Communication from the Commission on the transfer of small and medium-sized enterprises

(98/C 93/02)

(Text with EEA relevance)

INTRODUCTION

The transfer of business is one of the key issues of the European Commission's enterprise policy [1]. After the creation and growth of the business, the transfer is the third crucial phase in the life-cycle of a business [2]. Many jobs are at stake when the founder reaches his or her retirement age and has to envisage the handing over of the business.

Recent studies have come to the conclusion that more than 5 million enterprises in the European Union, representing about 30 % of all European enterprises, will have to face their transfer throughout the coming years. Moreover, it is expected that about 30 % of those enterprises, i.e. 1,5 million, will disappear because of poor preparation of their transfer. This will put about 6,3 million jobs at risk [3].

The European Commission's action in this field dates back to 28 and 29 January 1993, when it organised a symposium in Brussels with the aim of finding out the situation in the different Member States and to define best practice in the field of business transfers. This symposium was followed by wide consultation of all interested parties on the basis of a specific communication [4]. This consultation led to the adoption, on 7 December 1994, of a formal recommendation concerning the transfer of small and medium-sized enterprises (SMEs), which was addressed by the European Commission to the Member States [5].

The deadline, set out in Article 9 of the recommendation, by which the Member States were invited to report on the progress made, was on 31 December 1996. Already in the course of 1996, the Commission had asked all Member States to provide intermediary information about the action taken in respect of the various elements of the recommendation and about further envisaged modifications of the existing legislation.

In its proposal for a Council decision on the third multiannual programme for SMEs, the Commission intended to bring forward further initiatives, including a concerted action, on the basis of the evaluation of the follow-up to the 1994 recommendation [6]. The Council Decision of 9 December 1996 on the third multiannual programme confirmed the objective of continuing efforts in this field [7]. Mindful of this decision, the European Commisison organised the European forum on the transfer of business on 3 and 4 February 1997 in Lille (France). The evaluation of the information provided by the Member States as well as the discussions in the plenary sessions and in the different workshops of the forum have shown the results set out in this Communication.

Since the Commission issued the recommendation, several Member States have either adopted or at least considered adopting measures to improve the legislative and fiscal environment in this field. In addition, there is a desire in most Member States to facilitate the transfer of SMEs. All the parties concerned, i.e. government authorities, business organisations and the enterprises themselves, are beginning to realise the scale of the task. This latter point is of considerable importance, since getting this message across to the people concerned is one of the main objectives of the Commission's efforts.

MEASURES TAKEN OR PROPOSED

Most of the measures taken so far concern modifications of the legal environment in order to encourage and smooth preparations for transferring businesses (see point A below). Several Member States have modified the fiscal treatment of transfers, notably through the reduction of inheritance and gift taxes (see point B). Other initiatives are aimed at improving the financial prospects of businesses when they are transferred (see point C). Finally, a number of practical apsects often have a considerable impact on the success or failure of a business transfer (see point D).

A. **Legal measures regarding the transfer of business**

In some Member States, legal measures have been taken in recent years in order to facilitate business transfers.

(1) 'Maximising European SMEs' full potential for employment, growth and competitiveness'. Proposal for a Council Decision on a third multiannual programme for small and medium-sized enterprises in the European Union (1997 to 2000), COM(96) 98 final of 20 March 1996.

(2) Integrated programme in favour of SMEs and the craft sector, COM(94) 207 final of 3 June 1994.

(3) The European Observatory for SMEs, fourth annual report, 1996, page 183.

(4) Communication from the Commission on the transfer of businesses. Actions in favour of SMEs (OJ C 204, 23.7.1994, p. 1).

(5) OJ L 385, 31.12.1994, p. 14 (hereinafter referred to as 'the recommendation'); see also the communication containing the motivations of the recommendation (OJ C 400, 31.12.1994, p. 1).

(6) See above, footnote 1, p. 6.

(7) OJ L 6, 10.1.1997, p. 25.

Most of these measures concern civil and company law. Progress has been made in some areas, but little in others and the improvements are uneven across Member States. The following areas are of particular concern.

1. *Conversion of partnerships into limited companies and vice-versa*

A change of the legal form of a business (conversion) can be useful for the transferor, in order to allow him to prepare for transfer with the most adequate structure, as well as for the transferee, in order to introduce appropriate decision-making procedures, for example. However, in such a case, some Member States require the winding-up of the business and the creation of a new one, which is a very burdensome requirement and an obstacle to many successful business transfers.

As pointed out in Article 4(a) of the recommendation, it is therefore important that in all Member States, SMEs have the posibility of being converted into another legal structure without previously being wound up.

In Germany, the law on conversion of 1994 (Umwandlungsgesetz) introduced various forms of conversions, such as mergers, change of legal form and divisions. In addition, this law introduced the concept of demerger into German company law. These provisions apply to both limited companies and partnerships, and accordingly could benefit a large number of SME transfers. This law was accompanied by tax rules (Umwandlungssteuergesetz) providing for tax neutrality of any conversion operation (see B.4 below).

Under Spanish law, the conversion of partnerships into limited companies and vice-versa is already widely possible.

Under Austrian law (Umwandlungsgesetz), the conversion of limited companies is possible by way of fusion to the benefit of the main shareholder, or by way of transformation into a newly-created partnership. These operations were facilitated in 1996 by the adoption of tax rules (Umgründungssteuergesetz) providing for the tax neutrality of any conversion (see B.4 below). The conversion of a partnership into a limited company is not covered by this law and is only possible in the form of integration of the assets of the partnership (as contribution in kind) into the limited company. The abovementioned tax exemption applies to this form of conversion only after a minimum time period of existence of the company.

Under Finnish law, the conversion of a partnership into a limited company is possible, whereas the opposite operation is not. In Sweden, the conversion of companies in case of a business transfer has been facilitated by law of 1996.

The abovementioned legislation in the various Member States has turned out to be successful in practice. This experience should therefore be taken into account by other Member States where such changes are still not allowed or result in adverse tax consequences, such as in the United Kingdom, Denmark and Ireland (see Annex, Table 2).

2. *Simplified public limited company*

SMEs should be able to consider switching over from sole trader or partnership to companies limited by share capital. It is true that the private limited company (Sàrl, GmbH) is also a legal entity which is largely independent from its members and therefore can continue to exist after the death of one of its members. However, while it may be useful for very small companies due to its lower requirements for share capital, it is less suitable for medium-sized companies as its credit standing *vis-à-vis* banks is generally weaker than that of public limited companies. Moreover, in many Member States, the private limited company does not permit the issuance of bearer shares, making this form of company less suitable for the transfer of companies from the second to the third (or indeed a further) generation, where generally the needs of a larger number of heirs must be taken into account. This is then best achieved through a public limited company (SA, AG).

This is why Article 4(b) of the recommendation states that the concept of a simplified public limited company should be introduced into all Member States' laws to give SMEs easier access to such a company, which is more robust in the process of transfer while permitting the distribution of shares among current or future heirs, as required by inheritance law.

Such a simplified limited company has so far only been introduced in Germany, within the law governing public limited companies (Aktiengesetz). This law was amended in 1994, so as to make it easier for SMEs to take the form of a simplified public limited company (kleine Aktiengesellschaft). Accordingly, the amended law provides for a number of reliefs in establishing such a company and in its functioning, as for instance fewer formalities at the annual general meeting for companies

below a certain size, exemption from the requirement of having a supervisory council for companies with fewer than 500 employees, and the possibility of excluding a priority right to purchase new shares.

In France, the Société par actions simplifiées (SAS) was introduced in 1994. However, this legal form aims at facilitating the cooperation between big companies and is therefore not a suitable instrument for all SMEs, especially not for the smallest ones. Therefore, the reduction of the criteria for setting up such a company is currently being envisaged within the report on the modernisation of company law, which was presented to the French Prime Minister in 1996 by Senator Ph. Marini ([8]).

Other Member States should also consider further facilitating the access to the legal form of a public limited company, so that this type of company could be more widely used by SMEs.

3. *Single-member public limited company*

While for the purpose of a business transfer, the public limited company is often the most convenient and appropriate legal structure, many Member States have set high requirements concerning the minimum number of initial subscribers and/or shareholders. As a result of this, many entrepreneurs in small businesses refrain from choosing this legal structure, because it is too complex.

The twelfth Directive on company law ([9]), allowing the setting up of a company with a single member, applies in principle to private limted companies. According to Article 6, this Directive also applies if a Member State allows a public limited company with a single member. In the numerous Member States which have not introduced such a possibility, this Directive still only applies to private limited companies, so that several founders are still required for public limited companies. For the reasons set out above, it is desirable to also allow public limited companies to be set up and run with a single member (see Article 4(c) of the recommendation). This has already been achieved in Denmark, Germany (since the revision of the Aktiengesetz in 1994), Finland, Spain (since 1995), the Netherlands and Sweden. In Belgium, since 1995, a public limited company may have a single shareholder, whereas the minimum number of initial subscribers is still two.

Other Member States should consider modifying their company law in order to allow public limited companies with a single subscriber/shareholder. This has recently been envisaged in France within the Rapport Marini ([10]).

4. *Increasing the continuity of businesses*

Many small and medium-sized businesses are set up without the entrepreneurs using legal advice. This should of course remain possible, but in some cases leads to a situation where strategic choices and legal derogations are not used in an optimum way, especially concerning the case of the unforseen death of the entrepreneur. Therefore, many businesses are subject to legal provisions, obliging them to be wound up. A few changes in national law would considerably alleviate this situation, notably the following ones:

(a) ***Legal principle of continuity***

As pointed out in Article 5(a) of the recommendation, the continuity of partnerships as a legal principle should be introduced into all national civil law, in order to avoid the unwarranted closure of SMEs. This principle already exists in Italy and Portugal, with these countries representing the best practice in this field.

In Germany, this principle has been introduced for partnerships in the liberal professions (by virtue of the Partnerschaftsgesellschaftengesetz of 1994). The introduction of this principle more generally into German law has recently been envisaged in the 1996 draft proposal for the revision of the Commercial Law (Handelsrechtsreformgesetz).

(b) ***Pre-emption rights***

Other ways of achieving greater continuity of partnerships could be the introduction of a right of the entrepreneur to transfer his or her trading authorisation, even provisionally, to a member of the family, in case of death, illness or other permanent incapacity to continue the business (as introduced for example in Luxembourg in the Loi réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales of 1988).

In Belgium, the law of 1995 amending the coordinated laws on commercial companies (Loi de réparation) introduced the possibility of using approval clauses and pre-emption clauses in agreements on the succession or liquidation of the common ownership of goods among relatives, which were previously prohibited. As a result,

([8]) La modernisation du droit des sociétés, Rapport au Premier ministre, La documentation française, Collection des rapports officiels, Paris 1996.

([9]) Council Directive 89/667/EEC, (OJ L 395, 30.12.1989, p. 40, see article 2(1)).

([10]) See footnote 8.

entrepreneurs now have greater contractual freedom in planning the succession of their business and in keeping it within the family. This is brought about by requiring an approval among the heirs or by providing for the preferential attribution of the business to one of the heirs.

Partnerships, although very widespread among SMEs in continental Europe, are inherently weak forms of association when it comes to resisting the tensions which often arise in the course of a transfer. This is particularly true in cases where several heirs claim their share in the enterprise and require that it be paid out in cash. As a result, the partnership is usually dissolved and the business ceases, with a loss of economic activity and jobs. In order to protect partnerships from being dissolved by heirs with conflicting interests, a number of Member States have introduced a pre-emption right or another form of preferential attribution of shares in a business to one of the heirs working in the business, coupled with the obligation to compensate the other heirs (e.g. Luxembourg in Article 815-1 to 815-18 Code Civil, as modified by the Loi relative à l'organisation de l'indivision et étendant l'attribution préférentielle en cas de succession aux entreprises commerciales, industrielles et artisanales of 1993; for agricultural businesses in Belgium, see Article 41 law of 1988).

(c) ***Administratiekantoor, trust, fiducie***

The continuity of businesses could also be increased by introducing a form of certification of shares into national law, as exists for instance with the administratiekantoor of Dutch law, whose introduction is being considered in Belgium.

An even stronger instrument would be the introduction of the trust, as is well known in English law, or of other forms similar to it, which are already used in Germany (Treuhandgesellschaft) and in Luxembourg (fiducie). The introduction of the fiducie has recently been envisaged in Belgium and in France (see the Rapport Marini ([11])).

(d) ***Business/family agreements***

Another practical way of increasing the continuity of the business is the use of business or family agreements (pacte d'entreprise, protocole familial). Especially in family businesses, such agreements can be used in order to maintain a certain number of management rules throughout the change of generations. They are already used to a certain extent in France and Spain, so as to mitigate the consequences of the prohibition of future succession pacts.

It is clear, however, that these agreements remain a comparatively weak alternative to proper succession pacts which are permitted in the majority of Member States. Where future succession pacts are prohibited (Italy, France, Belgium, Spain, Luxembourg), Member States should consider allowing the conclusion of future succession pacts, as their prohibition makes proper estate planning unnecessarily difficult.

5. *Administrative and accountancy simplification*

It is important for the survival of many enterprises that the administrative requirements of the transfer of business are simplified in the same way as for the setting up of companies, i.e. with fewer formalities, shorter deadlines and with a single contact point for the entrepreneur ([12]). At present, for example in Italy, the entrepreneur often has to contact several offices and complete time-consuming administrative procedures before the transfer can take place.

In Denmark, a draft law was proposed in 1996, which aims at simplifying administrative burdens for SMEs. Furthermore, a radical simplification of accounting regulations applicable to SMEs has been approved within the Danish Company Accounts Act of 1996. A model set of accounts has been drafted to facilitate the filing of annual accounts by SMEs involved in the more typical activities such as commerce, craft and industry. In Finland, a ministerial working group has been set up to consider ways to simplify the administration of small businesses.

B. **Tax measures regarding the transfer of business**

Transfers of businesses should not be tax driven. The aim should be to ensure that tax systems do not stand in the way of sound business preparations for transfer, and do not result in the business having to be sold in order to pay the tax bill. The clear objective of taxation policies concerning transfers should therefore be the protection of employment. Everyone, including the State, loses out when jobs are lost through unsuccessful transfers.

([11]) See footnote 8.

([12]) Commission recommendation of 22 April 1997 (OJ L 145, 5.6.1997, p. 29).

Since the publication of the Commission's recommendation, tax measures have been taken in a number of Member States to improve the tax treatment of business transfers. Most of the measures concern inheritance or gift taxes. Reductions of the tax burden on business transfers can be achieved by reducing the highest applicable rates or by introducing exemptions, reliefs or thresholds. If these thresholds are to have any effect in facilitating the continuity of business, then they must be set at levels which are likely to benefit SMEs.

As with the legal measures, the general picture for taxation is of progress in some areas, but little in others, and the improvements are uneven across Member States. Capital gains tax, inheritance tax and (where it exists as a separate tax) gift tax, sometimes at prohibitively high rates, continue to cause difficulties for the transfer of business in almost all Member States, whether the transfer is by way of gift or succession within the family, or to third parties. The following areas are of particular concern.

1. *Gifts and successions*

In some Member States, maximum inheritance and gift tax rates remain high (80 % in Belgium, 68 % in the Netherlands, 65 % in Greece), whereas others recently adopted or envisage the adoption of less burdensome taxation rules for business transfers.

The United Kingdom, for example, has a 100 % exemption from inheritance tax for business assets. If a business has been owned for a minimum of two years prior to transfer, 100 % relief from inheritance tax is available for transfers of interests in a business as well as unlisted shares in trading companies (including companies quoted on the Alternative Investment Market) held for two years, regardless of the size of holding and voting entitlement.

In the Flemish region of Belgium, inheritance tax for business transfers was reduced in 1996, to 3 % of the net value of the assets of a family-owned business, the taxable base being adjusted according to the number of employees. In 1997, the Federal Belgian Government approved a draft law reducing the gift tax for businesses to 3 % if the transfer is made to a family member who continues the business for at least five years.

In Sweden, inheritance tax on businesses is only charged, after a basic relief of SEK 70 000, at a rate of 10 % on amounts up to SEK 300 000, 20 % up to SEK 600 000 and 30 % above SEK 600 000.

In Germany, a DEM 500 000 relief and a value reduction of 60 % was introduced for business assets in 1996. The rest of the amount is always taxed in the lowest category of tax rates, i.e. the one for the closest relatives (between 7 % and 30 %). The inheritance tax can be paid in instalments over up to 10 years free of interest.

Spain now has a significant relief from inheritance tax for the transfer of business within the family. Article 20 of the Inheritance and Gift Tax law was recently modified in order to secure the transfer of business and securities within the family. The change introduced a relief of 95 % on the taxable base of inheritance tax if the business or securities are transferred to spouses or descendants of the deceased. There are certain requirements when securities of a company are transferred, for example the individual must hold an interest of at least 15 % and be engaged in the management of the company. Moreover, the transferees are required to maintain the acquisition for 10 years. The same relief also applies to gifts if the donor is more than 65 years old or in permanent incapacity to work and no longer has income from the business.

From 1 April 1996, France has reduced tax on gifts by providing for a tax reduction on transfers free of charge. The tax reduction on shared gifts was increased from 25 % to 35 % for donors under 65 years of age, and from 15 % to 25 % for donors between 65 and 75 years of age. However, such a regime limited to gifts does not satisfactorily deal with unprepared transfers, such as accidental death of the entrepreneur. These provisions should therefore be extended to cover unprepared transfers.

More needs to be done in order to reduce the burden resulting from inheritance and gift taxes on the transfer of business assets, as set out in Article 6(a) of the recommendation. This could be done, for example, by way of complete exemption, reduced tax rates or higher reliefs. Finally, a deferred payment of the inheritance tax over a reasonably long period could be envisaged, perhaps with the possibility for the continuing entrepreneur to 'work off' his tax bill over the years.

2. *Sale to third parties*

Regarding the transfer of businesses to third parties, there are already capital-gains tax exemptions or reductions in some Member States. As set out in Article 7(a) of the recommendation, these tax reliefs should become more widespread.

In particular, relief for the reinvestment of the sale proceeds from a business into a subsequent business (roll-over relief) should be introduced. This exists in Ireland and the United Kingdom, where the relief also applies when the proceeds of the sale of the business are invested in a new limited company. The capital gain is 'rolled-over' to the new share holding and the transferor only becomes liable for capital gains tax if he sells his share holding. The same possibility exists to some extent in Germany.

Similarly, relief encouraging transfers from a certain age of the entrepreneur (retirement relief), which already exists in Austria, Belgium, Germany, Ireland, the Netherlands and the United Kingdom, should be made available in other Member States. In Germany, when the owner is more than 55 years old, he can have a tax relief of DEM 60 000. This relief is reduced by any amount of capital gains which exceed DEM 300 000 or is reduced to zero if the gains are more than DEM 360 000. If the result of the sale exceeds DEM 15 million, the tax rate applicable is only 50 % of the normal one.

In Ireland, since the 1995 Finance Act, the owner of a small business, if he is over the age of 55 and has owned the business for 10 years, can retire and transfer his family-owned business to anyone without incurring a liability for capital gains tax on the first IEP 250 000 of the selling price. In the UK, retirement relief from tax on capital gains was also extended recently. The age at which an entrepreneur can transfer his enterprise and benefit from the relief has been reduced from 55 years to 50 years. When a 'full-time working investor' disposes of all or part of a business or trading company there are substantial degrees of exemption for chargeable gains. If the gain is below GBP 250 000 there is full exemption, plus a 50 % exemption on gains falling between GBP 250 000 and GBP 1 million. The qualifying age is 50 or lower if the retirement from the business is because of ill-health.

In Austria, the tax burden on a transfer to third parties was reduced in a law of 1996 (Strukturanpassungsgesetz). The profit from selling an enterprise may now be spread over three years if the business had existed for at least seven years. Capital gains are being taxed at half rate if the seller died, became unable to work or retired at the age of at least 60. In France, 80 % of such transfers can be exempted from taxation or only be taxed at a flat rate of 5 %.

3. *Sale to employees*

The transfer of a business to its employees is one way of preserving the jobs provided by the business and maintaining the motivation and expertise of those already involved in the business. However, the tax burden from the sale of a business to its employees may be an obstacle to such an operation. That is why the Commission recommended that there should be a more favourable treatment for this type of transfer, as set out in Article 7(b) of the recommendation.

However, very few tax measures have been introduced so far to encourage transfers of businesses to employees. In France, such transfers are, under certain circumstances, exempt from stamp duties. In the United Kingdom, there are various reliefs for the transfer of shares to employees, for example through the use of trusts (statutory employee share ownership trusts and approved profit-sharing schemes). It would be very helpful for many businesses if such reliefs, which have proved to be very popular, became more generally available in other Member States so as to encourage the continuation of the business by employees.

4. *Conversion of companies*

Unwarranted tax charges can arise from the conversion of a company in preparation for transfer (see Section A.1). Member States should therefore consider eliminating such tax charges, in order to promote successful transfers. In Germany, for example, the tax measures adopted with the 1994 law on the conversion of businesses (Umwandlungssteuergesetz) provide for tax neutrality for income tax and corporation tax for all types of conversion, including those not specifically covered by the law on conversion. In Austria, the Umgründungssteuergesetz also provides for tax neutrality of all kinds of such operation. In France, the conversion of a partnership to a capital company is taxed at a fixed amount of only FRF 500, if the partners accept to keep their shares for a period of at least five years after the conversion. Other Member States are invited to follow these examples and introduce such a system of complete or at least partial tax neutrality for all conversion operations.

5. *Double taxation*

There are at present very few double taxation treaties between Member States covering inheritance and gift taxes. Double taxation can be a major problem for the transfer of business assets other than land when the business operates with branches in more than one Member State. It is important that all double taxation in this field is eliminated by way of completing the inheritance/gift tax treaty network, as they are required to do within the meaning of Article 220 of the EC Treaty.

6. *Information and best practice*

As pointed out in Article 2 of the recommendation, clear and accessible information on tax law and practice relating to business transfers needs to be provided, whether by public or private bodies. A system of advance rulings by the tax authorities, agreeing the tax consequences of a business transfer before the operations take place, would provide greater certainty for all parties involved. This is at present envisaged in France.

Entrepeneurs need to 'think tax' when preparing for the transfer of their business, right from the start of the preparations. The Commission itself has a role to play in disseminating up-to-date information and examples of best practices across Member States.

7. *Tax reforms*

Article 6 of the recommendation states that the survival of businesses should be ensured through appropriate fiscal treatment. This implies that tax systems need to evolve with changing business practices and changing priorities. On-going tax reform in the area of business transfers, tackling the most urgent obstacles first, should be pursued by Member States. Also in this field, the Commission will continue to assist Member States in the exchange of best practice.

C. **Support measures provided by public institutions and private persons regarding the transfer of business**

According to Article 2 of the recommendation, public and private initiatives aimed at stimulating increased awareness, information and training of businessmen should be encouraged. Futhermore, Article 3 of the recommendation states that SMEs should be provided with a financial environment which is conducive to successful transfers. These suggestions, concerning mainly consultants and financial institutions, still remain valid and can be specified as follows.

1. *The role of financial institutions*

SMEs frequently face difficulties in obtaining finance from financial institutions. Yet business transfers often require high financial requirements, for example in order to fund the acquisition costs. Moreover, a takeover often results in the need for a strategic reorganisation of the business which may require a considerable amount of additional capital. A study carried out by the Deutsche Ausgleichsbank has shown that the capital requirement for takeovers is 60 % higher than for business start-ups (DEM 400 000 for takeovers against DEM 250 000 for start-ups).

(a) ***Existing measures***

Existing support measures by banks include databases for the collection and delivery of information on the calculation of risks, a network for the active search of partners for the matching of potential buyers and sellers of a business (including cross-border information networks), a valuation service to determine the precise value of the business, advice on the precise amount of required financial support, loan guarantee funds as well as mutual guarantee funds.

In Belgium, a special fund for financing business transfers (Fonds de transmission) has been set up as part of the Fonds de participation at the Caisse nationale du crédit professionnel. The transfer fund offers preferential interest rates for loans facilitating business transfers within the family or to third parties. The loan is granted for a minimum period of seven years and a maximum of 20 years. The interest rate is 3 % during the first five years, and rises by 0,25 % points thereafter with an upper limit of 3,75 %. No guarantee is required to secure the loan.

Since 1990, the Deutsche Ausgleichsbank, a German public institution, has promoted the transfer of businesses through its Eigenkapitalhilfeprogramm (equity capital assistance programme). More than 20 000 business takeovers have been supported through subordinated loans at very favourable interest rates. Almost 50 % of the businesses taken over belong to the craft sector, 25 % to trade and 20 % to the service sector. This experience has shown that the default rate of loans granted for the transfer of business was slightly higher than that for newly-created enterprises (4,6 % for transfers against 3,3 % for start-ups), but could be kept within manageable proportions.

Schemes providing guarantees for business takeovers also exist in France, where loans are available at a rate of only 3,5 % through the State-owned financial organism Sofaris ([13]), in the United Kingdom through the small firms loan guarantees scheme, in Austria through the BÜRGES-Förderungsbank, and in Finland through the State-owned financial institution Kera Ltd.

All the abovementioned schemes have generally proved worthwhile and their adaptability to other Member States should be investigated.

(b) ***Priorities to be taken into account***

Many business transfers could be facilitated if financial institutions were encouraged to adopt a more positive approach towards granting loans for SMEs. Indeed, the financing of SMEs' operations in general and that of SME transfers in particular can be a profitable business for banks if they conduct it in a highly professional way, notably by considering long-term calculation of interest for loans and the introduction of a quality assessment of the business to be transferred. The financing of goodwill needs particular care, given the difficulty of arriving at a precise valuation of intangible assets.

Furthermore, banks could adopt a more coherent internal strategy for transfers of SMEs, including preparation schemes for a successful transfer of business with better and earlier information for entrepreneurs on the support measures available, as well as transfer plans covering the value of the business, the profile of the person taking over and ways to achieve the best price for the business.

2. *The role of intermediaries*

Since the transfer of a business covers accounting, taxation and legal questions, as well as financial requirements, a wide range of professional services by all intermediaries, including accountants, tax advisers, lawyers, notaries public, business consultants, etc., should be available to entrepreneurs contemplating transferring or taking over a business. All of the options for succession need to be considered by the professional advisers after careful consideration of both the commercial circumstances of the business and the emotional relationships of the family members.

(a) ***Existing measures***

For the entrepreneur thinking about transferring the business, the main services provided by the abovementioned professionals concern advice, studies, surveys, seminars, communication, development of a network, and an enterprise check-up. For persons seeking to take over a business, the main services are the preparation and monitoring of the business before and after the takeover, notably by examining a considerable number of potential firms offered for sale, by contacting networks or databases, or by setting up a network of enterprises which are ready for transfer, and the development of business transfer plans.

Many firms and organisations are active in this field and many databases have been set up in specific regions or sectors. However, the activities aimed at bringing interested parties together generally have a limited range. There is no single activity which fulfils the requirements of the entire group. In order to mediate effectively between the parties, a larger database of supply and demand would therefore be necessary, so that specific and selective contacts could be arranged. The fact that most of the databases are not accessible for the public poses another problem, since entrepreneurs are excluded from consulting the data available only to banks and accountants. It would be hepful for the success of many business transfers if these databases could become more widely accessible.

(b) ***Priorities to be taken into account***

Professional advice is needed at a much earlier stage so that a business plan can be prepared in time. All consultants need to check the criteria for a successful transfer of business in three main areas: the future entrepreneur (e.g. training, experience, financial situation, etc.), the current entrepreneur (e.g. pensions, age, future interest, etc.) and the business itself (assets, investment, employees, financial situation, prospects, etc.). Intermediaries should consider developing an overall approach for the development of the business transfer plan, involving all the abovementioned professionals.

([13]) Sofaris and CEPME have recently been integrated into the financial holding BDPME (Banque pour le développement des PME). Both organisms are now bound to cooperate by using their complementary skills, in order to provide a wider range of financial support to SMEs, but Sofaris still exists as such and is specialised in guarantee schemes.

The services provided could fall into three main sectors: the stability of the enterprise once transferred to the next generation, the pension arrangements for the retiring entrepreneur and the opportunities for the new entrepreneur. A structure, such as a family forum, should exist to allow a frank discussion of succession issues before a succession plan is drafted. The succession plan should settle the succession, the continuation of the business, as well as a timetable and mechanisms for correcting any errors.

3. *Conclusions*

In order to be carried out successfully, the transfer of business needs to be accompanied in all its phases, since the entrepreneur needs financial support (see Article 3 of the recommendation) and professional advice before, during and after the transfer. The criteria for the best future development of the business and the actions which have to be taken need to be clearly identified from the outset. A cross-border network of potential buyers and sellers (as in the Netherlands and Belgium) could be very helpful in this respect. The financial support of business transfers ought to be granted on the same level as for business start-ups (as in Belgium, France, Germany and Italy).

D. **Practical experience by entrepreneurs having transferred or taken over a business**

In the course of 1996, as part of the preparation of the European Forum in Lille, European business organisations conducted a survey about the practical experience of transferors (i.e. the person transferring the business) and transferees (i.e. the person taking over the business). This survey was carried out through the evaluation of a questionnaire which had previously been sent to numerous entrepreneurs from the different Member States. The results of this survey can be summarised as follows.

1. *Preparation and training*

The clearest conclusion is that the transfer of business is often badly prepared. Generally, the problem is tackled too late, thus leading to options which are more expensive and which entail greater risks.

Transferors mostly prefer the total transfer of the whole business. If this cannot be achieved, they are in favour of a gradual transfer to a person within the family instead of someone external to the enterprise or an employee. According to the survey, transferees consider the transfer primarily in terms of taking advantage of a good opportunity, and only to a lesser extent in terms of ensuring the continuity of the enterprise. They tend to opt for a total or partial transfer, whereas other possibilities, such as leasing, donation or going public, are not considered highly. The two essential aspects for the successful transfer of business are the awareness of the transferor of the need to prepare the transfer in plenty of time, and the familiarisation of the transferee with the specific structure of the enterprise.

The transfer of business is not usually seen as a central management activity. It is therefore vital to start awareness-raising programmes for entrepreneurs, taking into account that the business transfer is a sensitive matter regarding both emotional aspects and confidentiality. One way of approaching this subject would be to start training measures in businesses with a view to familiarising entrepreneurs with the issue of transfer, as mentioned in Article 2 of the recommendation.

2. *Valuation*

The issue of valuation plays a role in three different scenarios, i.e. taxation of the business, sale of the business to a third party or gift of the business to a member of the family. The valuation can be made by using methods based on the intrinsic value, the proceeds, the return on investment, cash-flow, market value, etc.

(a) ***Taxation of the business***

As regards taxation, in particular for transfers by way of succession, the valuation methods used by State administrations, relating to inheritance taxes, are often seen as being too rigid. It is, therefore, important to allow enterprises the option of having an independent analysis carried out. Moreover, as set out in Article 6(c) of the recommendation, it is important to ensure that the tax assessment of the business should take account of how the value of the business can change after the death of the owner. In most cases, this value will be much lower than during the lifetime of the previous owner and should therefore be assessed by reference to a moment several months after the death of the owner.

(b) ***Sale of the business to a third party***

As regards transfers by way of sale, the final result is determined by negotiations and by the financial capacities of the transferee involved. In this respect, one can only encourage transferors and transferees to

inform themselves about the different methods of valuation and, if necessary, to make use of experts sufficiently early in the process, in order to allow a thoroughassessment of the offer. What counts in the end, however, is the market value of the enterprise, i.e. the price which potential transferees are ready to pay.

(c) ***Gift of the business to a member of the family***

As regards transfers by way of a gift within the family, the problem consists of the fact that there is no market price and that the valuation will therefore depend on a number of estimates. On the other hand, the valuation of the business will be compared to that of other items of property given to members of the family in anticipation of the succession. In this situation, the valuation of the business should notably take into account the specific risks and potential weaknesses of a business in comparison with the other items transferred, such as real estate, the value of which tends to be less volatile.

3. *Using the experience of former entrepreneurs*

Even for transfers which have been prepared sufficiently early and which have been accomplished according to an agreed plan, the transferee often has to face unexpected management situations. In such a case, the transferor could continue to help the new entrepreneur in his decision-making, acting for example as a consultant or part-time director or manager for a limited period of time after the transfer. Good understanding between the transferor and the transferee is essential in this respect. It could also be envisaged that an external adviser proceeds to audit on social, fiscal and financial matters, in order to assist the transferor and the transferee in working towards a smooth changeover.

It would be advantageous if a dialogue was initiated on advantages to be gained from greater understanding between different generations of entrepreneurs as well as a better transfer of know-how from one generation to the next. For example, the concept of business angels ([14]), which is relatively widespread in the USA and the United Kingdom, consists of retired businessmen who are prepared to invest the proceeds of the sale of their own business in one or several other small and medium-sized business. The reinvestment of such proceeds has been made attractive for tax purposes and could well facilitate a number of business transfers. The added-valued of this scheme consists in the fact that the retired businessmen also offer advice to the companies in which they invest, thus assisting them in avoiding problems encountered in the transfer from one generation to the next.

([14]) See Commission communication on the financial problems experienced by small and medium-sized companies, COM(93) 528 of 10 November 1993, paragraph 29; Commission communication on the improvement of the fiscal environment of small and medium-sized enterprises (OJ C 187, 9.7.1994, p. 5, paragraph 6).

COMPARATIVE TABLES

To get the best possible overview of the current situation concerning legal and tax aspects of the business transfer in the 15 Member States of the European Union, the Commission has updated and amended the comparative tables published as annexes to the communication of 23 July 1994 ([15]). These six tables are adjoined as annexes to the present communication.

SUMMARY AND CONSEQUENCES OF THE PRESENT SITUATION

As shown in the preceding section and in the tables set out in the annexes to the present communication, there are wide variations between the situation in the different Member States. Some of them have taken action in recent years or are contemplating facilitating the legal, fiscal and financial environment of business transfers, whereas others have not been very active in this respect.

The general picture of all Member States shows that the various suggestions set out in the recommendation have not been followed to an extent which would be sufficient to overcome the specific obstacles met by businesses facing their transfer. This conclusion seems to be particularly acute in the light of the high number of expected business failures due to poor preparation of the transfer.

Member States, but also all public and private intermediaries and the entrepreneurs themselves, should therefore be aware of the crucial importance of this subject for the survival of many businesses and, thereby, for the maintenance of a great number of jobs. Member States should furthermore continue and strengthen their efforts to facilitate the transfer of businesses, through legislative and administrative simplification, effective tax reductions and easier access to financial support for the takeover of a business. Intermediaries should be well informed and trained in all relevant aspects of the

([15]) See footnote 4.

transfer of businesses so as to be prepared to give their know-how to a large number of entrepreneurs, both of the present and of the coming generation.

The role of the European Commission in this field will be to monitor the situation closely and to contribute to raising awareness, information and training of all parties concerned. On the basis of a thorough evaluation of all the reactions to the present communication, the European Commission may propose further measures to facilitate the transfer of business.

The Commission would therefore welcome comments on this communication, which should be sent to:

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ANNEX

COMPARATIVE TABLE 1

Companies limited by share capital

Member State	Minimum number of members for formation	Minimum capital	Supervisory board	Reduced administrative burdens for SMEs
A	2	ATS 1 million ECU 71 890	Obligatory (3/7/12/20 members according to the size of the company)	No
B	2	BEF 1 250 000 ECU 30 660	No	Yes (accountancy)
DK	1	DKK 500 000 ECU 66 490	Obligatory (mixed system with optional workers' participation)	Yes (accountancy)
D	1	DEM 100 000 ECU 50 500	Obligatory (workers' participation limited to companies having at least 500 employees)	Yes (kleine Aktiengesellschaft)
EL	2	GRD 10 000 000 ECU 32 260	—	No
FIN	1	FIM 500 000 ECU 83 750	Optional if capital of at least FIM 500 000; if capital is lower, the number of board members can be fewer than three and the managing director is not obligatory	Yes (accountancy)
E	3	ESP 10 000 000 ECU 59 880 (higher for special companies)	No	Yes (accountancy)
F	7	On the share market: FRF 1 500 000 ECU 226 930 not on the share market: FRF 250 000 ECU 37 820	Optional	No
IRL	7	IEP 30 000 ECU 39 470	No	No
I	2	ITL 200 000 000 ECU 103 250	No	No
L	2	LUF 1 250 000 ECU 30 660	No	No
NL	1	NLG 100 000 ECU 43 860	Obligatory for major companies (capital at least NLG 25 million, company council, at least 100 employees)	No
P	5	PTE 5 000 000 ECU 24 780 (higher for special activities)	Optional	No
UK	2	GBP 50 000 ECU 74 630	No	No
S	1	SEK 500 000 ECU 57 600	Obligatory	No

COMPARATIVE TABLE 2

Partnerships and sole proprietorships

Member State	Continuity of partnerships as a legal principle	Conflict will/partnership contract	Decision of the beneficaries	Transfer of enterprise assets	Transformation to capital companies and vice-versa
A	No	No legal solution, but agreement prevails in practice	Unanimity	—	Partially codified (only from capital companies to partnerships)
B	No	No legal solution, but agreement prevails in practice	Unanimity	Concept of 'fonds de commerce' used in practice	Partially codified
DK	No	No legal solution	—	—	Codified
D	No (soon: yes) yes: for partner associations	Solution only partly in favour of the priority of the partnership contract	Unanimity (majority in specific cases)	Transfer in total for sole traders and for partner associations	Codified
EL	No	Solution only partly in favour of the priority of the partnership contract	Unaminity	—	—
FIN	No	Priority of the partnership contract	Unanimity	No legal obligation to transfer each asset individually	Partially codified (only from a partnership to a capital company)
E	No	Solution only partly in favour of the priority of the partnership contract	Unanimity for the disposal of partnership shares, majority for their administration	Provision of immediate cash	Partially codified
F	No	Priority of the partnership contract	Unanimity	Transfer in total ('fonds de commerce')	Partially codified
IRL	No	No legal solution, but priority of the partnership contract in practice	Unanimity	Transfer in total	Not codified, obligation to dissolve the company when transformed into partnership (disincorporation)
I	Yes	No legal solution, but surviving partners have a threefold choice	Unanimity	Transfer in total ('azienda')	—
L	No	No legal solution	Unanimity	Concept of 'fonds de commerce' used in practice	Partially codified
NL	No	—	—	No transfer in total	Partially codified

Member State	Continuity of partnerships as a legal principle	Conflict will/partnership contract	Decision of the beneficaries	Transfer of enterprise assets	Transformation to capital companies and vice-versa
P	Yes	No legal solution	Unanimity for the disposal of partnership shares, majority for their administration	Transfer in total ('estabelecimento comercial')	Codified
UK	No, but personal representative can dispose of the enterprise within one year on the instructions of the beneficiaries	No legal solution	Unanimity	Transfer in total	Not codified; obligation to dissolve the company when transformed into a partnership (disincorporation)
S	No	Solution in favour of the partnership contract	Unanimity	Transfer in total	Partially codified

COMPARATIVE TABLE 3

Transfer of business within the family and its taxation

Member State	Transfer between spouses	Rights of the spouse at the death of the entrepreneur	Taxation implications of transfers between spouses	Moment of valuation of the business for tax purposes	Payment by instalments of the capital gains tax arising from a transfer
A	Yes	Legal right to inherit (Ehegattenerbrecht), compensation in cash (Pflichtteil), exception for agricultural properties: no adequate compensation (Anerbenrecht)	—	—	Yes, over three years (Strukturanpassungsgesetz)
B	Only within wedding agreement; no sale; no agreements on future inheritance	No property right, but right to use and profit (usufruit), possibility of buying this right back	—	—	No
DK	—	Optional undistributed property right on estate	No	Inventory day (one to two years after the death of the entrepreneur)	No
D	Yes	Legal right to inherit (Ehegattenerbrecht), compensation in cash (Pflichtteil)	—	Death of the entrepreneur	—
EL	—	—	—	—	—
FIN	Yes	No	Capital gains tax, inheritance tax and gift tax apply	Death of the entrepreneur	No
E	—	No property right, but compensation in cash; exception for agricultural properties	—	—	—
F	Only within wedding agreement (communauté universelle), gift possible; no sale; no agreements on future inheritance	—	Relief of FRF 330 000	Death of the entrepreneur (the declaration has to be made within six months)	—
IRL	Yes	—	No	On decision by the administrator of the estate after taking into account tax and legal requirements (usually shortly after the death)	—
I	Only within wedding agreement (azienda coniugale); no sale; no agreements on future inheritance	—	—	—	No

Member State	Transfer between spouses	Rights of the spouse at the death of the entrepreneur	Taxation implications of transfers between spouses	Moment of valuation of the business for tax purposes	Payment by instalments of the capital gains tax arising from a transfer
L	—	—	—	—	—
NL	—	—	—	—	No
P	—	—	—	—	—
UK	Yes	—	—	—	Yes
S	Yes	No special rights for the spouse	No income tax when changing shareholders, gift and inheritance tax apply	Death of the entrepreneur	No

COMPARATIVE TABLE 4

Inheritance and gift tax

Member State	Inheritance tax maximum rate	Maximum rate for children	Special rules for business	Interest-free instalments	Calculation of the tax base
A	60 %	15 %	No	No	Market value less liabilities, real property: monetary value (10 % of market value)
B	80 %	30 %	Flemish law of 1996 reduced rate for business assets to 3 %; draft federal law of 1997 reduces gift tax rate to 3 %	—	Market value + relationship between donor and donee
DK	36,25 %	15 %	ECU 25 000 relief	—	Market value + relationship between donor and donee
D	50 %	30 %	DEM 500 000 business relief, 40 % on the rest of the amount	Yes: 10 years (if necessary to assure the survival)	Tax balance value of real estate: assessed value less relief + relationship between donor and donee
EL	65 %	25 %	—	Yes: five years	Scaled from 5 % to 60 %
FIN	48 %	16 %	Taxation on tax value instead of market value (on request)	Yes: five years (on request)	Market value less liabilities
E	34 % (calculation of due amount with wealth coefficient up to 2,4)	The taxable amount is reduced in line with the children's age	Reduction of 95 %	Yes: five years	Market value less liabilities
F	60 %	40 %	Payment deferred or in instalments	No	Assessed value less relief
IRL	40 % estate duty	40 %	Business relief	No	Market value less relief + relationship between donor and donee
I	60 %	27 %	Business relief of ITL 250 000 000	—	Book value plus goodwill + relationship between donor and donee

Member State	Inheritance tax maximum rate	Maximum rate for children	Special rules for business	Interest-free instalments	Calculation of the tax base
L	15 %	15 %	—	—	Market value less liabilities + relationship between donor and donee
NL	68 %	27 %	—	—	Income and inheritance tax
P	50 %	25 %	—	—	Market value less liabilities + relationship between donor and donee
UK	40 %	40 %	100 % exemption for business (the threshold for taxable assets increased to ECU 155 000)	Yes: 10 years for non-exempted assets	Market value less liabilities + relationship between donor and donee
S	30 %	30 %	Basic allowance: SEK 70 000, 10 % on remaining amounts from SEK 1 up to SEK 300 000, 20 % up to SEK 600 000 and 30 % above SEK 600 000	No	Market value less liabilities + relationship between donor and donee

COMPARATIVE TABLE 5

Transfer of business to third parties and its taxation

Member State	Measures facilitating the transfer of businesses to third parties	Tax relief on money, received from a transfer, which is subsequently reinvested in another SME	Relief for early retirement
A	Payment of capital gains tax is possible over three years if seller had owned the business for at least seven years	No	Capital gains tax rate is only 50 % if the seller is more than 60 years old and retires
B	—	No	Capital gains on intangible assets are subject to a reduced income tax if seller is more than 60 years old
DK	No	No	No
D	Half of the average income tax rate	Yes	Basic allowance of DEM 60 000 for transfers by owners over 55. This is reduced by the amount by which the transfer exceeds DEM 300 000
EL	—	—	—
FIN	No	No	No
E	No	—	—
F	—	No	No
IRL	Yes	Yes (roll-over relief)	If an entrepreneur reaches 55 years of age and sells qualifying business assets for less than IEP 250 000, he will get tax exemption for the capital gain
I	—	No	—
L	—	—	—
NL	Taxation can be deferred by legal means and also avoids high rates	No	NLG 20 000 are exempted; for people above 55 this exemption is increased to NLG 45 000
P	—	—	—
UK	Yes	Yes	Capital gains tax relief (qualifying age reduced from 55 to 50)
S	No	No	No

COMPARATIVE TABLE 6

Transfer of businesses to employees and its taxation

Member State	Specific measures facilitating transfers to employees	Relief available to employees in relation to stamp duties and registration fees	Special rules for the transfer to an enterprise or a workers' cooperative set up by the employees
A	—	No	—
B	—	BEF 40 000/ECU 1 000 general tax relief	Social economy companies
DK	No	No	No
D	Inheritance and gifts tax down to 30 %	DEM 300/ECU 150 threshold per year	—
EL	—	—	—
FIN	—	—	—
E	—	—	Cooperatives
F	—	Tax reduction	Tax exemption for shares transferred
IRL	—	—	—
I	—	—	—
L	—	—	—
NL	—	—	—
P	—	—	—
UK	ESOP	ESOP	ESOP
S	No	No	No