amended accordingly,

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<sup>21</sup> OJ L 295, 20.10.1978, p. 36.

<sup>22</sup> OJ L 390, 31.12.2004, p. 38

<sup>23</sup> OJ L 378, 31.12.1982, p. 47.

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*  
*Amendments to Directive 78/855/EEC*

Directive 78/855/EC is amended as follows:

1. In Article 1(1), the fourteenth indent is replaced by the following. "- Finland: julkinen osakeyhtiö/publikt aktiebolag".

2. In Article 6, the following paragraph is added:

Such publication shall not be required from a company if, for a continuous period beginning not later than one month before the day fixed for the general meeting, it makes available the draft terms of merger on its own or on any other Internet site. Where a company makes use of this possibility it shall publish a reference that gives access to that Internet site on the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. That reference shall include the date of the publication of the draft terms of merger on the Internet site."

3. In Article 8 the following paragraph is added:

"For the purposes of point (b) of the first paragraph, Article 11(2), (3) and (4) shall apply;"

4. Article 9 is replaced by the following:

"Article 9

1. The administration or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio.

The report shall also describe any special valuation difficulties which have arisen.

2. The administrative or management bodies of each of the companies involved shall inform the general meeting of their company and the administrative or management bodies of the other companies involved so that they can inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of merger and the date of the general meetings which are to decide on the draft terms of merger.

3. The report referred to in paragraph 1 and the information referred to in paragraph 2 shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed."

5. Article 11 is amended as follows:

(a) Paragraph 1 is amended as follows:

- (i) Point (d) is replaced by the following:
  - "(d) where applicable, the reports of the administrative or management bodies of the merging companies provided for in Article 9;"
- (ii) the following subparagraph is added:

"For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required in any of the following situations:

  - (a) if the company publishes a half-yearly financial report, in accordance with Article 5 of Directive 2004/109/EC, and makes it available to shareholders, in accordance with this paragraph;
  - (b) if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed;"
- (b) In paragraph 3, the following subparagraph is added:

"Where a shareholder has consented to the use, by the company, of electronic means for conveying information, copies may be provided by electronic mail."
- (c) The following paragraph 4 is added:

"4. A company shall not be required to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning not later than one month before the day fixed for the general meeting, it makes them available on its Internet site.

Paragraph 3 shall not apply if the Internet site gives shareholders the possibility to save an electronic copy of the documents referred to in paragraph 1, throughout the period referred to in paragraph 1."
- 6. Paragraph 2 of Article 13 is replaced by the following:

"2. To this end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the proposed merger the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company."
- 7. In Article 23, paragraph 4 is deleted.
- 8. Article 24 is amended as follows:
  - (a) The second sentence is replaced by the following:

"Such operations shall be regulated by the provisions of Chapter II."

- (b) The following sentence is added:

"However, Member States may not impose the requirements set out in Articles 5 (2) (b), (c) and (d), 9, 10, 11 (1) (d) and (e), 19 (1) (b), 20 and 21."

9. Article 25 is amended as follows:

- (a) The introductory phrase is replaced by the following:

"Member States shall not require approval of a merger pursuant to Article 24 by the general meeting if the following conditions are fulfilled:"

- (b) In point (b), the second sentence is deleted;

- (c) The following paragraph is added:

"For the purposes of point (b) of the first paragraph, Article 11 (2), (3) and (4) shall apply."

10. Articles 26 and 27 are replaced by the following:

#### "Article 26

"Articles 24 and 25 shall apply to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if all the shares and other securities specified in Article 24 of the company or companies being acquired are held by the acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

#### Article 27

In cases of merger where one or more companies are acquired by another company which holds 90 % or more, but not all, of the shares and other securities of each of those companies the holding of which confers the right to vote at general meetings, the Member States shall not require approval of the merger by the general meeting of the acquiring company if the conditions set out in Article 8 (a), (b) and (c) are fulfilled."

11. In Article 28, the introductory sentence is replaced by the following: "The Member States may not impose the requirements set out in Articles 9, 10 and 11 in the case of a merger within the meaning of Article 27 if the following conditions are fulfilled:"

12. Article 29 is replaced by the following:

#### "Article 29

Articles 27 and 28 shall apply to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if 90 % or more, but not all, of the shares and other securities

referred to in Article 27 of the company or companies being acquired are held by that acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company."

*Article 2*  
*Amendments to Directive 82/891/EEC*

Directive 82/891/EEC is amended as follows:

1. In Article 4, the following paragraph is added:

"Such publication shall not be required from a company if, for a continuous period beginning not later than one month before the day fixed for the general meeting, it makes available the draft terms of division on its own or on any other Internet site. Where a company makes use of this possibility it shall publish a reference that gives access to that Internet site on the central electronic platform referred to in Article 3 (4) of Directive 68/151/EEC. That reference shall include the date of the publication of the draft terms of division on the Internet site."

2. In Article 6, the following paragraph is added:

"For the purposes of point (b) of the first paragraph, Article 9 (2), (3) and (4) shall apply;"

3. In Article 7(2), the second subparagraph is replaced by the following:

"Where applicable, it shall disclose the preparation of the report on the consideration other than in cash referred to in Article 27 (2) of Directive 77/91/EEC for recipient companies and the register where that report must be lodged."

4. In Article 8, paragraph 3 is deleted.

5. Article 9 is amended as follows:

- (a) In paragraph 1, the following subparagraph is added:

"For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report, in accordance with Article 5 of Directive 2004/109/EC, and makes it available to shareholders, in accordance with this paragraph;"

- (b) In paragraph 3, the following subparagraph is added:

"Where a shareholder has consented to the use, by the company, of electronic means for conveying information, the company may provide the copies by electronic mail."

- (c) The following paragraph 4 is added:

"4. A company shall not be required to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning not

later than one month before the day fixed for the general meeting, it makes them available on its Internet site.

Paragraph 3 shall not apply if the Internet site gives shareholders the possibility to save an electronic copy of the documents referred to in paragraph 1, throughout the period referred to in paragraph 1."

6. Article 10 is replaced by the following:

"Article 10

The requirements set out in Articles 7 and 8, in points (c), (d) and (e) of Article 9(1) and in Article 9(2) and (3) shall not apply if all the shareholders and the holders of other securities giving the right to vote of the companies involved in a division have so agreed."

7. Paragraph 2 of Article 12 is replaced by the following:

"2. To this end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the proposed division the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company."

8. Article 20 is amended as follows:

- (a) The introductory sentence is replaced by the following:

"Without prejudice to Article 6, Member States shall not require approval of the division by the general meeting of the company being divided if the recipient companies together hold all the shares of the company being divided and the following conditions are fulfilled:"

- (b) In point (b), the second sentence is deleted;

- (c) Point (c) is deleted;

- (d) The following paragraph is added:

"For the purposes of point (b) of the first paragraph, Article 9 (2), (3) and (4) and Article 10 shall apply."

9. Article 22 is amended as follows:

- (a) Paragraph 4 is deleted;

- (b) Paragraph 5 is replaced by the following:

"5. Member States shall not impose the requirements set out in Articles 7, 8 and 9 (1) (c), (d) and (e) where the shares in each of the new companies are allocated to the shareholders of the company being divided in proportion to their rights in the capital of that company."

*Article 3*  
*Amendments to Directive 2005/56/EC*

1. In Article 6(1), the following subparagraph is added:

"A publication in accordance with the first subparagraph shall not be required from a company if, for a continuous period beginning not later than one month before the day fixed for the general meeting, the company makes available the draft terms of merger on its own or on any other Internet site. Where a company makes use of this possibility it shall publish a reference that gives access to that Internet site on the central electronic platform referred to in Article 3 (4) of Directive 68/151/EEC. The reference shall include the date of the publication of the draft terms of merger on the Internet site."

2. In Article 15, paragraph 2 is replaced by the following:

"2. Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company being acquired so requires, in accordance with Directive 78/855/EEC."

*Article 4*  
*Amendments to Directive 77/91/EEC*

Directive 77/91/EEC is amended as follows:

1. In Article 1(1), the fourteenth indent is replaced by the following. "- in Finland: julkinen osakeyhtiö/publikt aktieföretag".
2. In Article 10, the following paragraph 5 is added:

"5. Member States may decide not to apply this Article to the formation of a new company by way of merger or division where an expert report under Article 10 of Council Directive 78/855/EEC<sup>24</sup>, Article 8 of Council Directive 82/891/EEC<sup>25</sup> or

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<sup>24</sup> OJ L 295, 20.10.1978, p. 36.

<sup>25</sup> OJ L 378, 31.12.1982, p. 47.

Article 8 of Directive 2005/56/EC of the European Parliament and the Council<sup>26</sup> is established.

Where Member States decide to apply this Article in the cases referred to in the first subparagraph, they may provide that the report under this Article and the report under Article 10 of Directive 78/855/EEC, the report under Article 8 of Directive 82/891/EEC or the report under Article 8 of Directive 2005/56/EC of the European Parliament and the Council may be drawn up by the same expert or experts."

3. In Article 27, paragraph 3 is replaced by the following:

"3. Member States may decide not to apply paragraph 2 in the event of an increase in subscribed capital made in order to give effect to a merger, a division or a public offer for the purchase or exchange of shares and to pay the shareholders of the company which is being absorbed, divided or which is the object of the public offer for the purchase or exchange of shares.

However, in the cases of a merger or a division, this shall only apply where an expert report under Article 10 of Directive 78/855/EEC, Article 8 of Directive 82/891/EEC or Article 8 of Directive 2005/56/EC is drawn up.

Where Member States decide to apply paragraph 2 in the case of a merger or a division, they may provide that the report under this Article and the report under Article 10 of Directive 78/855/EEC, the report under Article 8 of Directive 82/891/EEC or the report under Article 8 of Directive 2005/56/EC of the European Parliament and the Council may be drawn up by the same expert or experts."

#### *Article 5* *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2011 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

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<sup>26</sup> OJ L 310, 25.11.2005, p. 1

*Article 6*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 7*

This Directive is addressed to the Member States.

Done at Brussels, [...]

*For the European Parliament*  
*The President*

*For the Council*  
*The President*