



EUROPEAN UNION

THE EUROPEAN PARLIAMENT

THE COUNCIL

**Brussels, 1 July 2009
(OR. fr)**

2008/0022 (COD)

PE-CONS 3631/09

**CODIF 38
FIN 150
CODEC 607**

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 (codified version)

DIRECTIVE 2009/.../EC
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

**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
(codified version)**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

¹ OJ 2, 15.1.1962, p. 36/62.

² OJ C 204, 9.8.2008, p. 25.

³ Opinion of the European Parliament of 17 June 2008 (not yet published in the Official Journal) and Council Decision of

Whereas:

- (1) 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 Community¹ has been substantially amended several times². In the interests of clarity and rationality the said Directive should be codified.
- (2) The coordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability is of special importance, particularly for the purpose of protecting the interests of third parties.
- (3) The basic documents of the company should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company.
- (4) Without prejudice to substantive requirements and formalities established by the national law of the Member States, companies should be able to choose to file their compulsory documents and particulars by paper means or by electronic means.
- (5) Interested parties should be able to obtain from the register a copy of such documents and particulars by paper means as well as by electronic means.

¹ OJ L 65, 14.3.1968, p. 8.

² See Annex I, Part A.

- (6) Member States should be allowed to decide to keep the national gazette, designated for publication of compulsory documents and particulars, in paper form or electronic form, or to provide for disclosure by equally effective means.
- (7) Cross-border access to company information should be facilitated by allowing, in addition to the mandatory disclosure made in one of the languages permitted in the company's Member State, voluntary registration in additional languages of the required documents and particulars. Third parties acting in good faith should be able to rely on the translations thereof.
- (8) It is appropriate to clarify that the statement of the compulsory particulars set out in this Directive should be included in all company letters and order forms, whether they are in paper form or use any other medium. In the light of technological developments, it is also appropriate to provide that these statements be placed on any company website.
- (9) The protection of third parties should be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid.
- (10) It is necessary, in order to ensure certainty in the law as regards relations between the company and third parties, and also between members, to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity, and to fix a short time-limit within which third parties may enter objection to any such declaration.

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

HAVE ADOPTED THIS DIRECTIVE:

Chapter 1

Scope

Article 1

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

– *Belgium:*

naamloze vennootschap,

société anonyme,

commanditaire vennootschap op aandelen,

société en commandite par actions,

personenvennootschap met beperkte aansprakelijkheid;

société de personnes à responsabilité limitée;

– *Bulgaria:*

акционерно дружество, дружество с ограничена отговорност, командитно дружество с акции;

– *Czech Republic:*

společnost s ručením omezeným, akciová společnost;

- *Denmark:*
aktieselskab, kommanditaktieselskab, anpartsselskab;
- *Germany:*
die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien, die Gesellschaft mit beschränkter Haftung;
- *Estonia:*
aktsiaselts, osäühing;
- *Ireland:*
Companies incorporated with limited liability;
- *Greece:*
ανώνυμη εταιρία, εταιρία περιορισμένης ευθύνης, ετερόρρυθμη κατά μετοχές εταιρία;
- *Spain:*
la sociedad anónima, la sociedad comanditaria por acciones, la sociedad de responsabilidad limitada;
- *France:*
société anonyme, société en commandite par actions, société à responsabilité limitée, société par actions simplifiée;

- *Italy:*
società per azioni, società in accomandita per azioni, società a responsabilità limitata;
- *Cyprus:*
δημόσιες εταιρείες περιορισμένης ευθύνης με μετοχές ή με εγγύηση, ιδιωτικές εταιρείες περιορισμένης ευθύνης με μετοχές ή με εγγύηση;
- *Latvia:*
akciju sabiedrība, sabiedrība ar ierobežotu atbildību, komanditsabiedrība;
- *Lithuania:*
akcinė bendrovė, uždaroji akcinė bendrovė;
- *Luxembourg:*
société anonyme, société en commandite par actions, société à responsabilité limitée;
- *Hungary:*
részvénytársaság, korlátolt felelősségű társaság;
- *Malta:*
kumpannija pubblika/public limited liability company, kumpannija privata/private limited liability company;

- *The Netherlands:*
naamloze vennootschap, besloten vennootschap met beperkte aansprakelijkheid;
- *Austria:*
die Aktiengesellschaft, die Gesellschaft mit beschränkter Haftung;
- *Poland:*
spółka z ograniczoną odpowiedzialnością, spółka komandytowo-akcyjna, spółka akcyjna;
- *Portugal:*
a sociedade anónima de responsabilidade limitada, a sociedade em comandita por acções, a sociedade por quotas de responsabilidade limitada;
- *Romania:*
societate pe acţiuni, societate cu răspundere limitată, societate în comandită pe acţiuni;
- *Slovenia:*
delniška družba, družba z omejeno odgovornostjo, komaditna delniška družba;
- *Slovakia:*
akciová spoločnosť, spoločnosť s ručením obmedzeným;

- *Finland:*
yksityinen osakeyhtiö/privat aktiebolag, julkinen osakeyhtiö/publikt aktiebolag;
- *Sweden:*
aktiebolag;
- *United Kingdom:*
Companies incorporated with limited liability.

Chapter 2

Disclosure

Article 2

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

- (a) the instrument of constitution, and the statutes if they are contained in a separate instrument;
- (b) any amendments to the instruments mentioned in point (a), including any extension of the duration of the company;
- (c) after every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date;

- (d) the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:
- (i) are authorised to represent the company in dealings with third parties and in legal proceedings; it must be apparent from the disclosure whether the persons authorised to represent the company may do so alone or must act jointly;
 - (ii) take part in the administration, supervision or control of the company;
- (e) at least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorised capital, unless any increase in the capital subscribed necessitates an amendment of the statutes;
- (f) the accounting documents for each financial year which are required to be published in accordance with Council Directives 78/660/EEC¹, 83/349/EEC², 86/635/EEC³ and 91/674/EEC⁴;
- (g) any transfer of the seat of the company;
- (h) the winding-up of the company;
- (i) any declaration of nullity of the company by the courts;
- (j) the appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company;

¹ Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

² Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1).

³ Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

⁴ Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 31.12.1991, p. 7).

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

Article 3

1. In each Member State, a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein.
2. For the purposes of this Article, "by electronic means" shall mean that the information is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received in a manner to be determined by Member States by wire, by radio, by optical means or by other electromagnetic means.
3. All documents and particulars which must be disclosed pursuant to Article 2 shall be kept in the file, or entered in the register; the subject-matter of the entries in the register must in every case appear in the file.

Member States shall ensure that the filing by companies, as well as by other persons and bodies required to make or assist in making notifications, of all documents and particulars which must be disclosed pursuant to Article 2 is possible by electronic means. In addition, Member States may require all, or certain categories of, companies to file all, or certain types of, such documents and particulars by electronic means.

All documents and particulars referred to in Article 2 which are filed, whether by paper means or by electronic means, shall be kept in the file, or entered in the register, in electronic form. To this end, Member States shall ensure that all such documents and particulars which are filed by paper means are converted by the register to electronic form.

The documents and particulars referred to in Article 2 that have been filed by paper means up to 31 December 2006 shall not be required to be converted automatically into electronic form by the register. Member States shall nevertheless ensure that they are converted into electronic form by the register upon receipt of an application for disclosure by electronic means submitted in accordance with the measures adopted to give effect to paragraph 4.

4. A copy of the whole or any part of the documents or particulars referred to in Article 2 must be obtainable on application. Applications may be submitted to the register by paper means or by electronic means as the applicant chooses.

Copies as referred to in the first subparagraph must be obtainable from the register by paper means or by electronic means as the applicant chooses. This shall apply in the case of all documents and particulars already filed. However, Member States may decide that all, or certain types of, documents and particulars filed by paper means on or before a date which may not be later than 31 December 2006 shall not be obtainable from the register by electronic means if a specified period has elapsed between the date of filing and the date of the application submitted to the register. Such specified period may not be less than 10 years.

The price of obtaining a copy of the whole or any part of the documents or particulars referred to in Article 2, whether by paper means or by electronic means, shall not exceed the administrative cost thereof.

Paper copies supplied shall be certified as "true copies", unless the applicant dispenses with such certification. Electronic copies supplied shall not be certified as "true copies", unless the applicant explicitly requests such a certification.

Member States shall take the necessary measures to ensure that certification of electronic copies guarantees both the authenticity of their origin and the integrity of their contents, by means at least of an advanced electronic signature within the meaning of Article 2(2) of Directive 1999/93/EC¹.

5. Disclosure of the documents and particulars referred to in paragraph 3 shall be effected by publication in the national gazette designated for that purpose by the Member State, either of the full text or of a partial text, or by means of a reference to the document which has been deposited in the file or entered in the register. The national gazette designated for that purpose may be kept in electronic form.

Member States may decide to replace publication in the national gazette with equally effective means, which shall entail at least the use of a system whereby the information disclosed can be accessed in chronological order through a central electronic platform.

¹ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L 13, 19.1.2000, p. 12).

6. The documents and particulars may be relied on by the company as against third parties only after they have been disclosed in accordance with paragraph 5, unless the company proves that the third parties had knowledge thereof.

However, with regard to transactions taking place before the 16th day following the disclosure, the documents and particulars shall not be relied on as against third parties who prove that it was impossible for them to have had knowledge thereof.

7. Member States shall take the necessary measures to avoid any discrepancy between what is disclosed in accordance with paragraph 5 and what appears in the register or file.

However, in cases of discrepancy, the text disclosed in accordance with paragraph 5 may not be relied on as against third parties; such third parties may nevertheless rely thereon, unless the company proves that they had knowledge of the texts deposited in the file or entered in the register.

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

Article 4

1. Documents and particulars which must be disclosed pursuant to Article 2 shall be drawn up and filed in one of the languages permitted by the language rules applicable in the Member State in which the file referred to in Article 3(1) is opened.
2. In addition to the mandatory disclosure referred to in Article 3, Member States shall allow documents and particulars referred to in Article 2 to be disclosed voluntarily in accordance with Article 3 in any official language(s) of the Community.

Member States may prescribe that the translation of such documents and particulars be certified.

Member States shall take the necessary measures to facilitate access by third parties to the translations voluntarily disclosed.

3. In addition to the mandatory disclosure referred to in Article 3, and to the voluntary disclosure provided for under paragraph 2 of this Article, Member States may allow the documents and particulars concerned to be disclosed, in accordance with Article 3, in any other language(s).

Member States may prescribe that the translation of such documents and particulars be certified.

4. In cases of discrepancy between the documents and particulars disclosed in the official languages of the register and the translation voluntarily disclosed, the latter may not be relied upon as against third parties. Third parties may nevertheless rely on the translations voluntarily disclosed, unless the company proves that the third parties had knowledge of the version which was the subject of the mandatory disclosure.

Article 5

Member States shall prescribe that letters and order forms, whether they are in paper form or use any other medium, are to state the following particulars:

- (a) the information necessary in order to identify the register in which the file mentioned in Article 3 is kept, together with the number of the company in that register;
- (b) the legal form of the company, the location of its registered office and, where appropriate, the fact that the company is being wound up.

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

Member States shall prescribe that company websites are to contain at least the particulars mentioned in the first paragraph and, if applicable, a reference to the capital subscribed and paid up.

Article 6

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

Article 7

Member States shall provide for appropriate penalties at least in the case of:

- (a) failure to disclose accounting documents as required by point (f) of Article 2;
- (b) omission from commercial documents or from any company website of the compulsory particulars provided for in Article 5.

Chapter 3

Validity of obligations entered into by the company

Article 8

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

Article 9

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

Article 10

1. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

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

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may not be relied on as against third parties, even if they have been disclosed.

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

Chapter 4

Nullity of the company

Article 11

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

Article 12

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

- (a) nullity must be ordered by decision of a court of law;

- (b) nullity may be ordered only on the grounds:
- (i) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;
 - (ii) that the objects of the company are unlawful or contrary to public policy;
 - (iii) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company;
 - (iv) of failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up;
 - (v) of the incapacity of all the founder members;
 - (vi) that, contrary to the national law governing the company, the number of founder members is less than two.

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

Article 13

1. The question whether a decision of nullity pronounced by a court of law may be relied on as against third parties shall be governed by Article 3. Where the national law entitles a third party to challenge the decision, he may do so only within six months of public notice of the decision of the court being given.
2. Nullity shall entail the winding-up of the company, as may dissolution.
3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up.
4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.
5. Holders of shares in the capital shall remain obliged to pay up the capital agreed to be subscribed by them but which has not been paid up, to the extent that commitments entered into with creditors so require.

Chapter 5

General provisions

Article 14

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 15

The Commission shall present to the European Parliament and to the Council, by no later than 1 January 2012, a report, together with a proposal, if appropriate, for amendment of the provisions of point (f) of Article 2 and Articles 3, 4, 5 and 7 in the light of the experience acquired in applying those provisions, of their aims and of the technological developments observed at the time.

Article 16

Directive 68/151/EEC, as amended by the acts listed in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, 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 II.

Article 17

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

Article 18

This Directive is addressed to the Member States.

Done at ...,

For the European Parliament
The President

For the Council
The President

ANNEX I

Part A

Repealed Directive with list of its successive amendments (referred to in Article 16)

Council Directive 68/151/EEC
(OJ L 65, 14.3.1968, p. 8)

Point III.H of Annex I to the 1972 Act of Accession
(OJ L 73, 27.3.1972, p. 89)

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

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

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

Directive 2003/58/CE of the European Parliament
and of the Council
(OJ L 221, 4.9.2003, p. 13)

Point 1.4.A of Annex II to the 2003 Act of Accession
(OJ L 236, 23.9.2003, p. 338)

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

Only point A.1 of the Annex

Part B

List of time-limits for transposition into national law
(referred to in Article 16)

Directive	Time-limit for transposition
68/151/EEC	11 September 1969
2003/58/EC	30 December 2006
2006/99/EC	1 January 2007

ANNEX II

Correlation Table

Directive 68/151/EEC	This Directive
Article 1	Article 1
Article 2	Article 2
Article 3(1)	Article 3(1)
Article 3(2)	Article 3(3)
Article 3(3)	Article 3(4)
Article 3(4)	Article 3(5)
Article 3(5)	Article 3(6)
Article 3(6), first and second subparagraphs	Article 3(7), first and second subparagraphs
Article 3(7)	Article 3(7), third subparagraph
Article 3(8)	Article 3(2)
Article 3a	Article 4
Article 4	Article 5
Article 5	Article 6
Article 6	Article 7
Article 7	Article 8

Article 8	Article 9
Article 9	Article 10
Article 10	Article 11
Article 11, introductory wording	Article 12, introductory wording
Article 11, point 1	Article 12, point (a)
Article 11, point 2, introductory wording	Article 12, point (b), introductory wording
Article 11, point 2, points (a) to (f)	Article 12, point (b), points (i) to (vi)
Article 12	Article 13
Article 13, first, second and third paragraphs	_____
Article 13, fourth paragraph	Article 14
Article 14	Article 18
_____	Article 15
_____	Article 16
_____	Article 17
_____	Annex I
_____	Annex II