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Council Directive 92/101/EEC of 23 November 1992 amending Directive 77/91/EEC on the formation of public limited-liability companies and the maintenance and alteration of their capital

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COUNCIL DIRECTIVE 92/101/EEC of 23 November 1992 amending Directive 77/91/EEC on the formation of public limited-liability companies and the maintenance and alteration of their capital

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas in order to maintain the subscribed capital and ensure equal treatment of shareholders, Directive 77/91/EEC (4) restricts a public limited-liability company's right to acquire its own shares;

Whereas 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;

Whereas 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; whereas those arrangements should be extended to cover subscription for shares in the public limited-liability company;

Whereas in order to prevent the circumvention of Directive 77/91/EEC companies governed by Directive 68/151/EEC (5) and companies governed by the laws of third countries and having comparable legal forms should also be covered;

Whereas, where the relationship between a public limited-liability company and another company such as referred to in the third recital 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;

Whereas, where a Member State provides for a system of penalties equivalent to those laid down in Directive 77/91/EEC and for the suspension of voting rights, it may be considered that such legislation already meets the objectives of this Directive;

Whereas, furthermore, it is justifiable to exempt cases in which the specific nature of a professional activity rules out the possibility that the objectives of this Directive may be endangered;

Whereas, in order to avoid the disturbance of a Member State's financial market as a result of that country's economic structure and excessively abrupt consequences as regards the rules for self-regulation, provision should be made for an appropriate adaptation period,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The following Article shall be inserted after Article 24 of Directive 77/91/EEC:

'Article 24a

1. (a) The subscription, acquisition or holding of shares in a public limited-liability company by another company within the meaning of Article 1 of Directive 68/151/EEC 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;

(b) subparagraph (a) 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 68/151/EEC.

2. 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 paragraph 1 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.

3. 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.

4. (a) Member States need not apply 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.

(b) Member States need not apply 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 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 Article 19 (1) (b) is fulfilled.

6. Member States need not apply Article 20 (2) or (3) or Article 21 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 20 (2) and (3) and Article 21 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.'

Article 2

1. Member States need not apply Article 24a of Directive 77/91/EEC to shares acquired before the date referred to in Article 3 (2).

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 Article 19 (1) (b) of the same Directive is fulfilled.

2. In order to avoid disturbance of the financial market, the Kingdom of Belgium may postpone the suspension of such voting rights until 1 January 1998 on condition that:

- they are attached to shares acquired before the notification of this Directive and,

- for all companies the relationship of which with a public limited-liability company meets the criteria laid down in Article 24a (1) of Directive 77/91/EEC, they do not exceed 10 % of the voting rights attached to the shares in the public limited-liability company.

Article 3

1. Member States shall adopt before 1 January 1994 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.
2. The date of entry into force which Member States shall lay down for those provisions shall be no later than 1 January 1995.
3. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.
4. When Member States adopt these measures, they shall include a reference to this Directive or shall be accompanied by such a reference at the time of their official publication. The manner in which such a reference is to be made shall be laid down by the Member States.

Article 4

This Directive is addressed to the Member States. Done at Brussels, 23 November 1992. For the Council

The President

N. LAMONT

(1) OJ No C 8, 12. 1. 1991, p. 5 and OJ No C 317, 7. 12. 1991, p. 13. (2) OJ No C 240, 16. 9. 1991, p. 103 and Decision of 28 October 1992 (not yet published in the Official Journal). (3) OJ No C 269, 14. 10. 1991, p. 21. (4) OJ No L 26, 31. 1. 1977, p. 1. Directive last amended by the Act of Accession of Spain and Portugal. (5) OJ No L 65, 14. 3. 1968, p. 8.
