Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions

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On 16 October 2008, the Council decided to consult the European Economic and Social Committee, under Article 44 of the Treaty establishing the European Community, on the

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

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 3 February 2009 (the rapporteur was Ms SÁNCHEZ MIGUEL)

At its 451st plenary session, held on 25 and 26 February (meeting of 25 February), the European Economic and Social Committee adopted the following opinion by 104 votes with three abstentions.

1. Summary and recommendations

1.1 The EESC has repeatedly called for the Community legislation in this area to be simplified. Overlaying the original legislation with amendments has created difficulties in applying the law, together with excessive amounts of red tape. This prevents the regulated organisations from functioning smoothly.

1.2 The EESC has also stated however that this simplification process should not involve deregulation or reduced legal certainty, which should exist throughout the EU.

1.3 The regulation of the single market and the relations between economic and social players in Europe have allowed legislation to be harmonised and have also facilitated the free movement of people and capital, without compromising the rights and obligations of the different parties involved.

1.4 For this reason, and taking into account the consequences of insufficient regulation and transparency in some of the key organisations of the single market, the EESC believes that the Commission should assess whether the proposals to simplify procedures will have positive effects alone and reduce economic costs, or whether they could have an effect on the legal certainty of concentrations occurring through mergers or divisions.

1.5 The EESC therefore believes that legislation concerning European SMEs – which comprise the main part of Europe's economic fabric – should be clearly separated from legislation applicable to large companies, especially those which raise funds on the stock market. The unanimity requirement for many of the proposed provisions must surely be intended for small and medium-sized limited liability companies, as otherwise the requirement would be unworkable.

1.6 Until legislation is clearly separated in this way, legal guarantees for shareholders, creditors and employees should remain in place, and ways of supporting SMEs should be sought to mitigate the economic burden of meeting the demands of existing legislation.

2. Introduction

2.1 One of the Commission's priorities for the internal market has been to set up a process to simplify EU law, especially the law governing the administrative burdens on European companies. Most European companies are SMEs, but many of the requirements set out in company law Directives are designed for large limited-liability companies that raise funds on the stock market.

2.2 The Spring European Council in 2007 ([1]) endorsed the action programme to simplify and reduce the administrative burdens which unnecessarily hamper the economic activities of businesses. The action programme set the objective to reduce administrative burdens by 25 % by 2012.

([1]) Conclusions of the Presidency of the Brussels European Council. Doc 7224/07. p. 9.

2.3 In terms of company law, proposals to simplify procedures have been made in two areas: material law, in the First Directive on the formation of public limited companies ([1]) and in the Second Directive on the maintenance and alteration of capital ([2]); and the Directives on procedural law ([3]), particularly as regards accounting standards and information requirements for listed companies.

2.4 Two of the Directives that have been proposed for amendment have already been the subject of simplification proposals: the Third Directive on mergers and the Sixth Directive that regulates divisions ([4]) in relation to a key issue, the involvement of independent experts when public limited companies are merged or divided. The EESC was critical on this issue ([5]), stating that the absence of an objective observer from outside the company could jeopardise the interests of third parties, creditors and employees.

3. Gist of the Commission proposal

3.1 The Proposal for a Directive, on which this opinion is based, has a direct effect on three Directives: the Third Directive on mergers, the Sixth Directive on divisions, and the Directive on cross-border mergers which was adopted most recently ([6]). It also indirectly amends the Second Directive ([7]): introducing into the law on mergers and divisions the exemption from the independent expert's report (on non-cash consideration) will affect rules on the alteration of capital set out in the Second Directive.

3.2 Generally speaking the simplification measures proposed in the three Directives relate to:

— reducing information requirements on the draft terms of mergers or divisions

— publication and documentation obligations to shareholders on proposals for mergers or divisions

— rules on protecting creditors.

3.3 The reporting requirements in both the Third and the Sixth Directives currently involve producing three reports: a report by management on the legal and economic grounds of the merger or division; an independent expert's report; and an accounting statement where the annual accounts are older than six months. All these documents have to be approved by the general meeting of each company involved in the merger or division.

3.4 The proposal reduces these requirements if shareholders unanimously agree to waive the management report, and for the accounting statement, the rules established in the Transparency Directive ([8]) will be applied where the company has listed securities.

3.5 As regards the amendment of the Second Directive relating to the alteration of capital, the proposal is to exempt companies from the obligation to produce an expert's report on consideration other than in cash.

3.6 A key proposal involving the publication of the reports on mergers and divisions recommends using new technologies and the Internet to make this information available.

3.7 On the protection of creditors, the proposal changes their current right to oppose the mergers or divisions until payment of their loans is guaranteed. However in cross-border mergers, the expert's report on consideration other than in cash must be produced, ensuring that a value is placed on this which could be enforced in the courts in the various Member States where the companies are based, and thereby protecting creditors.

4. Comments on the proposal for amendment

4.1 The EESC considers that simplifying EU legislation – and company legislation in particular – is a positive step overall, because European companies and especially SMEs which make up an important part of the economic fabric of the EU, are over-burdened with red tape. The EESC has already pointed out however that this simplification process must not under any circumstances give rise to legal uncertainty for players in the single market.

4.2 We understand the Commission's interest in protecting shareholders as owners of the company, but it should not neglect other interested parties whose rights could be affected by legal transactions. We therefore understand and support the European Parliament's position ([9]) on the issue which pointed out the need to take into account the interests of all interested parties (investors, owners, creditors and employees). The EESC has already voiced this view ([10]), and we are making the point again to try and maintain transparency and ensure that economic and social actors have confidence in the European single market.

([1]) Directive 68/151/EEC (OJ L 65, 14.3.1968, p.8), amended in 2002 by Directive 2003/58/EC (OJ L 221, 4.9.2003, p. 13).
([2]) Directive 77/91/EEC (OJ L 26, 31.1.1977, p.1), amended by Directive 2006/68/EC (OJ L 264, 25.9.2006, p. 32).
([3]) Accounting standards and transparency requirements for corporate issuers, Directive 2004/109/EC (OJ L 390, 31.12.2004, p. 38).
([4]) Directive 2007/63/EC (OJ L 300, 17.11.2007, p. 47) 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.
([5]) EESC Opinion: OJ C 175, 27.7.2007, p. 33.
([6]) Directive 2005/56/EC on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1).
([7]) Directive 77/91/EEC.
([8]) Directive 2004/109/EC on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
([9]) European Parliament Report A6-0101/2008.
([10]) EESC Opinion OJ C 117, 30.4.2004, p. 43.

4.3 The following criticisms should be taken into account on the proposed simplification of reporting requirements for mergers and divisions, which allow documents to be made available to shareholders and creditors on the Internet rather than being published through a register (this also applies to cross-border mergers). Firstly, this amendment cannot be seen as safeguarding either shareholders' or creditors' rights if it recommends doing away with the intrinsically public system of registering documents, and secondly it will no longer be possible to use this information as reliable evidence in the context of any dispute. We therefore believe that ensuring transparency in this type of transaction should take precedence over economic savings, which is why we consider that this principle should be safeguarded more effectively.

4.4 We do agree however that it makes sense not to duplicate the accounting reports for listed companies [1], as they are drafted in line with established procedures and as they also involve the stock exchange authorities. Yet extending this measure to other non-listed companies, when all shareholders from all companies involved unanimously agree, seems to distort the aim of the legislation. If the company accounts are already available, and comply with legislation, there is no need to duplicate them, but this is not the implication of Article 9 (ii)(b) of the Third Directive, where the need to provide a report can be waived if shareholders unanimously agree.

4.5 The proposed amendment to the Second Directive 77/91/CEE (which will be in addition to the amendments made previously) is another issue which concerns us. The proposal is the non-application of Article 10 – on consideration other than in cash and assessment by an independent expert – for mergers or divisions, and the application of specific rules on expert reports. We understand that the report establishes how much capital corresponds to each shareholder, and the capital is the amount of each company's liability to third parties. The EESC maintains its views on transparency, particularly on the safeguards that should apply to all interested parties and others affected by the transactions. Having no 'objective' report on the company's assets at the very least, as reflected in the value of the company's nominal share capital, is surely getting off to the wrong start.

4.6 Lastly, the possibility for creditors to oppose mergers or divisions until they have obtained guarantees (as long as they have evidence of an outstanding claim on the companies that are involved in the transactions), has been one of the ways of maintaining confidence in market transactions and ensuring they run smoothly. Requiring creditors to apply to the appropriate administrative or judicial authority in order to obtain adequate safeguards, and to credibly demonstrate that the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company (Article 12(2) Directive 82/891/CEE), effectively diminishes creditor protection rules. Reversing the burden of proof in this way should make us pause to consider whether this is a sensible change to make: it will make hitherto routine market transactions more complicated, and could potentially lead to an increase in the number of transactions effected with legally binding guarantees.

Brussels, 25 February 2009.

The President
of the European Economic and Social Committee
Mario SEPI

[1] Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.