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THE EUROPEAN PARLIAMENT

THE COUNCIL

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Subject: DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions

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

of

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

¹ Opinion of 25 February 2009 (not yet published in the Official Journal).

² Opinion of the European Parliament of 22 April 2009 (not yet published in the Official Journal) and Council Decision of

Whereas:

- (1) The European Council agreed, at its meeting on 8 and 9 March 2007, that administrative burdens on companies should be reduced by 25 % by the year 2012 in order to enhance the competitiveness of companies in the Community.
- (2) Company law has been identified as one area imposing on companies numerous information obligations, some of which seem outdated or excessive. It is therefore appropriate to review those obligations and, where appropriate, to reduce the administrative burdens weighing on companies within the Community to the minimum needed in order to protect the interests of other stakeholders.
- (3) The scope of 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 equivalent¹, and of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies², should be adapted in order to reflect changes in Finnish company law.

¹ OJ L 26, 31.1.1977, p. 1.

² OJ L 295, 20.10.1978, p. 36.

- (4) Company websites or other websites offer, in certain cases, an alternative to publication via the companies registers. Member States should be able to designate those other websites which companies may use free of charge for such publication, such as websites of business associations or chambers of commerce or the central electronic platform referred to in 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. Where the possibility exists of using company or other websites for publication of draft terms of merger and/or division and of other documents that have to be made available to shareholders and creditors in the process, guarantees relating to the security of the website and the authenticity of the documents should be met.

¹ OJ L 65, 14.3.1968, p. 8.

- (5) The requirements concerning disclosure of draft terms of merger in cross-border mergers pursuant to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies¹ should be similar to those applicable to domestic mergers and divisions pursuant to Directive 78/855/EEC and Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies².
- (6) Member States should be able to provide that the extensive reporting or information requirements relating to the merger or division of companies, laid down in Article 9 and point (c) of Article 11(1) of Directive 78/855/EEC and in Article 7 and point (c) of Article 9(1) of Directive 82/891/EEC, need not be complied with if all the shareholders of the companies involved in the merger or division agree that such compliance may be dispensed with.
- (7) Any modification of Directives 78/855/EEC and 82/891/EEC allowing such agreement by shareholders should be without prejudice to the systems of protection of the interests of creditors of the companies involved and to rules aimed at ensuring the provision of necessary information to the employees of those companies and to public authorities, such as tax authorities, controlling the merger or division in accordance with existing Community law.

¹ OJ L 310, 25.11.2005, p. 1.

² OJ L 378, 31.12.1982, p. 47.

- (8) It is not necessary to impose the requirement to draw up an accounting statement where an issuer whose securities are admitted to trading on a regulated market publishes half-yearly financial reports in accordance with Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market¹.
- (9) An independent expert's report as provided for under Directive 77/91/EEC is often not needed where an independent expert's report protecting the interests of shareholders or creditors also has to be drawn up in the context of the merger or the division. Member States should therefore have the possibility in such cases of dispensing companies from the reporting requirement under Directive 77/91/EEC or of providing that both reports may be drawn up by the same expert.
- (10) Mergers between parent companies and their subsidiaries have a reduced economic impact on shareholders and creditors where the parent company's holding in the subsidiary amounts to 90 % or more of the shares and other securities conferring the right to vote. The same applies to certain divisions, in particular when companies are split into new companies that are owned by the shareholders in the proportion to their rights in the company being divided. In those cases, the reporting requirements laid down by Directives 78/855/EEC and 82/891/EEC should therefore be reduced.

¹ OJ L 390, 31.12.2004, p. 38.

- (11) Since the objective of this Directive, namely to reduce administrative burdens relating in particular to publication and documentation obligations of public limited liability companies within the Community, cannot be sufficiently achieved by Member States and can therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (12) Directives 77/91/EEC, 78/855/EEC, 82/891/EEC and 2005/56/EC should therefore be amended accordingly.
- (13) In accordance with point 34 of the Interinstitutional Agreement on better law-making¹, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

¹ OJ C 321, 31.12.2003, p. 1.

Article 1
Amendments to Directive 77/91/EEC

Directive 77/91/EEC is hereby amended as follows:

1) in Article 1(1), the fourteenth indent is replaced by the following:

"– in Finland: julkinen osakeyhtiö/publikt aktiebolag";

2) 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 an independent expert's report 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 independent expert's report on the draft terms of merger or division may be drawn up by the same expert or experts.";

3) Article 27(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 an independent expert's report 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 independent expert's report on the draft terms of merger or division may be drawn up by the same expert or experts."

Article 2

Amendments to Directive 78/855/EEC

Directive 78/855/EEC is hereby amended as follows:

- 1) in Article 1(1), the fourteenth indent is replaced by the following:

"– Finland: julkinen osakeyhtiö/publikt aktiebolag";

- 2) in Article 6, the following paragraphs are added:

"Any of the merging companies shall be exempt from the publication requirement laid down in Article 3 of Directive 68/151/EEC if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of merger and ending not earlier than the conclusion of that meeting, it makes the draft terms of such merger available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph, Member States may require that publication be effected via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the day fixed for the general meeting. That reference shall include the date of publication of the draft terms of merger on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth paragraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.";

3) in Article 8 the following paragraph is added:

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

4) Article 9 is replaced by the following:

"Article 9

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

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

2. The administrative or management bodies of each of the companies involved shall inform the general meeting of their company and the administrative or management bodies of the other companies involved so that the latter may inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of merger and the date of the general meetings which are to decide on the draft terms of merger.
 3. Member States may provide that the report referred to in paragraph 1 and/or the information referred to in paragraph 2 shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.";
- 5) Article 11 is amended as follows:
- (a) paragraph 1 is amended as follows:
 - (i) points (c) and (d) are replaced by the following:

"(c) where applicable, an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date;

(d) where applicable, the reports of the administrative or management bodies of the merging companies provided for in Article 9;"

(ii) the following subparagraph is added:

"For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report in accordance with Article 5 of Directive 2004/109/EC and makes it available to shareholders in accordance with this paragraph. Furthermore, Member States may provide that an accounting statement shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.";

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

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

(c) the following paragraph is added:

"4. A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of merger and ending not earlier than the conclusion of that meeting, it makes them available on its website. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

Paragraph 3 shall not apply if the website gives shareholders the possibility, throughout the period referred to in the first subparagraph of this paragraph, of downloading and printing the documents referred to in paragraph 1. However, in that case Member States may provide that the company is to make those documents available at its registered office for consultation by the shareholders.

Member States may require companies to maintain the information on their website for a specific period after the general meeting. Member States may determine the consequences of temporary disruption of access to the website caused by technical or other factors.";

6) in Article 13, paragraph 2 is replaced by the following:

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

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. 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 merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.";

7) in Article 23, paragraph 4 is deleted;

8) Article 24 is amended as follows:

(a) the second sentence is replaced by the following:

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

(b) the following sentence is added:

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

9) Article 25 is amended as follows:

(a) the introductory wording is replaced by the following:

"Member States shall not apply Article 7 to the operations referred to in Article 24 if the following conditions are fulfilled:";

(b) in point (b), the second sentence is deleted;

(c) the following paragraph is added:

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

10) Article 27 is amended as follows:

(a) the introductory wording is replaced by the following:

" Where a merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, Member States shall not require approval of the merger by the general meeting of the acquiring company if the following conditions are fulfilled:";

(b) point (b) is replaced by the following:

"(b) at least one month before the date specified in point (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in points (a), (b) and, where applicable, (c), (d) and (e) of Article 11(1) at the company's registered office;"

(c) the following paragraph is added:

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

11) Article 28 is amended as follows:

(a) the introductory wording is replaced by the following:

"Member States shall not impose the requirements set out in Articles 9, 10 and 11 in the case of a merger within the meaning of Article 27 if the following conditions are fulfilled:";

(b) in point (c), the following words are added:

"or by an administrative authority designated by the Member State for that purpose.";

(c) the following paragraph is added:

"A Member State need not apply the first paragraph if the laws of that Member State entitle the acquiring company, without a previous public takeover offer, to require all the holders of the remaining securities of the company or companies to be acquired to sell those securities to it prior to the merger at a fair price.".

Article 3
Amendments to Directive 82/891/EEC

Directive 82/891/EEC is hereby amended as follows:

- 1) In Article 4, the following paragraphs are added:

"Any of the companies involved in the division shall be exempt from the publication requirement laid down in Article 3 of Directive 68/151/EEC if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes the draft terms of division available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph, Member States may require that publication be effected via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the day fixed for the general meeting. That reference shall include the date of publication of the draft terms of division on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth paragraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.";

2) in Article 6, the following paragraph is added:

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

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

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

4) in Article 8, paragraph 3 is deleted;

5) Article 9 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) points (c) and (d) are replaced by the following:

"(c) where applicable, an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of division, if the latest annual accounts relate to a financial year which ended more than six months before that date;

(d) where applicable, the reports of the administrative or management bodies of the companies involved in the division provided for in Article 7(1);";

(ii) the following subparagraph is added:

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

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

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

(c) the following paragraph is added:

"4. A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes them available on its website. Member States shall not subject that exemption to requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

Paragraph 3 shall not apply if the website gives shareholders the possibility, throughout the period referred to in the first subparagraph of this paragraph, of downloading and printing the documents referred to in paragraph 1. However, in that case Member States may provide that the company is to make those documents available at its registered office for consultation by the shareholders.

Member States may require companies to maintain the information on their website for a specific period after the general meeting. Member States may determine the consequences of temporary disruption of access to the website caused by technical or other factors.";

6) paragraph 2 of Article 12 is replaced by the following:

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

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. 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 division the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.";

7) Article 20 is amended as follows:

(a) the introductory wording is replaced by the following:

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

(b) in point (b), the second sentence is deleted;

(c) point (c) is deleted;

(d) the following paragraph is added:

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

8) Article 22 is amended as follows:

- (a) paragraph 4 is deleted;
- (b) paragraph 5 is replaced by the following:

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

Article 4

Amendments to Directive 2005/56/EC

Directive 2005/56/EC is hereby amended as follows:

- 1) in Article 6(1), the following subparagraphs are added:

"Any of the merging companies shall be exempt from the publication requirement laid down in Article 3 of Directive 68/151/EEC if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the common draft terms of cross-border merger and ending not earlier than the conclusion of that meeting, it makes the common draft terms of such merger available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second subparagraph, Member States may require that publication be effected via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the day fixed for the general meeting. That reference shall include the date of publication of the common draft terms of cross-border merger on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth subparagraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.";

2) in Article 15, paragraph 2 is replaced by the following:

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

Article 5

Review

Five years after the date laid down in Article 6(1), the Commission shall review the functioning of those provisions of Directives 77/91/EEC, 78/855/EEC, 82/891/EEC and 2005/56/EC which are amended or added by this Directive, and in particular their effects on the reduction of administrative burdens on companies, in the light of experience acquired in their application, and shall present a report to the European Parliament and the Council, accompanied if necessary by proposals for further amendments of those directives.

Article 6

Transposition

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

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

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

Article 7

Entry into force

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

Article 8

Addressees

This Directive is addressed to the Member States.

Done at

For the European Parliament

The President

For the Council

The President