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COM(2010) 388 final

2008/0173 (COD)

Amended proposal for a

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

**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 54 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**

(Codification)

## EXPLANATORY MEMORANDUM

1. On 16 September 2008, the Commission presented a proposal for a Directive of the European Parliament and of the Council codifying 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>1</sup>.
2. In its opinion of 16 October 2008 the Consultative Working Party of the legal services set up under the Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts<sup>2</sup> stated that the proposal referred to in point 1 does indeed confine itself to straightforward codification, without any substantive changes to the acts covered by it.
3. Having regard to the amendments adopted<sup>3</sup> in respect of the proposal referred to in point 1 and in view of the work already carried out in the course of the legislative procedure, the Commission has decided to present – in accordance with Article 293(2) of the TFEU – an amended proposal for codification of the Directive in question.

This amended proposal also takes account of the purely formal or editorial changes proposed by the Consultative Working Party of the legal services, where these are considered justified<sup>4</sup>.

4. The changes made in this amended proposal, compared with the proposal referred to in point 1, are the following:
  - (1) In recitals 2 and 11, the references to "*Article 44(2)(g) of the Treaty*" are replaced by references to "*Article 50(2)(g) of the Treaty*".
  - (2) In recital 4, the word "*Community*" is replaced by "*Union*".
  - (3) In recital 5, the words "*Community provisions*" are replaced by the words "*Union provisions*".
  - (4) In recital 8, the reference to "*Directive 68/151/EEC*" is replaced by a reference to "*Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent*".
  - (5) In recital 9, the words "*another company such as referred to in the preceding recital*" are replaced by "*another company such as referred to in recital 7*".

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<sup>1</sup> COM(2008) 544 final.

<sup>2</sup> OJ C 102, 4.4.1996, p. 2.

<sup>3</sup> OJ L 259, 2.10.2009, p. 14.

<sup>4</sup> Cf. the opinion of the Consultative Working Party of 16.10.2008.

- (6) In recital 10, the final wording "*the possibility that the objectives of this Directive may be endangered*" is replaced by "*the possibility that the attainment of the objectives of this Directive may be endangered*".
- (7) In Article 1(2) and in point (a) of the third subparagraph of Article 17(7), the reference to "*Article 4 of Directive 68/151/EEC*" is replaced by a reference to "*Article 5 of Directive 2009/101/EC*".
- (8) In Article 2(d), the reference to "*Article 2(1)(e) of Directive 68/151/EEC*" is replaced by a reference to "*Article 2(e) of Directive 2009/101/EC*".
- (9) In the introductory wording of Article 3, in Article 10(3), in the second subparagraph of Article 12(1) and (2), in the third subparagraph of Article 25(3), in the first and second subparagraphs of Article 28(1), in Article 29(1), in Article 33(3) and (4), in the first paragraph of Article 34, in Article 39(a), in Article 40(1)(e) and in Article 43(h), the reference to "*Directive 68/151/EEC*" is replaced by a reference to "*Directive 2009/101/EC*".
- (10) In Article 6(2), the word "*Community*" is replaced by "*Union*".
- (11) In Article 10, the following paragraph 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 a report by one or more independent experts on the draft terms of merger or division is drawn up.*
- 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 by one or more independent experts on the draft terms of merger or division may be drawn up by the same expert or experts."*
- (12) In Article 11(3), second subparagraph, the word "*fourth*" is replaced by the word "*fifth*".
- (13) In Article 28(3), (4) and (5), the initial wording "*Member States need not apply paragraph 1*" is replaced by "*Member States need not apply the first and second subparagraphs of paragraph 1*".
- (14) In Article 31, 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 or divided or which is the object of the public offer for the purchase or exchange of shares.*
- In the case of a merger or a division, however, Member States shall apply the first subparagraph only where a report by one or more independent experts on the draft terms of merger or division 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 by one or more independent experts on the draft terms of merger or division may be drawn up by the same expert or experts."*

(15) In Article 39(b), in Article 40(1)(d), in Article 41(2) and in Article 43(d) and (g), the reference to "Article 17(1) and (2)" is replaced by a reference to "Article 17(1) to (4)".

(16) In Article 40(1)(a), the words "*subscription of*" are deleted.

(17) In Article 45(1), the reference to "Article 9(1)" is replaced by a reference to "*the first paragraph of Article 9*".

(18) In Article 47, paragraph 2 is replaced by the following:

*"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."*

(19) The wording of Article 49 is replaced by the following:

*"This Directive shall enter into force on 1 July 2011."*

(20) In Annex I, the indent relating to Finland is replaced by the following:

*"Finland: julkinen osakeyhtiö/publikt aktiebolag;"*

(21) In Annex II, Part A, the following entry is added:

*"Directive 2009/109/EC of the European Parliament and of the Council (OJ L 259, 2.10.2009, p. 14) / Article 1 only"*

(22) In Annex II, Part B, the date of 1 January 1994 appearing next to the entry "92/101/EEC" is replaced by 31 December 1993.

(23) In Annex II, Part B, the following entry is added:

*"2009/109/EC / 30 June 2011"*

5. To facilitate reading and examination, the full text of the amended proposal for codification is attached hereto.

Amended proposal for a

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

**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 54 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**

(Codification)  
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 50(2)(g) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>5</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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<sup>5</sup> OJ C [...], [...], p. [...].



- (1) 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>6</sup> has been substantially amended several times<sup>7</sup>. In the interests of clarity and rationality the said Directive should be codified.

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↓ 77/91/EEC recital 1 (adapted)

- (2) The coordination provided for in Article 50(2) (g) of the Treaty and in the General Programme for the abolition of restrictions on freedom of establishment, which was begun by First Council Directive 68/151/EEC of 9 March 1968 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, with a view to making such safeguards equivalent throughout the Community<sup>8</sup>, is especially important in relation to public limited liability companies, because their activities predominate in the economy of the Member States and frequently extend beyond their national boundaries.

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↓ 77/91/EEC recital 2

- (3) In order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important.

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↓ 77/91/EEC recital 3 (adapted)

- (4) In the Union, the statutes or instrument of incorporation of a public limited liability company must make it possible for any interested person to acquaint himself with the basic particulars of the company, including the exact composition of its capital.

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<sup>6</sup> OJ L 26, 31.1.1977, p. 1.

<sup>7</sup> See Annex II, Part A.

<sup>8</sup> OJ L 65, 14.3.1968, p. 8.

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↓ 77/91/EEC Recital 4 (adapted)

- (5)  Union  provisions  are necessary  for maintaining the capital, which constitutes the creditors' security, in particular by prohibiting any reduction thereof by distribution to shareholders where the latter are not entitled to it and by imposing limits on the company's right to acquire its own shares.

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↓ 92/101/EEC recital 2

- (6) The restrictions on a company's acquisition of its own shares apply not only to acquisitions made by a company itself but also to those made by any person acting in his own name but on the company's behalf.

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↓ 92/101/EEC recital 3

- (7) In order to prevent a public limited liability company from using another company in which it holds a majority of the voting rights or on which it can exercise a dominant influence to make such acquisitions without complying with the restrictions imposed in that respect, the arrangements governing a company's acquisition of its own shares should be extended to cover the most important and most frequent cases of the acquisition of shares by such other companies. Those arrangements should be extended to cover subscription for shares in the public limited liability company.

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↓ 92/101/EEC recital 4 (adapted)

- (8) In order to prevent the circumvention of  this Directive,  companies governed by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent<sup>9</sup> and companies governed by the laws of third countries and having comparable legal forms should also be covered  by the arrangements referred to in recital 7 .

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↓ 92/101/EEC recital 5

- (9) Where the relationship between a public limited liability company and another company such as referred to in recital 7 is only indirect, it would appear to be justified to relax the provisions applicable when that relationship is direct by providing for the suspension of voting rights as a minimum measure for the purpose of achieving the aims of this Directive.

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<sup>9</sup> OJ L 258, 1.10.2009, p. 11.



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↓ 92/101/EEC recital 7 (adapted)

- (10) Furthermore, it is justifiable to exempt cases in which the specific nature of a professional activity rules out the possibility that ☒ the attainment of ☒ the objectives of this Directive may be endangered.
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↓ 77/91/EEC recital 5 (adapted)

- (11) It is necessary, having regard to the objectives of Article ☒ 50(2) ☒ (g) ☒ of the Treaty ☒, that the Member States' laws relating to the increase or reduction of capital ensure that the principles of equal treatment of shareholders in the same position and of protection of creditors whose claims exist prior to the decision on reduction are observed and harmonised.
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↓ 2006/68/EC recital 6

- (12) In order to enhance standardised creditor protection in all Member States, creditors should be able to resort, under certain conditions, to judicial or administrative proceedings where their claims are at stake as a consequence of a reduction in the capital of a public limited liability company.
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↓ 2006/68/EC recital 7

- (13) In order to ensure that market abuse is prevented, Member States should take into account, for the purpose of implementation of this Directive, the provisions of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>10</sup>, Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments<sup>11</sup> and Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions<sup>12</sup>.

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<sup>10</sup> OJ L 96, 12.4.2003, p. 16.

<sup>11</sup> OJ L 336, 23.12.2003, p. 33.

<sup>12</sup> OJ L 162, 30.4.2004, p. 70.



(14) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex II, Part B,

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↓ 77/91/EEC (adapted)

HAVE ADOPTED THIS DIRECTIVE:

#### *Article 1*

1. The coordination measures prescribed by this Directive shall apply to the provisions laid down by law, regulation or administrative action in Member States relating to the types of company ☒ listed in Annex I ☒ .

The name for any company of the types ☒ listed in Annex I ☒ shall comprise or be accompanied by a description which is distinct from the description required of other types of companies.

2. The Member States may decide not to apply this Directive to investment companies with variable capital and to cooperatives incorporated as one of the types of company listed in ☒ Annex I ☒. In so far as the laws of the Member States make use of this option, they shall require such companies to include the words ‘investment company with variable capital’, or ‘cooperative’ in all documents indicated in Article 5 of Directive 2009/101/EC.

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↓ 77/91/EEC

The expression ‘investment company with variable capital’, within the meaning of this Directive, means only those companies:

- the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets,
- which offer their own shares for subscription by the public, and
- the statutes of which provide that, within the limits of a minimum and maximum capital, they may at any time issue, redeem or resell their shares.

#### *Article 2*

The statutes or the instrument of incorporation of the company shall always give at least the following information:

- (a) the type and name of the company;

- (b) the objects of the company;
- (c) when the company has no authorised capital, the amount of the subscribed capital;
- (d) when the company has an authorised capital, the amount thereof and also the amount of the capital subscribed at the time the company is incorporated or is authorised to commence business, and at the time of any change in the authorised capital, without prejudice to Article 2(e) of Directive 2009/101/EC;
- (e) in so far as they are not legally determined, the rules governing the number of and the procedure for appointing members of the bodies responsible for representing the company with regard to third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies;
- (f) the duration of the company, except where this is indefinite.

### *Article 3*

The following information at least must appear in either the statutes or the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC:

- (a) the registered office;
- (b) the nominal value of the shares subscribed and, at least once a year, the number thereof;
- (c) the number of shares subscribed without stating the nominal value, where such shares may be issued under national law;
- (d) the special conditions, if any, limiting the transfer of shares;
- (e) where there are several classes of shares, the information referred to in points (b), (c) and (d) for each class and the rights attaching to the shares of each class;
- (f) whether the shares are registered or bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;
- (g) the amount of the subscribed capital paid up at the time the company is incorporated or is authorised to commence business;
- (h) the nominal value of the shares or, where there is not nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing this consideration;
- (i) the identity of the natural or legal persons or companies or firms by whom or in whose name the statutes or the instrument of incorporation, or where the company was not formed at the same time, the drafts of these documents, have been signed;

- (j) the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of its formation and, where appropriate, before the company is authorised to commence business;
- (k) any special advantage granted, at the time the company is formed or up to the time it receives authorisation to commence business, to anyone who has taken part in the formation of the company or in transactions leading to the grant of such authorisation.

#### *Article 4*

1. Where the laws of a Member State prescribe that a company may not commence business without authorisation, they shall also make provision for responsibility for liabilities incurred by or on behalf of the company during the period before such authorisation is granted or refused.
2. Paragraph 1 shall not apply to liabilities under contracts concluded by the company conditionally upon its being granted authorisation to commence business.

#### *Article 5*

1. Where the laws of a Member State require a company to be formed by more than one member, the fact that all the shares are held by one person or that the number of members has fallen below the legal minimum after incorporation of the company shall not lead to the automatic dissolution of the company.
2. If, in the cases referred to in paragraph 1, the laws of a Member State permit the company to be wound up by order of the court, the judge having jurisdiction must be able to give the company sufficient time to regularise its position.

↓ 77/91/EEC (adapted)  
 →<sub>1</sub> Act of Accession of 1994  
 Art. 29 and Annex I, p. 194

3. Where a winding up order ☒ as referred to in paragraph 2 ☒ is made the company shall enter into liquidation.

#### *Article 6*

1. The laws of the Member States shall require that, in order that a company may be incorporated or obtain authorisation to commence business, a minimum capital shall be subscribed the amount of which shall be not less than →<sub>1</sub> ☒ EUR ☒ ← 25 000.
2. Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amount expressed in ☒ paragraph 1 ☒ in →<sub>1</sub> ☒ euro ☒ ← in the light of economic and monetary trends in the ☒ Union ☒ and of the tendency towards allowing only large and medium-sized undertakings to opt for the types of company listed in ☒ Annex I ☒.

*Article 7*

The subscribed capital may be formed only of assets capable of economic assessment. However, an undertaking to perform work or supply services may not form part of these assets.

*Article 8*

Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par.

However, Member States may allow those who undertake to place shares in the exercise of their profession to pay less than the total price of the shares for which they subscribe in the course of this transaction.

*Article 9*

Shares issued for a consideration must be paid up at the time the company is incorporated or is authorised to commence business at not less than 25% of their nominal value or, in the absence of a nominal value, their accountable par.

However, where shares are issued for a consideration other than in cash at the time the company is incorporated or is authorised to commence business, the consideration must be transferred in full within five years of that time.

*Article 10*

1. A report on any consideration other than in cash shall be drawn up before the company is incorporated or is authorised to commence business, by one or more independent experts appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.

2. The experts' report  referred to in paragraph 1  shall contain at least a description of each of the assets comprising the consideration as well as of the methods of valuation used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them.

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↓ 77/91/EEC

3. The experts' report shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 2009/101/EC.

4. Member States may decide not to apply this Article where 90% of the nominal value, or where there is no nominal value, of the accountable par, of all the shares is issued to one or more companies for a consideration other than in cash, and where the following requirements are met:

- (a) with regard to the company in receipt of such consideration, the persons referred to in Article 3(i) have agreed to dispense with the experts' report;
- (b) such agreement has been published as provided for in paragraph 3;
- (c) the companies furnishing such consideration have reserves which may not be distributed under the law or the statutes and which are at least equal to the nominal value or, where there is no nominal value, the accountable par of the shares issued for consideration other than in cash;
- (d) the companies furnishing such consideration guarantee, up to an amount equal to that indicated in point (c), the debts of the recipient company arising between the time the shares are issued for a consideration other than in cash and one year after the publication of that company's annual accounts for the financial year during which such consideration was furnished; any transfer of these shares is prohibited within this period;
- (e) the guarantee referred to in point (d) has been published as provided for in paragraph 3;
- (f) the companies furnishing such consideration shall place a sum equal to that indicated in point (c) into a reserve which may not be distributed until three years after publication of the annual accounts of the recipient company for the financial year during which such consideration was furnished or, if necessary, until such later date as all claims relating to the guarantee referred to in point (d) which are submitted during this period have been settled.

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↓ 2009/109/EC Art. 1 pt. 2  
(adapted)

5. Member States may decide not to apply this Article to the formation of a new company by way of merger or division where  a'  report  by one or more independent experts  on the draft terms of merger or division is drawn up.

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  by one or more independent experts  on the draft terms of merger or division may be drawn up by the same expert or experts.

*Article 11*

1. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, transferable securities as defined in point 18 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council<sup>13</sup> or money-market instruments as defined in point 19 of Article 4(1) of that Directive are contributed as consideration other than in cash, and those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated market(s) as defined in point 14 of Article 4(1) of that Directive during a sufficient period, to be determined by national law, preceding the effective date of the contribution of the respective consideration other than in cash.

However, where that price has been affected by exceptional circumstances that would significantly change the value of the asset at the effective date of its contribution, including situations where the market for such transferable securities or money-market instruments has become illiquid, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of the aforementioned revaluation, Article 10(1), (2) and (3) shall apply.

2. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognised independent expert and where the following conditions are fulfilled:

- (a) the fair value is determined for a date not more than six months before the effective date of the asset contribution;
- (b) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State, which are applicable to the kind of assets to be contributed.

In the case of new qualifying circumstances that would significantly change the fair value of the asset at the effective date of its contribution, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of the aforementioned revaluation, Article 10(1), (2) and (3) shall apply.

In the absence of such a revaluation, one or more shareholders holding an aggregate percentage of at least 5% of the company's subscribed capital on the day the decision on the increase in the capital is taken may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply.

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<sup>13</sup> OJ L 145, 30.4.2004, p. 1.

Such shareholder(s) may submit a demand up until the effective date of the asset contribution, provided that, at the date of the demand, the shareholder(s) in question still hold(s) an aggregate percentage of at least 5% of the company's subscribed capital, as it was on the day the decision on the increase in the capital was taken.

3. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as consideration other than in cash whose fair value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been subject to an audit in accordance with Directive 2006/43/EC of the European Parliament and of the Council<sup>14</sup>.

The second to fifth subparagraphs of paragraph 2 of this Article shall apply *mutatis mutandis*.

## Article 12

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↓ 2006/68/EC Art. 1 pt. 2  
(adapted)

1. Where consideration other than in cash as referred to in Article 11 occurs without an  experts'  report as referred to in Article 10(1), (2) and (3), in addition to the requirements set out in point (h) of Article 3 and within one month after the effective date of the asset contribution, a declaration containing the following shall be published:

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↓ 2006/68/EC Art. 1 pt. 2

- (a) a description of the consideration other than in cash at issue;
- (b) its value, the source of this valuation and, where appropriate, the method of valuation;
- (c) a statement whether the value arrived at corresponds at least to the number, to the nominal value or, where there is no nominal value, the accountable par and, where appropriate, to the premium on the shares to be issued for such consideration;
- (d) a statement that no new qualifying circumstances with regard to the original valuation have occurred.

That publication shall be effected in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC.

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<sup>14</sup> OJ L 157, 9.6.2006, p. 87.



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↓ 2006/68/EC Art. 1 pt. 2 (adapted)
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2. Where consideration other than in cash is proposed to be made without an  experts'  report as referred to in Article 10(1), (2) and (3) in relation to an increase in the capital proposed to be made under Article 29(2), an announcement containing the date when the decision on the increase was taken and the information listed in paragraph 1 of this Article shall be published, in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC, before the contribution of the asset as consideration other than in cash is to become effective. In that event, the declaration pursuant to paragraph 1 of this Article shall be limited to the statement that no new qualifying circumstances have occurred since the aforementioned announcement was published.

3. Each Member State shall provide for adequate safeguards ensuring compliance with the procedure set out in Article 11 and in this Article where a contribution for a consideration other than in cash is made without an  experts'  report as referred to in Article 10(1), (2) and (3).

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↓ 77/91/EEC → <sub>1</sub> 2006/68/EC Art. 1 pt. (3)(a) → <sub>2</sub> 2006/68/EC Art. 1 pt. (3)(b)
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### Article 13

1. If, before the expiry of a time-limit laid down by national law of at least two years from the time the company is incorporated or is authorised to commence business, the company acquires any asset belonging to a person or company or firm referred to in Article 3 (i) for a consideration of not less than one-tenth of the subscribed capital, the acquisition shall be examined and details of it published in the manner provided for in →<sub>1</sub> Article 10(1), (2) and (3) ← and it shall be submitted for the approval of the general meeting.

→<sub>2</sub> Articles 11 and 12 shall apply *mutatis mutandis*. ←

Member States may also require these provisions to be applied when the assets belong to a shareholder or to any other person.

2. Paragraph 1 shall not apply to acquisitions effected in the normal course of the company's business, to acquisitions effected at the instance or under the supervision of an administrative or judicial authority, or to stock exchange acquisitions.

### Article 14

Subject to the provisions relating to the reduction of subscribed capital, the shareholders may not be released from the obligation to pay up their contributions.

### *Article 15*

Pending coordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 2 to 14 in the event of the conversion of another type of company into a public limited liability company.

### *Article 16*

Articles 2 to 15 shall not prejudice the provisions of Member States on competence and procedure relating to the modification of the statutes or of the instrument of incorporation.

### *Article 17*

1. Except for cases of reductions of subscribed capital, no distribution to shareholders may be made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes.

2. Where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital referred to in paragraph 1.

3. The amount of a distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.

4. The expression "distribution" used in paragraphs (1) and (3) includes in particular the payment of dividends and of interest relating to shares.

5. When the laws of a Member State allow the payment of interim dividends, the following conditions at least shall apply:

- (a) interim accounts shall be drawn up showing that the funds available for distribution are sufficient;
- (b) the amount to be distributed may not exceed the total profits made since the end of the last financial year for which the annual accounts have been drawn up, plus any profits brought forward and sums drawn from reserves available for this purpose, less losses brought forward and sums to be placed to reserve pursuant to the requirements of the law or the statutes.

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↓ 77/91/EEC (adapted)
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6. Paragraphs 1  to 5  shall not affect the provisions of the Member States as regards increases in subscribed capital by capitalisation of reserves.

7. The laws of a Member State may provide for derogation from paragraph 1 in the case of investment companies with fixed capital.

The expression ‘investment company with fixed capital’, within the meaning of this paragraph, means only those companies:

- (a) the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets; and
- (b) which offer their own shares for subscription by the public.

In so far as the laws of Member States make use of this option they shall:

- (a) require such companies to include the expression ‘investment company’ in all documents indicated in Article 5 of Directive 2009/101/EC;
- (b) not permit any such company whose net assets fall below the amount specified in paragraph 1 to make a distribution to shareholders when on the closing date of the last financial year the company's total assets as set out in the annual accounts are, or following such distribution would become, less than one-and-a-half times the amount of the company's total liabilities to creditors as set out in the annual accounts;
- (c) require any such company which makes a distribution when its net assets fall below the amount specified in paragraph 1 to include in its annual accounts a note to that effect.

#### *Article 18*

Any distribution made contrary to Article 17 must be returned by shareholders who have received it if the company proves that those shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.

#### *Article 19*

1. In the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken.

2. The amount of a loss deemed to be serious within the meaning of paragraph 1 may not be set by the laws of Member States at a figure higher than half the subscribed capital.

#### *Article 20*

1. The shares of a company may not be subscribed for by the company itself.

2. If the shares of a company have been subscribed for by a person acting in his own name, but on behalf of the company, the subscriber shall be deemed to have subscribed for them for his own account.

3. The persons or companies or firms referred to in Article 3 (i) or, in cases of an increase in subscribed capital, the members of the administrative or management body shall be liable to pay for shares subscribed in contravention of this Article.

However, the laws of a Member State may provide that any such person may be released from his obligation if he proves that no fault is attributable to him personally.

#### *Article 21*

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↓ 2006/68/EC Art. 1 pt. 4

1. Without prejudice to the principle of equal treatment of all shareholders who are in the same position, and to Directive 2003/6/EC, Member States may permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf. To the extent that the acquisitions are permitted, Member States shall make such acquisitions subject to the following conditions:

- (a) authorisation shall be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and, in particular, the maximum number of shares to be acquired, the duration of the period for which the authorisation is given, the maximum length of which shall be determined by national law without, however, exceeding five years, and, in the case of acquisition for value, the maximum and minimum consideration; members of the administrative or management body shall satisfy themselves that, at the time when each authorised acquisition is effected, the conditions referred to in points (b) and (c) are respected;
- (b) the acquisitions, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not have the effect of reducing the net assets below the amount mentioned in Article 17(1) and (2);
- (c) only fully paid-up shares may be included in the transaction.

Furthermore, Member States may subject acquisitions within the meaning of the first subparagraph to any of the following conditions:

- (i) that the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed a limit to be determined by Member States; this limit may not be lower than 10% of the subscribed capital;
- (ii) that the power of the company to acquire its own shares within the meaning of the first subparagraph, the maximum number of shares to be acquired, the duration of the

period for which the power is given and the maximum or minimum consideration are laid down in the statutes or in the instrument of incorporation of the company;

- (iii) that the company complies with appropriate reporting and notification requirements;
- (iv) that certain companies, as determined by Member States, may be required to cancel the acquired shares provided that an amount equal to the nominal value of the shares cancelled must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves;
- (v) that the acquisition shall not prejudice the satisfaction of creditors' claims.

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↓ 77/91/EEC → <sub>1</sub> 2006/68/EC Art. 1 pt. 5
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2. The laws of a Member State may provide for derogations from the first sentence of paragraph 1(a) where the acquisition of a company's own shares is necessary to prevent serious and imminent harm to the company. In such a case, the next general meeting must be informed by the administrative or management body of the reasons for and nature of the acquisitions effected, of the number and nominal value or, in the absence of a nominal value, the accountable par, of the shares acquired, of the proportion of the subscribed capital which they represent, and of the consideration for these shares.

3. Member States may decide not to apply the first sentence of paragraph 1(a) to shares acquired by either the company itself or by a person acting in his own name but on the company's behalf, for distribution to that company's employees or to the employees of an associate company. Such shares must be distributed within 12 months of their acquisition.

## *Article 22*

1. Member States may decide not to apply Article 21 to:

- (a) shares acquired in carrying out a decision to reduce capital, or in the circumstances referred to in Article 43;
- (b) shares acquired as a result of a universal transfer of assets;
- (c) fully paid-up shares acquired free of charge or by banks and other financial institutions as purchasing commission;
- (d) shares acquired by virtue of a legal obligation or resulting from a court ruling for the protection of minority shareholders in the event, particularly, of a merger, a change in the company's object or form, transfer abroad of the registered office, or the introduction of restrictions on the transfer of shares;
- (e) shares acquired from a shareholder in the event of failure to pay them up;
- (f) shares acquired in order to indemnify minority shareholders in associated companies;

- (g) fully paid-up shares acquired under a sale enforced by a court order for the payment of a debt owed to the company by the owner of the shares;
- (h) fully paid-up shares issued by an investment company with fixed capital, as defined in the second subparagraph of Article 17(7), and acquired at the investor's request by that company or by an associate company. Point (a) of the third subparagraph of Article 17(7) shall apply. These acquisitions may not have the effect of reducing the net assets below the amount of the subscribed capital plus any reserves the distribution of which is forbidden by law.

2. Shares acquired in the cases listed in paragraph 1 (b) to (g) must, however, be disposed of within not more than three years of their acquisition unless the nominal value or, in the absence of a nominal value, the accountable par of the shares acquired, including shares which the company may have acquired through a person acting in his own name but on the company's behalf, does not exceed 10% of the subscribed capital.

3. If the shares are not disposed of within the period laid down in paragraph 2, they must be cancelled. The laws of a Member State may make this cancellation subject to a corresponding reduction in the subscribed capital. Such a reduction must be prescribed where the acquisition of shares to be cancelled results in the net assets having fallen below the amount specified in →<sub>1</sub> Article 17(1) and (2) ←.

#### *Article 23*

Shares acquired in contravention of Articles 21 and 22 shall be disposed of within one year of their acquisition. Should they not be disposed of within that period, Article 22(3) shall apply.

#### *Article 24*

1. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make the holding of these shares at all times subject to at least the following conditions:

- (a) among the rights attaching to the shares, the right to vote attaching to the company's own shares shall in any event be suspended;
- (b) if the shares are included among the assets shown in the balance sheet, a reserve of the same amount, unavailable for distribution, shall be included among the liabilities.

2. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall require the annual report to state at least:

- (a) the reasons for acquisitions made during the financial year;
- (b) the number and nominal value or, in the absence of a nominal value, the accountable par of the shares acquired and disposed of during the financial year and the proportion of the subscribed capital which they represent;
- (c) in the case of acquisition or disposal for a value, the consideration for the shares;

- (d) the number and nominal value or, in the absence of a nominal value, the accountable par of all the shares acquired and held by the company and the proportion of the subscribed capital which they represent.

*Article 25*

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↓ 2006/68/EC Art. 1 pt. 6

1. Where Member States permit a company to, either directly or indirectly, advance funds or make loans or provide security, with a view to the acquisition of its shares by a third party, they shall make such transactions subject to the conditions set out in paragraphs 2 to 5.

2. The transactions shall take place under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company and with regard to security provided to the company for the loans and advances referred to in paragraph 1.

The credit standing of the third party or, in the case of multiparty transactions, of each counterparty thereto shall have been duly investigated.

3. The transactions shall be submitted by the administrative or management body to the general meeting for prior approval, whereby the general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 44.

The administrative or management body shall present a written report to the general meeting, indicating:

- (a) the reasons for the transaction;
- (b) the interest of the company in entering into such a transaction;
- (c) the conditions on which the transaction is entered into;
- (d) the risks involved in the transaction for the liquidity and solvency of the company;  
and
- (e) the price at which the third party is to acquire the shares.

This report shall be submitted to the register for publication in accordance with Article 3 of Directive 2009/101/EC.

4. The aggregate financial assistance granted to third parties shall at no time result in the reduction of the net assets below the amount specified in Article 17(1) and (2), taking into account also any reduction of the net assets that may have occurred through the acquisition, by the company or on behalf of the company, of its own shares in accordance with Article 21(1).

The company shall include, among the liabilities in the balance sheet, a reserve, unavailable for distribution, of the amount of the aggregate financial assistance.

5. Where a third party by means of financial assistance from a company acquires that company's own shares within the meaning of Article 21(1) or subscribes for shares issued in the course of an increase in the subscribed capital, such acquisition or subscription shall be made at a fair price.

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↓ 77/91/EEC

6. Paragraphs 1 to 5 shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, nor to transactions effected with a view to the acquisition of shares by or for the company's employees or the employees of an associate company.

However, these transactions may not have the effect of reducing the net assets below the amount specified in Article 17(1).

7. Paragraphs 1 to 5 shall not apply to transactions effected with a view to acquisition of shares as described in Article 22(1)(h).

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↓ 2006/68/EC Art. 1 pt. 7

#### *Article 26*

In cases where individual members of the administrative or management body of the company being party to a transaction referred to in Article 25(1), or of the administrative or management body of a parent undertaking within the meaning of Article 1 of Council Directive 83/349/EEC<sup>15</sup> or such parent undertaking itself, or individuals acting in their own name, but on behalf of the members of such bodies or on behalf of such undertaking, are counterparties to such a transaction, Member States shall ensure through adequate safeguards that such transaction does not conflict with the company's best interests.

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↓ 77/91/EEC

#### *Article 27*

1. The acceptance of the company's own shares as security, either by the company itself or through a person acting in his own name but on the company's behalf, shall be treated as an acquisition for the purposes of Articles 21, 22(1), 24 and 25.

2. The Member States may decide not to apply paragraph 1 to transactions concluded by banks and other financial institutions in the normal course of business.

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<sup>15</sup> OJ L 193, 18.7.1983, p. 1.



*Article 28*

1. The subscription, acquisition or holding of shares in a public limited liability company by another company within the meaning of Article 1 of Directive 2009/101/EC in which the public limited liability company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence shall be regarded as having been effected by the public limited liability company itself.

The first subparagraph shall also apply where the other company is governed by the law of a third country and has a legal form comparable to those listed in Article 1 of Directive 2009/101/EC.

However, where the public limited liability company holds a majority of the voting rights indirectly or can exercise a dominant influence indirectly, Member States need not apply the first and the second subparagraphs if they provide for the suspension of the voting rights attached to the shares in the public limited liability company held by the other company.

2. In the absence of coordination of national legislation on groups of companies, Member States may:

- (a) define the cases in which a public limited liability company shall be regarded as being able to exercise a dominant influence on another company; if a Member State exercises this option, its national law must in any event provide that a dominant influence can be exercised if a public limited liability company:
  - has the right to appoint or dismiss a majority of the members of the administrative organ, of the management organ or of the supervisory organ, and is at the same time a shareholder or member of the other company, or
  - is a shareholder or member of the other company and has sole control of a majority of the voting rights of its shareholders or members under an agreement concluded with other shareholders or members of that company.

Member States shall not be obliged to make provision for any cases other than those referred to in the first and second indents;

- (b) define the cases in which a public limited liability company shall be regarded as indirectly holding voting rights or as able indirectly to exercise a dominant influence;
- (c) specify the circumstances in which a public limited liability company shall be regarded as holding voting rights.

3. Member States need not apply the first and second subparagraphs of paragraph 1 where the subscription, acquisition or holding is effected on behalf of a person other than the person subscribing, acquiring or holding the shares, who is neither the public limited liability company referred to in paragraph 1 nor another company in which the public limited liability company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence.

4. Member States need not apply the first and second subparagraphs of paragraph 1 where the subscription, acquisition or holding is effected by the other company in its capacity and in the context of its activities as a professional dealer in securities, provided that it is a member of a stock exchange situated or operating within a Member State, or is approved or supervised by an authority of a Member State competent to supervise professional dealers in securities which, within the meaning of this Directive, may include credit institutions.

5. Member States need not apply the first and second subparagraphs of paragraph 1 where shares in a public limited liability company held by another company were acquired before the relationship between the two companies corresponded to the criteria laid down in paragraph 1.

However, the voting rights attached to those shares shall be suspended and the shares shall be taken into account when it is determined whether the condition laid down in point (b) of Article 21(1) is fulfilled.

6. Member States need not apply Article 22(2) or (3) or Article 23 where shares in a public limited liability company are acquired by another company on condition that they provide for:

- (a) the suspension of the voting rights attached to the shares in the public limited liability company held by the other company; and
- (b) the members of the administrative or the management organ of the public limited liability company to be obliged to buy back from the other company the shares referred to in Article 22(2) and (3) and Article 23 at the price at which the other company acquired them; this sanction shall be inapplicable only where the members of the administrative or the management organ of the public limited liability company prove that that company played no part whatsoever in the subscription for or acquisition of the shares in question.

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↓ 77/91/EEC

#### *Article 29*

1. Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 2009/101/EC.

2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with the rules referred to in paragraph 1, may authorise an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.

3. Where there are several classes of shares, the decision by the general meeting concerning the increase in capital referred to in paragraph 1 or the authorisation to increase the capital

referred to in paragraph 2, shall be subject to a separate vote at least for each class of shareholder whose rights are affected by the transaction.

4. This Article shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.

#### *Article 30*

Shares issued for a consideration, in the course of an increase in subscribed capital, must be paid up to at least 25% of their nominal value or, in the absence of a nominal value, of their accountable par. Where provision is made for an issue premium, it must be paid in full.

#### *Article 31*

1. Where shares are issued for a consideration other than in cash in the course of an increase in the subscribed capital the consideration must be transferred in full within a period of five years from the decision to increase the subscribed capital.

2. The consideration referred to in paragraph 1 shall be the subject of a report drawn up before the increase in capital is made by one or more experts who are independent of the company and appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies and firms under the laws of each Member State.

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↓ 2006/68/EC Art. 1 pt. 8

Article 10(2) and (3) and Articles 11 and 12 shall apply.

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↓ 2009/109/EC Art. 1 pt. 3

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 or divided or which is the object of the public offer for the purchase or exchange of shares.

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↓ 2009/109/EC Art. 1 pt. 3  
(adapted)

In the case of a merger or a division, however, Member States shall apply the first subparagraph only where a report  by one or more independent experts  on the draft terms of merger or division 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  by one or more independent experts  on the draft terms of merger or division may be drawn up by the same expert or experts.

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↓ 77/91/EEC

4. Member States may decide not to apply paragraph 2 if all the shares issued in the course of an increase in subscribed capital are issued for a consideration other than in cash to one or more companies, on condition that all the shareholders in the company which receive the consideration have agreed not to have an experts' report drawn up and that the requirements of Article 10(4)(b) to (f) are met.

### *Article 32*

Where an increase in capital is not fully subscribed, the capital will be increased by the amount of the subscriptions received only if the conditions of the issue so provide.

### *Article 33*

1. Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

2. The laws of a Member State:

- (a) need not apply paragraph 1 to shares which carry a limited right to participate in distributions within the meaning of Article 17 and/or in the company's assets in the event of liquidation; or
- (b) may permit, where the subscribed capital of a company having several classes of shares carrying different rights with regard to voting, or participation in distributions within the meaning of Article 17 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the right of pre-emption of shareholders of the other classes to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued.

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↓ 77/91/EEC (adapted)

3. Any offer of subscription on a pre-emptive basis and the period within which this right must be exercised shall be published in the national gazette appointed in accordance with Directive 2009/101/EC. However, the laws of a Member State need not provide for such publication where all  of  a company's shares are registered. In such case, all the company's shareholders must be informed in writing. The right of pre-emption must be exercised within a period which shall not be less than 14 days from the date of publication of the offer or from the date of dispatch of the letters to the shareholders.

4. The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. This may, however, be done by decision of the general meeting. The administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price. The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 44. Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 2009/101/EC.

5. The laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 4, may give the power to restrict or withdraw the right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limit of the authorised capital. This power may not be granted for a longer period than the power for which provision is made in Article 29(2).

6. Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.

7. The right of pre-emption is not excluded for the purposes of paragraphs 4 and 5 where, in accordance with the decision to increase the subscribed capital, shares are issued to banks or other financial institutions with a view to their being offered to shareholders of the company in accordance with paragraphs 1 and 3.

#### *Article 34*

Any reduction in the subscribed capital, except under a court order, must be subject at least to a decision of the general meeting acting in accordance with the rules for a quorum and a majority laid down in Article 44 without prejudice to Articles 40 and 41. Such decision shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC.

The notice convening the meeting must specify at least the purpose of the reduction and the way in which it is to be carried out.

#### *Article 35*

Where there are several classes of shares, the decision by the general meeting concerning a reduction in the subscribed capital shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

### Article 36

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↓ 2006/68/EC Art. 1 pt. 9

1. In the event of a reduction in the subscribed capital, at least the creditors whose claims antedate the publication of the decision on the reduction shall at least have the right to obtain security for claims which have not fallen due by the date of that publication. Member States may not set aside such a right unless the creditor has adequate safeguards, or unless such safeguards are not necessary having regard to the assets of the company.

Member States shall lay down the conditions for the exercise of the right provided for 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 reduction in the subscribed capital the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company.

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↓ 77/91/EEC

2. The laws of the Member States shall also stipulate at least that the reduction shall be void, or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.

3. This Article shall apply where the reduction in the subscribed capital is brought about by the total or partial waiving of the payment of the balance of the shareholders' contributions.

### Article 37

1. Member States need not apply Article 36 to a reduction in the subscribed capital whose purpose is to offset losses incurred or to include sums of money in a reserve provided that, following this operation, the amount of such reserve is not more than 10% of the reduced subscribed capital. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders; it may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, in so far as the Member States permit such an operation.

2. In the cases referred to in paragraph 1 the laws of the Member States must at least provide for the measures necessary to ensure that the amounts deriving from the reduction of subscribed capital may not be used for making payments or distributions to shareholders or discharging shareholders from the obligation to make their contributions.

### Article 38

The subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 6.

However, Member States may permit such a reduction if they also provide that the decision to reduce the subscribed capital may take effect only when the subscribed capital is increased to an amount at least equal to the prescribed minimum.

#### *Article 39*

Where the laws of a Member State authorise total or partial redemption of the subscribed capital without reduction of the latter, they shall at least require that the following conditions are observed:

- (a) where the statutes or instrument of incorporation provide for redemption, the latter shall be decided on by the general meeting voting at least under the usual conditions of quorum and majority; where the statutes or instrument of incorporation do not provide for redemption, the latter shall be decided upon by the general meeting acting at least under the conditions of quorum and majority laid down in Article 44; the decision must be published in the manner prescribed by the laws of each Member State, in accordance with Article 3 of Directive 2009/101/EC;
- (b) only sums which are available for distribution within the meaning of Article 17(1) to (4) may be used for redemption purposes;
- (c) shareholders whose shares are redeemed shall retain their rights in the company, with the exception of their rights to the repayment of their investment and participation in the distribution of an initial dividend on unredeemed shares.

#### *Article 40*

1. Where the laws of a Member State may allow companies to reduce their subscribed capital by compulsory withdrawal of shares, they shall require that at least the conditions set out in points (a) to (e) are observed:

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↓ 77/91/EEC (adapted)

- (a) compulsory withdrawal must be prescribed or authorised by the statutes or instrument of incorporation before the shares which are to be withdrawn are subscribed for;

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↓ 77/91/EEC

- (b) where the compulsory withdrawal is merely authorised by the statutes or instrument of incorporation, it shall be decided upon by the general meeting unless it has been unanimously approved by the shareholders concerned;
- (c) the company body deciding on the compulsory withdrawal shall fix the terms and manner thereof, where they have not already been fixed by the statutes or instrument of incorporation;

- (d) Article 36 shall apply except in the case of fully paid-up shares which are made available to the company free of charge or are withdrawn using sums available for distribution in accordance with Article 17(1) to (4) ; in these cases, an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the withdrawn shares must be included in a reserve; except in the event of a reduction in the subscribed capital this reserve may not be distributed to shareholders; it can be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, in so far as Member States permit such an operation;
- (e) the decision on compulsory withdrawal shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC.

2. Articles 34(1), 35, 37 and 44 shall not apply to the cases to which paragraph 1 of this Article refers.

#### *Article 41*

1. In the case of a reduction in the subscribed capital by the withdrawal of shares acquired by the company itself or by a person acting in his own name but on behalf of the company, the withdrawal must always be decided on by the general meeting.

2. Article 36 shall apply unless the shares are fully paid up and are acquired free of charge or using sums available for distribution in accordance with Article 17(1) to (4); in these cases an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the shares withdrawn must be included in a reserve. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders. It may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, in so far as the Member States permit such an operation.

3. Articles 35, 37 and 44 shall not apply to the cases to which paragraph 1 of this Article refers.

#### *Article 42*

In the cases covered by Articles 39, 40(1)(b) and 41(1), when there are several classes of shares, the decision by the general meeting concerning redemption of the subscribed capital or its reduction by withdrawal of shares shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

#### *Article 43*

Where the laws of a Member State authorise companies to issue redeemable shares, they shall require that the following conditions, at least, are complied with for the redemption of such shares:

- (a) redemption must be authorised by the company's statutes or instrument of incorporation before the redeemable shares are subscribed for;



- (b) the shares must be fully paid up;
- (c) the terms and the manner of redemption must be laid down in the company's statutes or instrument of incorporation;
- (d) redemption can be only effected by using sums available for distribution in accordance with Article 17(1) to (4) or the proceeds of a new issue made with a view to effecting such redemption;
- (e) an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the redeemed shares must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; it may be used only for the purpose of increasing the subscribed capital by the capitalisation of reserves;
- (f) point (e) shall not apply to redemption using the proceeds of a new issue made with a view to effecting such redemption;
- (g) where provision is made for the payment of a premium to shareholders in consequence of a redemption, the premium may be paid only from sums available for distribution in accordance with Article 17(1) to (4) , or from a reserve other than that referred to in point (e) of this Article which may not be distributed to shareholders except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves or for covering the costs referred to in Article 3(j) or the cost of issuing shares or debentures or for the payment of a premium to holders of redeemable shares or debentures;
- (h) notification of redemption shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC.

#### *Article 44*

The laws of the Member States shall provide that the decisions referred to in Articles 33(4) and (5), 34, 35, 39 and 42 must be taken at least by a majority of not less than two-thirds of the votes attaching to the securities or the subscribed capital represented.

The laws of the Member States may, however, lay down that a simple majority of the votes specified in the first paragraph is sufficient when at least half the subscribed capital is represented.

#### *Article 45*

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↓ 2006/68/EC Art. 1 pt. 10

1. Member States may derogate from the first paragraph of Article 9, the first sentence of point (a) of Article 21(1), and Articles 29, 30 and 33 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation

of employees, or other groups of persons defined by national law, in the capital of undertakings.

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↓ 77/91/EEC

2. Member States may decide not to apply the first sentence of point (a) of Article 21(1), and Articles 34, 35, 40, 41, 42 and 43 to companies incorporated under a special law which issue both capital shares and workers' shares, the latter being issued to the company's employees as a body, who are represented at general meetings of shareholders by delegates having the right to vote.

#### *Article 46*

For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.

#### *Article 47*

---

↓ 77/91/EEC (adapted)

1. Member States may decide not to apply Article 3 (g), (i), (j) and (k) to companies already in existence at the date of entry into force of the  laws, regulations and administrative  provisions  adopted in order to comply with Directive 77/91/EEC .

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.

---

↓

#### *Article 48*

Directive 77/91/EEC, as amended by the Acts listed in Annex II, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

#### *Article 49*

This Directive shall enter into force on 1 July 2011.

*Article 50*

This Directive is addressed to the Member States.

Done at [...], [...]

*For the European Parliament*  
*The President*  
[...]

*For the Council*  
*The President*  
[...]



**ANNEX I**

**Types of companies referred to in the first subparagraph of Article 1(1)**

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↓ 77/91/EEC

- *Belgium:*  
société anonyme / naamloze vennootschap;
- 

↓ 2006/99/EC Art. 1 and Annex pt. A(2)

- *Bulgaria:*  
акционерно дружество;
- 

↓ 2003 Act of Accession Art 20 and Annex II, p. 339

- *the Czech Republic:*  
akciová společnost;
- 

↓ 77/91/EEC

- *Denmark:*  
aktieselskab;
- *Germany:*  
Aktiengesellschaft;
- 

↓ 2003 Act of Accession, Art 20 and Annex II, p. 339

- *Estonia:*  
aktsiaselts;

---

↓ 77/91/EEC

– *Ireland:*

public company limited by shares,

public company limited by guarantee and having a share capital;

---

↓ 1979 Act of Accession Art. 21  
and Annex I, p. 89

– *Greece:*

ανώνυμη εταιρία;

---

↓ 1985 Act of Accession Art. 26  
and Annex I, p. 157

– *Spain:*

sociedad anónima;

---

↓ 77/91/EEC

– *France:*

société anonyme;

– *Italy:*

società per azioni;

---

↓ 2003 Act of Accession, Art 20  
and Annex II, p. 339

– *Cyprus:*

δημόσιες εταιρείες περιορισμένης ευθύνης με μετοχές, δημόσιες εταιρείες περιορισμένης ευθύνης με εγγύηση που διαθέτουν μετοχικό κεφάλαιο;

– *Latvia:*

akciju sabiedrība;

– *Lithuania:*

akcinė bendrovė;

---

↓ 77/91/EEC

- *Luxembourg:*  
société anonyme;
- 

↓ 2006/68/EC Art. 1 pt. 1

- *Hungary:*  
nyilvánosan működő részvénytársaság;
- 

↓ 2003 Act of Accession, Art 20  
and Annex II, p. 339

- *Malta:*  
kumpanija pubblika/public limited liability company;
- 

↓ 77/91/EEC

- *the Netherlands:*  
naamloze vennootschap;
- 

↓ 1994 Act of Accession, Art 29  
and Annex I, p. 194

- *Austria:*  
Aktiengesellschaft;
- 

↓ 2003 Act of Accession, Art 20  
and Annex II, p. 339

- *Poland:*  
spółka akcyjna;

---

↓ 1985 Act of Accession Art 26  
and Annex I, p. 157

- *Portugal:*  
sociedade anónima de responsabilidade limitada;

---

↓ 2006/99/EC Art. 1 and Annex  
pt. A(2)

- *Romania:*  
societate pe acțiuni;

---

↓ 2003 Act of Accession, Art 20  
and Annex II, p. 339

- *Slovenia:*  
delniška družba;
- *Slovakia:*  
akciová spoločnosť;

---

↓ 2009/109/EC Art. 1 pt. 1

- *Finland:*  
julkinen osakeyhtiö/publikt aktiebolag;

---

↓ 1994 Act of Accession, Art 29  
and Annex I, p. 194

- *Sweden:*  
aktiebolag;

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↓ 77/91/EEC
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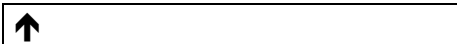
– *the United Kingdom:*

public company limited by shares,

public company limited by guarantee and having a share capital.

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## **ANNEX II**

### **Part A**

#### **Repealed Directive with list of its successive amendments (referred to in Article 48)**

Council Directive 77/91/EEC  
(OJ L 26, 31.1.1977, p. 1)

Annex I, Point III (C) of the 1979 Act of Accession  
(OJ L 291, 19.11.1979, p. 89)

Annex I of the 1985 Act of Accession  
(OJ L 302, 15.11.1985, p. 157)

Council Directive 92/101/EEC  
(OJ L 347, 28.11.1992, p. 64)

Annex I, Point XI (A) of the 1994 Act of Accession  
(OJ C 241, 29.8.1994, p. 194)

Annex II, Point 4 (A) of the 2003 Act of Accession  
(OJ L 236, 23.9.2003, p. 338)

Directive 2006/68/EC of the European Parliament  
and of the Council  
(OJ L 264, 25.9.2006, p. 32)

Council Directive 2006/99/EC  
(OJ L 363, 20.12.2006, p. 137)

only point A(2) of the Annex

Directive 2009/109/EC of the European Parliament  
and of the Council  
(OJ L 259, 2.10.2009, p. 14)

Article 1 only

## Part B

### List of time-limits for transposition into national law and application (referred to in Article 48)

Directive	Time-limit for transposition	Date of application
77/91/EEC	17 December 1978	
92/101/EEC	31 December 1993	1 January 1995
2006/68/EC	15 April 2008	
2006/99/EC	1 January 2007	
2009/109/EC	30 June 2011	

## ANNEX III

### CORRELATION TABLE

Directive 77/91/EEC	This Directive
Article 1(1) first subparagraph introductory phrase	Article 1(1) first subparagraph
Article 1(1) first subparagraph first to 27th indents	Annex I
Article 1(1) second subparagraph	Article 1(1) second subparagraph
Article 1(2)	Article 1(2)
Article 2 introductory phrase	Article 2 introductory phrase
Article 2(a)	Article 2(a)
Article 2(b)	Article 2(b)
Article 2(c) first indent	Article 2(c)
Article 2(c) second indent	Article 2(d)
Article 2(d)	Article 2(e)
Article 2(e)	Article 2(f)
Articles 3 to 5	Articles 3 to 5
Article 6(1) first subparagraph	Article 6(1)
Article 6(1) second subparagraph	-
Article 6(2)	-
Article 6(3)	Article 6(2)
Article 7	Article 7
Article 8(1)	Article 8 first paragraph
Article 8(2)	Article 8 second paragraph
Article 9(1)	Article 9 first paragraph
Article 9(2)	Article 9 second paragraph
Article 10	Article 10

Article 10a(1) first subparagraph	Article 11(1) first subparagraph
Article 10a(1) second subparagraph first sentence	Article 11(1) second subparagraph
Article 10a(1) second subparagraph second sentence	Article 11(1) third subparagraph
Article 10a(2) first subparagraph	Article 11(2) first subparagraph
Article 10a(2) second subparagraph first sentence	Article 11(2) second subparagraph
Article 10a(2) second subparagraph second sentence	Article 11(2) third subparagraph
Article 10a(2) third subparagraph first sentence	Article 11(2) fourth subparagraph
Article 10a(2) third subparagraph second sentence	Article 11(2) fifth subparagraph
Article 10a(3)	Article 11(3)
Article 10b	Article 12
Article 11(1) first subparagraph first sentence	Article 13(1) first subparagraph
Article 11(1) first subparagraph second sentence	Article 13(1) second subparagraph
Article 11(1) second subparagraph	Article 13(1) third subparagraph
Article 11 (2)	Article 13(2)
Article 12	Article 14
Article 13	Article 15
Article 14	Article 16
Article 15(1)(a)	Article 17(1)
Article 15(1)(b)	Article 17(2)
Article 15(1)(c)	Article 17(3)
Article 15(1)(d)	Article 17(4)
Article 15(2)	Article 17(5)
Article 15(3)	Article 17(6)

Article 15(4) first subparagraph	Article 17(7) first subparagraph
Article 15(4) second subparagraph first indent	Article 17(7) second subparagraph point (a)
Article 15(4) second subparagraph second indent	Article 17(7) second subparagraph point (b)
Article 15(4) third subparagraph	Article 17(7) third subparagraph
Article 16	Article 18
Article 17	Article 19
Article 18	Article 20
Article 19	Article 21
Article 20	Article 22
Article 21	Article 23
Article 22	Article 24
Article 23(1) first subparagraph	Article 25(1) first subparagraph
Article 23(1) second subparagraph first sentence	Article 25(2) first subparagraph
Article 23(1) second subparagraph second sentence	Article 25(2) second subparagraph
Article 23(1) third subparagraph first sentence	Article 25(3) first subparagraph
Article 23(1) third subparagraph first part of second sentence	Article 25(3) second subparagraph introductory phrase
Article 23(1) third subparagraph remaining part of second sentence	Article 25(3) second subparagraph points (a) to (e)
Article 23(1) third subparagraph third sentence	Article 25(3) third subparagraph
Article 23(1) fourth subparagraph first sentence	Article 25(4) first subparagraph
Article 23(1) fourth subparagraph second sentence	Article 25(4) second subparagraph
Article 23(1) fifth subparagraph	Article 25(5)
Article 23(2) first sentence	Article 25(6) first subparagraph

Article 23(2) second sentence  
Article 23(3)  
Article 23a  
Article 24  
Article 24a(1)(a)  
Article 24a(1)(b)  
Article 24a(2)  
Article 24a(3)  
Article 24a(4)(a)  
Article 24a(4)(b)  
Article 24a(5)  
Article 24a(6)  
Article 25  
Article 26  
Article 27  
Article 28  
Article 29  
Article 30  
Article 31  
Article 32  
Article 33  
Article 34, first sentence  
Article 34, second sentence  
Article 35  
Article 36  
Article 37  
Article 38

Article 25(6) second subparagraph  
Article 25(7)  
Article 26  
Article 27  
Article 28(1) first subparagraph  
Article 28(1) second subparagraph  
Article 28(1) third subparagraph  
Article 28(2)  
Article 28(3)  
Article 28(4)  
Article 28(5)  
Article 28(6)  
Article 29  
Article 30  
Article 31  
Article 32  
Article 33  
Article 34  
Article 35  
Article 36  
Article 37  
Article 38, first subparagraph  
Article 38, second subparagraph  
Article 39  
Article 40  
Article 41  
Article 42

Article 39	Article 43
Article 40(1)	Article 44, first subparagraph
Article 40(2)	Article 44, second subparagraph
Article 41	Article 45
Article 42	Article 46
Article 43(1)	-
Article 43(2) first subparagraph	Article 47(1)
Article 43(2) second and third subparagraphs	-
Article 43(3)	Article 47(2)
-	Article 48
-	Article 49
Article 44	Article 50
-	Annex II
-	Annex III