II

(Preparatory Acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

419th PLENARY SESSION, HELD ON 13 AND 14 JULY 2005


(2005/C 294/01)

On 13 January 2005 the Council decided to consult the European Economic and Social Committee, under Article 44(1) of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 23 June 2005. The rapporteur was Mr Burani.

At its 419th plenary session, held on 13 and 14 July 2005 (meeting of 13 July), the European Economic and Social Committee unanimously adopted the following opinion.

Preamble

1. Background

1.1 In September 1999, in the context of the Simplification of the Legislation on the Internal Market process (SLIM), a Commission Company Law Working Group issued a report on the simplification of the First and Second Company Law Directives. In its report on a Modern Regulatory Framework for Company Law in Europe (issued in November 2002), the High-Level Group of Company Law Experts stated that most of the SLIM Group proposals were worth implementing in the form of a directive.

1.2 The draft directive in question undertakes to simplify certain aspects of the Second Directive, which currently sets out the following requirements:

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- Streamlining of ownership in the company's share capital is, if possible at all, subject in principle to ex-ante authorisation by the statutes, by the instruments of incorporation and/or by the general meeting.

- Acquisition by the company of its own shares is subject in principle to approval by the general meeting only for a certain period of time and only for a certain fraction of the company's capital.

- Financial assistance by the company for the acquisition of its shares by a third party is possible only in very limited cases and only up to a certain limit.

- Exclusion of pre-emptive rights in capital increases for cash consideration is subject to approval by the general meeting and to the requirement of a written report by the company's administrative or management body.

- For cases of capital reduction, it is up to the Member States to lay down the conditions for the exercise of a creditor's right to obtain adequate security.
2. Content of the draft directive

2.1 The draft directive is based on the premise that a simplification of the Second Directive would do much to promote business efficiency and competitiveness without reducing the protection offered to shareholders and creditors.

2.2 In this light, the draft directive's various articles are aimed directly or indirectly at:

— providing companies with the possibility to attract considerations other than in cash to their capital without having to resort to a special expert valuation, providing there is no opposition;

— enabling companies to acquire their own shares up to the limit of the company’s distributable reserves;

— enabling companies to grant financial assistance with a view to the acquisition of their shares by a third party up to the limit of their distributable reserves;

— enabling companies to increase, under certain conditions, their capital without having to meet reporting requirements linked to the restriction or withdrawal of the pre-emption rights of shareholders;

— offering creditors the opportunity to resort to judicial or administrative proceedings where their claims are at stake;

— giving shareholders holding a large majority (90%) of a public limited liability company’s capital the right to acquire the remaining shares.

2.3 In order to prevent market abuse, Member States should take into account, for the purpose of implementation of this Directive, the provisions of Directives 2003/6/EC and 2004/72/EC as regards accepted market practices and a series of measures aimed at securing transparency in management and the accountability of management bodies.

3. General comments

3.1 The Committee approves the objectives set by the draft directive and, in general, the means by which the Commission intends to meet them. A distinction must be made, however, between genuine simplification, which does not alter the meaning or scope of existing provisions, and modifying simplification, which, by doing away with certain procedures that were originally designed to protect third parties, the market or companies themselves, can bring about a change, be it substantial or secondary, to the protective nature of previous directives.

3.2 Modifying simplification is not necessarily a bad thing and can indeed prove useful if it adjusts provisions to the reality of the market and company life. However, when undertaking it, the Commission cannot go beyond its remit of simplifying — not modernising — the legislation in force. In other words, a modification is acceptable if it demonstrably helps to simplify corporate governance, improving companies’ competitiveness and cutting their costs; it is not acceptable if it reduces the rights of third parties, especially minority shareholders or creditors. The Committee draws the attention of the Parliament and the Council to this point, which is very important in order to avoid giving the public the impression that a simplification exercise is being used to make substantive changes that are unrelated to simplification. That is the spirit in which the EESC intends to make its contribution, commenting solely on those aspects requiring attention, it being understood that those not mentioned have received its approval.

4. Specific comments

4.1 Article 10a(1) states that Member States may decide not to apply the protective provisions of Article 10(1), (2) and (3) of Directive 77/91/EEC, in the event of a new non-cash capital contribution: in practice, if the contribution consists of quoted securities. In this case, certification by an expert may be replaced by a valuation on the basis of their weighted average price over the previous three months.

4.1.1 The Committee approves this, but would point out that a calculation on the basis of the weighted average price over the previous three months is based on past values that do not take future prospects into account; prices may rise but also fall. The rule should be expanded to allow for the weighted average price to be considered a maximum, giving the decision-making bodies the option to choose a different value, giving reasons.

4.1.2 The derogations envisaged in Article 10a(1) should be applied throughout the EU. If they were left to the Member States’ discretion, there is a risk that the desired deregulatory effect would not be felt in certain countries.

4.2 Under Article 10a(2), Member States may also decide not to apply the abovementioned protective provisions in the event of a new capital contribution that does not take the form of quoted securities (unquoted securities, immovable property, etc.). In such cases however, the valuation has to have been undertaken by an independent expert who is ‘sufficiently trained and experienced’ in this area. For the purposes of the Directive it is sufficient to stipulate referral to an independent expert recognised by the competent authorities.

4.2.1 The Committee thinks that Article 10a(2)(a) concerning the expert should be deleted, as the requirement that he be ‘sufficiently trained and experienced’ is too vague. For the purposes of the Directive it is sufficient to stipulate referral to an independent expert recognised by the competent authorities.

4.2.1.1 In Article 10a(2)(b) concerning the valuation of the contribution, the period of three months should be extended to at least six months.
4.2.2 Article 10a(2)(c) states that the expert must make the evaluation ‘in accordance with generally accepted valuation standards and principles in the Member State’. The EESC proposes that the accounting rules recognised by law or by official regulations be cited explicitly.

4.2.3 Under Article 10a(3), Member States may decide not to apply the valuation provisions when assets are contributed as consideration other than in cash whose value is derived from the accounts of the previous year. It should be made clear whether ‘value … derived by … asset’ refers to book value.

4.3 Article 10b(2) states that ‘each Member State shall designate an independent administrative or judicial authority to be responsible for examining the legality of the considerations other than in cash’. On a point of form alone, the EESC would note that a judicial authority is always independent, and suggests a slight change in the wording of the text. More importantly, such authorities are referred to a number of times in the text of the directive, each time with reference to different functions, but never with a definition of their precise role or a list of tasks.

4.3.1 Every Member State has administrative or judicial authorities with notarial, authorising or regulatory functions, and the time seems to have come for the situation to be clarified, at least within the Member States, and for a single authority (a ‘one-stop shop’ along the lines of the ‘services’ directive) to be designated as responsible for company regulation and control. This would mark a real step forward, not only towards simplification, but also and above all in the completion of the single market.

4.4 Article 19(1) states that in countries that allow companies to acquire their own shares, authorisation must be given by the general meeting for a maximum period of five years. The EESC thinks that this period is much too long. The state of the market and of a company can change radically, obliging decision-making bodies to reverse their decisions. Share purchase orders are not generally valid for five years. In the interests of prudence and in order to give the general shareholders’ meeting a degree of discretion, it would be preferable to reduce the period to two years, allowing for either annual or biannual renewals.

4.4.1 In the second subparagraph of Article 23(1), the stipulation that transactions should take place ‘on the initiative’ of the administrative or management body should be deleted. The concept is much too vague and can only have been intended as an illustration. The period of five years for the cash flow analysis in the second subparagraph also appears to be too long and should be cut to two years.

4.5 Article 23a establishes the right of shareholders to contest the general meeting’s approval of a contribution transaction other than in cash by asking the appropriate judicial or administrative body to decide on the legality of the transaction. The EESC notes that the decisions of a general shareholders’ meeting have legal force and that it would be difficult for an authority with solely administrative powers to decide to annul or change them. This makes it all the more necessary to define the roles of the authorities responsible (see above in point 4.3) and to set up a one-stop shop to include judicial functions (administrative tribunal).

4.6 A paragraph is added to Article 29 exempting administrative or management bodies from the obligation to present a written report on the restriction or withdrawal of the right of pre-emption in the case of an increase in capital. The EESC cannot see the logic behind this provision, which seems to run counter to the principle of transparency without simplifying procedures in any significant way. It should also be noted that shareholders may ‘request the administrative or management body to indicate the reasons for the restriction or withdrawal of the right of pre-emption’. However, there is no provision for a refusal to provide information or for shareholders to disagree about the information they are given. The point of reference should be the general principles of company law: the general meeting is sovereign when it comes to the powers delegated to company bodies, and always, in all cases, has the right to be informed on what has been done and to receive an account of every budget heading, concerning both income and expenditure. The EESC therefore proposes that the new paragraph be deleted.

4.7 Article 39a does not introduce a simplification as such, but attempts to codify (mirroring Article 15 of the takeover bids directive) a rule that exists only in certain countries: a ‘majority shareholder’ (i.e. one who holds at least 90% of subscribed capital in a listed company) can oblige ‘minority shareholders’ to sell him or her those shares at a ‘fair price’. Member States may raise the threshold to a maximum of 95%. The preamble to the proposed directive extends the term ‘majority shareholder’ to cases where there are several main shareholders, while the wording of Article 39a suggests that a single shareholder is meant. This ambiguity needs to be resolved in the definitive text.

4.7.1 A rule of this kind has been codified in the takeover bids directive, as mentioned above, but this is different: the guarantees of transparency associated with a takeover bid are lacking, as are the conditions which prompted it. While it may well be in the interests of the majority shareholder to control 100% of the company (particularly in the presence of an obstructionist or argumentative minority), the minority shareholders may view the matter very differently, depending on circumstances and individual situations. A shareholder who has no influence on the running of the company may be quite happy to sell his or her portfolio at a fair price, providing it is higher than the price he or she could obtain by selling the shares on the stock market. However, if the shares provide a good return or look likely to increase in value, an investor/shareholder may prefer to hold on to them. In such circumstances, it is not clear why he or she should be obliged to sell. In conclusion, while a minority 10% shareholding is generally unlikely to hamper corporate governance, one must also...
recognise the full freedom of choice that is the right of every shareholder. At the same time, however, there will be a few cases in which governance requires control of all shareholders: these are the only cases where such a rule would be justified, and then only with the authorisation of the supervisory authorities.

4.8 Article 39b (modelled on Article 16 of the takeover bids directive) is the mirror image of the previous point: minority shareholders may, individually or jointly, oblige the majority shareholder to buy their shares, again ‘at a fair price’. The comments made in the previous paragraph apply mutatis mutandis. Here too, the authorities should only approve a forced sale in cases of proven necessity, excluding that of selling off a shareholding simply because the company is forecast to perform badly.

4.8.1 In both of the above two cases, the Committee's conclusions are prompted by the same concern for fairness and respect for general legal principles: the shareholders' right to choose must be fully upheld and must not be restricted by considerations extraneous to their interests unless there is a proven necessity that dictates otherwise.

Brussels, 13 July 2005

The President
of the European Economic and Social Committee
Anne-Marie SIGMUND


(2005/C 294/02)

On 3 February 2005, the Council decided to consult the European Economic and Social Committee, under Article 44(1) of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 23 June 2005. The rapporteur was Mr Byrne.

At its 419th plenary session, held on 13 and 14 July 2005 (meeting of 13 July), the European Economic and Social Committee adopted the following opinion unanimously.

1. Summary

1.1 The proposal to amend the Accounting Directives is a follow up to the Action Plan adopted by the Commission on 21 May 2003, for Modernising Company Law and Corporate Governance at EU level.

1.2 The objective of the proposals is to further enhance confidence in the financial statements and annual reports published by European companies to provide shareholders and other stakeholders (e.g. employees and suppliers) with reliable, complete and easily accessible information.

1.3 The EESC has made its comments on certain points of detail in this document but in general supports the stated objective and believes that this action is necessary to protect all stakeholders.

2. Details of the Commission's proposal

2.1 The proposal requires that the Accounting Directives (78/660/EEC and 83/349/EEC) be amended to:

(a) Establish collective responsibility of board members i.e. drawing up the financial statements is a collective responsibility of all board members (administrative, management and supervisory)

(b) Enhance transparency about related parties’ transactions i.e. involving all companies transactions with their managers, the latter's family or other related parties which are not carried out under normal commercial conditions

(c) Enhance transparency about off-balance sheet arrangements by updating the requirements currently set out in the Accounting Directives to cover for example Special Purpose Entities (SPE)