Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers'

COM(2011) 79 final — 2011/0038 (COD)

(2011/C 248/20)

Rapporteur: **Miklós PÁSZTOR**

On 8 March 2011 the European Parliament, and on 16 March 2011 the Council, decided to consult the European Economic and Social Committee, under Article 50(2)(g) of the Treaty on the Functioning of the European Union, on the

Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers

COM(2011) 79 final – 2011/0038 (COD).

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 26 May 2011.

At its 472nd plenary session, held on 15 and 16 June 2011 (meeting of 15 June), the European Economic and Social Committee adopted the following opinion by 144 votes to two with four abstentions.

1. **Conclusions and recommendations**

1.1 The EESC welcomes this directive which represents a major step forward in the development of the single market. The directive will enable achievement of the broader objectives of businesses, employees, consumers and European citizens, as envisaged by the Europe 2020 strategy and the Small Business Act. However, in its current form, which envisages standardising the most important identifiers and documents and replacing voluntary cooperation with a legal obligation that would apply throughout the EU, the proposal only meets some of the basic demands that have been expressed.

1.2 At the same time, the proposal contains numerous uncertainties as regards implementation, and responsibility for drawing up further rules to resolve many of the issues has been delegated to the Commission. The EESC hopes that it will also be involved in future legislative stages and that it will continue to act as partner in the framing of rules delegated to the Commission.

1.3 The EESC would have preferred for the proposal to consolidate the three amended directives and set out the EU's requirements in this field in a genuinely independent manner [1]. With the changes and the delegated acts that will be adopted at a later date, implementation will become somewhat less clear. The EESC therefore maintains its views on these issues as expressed in connection with the Green Paper, and hopes that these views will be reflected in future legislation.

1.4 The Committee feels that failure in this legislation to regulate the issue of relocating registered offices - an issue which, as the Green Paper points out, is becoming increasingly crucial in a more closely integrated market - is a serious shortcoming. In the EESC's view, the fact that the legislator, despite referring to the directive on the transparency of securities, does not use it as a model represents a missed opportunity.

1.5 The EESC endorses the proposal's changes regarding Directives 89/666/EEC and 2005/56/EC.

1.6 With regard to amendment of Directive 2009/101/EC, the EESC feels that the following aspects are important:

— data should be published as soon as possible, taking into account legal and technical constraints,

— as the EESC has already recommended, requests for basic information through a unified European system should be free of charge,

— the costs of developing and operating the system have not yet been clarified. The Committee notes that the relevant impact assessments are lacking from the proposal, but still feels that EU funding must be set aside to cover such costs,

— access to information via the system should be as direct as possible, while keeping paper-based information disclosure to a minimum.

[1] The first and eleventh directives can in fact easily be combined, as they address the same subject (company disclosure) whereas the directive on cross-border mergers is confined to one specific aspect, which is the clarity of trade registers as regards cross-border operations.

1.7 The EESC accepts the deadline of 1 January 2014 for the EU and the Member States to implement the necessary legal acts. However, it feels that the EU needs an internal deadline for framing measures set out in the legal acts which are to be drawn up on the basis of delegation.

2. **Gist of the proposed directive**

2.1 The aim of this directive is to improve the transparency of the legal and fiscal environment for businesses, which are increasingly taking advantage of the opportunities offered by the single market, and thus to increase confidence in the single market, in order to ensure that good use is made of the competitive advantages developed through relations between trading partners.

2.2 On the basis of this directive, Member States should take the necessary steps to provide members and third parties with easy access, throughout the EU, to the documents and particulars concerning companies and their relations with one another. To date there has been no real obligation or possibility for this to be done. The issue of transparency is especially acute and urgent in the case of mergers and break-ups of companies located on different sides of a border or of local branches of a company subject to the law of another Member State.

2.3 The solution proposed by the Commission is to amend earlier directives:

— Directive 89/666/EEC concerning disclosure requirements in respect of branches in another Member State (the Eleventh directive);

— Directive 2005/56/EC on cross-border mergers of limited liability companies; and

— Directive 2009/101/EC on coordination of safeguards for the protection of the interests of members and third parties (a new directive on business disclosure, replacing the first directive).

These directives were only partially meeting growing demands for information.

2.4 The changes made by the new directive extend, clarify and build on existing requirements and procedures and give the Commission the power to apply other specific details and extensions when implementing the directive. The main aim of this measure is to ensure that all companies, branches or groupings of economic operators can be identified clearly and as swiftly as possible and that any change is immediately registered and accessible. The best instrument for achieving this has proven to be the electronic storage and publication of documents and particulars, and Member States should guarantee the digitisation and accessibility of data through the planned single European platform.

2.5 Most of the amendments proposed by the European Commission target Directive 2009/101/EC:

— the deadline for publishing data is set at 15 calendar days;

— every company should have a unique identifier that allows for their unequivocal identification in the European economic area;

— the procedures laid down by the Member States should be compatible with accessibility through a single European electronic platform;

— Member States must guarantee the credibility of documents and particulars;

— publication costs should not exceed the necessary administrative costs;

— for the purpose of implementing these provisions, the European Commission may adopt delegated acts to lay down the technical arrangements for the management, security and creation of the single identifier, language use, the methods and technical standards for disclosure and potential penalties for non-compliance with the provisions.

2.6 Where the 1989 and 2005 directives are concerned, the changes relate to the unique identifier of branches or limited liability companies that have undergone a cross-border merger and to the requirement for the electronic compatibility of other registration activities.

2.7 Turning to the Member States, the directive then sets 1 January 2014 as the final deadline for their implementation of it; the directive itself will enter into force on the twentieth day following that of its publication.

3. **Legal background**

3.1 The transparency of business registers is not only an important goal in itself; it is also a prerequisite for promoting the harmonisation of company law. The interoperability of national registers is essentially an information-related and economic issue, but the proposal must be published in a legal form, because legal requirements cannot be disregarded. In addition to the need to find the appropriate legal form, the legal background to harmonisation also warrants a detailed study.

3.1.1 Against this backdrop, the first question might be how to reconcile the interests of countries that are traditionally exporters of capital and those that are traditionally importers. The table below gives a broad outline of their main approaches. On the basis of these approaches, taking account of States' underlying interests in the longer term intrinsically limits the success of in-depth harmonisation, even if, in the context of the discussions, the issue of the interoperability of business registers, being of a technical nature, might appear less important.

	Capital-exporting Member State	Capital-importing Member State
1. Giving businesses legitimacy (legal personality)	Fiction theory (universality)	Realism theory (specific approach)
2. Identifiability of legal personality	Place of incorporation	Effective place of management
3. Jurisdiction	Personal scope	Territorial scope
4. Principle of business law	Legal certainty	Prevention of abuse of the law
5. Principle of EU law (internal market policy)	Prohibition on restricting fundamental freedoms	Prohibition on discriminatory treatment

3.2 Far fewer barriers to the national registration of businesses are imposed in some countries – those adhering to the fiction theory (in which recognition of businesses at the national level is in principle automatic, provided they meet certain formal requirements) – than in others (in which importance is also attached to protecting local communities of which the business forms part), because the business applying for registration holds greater responsibility than the State. In other words, where business registration is concerned, private law takes precedence over public law.

3.3 In some countries, the company statute simply cannot be changed, whereas in others, when the company's administrative seat is transferred, the identity that can be recognised by company law must be changed, and consequently the register. This has led to a number of problems on the internal market (see for example the Überseering case), excluding neither double identity nor the nightmare scenario of double non-identity (e.g. in the case of a German-Irish grouping).

3.4 Some countries see the world as a whole and take an overview of business activity, regardless of whether this is carried out within their borders or abroad (the personal scope of jurisdiction is applied). In other countries, jurisdiction is based on the principle of territoriality: what is important is where a business is located, and there is consequently a crucial difference between national territory and abroad. There is thus a real need for harmonisation. In the first case (personal scope of jurisdiction), the interoperability of business registers falls essentially under private law and company law deals with businesses' own interests. In the second case, public measures are necessary. In the first case, i.e. for capital-exporting countries, the BRITE project appears to be an example of a better solution than positive harmonisation.

3.5 Where registration is concerned, countries that traditionally issue capital are reluctant to change the identifier obtained under company law because they consider legal certainty to take precedence over any other factor. Other countries, however, consider that protecting the local communities of which the business forms part is the most important aspect and do not hesitate, where necessary, to challenge a business's legal status. This is why Article 11 of the first directive (Article 12 in the new one), which provides a detailed explanation of the grounds for a company's winding-up, can be implemented quite differently from one country to another, in line with that country's interpretation of how a company should be set up (see the Ubbink or Marleasing cases, for example).

3.6 Countries that do not in principle make any distinction between domestic and non-domestic activities generally take greater advantage of the possibilities offered by the internal market and businesses registered in such countries could easily complain that the measures adopted by the host State restrict fundamental Community freedoms. On the other hand, in the practices of States that recognise the realism theory, in other words territoriality, the emphasis is sometimes placed more on the issue of the discriminatory treatment of foreign businesses. It is clearly first and foremost capital-exporting countries that gain from the standardisation of business registers, whereas harmonisation in this field is more challenging for capital-importing States.

4. **General comments**

4.1 The EESC welcomes this directive, which represents important progress in the development of the single market. Businesses, employees, consumers and European citizens will be able to achieve their broader objectives, as previously discussed by the EESC in connection with the Green Paper. The interconnection of business registers should reflect the goals of two strategic documents: the Europe 2020 strategy and the Small Business Act (SBA). 'Interconnecting business registers should increase transparency and facilitate cooperation between businesses, as well as lower the barriers to cross-border business activities and reduce administrative burdens, particularly for SMEs. All of this is crucial to consolidating the single market and promoting balanced and sustainable economic and social progress, as highlighted in the Commission communication *Think Small First: Priority to SMEs. A Small Business Act for Europe* (COM(2008) 394 final)' ([2]).

4.2 The Committee also notes that in its current form, the proposal only meets some of the basic demands that have been expressed, in that it provides for standardising the most important identifiers and documents and for replacing voluntary cooperation with a legal obligation that would apply throughout the EU. It also finds both the approach of the regulation to administrative costs and data protection acceptable, but many of the details need to be worked out.

4.3 It should be pointed out, however, that the proposal still contains a number of uncertainties as regards implementation. By and large, it leaves responsibility for detailed arrangements to future regulation. It would be useful to be informed at this stage about these arrangements. For example, the proposal could include more information on particular standards or content given that the Green Paper has referred to some of these issues and called for an answer. It should, therefore, have

([2]) OJ C 48, 15.2.2011, p. 120. point 1.2.

been possible to comment on their practical aspects. The EESC therefore maintains its views on these issues as expressed in connection with the Green Paper, and hopes that these views will be reflected in future legislation.

4.4 As mentioned in point 3, the EESC feels that the European Union has consequently missed an opportunity to take a greater step towards the closer harmonisation of company law. The Committee is aware of the fact that considerable legal and institutional differences make it difficult to make progress on the broader issues and that harmonising company law could take a decade. Nevertheless, registration is one part of the process and by neglecting to address this issue in detail, we have let slip an opportunity to find common formats and to open a debate on the matter. Furthermore, the BRITE programme clearly illustrates the fact that the stakeholders concerned can satisfactorily solve several issues concerning details through self-regulation.

4.5 The Committee feels that failure in this legislation to regulate the issue of relocating registered offices - an issue which, as the Green Paper points out, is becoming increasingly crucial in a more closely integrated market - is a serious shortcoming. In the EESC's view, the fact that the legislator, despite referring to the directive on the transparency of securities, does not use it as a model, represents a missed opportunity.

4.6 As part of this process, it might have been useful for the proposal to consolidate the three amended directives and set out the EU's requirements in this field in a genuinely independent manner ([3]). With the changes and the delegated acts that will be adopted at a later date, implementation will become somewhat less clear, especially since the proposal under consideration does not discuss in detail how to manage national business registers and cooperation between them.

4.7 The Committee takes the view that new problems will arise when implementing the objectives that have been set, because according to the wording of the proposal, and not – let us hope – according to the objective that had originally been intended, the bodies cooperating in the field of registration that have been active to date at the European level, whether official, working on a voluntary basis or set up by the market, will have no place under the new framework for cooperation. The EESC also agrees that the EU's single legal portal - the European e-Justice portal – should be the key access point for legal information; however, there should still be scope for other and possibly broader initiatives. The Committee also reiterates that it is 'particularly important that national and European institutions cooperate with the social partners and civil society in this field'. ([4]) The EESC hopes that it will also be involved in future legislative stages and that it will continue to act as partner in the framing of rules delegated to the Commission.

5. **Specific comments**

5.1 The EESC endorses the proposal's changes regarding Directives 89/666/EEC and 2005/56/EC.

5.2 The EESC feels that if Directive 2009/101/EC is amended, data should be published as soon as possible, taking into account legal and technical constraints. We believe that the proposed deadline could be drastically reduced in the short term. It wishes to point out, however, that even this deadline could prove to be too long in certain cases and that there is consequently a potential need for the declaration of changes to be made much more quickly, in other words through the single European platform in the form of a 'disclosure' taking place immediately after a local notification ([5]) and which could be certified at a later date. Current information technology makes this possible.

5.3 In terms of the costs arising from this information service, it should be clearly established whether all costs are to be covered by the amount paid by the notifying party or whether the party requesting information should also pay. There are differences in the systems currently in place in the Member States on this issue. Practice to date has been that the service only has to be paid for where information requested has to come from another country's trade register. The EESC reiterates its previous recommendation that requests for basic information through a unified European system should be free of charge ([6]).

5.3.1 The Committee feels that information on a company's registered office, owners and senior managers, the company's economic and legal situation, its strength, together with accurate accounting and balance sheet data, should be considered as basic information for partner companies, shareholders, creditors and employees.

5.3.2 In this connection, it should be emphasised that the costs of developing and operating the system have not yet been clarified. The Committee feels that the relevant impact assessments are lacking from the proposal, but still feels that EU funding must be set aside to cover such costs.

5.4 The EESC welcomes the fact that data will be available electronically. At the same time, access to information via the system should be as direct as possible. It is recognised that a balance must be struck here between the requirement for disclosure and a swift and secure operation. The Committee is

([3]) The first and eleventh directives can in fact easily be combined, as they address the same subject (company disclosure) whereas the directive on cross-border mergers is confined to one specific aspect, which is the clarity of trade registers as regards cross-border operations.

([4]) See OJ C 48, 15.2.2011, p. 120, point 6.7.

([5]) This would take the form of messages or information published on the European electronic network and directly accessible to the interested parties.

([6]) See OJ C 48, 15.2.2011, p. 120, point 1.5.

convinced that a satisfactory compromise is possible, ultimately enabling improved disclosure. The Committee feels that an essential requirement of the system is to keep paper-based information disclosure to a minimum, thus also cutting costs.

5.4.1 The Committee draws attention to the possible contradiction between EU notification requirements and legal requirements at national level (e.g. the issue of document authenticity). In the long term, this is not a situation which can continue.

5.5 In the Committee's view, straightforward technical solutions also exist for language issues, provided that a considerable amount of preliminary work is carried out. Modern translation software makes it possible to publish standardised texts easily in any other language, provided that these texts are available and have been approved, following the appropriate consultation. This type of standardisation could be contemplated for basic information and accounting documents in particular.

5.6 Where data protection is concerned, the EESC believes it would be appropriate to apply the provisions of Directive 95/46/CE on the protection of personal data to the company register.

5.7 The EESC accepts the deadline of 1 January 2014 for the Member States to implement the necessary legal acts. However, it feels that the EU needs an internal deadline for framing measures set out in the legal acts which are to be drawn up on the basis of delegation. This will ensure that the body providing rapid and uniform access to company information is up and running as soon as possible throughout the EU.

Brussels, 15 June 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON