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Accompanying document to the

Proposals for a directive of the European Parliament and the Council simplifying the rules of the Third and the Sixth Company law Directives

Impact assessment

EXECUTIVE SUMMARY

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Executive summary

1. INTRODUCTION

In 2007, the Commission launched an initiative for a broad simplification exercise in the areas of company law, accounting and auditing. This initiative is a key contribution to the wider Better Regulation/Simplification agenda, in particular the initiative to reduce administrative burdens weighing on European companies.

A first proposal for a directive simplifying the Third and the Sixth Company law Directives on domestic mergers and divisions was included in the first package of "fast track" proposals adopted by the Commission in March 2007. This proposal aimed at repealing the requirement for an expert report in the context of a merger or a division of public limited companies where all shareholders of the companies concerned renounce to this report. The directive was adopted by the European Parliament and the Council on 13 November 2007.[1]

On 10 July 2007, the Commission adopted a communication ("the Communication") setting out its further ideas for simplification of the company law acquis, including additional proposals for a simplification of the Third and the Sixth Company law Directives.[2]

The Communication was welcomed by Competitiveness Council on 22 November 2007 and by the European Parliament on 21 May 2008. The European Parliament however recalls that the interests of all stakeholders, including investors, owners, creditors and employees, as well as the principles of subsidiarity and proportionality, must be duly taken into account.[3]

In addition, at the Commission's invitation to stakeholders to submit comments in writing by October 2007, contributions from eighteen Member State governments, one EEA country and 110 stakeholders (including European bodies and associations) were submitted that originated from 23 countries in total, of which 22 Member States. A report on the reactions received is available on the website of the Directorate-General for Internal Market and Services (DG MARKT) at http://ec.europa.eu/internal_market/company/simplification/index_en.htm.

The administrative costs related to the information obligations contained in the Third and the Sixth Company law Directives were measured in the context of a large-scale measurement that is a key part of the Commission's Action Programme for measuring administrative costs and reducing administrative burdens[4]. The report on this measurement which is based on the 'EU Standard Cost Model' was delivered at the end of June 2008.[5] The High Level Group of Independent Stakeholders[6] was consulted alongside the work of the consortium

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

2 Communication from the Commission on a simplified business environment for companies in the areas of company law accounting and auditing (COM(2007)394); http://ec.europa.eu/internal_market/company/simplification/index_en.htm

3 Report A6-0101/2008

4 See COM(2006)689 final, OJ C 78, 11.4.2007, p. 9.

5 Although the report has been delivered as final version, minor adjustments in the version that will ultimately be published, at this stage, cannot be excluded.

6 See http://ec.europa.eu/enterprise/regulation/better_regulation/high_level_group_is_en_version.htm

Deloitte/Rambøll/Capgemini that carries out the measurement. The Group, in its opinion of 10 July 2008, supports the Commission's intention to propose measures to reduce the administrative burdens created by the Third and the Sixth Directive.

The report on the measurement forms the main basis of the Impact Assessment. Other sources of information are replies from the Member States to questions submitted by DG MARKT and the summary report on the reactions to the July 2007 Communication.

2. SUBSIDIARITY

Action at EU level is necessary to the extent that the obligations that impose administrative burdens derive from EU directives. Under those conditions, the reduction of administrative burden requires the modification of the EU rules. Action at EU level is therefore justified.

3. OBJECTIVES

The objective of this initiative, which is foreseen in the Simplification Rolling Programme for adoption by the Commission in 2008[7], is to enhance the competitiveness of EU companies by reducing administrative burdens that are caused by the rules of the Third and the Sixth Directives, where this can be done without jeopardising the interests of other stakeholders.

In particular, this initiative aims at:

- Reducing reporting requirements at EU level in the context of mergers and divisions, in order to provide Member States and companies with more flexibility to decide which reports are really needed in each specific case;

- Removing rules that lead to double reporting and, therefore, cause unnecessary costs to companies;

- Adapting rules on publication and information duties to the technological developments, also with a view to general environmental considerations; and

- Ensuring coherence between the rules of the Third and the Sixth Directives on the one hand and recent changes to the rest of the Company law acquis on the other, in particular as concerns the creditor protection rules in the Third, the Sixth and the Second Directive.

4. PROBLEM DEFINITION, OPTIONS & IMPACTS

The Third and the Sixth Directives currently contain a number of detailed reporting requirements that companies involved in a merger/division have to comply with and which impose considerable costs on them. When the requirements of these two directives are considered in conjunction with the Second Company law Directive on the capital of public limited-liability companies, in certain situations, this can lead to a further increase in costs. Furthermore, the means provided for in the directives to inform shareholders about the details

[7] "Second progress report on the strategy for simplifying the regulatory environment", Annex 1, Revision of the company law, accounting and auditing acquis (COM(2008)33, not published in the Official Journal, p. 23)

of the transactions were designed 30 years ago and therefore do not take into account today's technological possibilities. Finally, changes in other directives during the last years and in particular to the Second Company law Directive in the area of creditor protection have lead to certain inconsistencies between the different directives.

In the light of the problem definition above, there are three areas that could be addressed by simplification measures:

(1) Reporting requirements in the context of the planned merger/division;

(2) Publication and documentation duties vis-à-vis the shareholders in particular; and

(3) Rules on creditor protection.

The impact of possible policy options was measured against the following criteria: reduction of companies' administrative burdens, impact on the rights of resident and non-resident shareholders, impact on creditors and other stakeholders (e.g. employees), environmental impact and consistency with other directives.

The conclusion of the impact assessment is that the potential overall savings of the recommended options in terms of administrative burdens can roughly be estimated at about 172 mio €/year. This would imply a reduction in administrative burdens by about 9.15 % as far as the area of company law is concerned and by about 1.23 % if the total administrative burdens in the areas of company law, accounting and auditing are taken as a basis.

4.1. Reporting requirements

The reporting requirements in the Third and the Sixth Directives consist of the obligation to produce a written report by the management on the legal and economic grounds of the merger/division, an independent expert's report that examines in particular the proposed share exchange ratio, and an accounting statement where the annual accounts are older than six months. These documents have to be submitted to the general meeting of shareholders that has to decide on the merger or the division.

In relation to the **written report from the management,** the measurement report indicates that for **mergers**, the total administrative costs in the EU 27 amount to around 7.79 mio €/year. 25 % are estimated to be so-called "business as usual costs", so that the administrative burden is estimated to around 5.84 mio €/year.

With a view to **divisions**, the corresponding total costs are about 7.98 mio €/year, but this figure only covers 23 Member States.[8] Assuming the costs of divisions, in the missing four Member States, are about the same as for mergers the total costs with a view to divisions can be estimated to 8.89 mio €/year, and the administrative burden 6.67 mio €/year.

As far as the **independent expert report** on the draft terms of merger/division is concerned, the yearly administrative burden are estimated at about 248.15 mio € with a view to **mergers**, and about 81.17 mio € with a view to **divisions**. The consortium estimates these burdens will be reduced by about 170.09 mio €/year once Directive 2007/63 has been transposed[9].

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8 The missing MS are DK, HU, IE and NL.

9 Transposition deadline is 31/12/2008.

The impact assessment estimates the administrative burden of producing the **accounting statement** to be at least 1.28 mio €/year.

These figures show that these reporting requirements create considerable administrative burdens for companies.

The first question to be addressed is therefore, whether these reporting requirements are indispensable in their current form. Furthermore, account needs to be taken of the fact that these costs are increased further where one of the companies has to finance the operation through a capital increase or where a new company is set up as a part of the operation as this leads to additional reporting requirements under the Second Company law Directive. Finally, the current use of Member State options to reduce reporting requirements in certain situations needs to be looked at. Where a merger/division involves a parent company and its 100 or at least 90% subsidiary, the directives, under certain conditions, already give Member States the possibility to reduce the reporting requirements deriving from the Third and the Sixth Directives. However, not all Member States currently make use of this possibility.

The impact assessment identified possible simplification measures for this problem strand in three areas:

(4) measures targeting all public limited-liability companies;

(5) measures with a view to companies that are set up or increase their capital in the context of a merger or division; and

(6) measures concerning simplified mergers and divisions between parent companies and subsidiaries.

4.1.1. Measures targeting all public limited-liability companies

Four options are presented with a view to the first strand of actions that addresses the current extent of the reporting requirements in general:

– Option 1: No policy change;

– Option 2: Introduce the possibility, for shareholders, to renounce the written report of the management and the accounting statement, either by unanimity or by majority decision;

– Option 3: Restrict the reporting requirements in the directives to medium sized and large or to listed companies; and

– Option 4: Repeal the reporting requirements in the directives.

The impact assessment concludes that option 2 should be preferred as it avoids any negative impact on the interests of the shareholders while achieving some burden savings for the companies involved. Option 1 would not lead to any additional savings for companies once directive 2007/63 has been transposed whereas options 3 and 4 are likely to have a too harmful effect on the rights of shareholders. Furthermore, under the two latter options there

would be a risk of diverging national rules with a view to domestic mergers on one hand and cross-border mergers on the other which are regulated by the so-called Tenth Directive[10].

In addition to the measures under option 2, it is proposed to abolish the requirement for an accounting statement where the company has set up a half-yearly financial statement under the Transparency Directive.

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

4.1.2. Measures with a view to companies that set up new companies or increase their capital in the context of a merger or division

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

Three options are presented:

– Option 1: No policy change;

– Option 2: Introduce a Member State option to grant an exemption from the reporting requirement under the Second Directive where an expert report is established in the course of a division; and

– Option 3: Introduce a mandatory exemption from the reporting requirement under the Second Directive in the case of a merger, a public offer and a division.

The conclusion in the Impact Assessment is that option 2 should be preferred. Whereas option 1 implies that double reporting would have to continue, option 3 would not leave Member States any flexibility to adapt procedures under national law to the precise need of companies and shareholders. This flexibility, however, seems useful given that the contents of the reports under the Third and the Sixth Directives on one hand and the Second Directive on the other are not entirely identical.

The burden savings of option 2 are estimated to lie between 3.26 – 9.43 mio €/year, depending on how many Member States will make use of the option to be granted.

4.1.3. Measures concerning simplified mergers and divisions between parent companies and subsidiaries

The third strand of action looks at the current possibility for Member States to grant exemptions from the need to hold a general meeting and from certain reporting and information requirements where the merger or division take place between parent companies

[10] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L310, 25.11.2005, p. 1

and their subsidiaries. Currently, only about one third of the Member States make full use of this option.

The impact assessment sets out three options:

– Option 1: No policy change;

– Option 2: Removing the Member State options as regards simplified mergers and divisions; and

– Option 3: Ensuring that Member States have to grant the possibility of simplified mergers/divisions to their companies.

The conclusion is that option 3 should be preferred as none of the two other options is likely to lead to a change at Member State level. The potential savings, under this option, are estimated to be around 153.49 mio €/year.

4.2. Publication and documentation duties

Under the rules of the Third and the Sixth Directives, companies have to file the draft terms of merger/division with the companies register and publish these draft terms in the national gazette or a central electronic platform, in line with the provisions of the First Company law Directive on disclosure obligations of limited-liability companies. The necessity of filing these draft terms with the register can be questioned, in particular where they are today available online.

Furthermore, the directives provide that shareholders must be given the possibility to access certain documents at the place of the company's registered office and to receive free copies of these documents. Also this obligation does not seem to be in line any more with the possibilities offered by modern information technology which allow for an easier and cheaper access to the information and have therefore already been used in more recent directives.

In the impact assessment, three options for action are therefore examined:

– Option 1: No policy change;

– Option 2: Use a central digital solution at national level for publishing the information; and

– Option 3: Use the company's or another Internet site for publishing the information.

Option 3 is identified as the option to be preferred as it combines the advantage of adapting the information mechanisms under the Third and the Sixth Directives to those used in more recent directives with a low risk that shareholders will incur additional costs for the access to the information. Option 3 also offers the highest burden savings potential which is estimated at over 3.5 mio €/year.

4.3. Protection of creditors

Recent changes to the Second Company law Directive[11] have, inter alia, led to clarifying the creditor protection rules under that directive in the sense that creditors have to show credibly that an operation concerning the company's capital jeopardises their claims if they want to obtain securities. This clarification is lacking in the parallel rules contained in the Third and the Sixth Directives which leads to a certain inconsistency between these directives.

On this issue, three options are discussed:

– Option 1: No policy change;

– Option 2: Adapt creditor protection rules to the provision in the modernised Second Directive; and

– Option 3: Repeal the creditor protection rules in the directives.

Option 2 is recommended as it ensures coherence between the different EU directives without jeopardising creditors' rights. No material impact on companies' costs is expected from this option.

5. MONITORING AND EVALUATION

Five years after the transposition of the amendments, the effect of the measures should be evaluated.

This evaluation should look, in particular at the following questions:

- Whether and to what extent the overall costs of companies have been reduced in the context of mergers and divisions; this should be based, inter alia, on the feedback from a sample of companies;

- Whether the information provided to shareholders and other stakeholders in the course of the process is considered sufficient; and

- Whether the recommended Member States' option with a view to the reporting requirement under the Second Company law Directive in the case of mergers and divisions provides useful results on whether a mandatory exemption should be considered.

A permanent monitoring of the developments of companies' costs would imply putting additional administrative burdens on companies in order to obtain the information required. Such a system is therefore not envisaged at this stage.

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