



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 78/855/EEC concerning mergers of public limited liability companies and Council Directive 82/891/EEC concerning the division of public limited companies as regards the requirement for an independent expert's report on the occasion of a merger or a division

(presented by the Commission)

[SEC(2007) 298]
[SEC(2007) 300]

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Grounds for and objectives of the proposal

A large part of EC legislation was introduced to correct market failures and ensure a level playing field. These goals could often only be achieved by imposing obligations on businesses to provide information and report on the application of the legislation.

With time, some of these procedures have become needlessly time-consuming or obsolete. These unnecessary administrative burdens hamper economic activity and have a negative impact on the competitiveness of European enterprises.

The Commission is committed to reducing these unnecessary burdens to the maximum extent possible. This is a part of the Better Regulation strategy and it is of vital importance for achieving our "Lisbon" targets of more growth and jobs.

• General context

On 14 November 2006, the Commission presented a Strategic Review of Better Regulation in the European Union (COM (2006) 689), including a proposal for a target to reduce the administrative burdens on businesses by 25% by 2012.

Ten concrete proposals for "fast track action" were thereupon identified in Annex III of the Action Programme for reducing administrative burdens in the EU (COM (2007) 23), based on broad stakeholder consultation and suggestions from Member States and Commission experts. The "fast track actions" aim at significantly reducing administrative burdens on businesses through minor legislative changes without challenging the level of protection or the original purpose of the legislation.

One of these "fast track action" proposals concerns Council Directive 78/855/EEC concerning mergers of public limited liability companies and Council Directive 82/891/EEC concerning the division of public limited liability companies. The aim of this proposal is to remove unnecessary administrative burdens on businesses by giving shareholders the direct¹ possibility to renounce to the written expert report on the draft terms of merger or division, if they so desire. This will bring the two directives in line with the current requirements in the Tenth Company Law Directive (Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies).

• Existing provisions in the area of the proposal

The existing provisions that this proposal seeks to modify are Articles 9 and 11 of Council Directive 78/855/EEC concerning mergers of public limited liability companies and Articles 8 and 9 of Council Directive 82/891/EEC concerning the division of public limited liability companies.

¹ Council Directive 82/891/EEC currently allows the Member States to provide a possibility for the shareholders to renounce to the expert report on the draft terms of division.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

• Consultation of interested parties

Consultation methods

In the Action Programme of 24 January 2007, the Commission presented ten concrete proposals for "fast track actions". These proposals were based on consultations with experts and in particular on a pilot project comparing the baseline measurements of administrative burdens in the Czech Republic, Denmark, The Netherlands and the United Kingdom in 2006.

One of these "fast track actions" concerned Company Law and proposed to "ease requirements regarding written reports to the stockholders in case of merger and division". Council Directives 78/855/EEC and 82/891/EEC provide for the company having to set up an expert report on the draft terms of a merger or a division. Council Directive 82/891/EEC leaves Member States the possibility not to apply these provisions if all the shareholders and holders of other securities giving the right to vote have so agreed. Following an indication from some Member States, consultations with the Commission's Advisory Group on Corporate Governance and Company Law were held.

Summary of responses

Consultations with the Commission's Advisory Group on Corporate Governance and Company Law have confirmed that this requirement of Council Directive 78/855/EEC concerning the expert report on the draft terms of mergers is excessive. As it has already been recognised in the context of the adoption of Directive 2005/56/EC, this requirement becomes an unnecessary formality where the shareholders of all companies involved in the merger do not consider such a report necessary.

Furthermore, the Commission has received positive responses to the presentation of its Action Programme, including the fast track proposal related to Company Law. A few responses have underlined concerns about transparency and shareholder protection. These concerns have been taken into account in the current proposal. It seems therefore appropriate to align the provisions of Council Directives 78/855/EEC and 82/891/EEC with the exemption contained in Directive 2005/56/EC.

• Impact assessment

The Impact Assessment considered three policy options:

Option 1 No-Policy Change.

Option 2 Abolition of the requirements unless shareholders ask for it.

Option 3 Abolition of the requirements where all the shareholders agree that it is not needed.

Option 3 is the preferred option because it provides a satisfactory level of transparency and shareholder protection whilst contributing to the objective of reducing administrative burdens on companies.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposal action**

It is proposed to align the provisions of Council Directives 78/855/EEC and 82/891/EEC on the expert report on the draft terms of merger or division with the corresponding rule in Article 8 of Directive 2005/56/EC.

- **Legal basis**

The legal base of Community action in this area is laid down in Article 44 EC Treaty.

- **Subsidiarity principle**

Action by the Member States would not suffice to reduce administrative burdens in this area as the information requirements were imposed for mergers and divisions of public limited liability companies by way of EC Directives.

EU action will ensure that all future mergers and divisions of public limited liability companies taking place in Europe can benefit from this administrative burdens reduction.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

By proposing to modify the relevant Articles of Council Directive 78/855/EEC and Council Directive 82/891/EEC by way of a Directive, the Member States still have sufficient scope for transposing the Directive and achieving the required result in a manner that they see fit and that is best suited for their national legal system.

This proposal ensures that the administrative burdens falling upon the economic operators in the case of mergers and divisions of public limited liability companies are minimized.

- **Choice of instruments**

Proposed instruments: Directive

The objective of reducing administrative burdens caused by the information requirements imposed by the Council Directive 78/855/EEC and Council Directive 82/891/EEC can only be reached by modifying these Directives, which can only be done by way of a binding EC legal instrument of the same type and level, a Directive.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5. ADDITIONAL INFORMATION

- **Simplification**

The proposal provides for simplification of administrative procedures for private parties.

The administrative procedure to be followed by public limited liability companies in case of mergers and divisions will be simplified in the sense that certain information obligations will be made voluntary instead of mandatory.

- **Correlation table**

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive as well as a correlation table between those provisions and this Directive.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(2)(g) thereof,

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Economic and Social Committee³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

- (1) Community policies on Better Regulation, in particular the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "A strategic review of Better Regulation in the European Union"⁵ and the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "Action Programme for Reducing Administrative Burdens in the European Union"⁶, stress the importance of reducing the administrative burdens imposed on enterprises by existing legislation as a crucial element for improving their competitiveness and for achieving the objectives of the Lisbon agenda.
- (2) Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies⁷ provides for an exemption from the obligation to have the draft terms of merger examined by an independent expert and to have a report established by that expert, if all the shareholders agree that such a report is not needed.

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ C , , p. .

⁵ COM (2006) 689.

⁶ COM (2007) 23.

⁷ OJ L 310, 25.11.2005, p. 1.

- (3) Council Directive 78/855/EEC⁸ does not contain any similar exemption, and Council Directive 82/891/EEC⁹ leaves it to the Member States whether to provide for such a possibility with a view to the expert report on the draft terms of division.
- (4) There is no reason to require such an examination by an independent expert if all the shareholders agree that it may be dispensed with.
- (5) Directive 78/855/EEC and Directive 82/891/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 78/855/EEC is amended as follows:

- (1) In Article 10, the following paragraph 4 is added:

"4. Neither an examination of the draft terms of merger nor an expert report shall be required if all the shareholders and the holders of other securities giving the right to vote of each of the companies involved in the merger have so agreed."

- (2) In Article 11 (1), point (e) is replaced by the following:

"(e) where applicable, the reports provided for in Article 10."

Article 2

Directive 82/891/EEC is amended as follows:

- (1) In Article 9 (1), point (e) is replaced by the following:

"(e) where applicable, the reports provided for in Article 8."

- (2) Article 10 is replaced by the following:

"Article 10

1. Neither an examination of the draft terms of division nor an expert report as provided for in Article 8 (1) shall be required if all the shareholders and the holders of other securities giving the right to vote of each of the companies involved in the division have so agreed.

2. Member States may permit the non-application of Article 7 and Article 9 (1) (c) and (d) if all the shareholders and the holders of other securities giving the right to vote of the companies involved in the division have so agreed."

⁸ OJ L 295, 20.10.1978, p. 36. Directive as last amended by Council Directive 2006/99/EC (OJ L 363, 20.12.2006, p. 37).

⁹ OJ L 378, 31.12.1982, p. 47.

Article 3
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 July 2008 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 5

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President