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COMMISSION STAFF WORKING DOCUMENT

Accompanying document to the

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

Impact assessment

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[SEC(2007) 300]

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Impact assessment

Problem Definition

As international trade barriers are being dismantled it is generally accepted that competitive pressures are increasing. Making the EU economies fit to meet the challenges of a more competitive global business environment entails improving the business environment in which they have to operate. The proposal this Impact Assessment accompanies is part of the wide ranging administrative burden reduction exercise[1]. More specifically, this IA is written for an item on the list of Fast Track Actions in the area of company law, namely Directive 78/855/EEC of 9 October 1978 and Directive 82/891/EEC. These Directives state that if a public limited liability company is subject to a merger or a division, one or more experts must be appointed or approved by a judicial or administrative authority and act on behalf of but independent from each of the merging companies (or the dividing company), in order to examine the draft terms of the merger/division. They have to produce a written report that explains the terms of the merger or division and the method that is used for calculating the share-exchange ratio and submit it to the shareholders of each of the relevant companies. In the case of a division Member States may permit the non-application of the provisions if all shareholders and the holders of other securities giving the right to vote have so agreed.

The requirement of producing this report is currently mandatory in the case of a merger, which means that even in cases in which shareholders do not require this information it has to be produced. In the case of a division the preparation of the report is mandatory if the respective Member State has not used the option in Article 10 of Directive 82/891/EEC. For example, companies with a limited number of shareholders who may be actively involved in the management and the running of the business, e.g. a SME, have to commission this report just as well as bigger companies with numerous shareholders have to. According to estimates available from countries that have already carried out their national administrative burden measurement exercises, the number of mergers and divisions may be significant in some countries. In Denmark and the Netherlands in the figures are approximately 1100 and 1800 cases per annum respectively. The number of mergers however varies across the EU. In the UK, where takeovers are much more common, the annual figure of mergers of these

[1] For a fuller analysis of the costs and benefits of this exercise, please see the IA that was published alongside the Action Programme for Reducing Administrative Burdens on 24 January 2007.

companies is normally less than a handful. There are more than 600.000 public limited liability companies in the EU, but the distribution varies substantially across Member States[2].

- AT: 1.720
- DK: 39.535
- DE: 20.297
- EE: 5.945
- FI: 204
- FR: 143.401
- IT: 54.852
- LU: 47.196
- NL: 6.027
- SP: 316.699
- UK: 11.500

Notwithstanding these huge variations in the number of companies that have public limited liability status and the number of mergers of these companies across the EU, estimates suggest that the annual administrative cost of producing these reports may be substantial. According to figures that are available from the Danish measurement exercise, the administrative costs of producing this report are approximately EUR 3.500 for every merger or a division. These costs arise predominantly due to the need to employ external experts to draw up the report, although companies also spend some time assisting the expert and validating the reports. The nature of the current requirement means that financial and other resources may be misallocated if a report is produced although there is no need or demand for it. Those resources could be employed more purposefully elsewhere. Thus, the problem may be defined as the current requirements under the existing Directives preventing a better use of resources, be they financial or otherwise, in some instances. This means that efficiency gains can be realised by changing the mandatory nature of the existing obligation.

However, it has to be acknowledged that the reports are not always redundant and can prove useful for shareholders when forming an opinion concerning a merger or a division of their company. Any proposed changes to the Directives will have to take fully into account the positive benefits the reports might offer.

As the requirement stems from EU Directives, any changes have to involve the EU-level.

2 Source: European Commerce Registers Forum 2005 survey.

1. OBJECTIVES

The overarching objectives that this proposal contributes to are the goals of the Lisbon strategy, in particular the improvement of economic growth and the creation of more and better jobs. As stated above, this proposal is part of the wider Administrative Burden reduction exercise which aims to enhance the competitiveness of the EU's economies by facilitating the regulatory environment and more specifically by freeing up and redirecting resources to more business specific and productive activities[3]. It is clear that the direct efficiency gains will be of a somewhat limited nature and should be seen in the context of contributing to the overall drive towards positively influencing EU competitiveness. Moreover, as this is part of the wider Action Programme for Reducing Administrative Burdens[4], further objectives are to contribute to the overall reduction target of 25% by 2012 and to ensure the availability of necessary and useful information to its current users.

2. POLICY OPTIONS

Given the objectives stated above, any alternative options must contain a safety mechanism so that if it is deemed appropriate to make the requirement voluntary, the reports will continue to be made available if there is a demand for such information. Thus, the following policy options lend themselves to further examination:

Option 1 No-Policy Change.

This options means that the existing Directives are not changed. The requirements regarding the compilation of these reports remain in place.

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

This option entails that the current requirement is abolished. The production of the report for both mergers and divisions will be voluntary. In order to safeguard against loss of valuable information this option still allows shareholders to have the report produced if such a demand exists. In other words, the report does not need to be produced unless requested by one or more shareholders.

Option 3 Abolition of the requirement in cases where all the shareholders agree that it is not needed.

In option 3, commissioning the report will not be obligatory as long as all shareholders agree that it is not needed. This means that contrary to option 2 all shareholders would have to give their prior consent so as to make the requirement not obligatory. In effect, this option means that one could opt-out of the requirement only if all the shareholders give their prior consent. However, for many small companies where shareholders are actively involved in the management and the running of the business, asking for their approval would be relatively straightforward.

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3 For a more elaborate explanation of the underlying reasoning see the Action Programme of 24 January.
4 COM(2007)23

3. ANALYSIS OF OPTIONS

Option 1

There are no directly negative impacts to be expected if the current requirement is not changed other than the opportunity cost of foregoing the better use of mainly financial resources. What this opportunity cost amounts to in some more detail can be found in the analysis of the other two options.

Option 2

Abolishing the current requirement, whilst allowing shareholders to request the report, introduces flexibility that balances information needs with the freedom of choosing to do without the report. As it requires only one shareholder to demand the report to be written the potential benefits that shareholders currently derive from the report would be guaranteed. There would however be an obligation on the shareholder of a public limited liability company to actively exercise his or her 'veto' right.

The smaller the number of shareholders a company has, the higher the likelihood that it does not need this report, which means that it is reasonable to assume that SMEs, and particularly those with a limited number of shareholders, would gain from such a change. Some estimates regarding the potential for cost savings in merger and division cases of public limited liability companies exist from the Member States that have already carried out their own Administrative Burden measurement and reduction exercises. According to the estimates presented above, the total administrative cost of producing a report amounts to EUR 3.500 for every merger or division. However, the overall impact is difficult to estimate at this point in time. First of all, although comparable data is not readily available, it is known that the number of merger cases varies hugely between EU Member States. In Denmark the annual number of mergers of public limited liability companies is somewhere in the region of 1100, while in the Netherlands it is close to 1800 per annum. In the UK it is less than five[5]. Secondly, there is considerable uncertainty concerning the number of mergers that would actually take place without there being a demand for such a report. As stated above, it is likely that public limited liability SMEs with a limited number of shareholders are likely to make more use of not commissioning the report.

Thus, one has to estimate the likely consequences cautiously. However, it is clear that the proposal will only entail positive impacts, although the exact extent of these is difficult to assess. In the unrealistic case that there is no take-up whatsoever of the exemption, the report will continue to be produced for each merger and division and the overall benefit will be zero. As long as a few mergers and divisions take place without there being a demand for this report, the administrative cost savings will already produce positive benefits. Due to there being no loss of information and thus no negative benefits, a much more thorough analysis consisting of new data gathering, for example on the number of mergers likely to proceed without this report being produced in order to calculated a more precise estimate of the likely overall impacts (benefits), would be disproportionate and not in accordance with the Commission Impact Assessment guidelines' core principle of proportionate analysis.

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5 The very low number in the case of the UK can to some extent be explained by the much higher rate of takeovers.

Option 3

.Having established that a less stringent obligation is likely to have a positive impact there remains a question concerning the most efficient way of introducing the required voluntary element. The previous option suggests leaving it to shareholders to request the report to be written, while this option proposes gathering shareholders' prior agreement to not producing the report. This option would require an extra effort of asking for shareholders' agreement as compared to option 2. However, this extra effort increases transparency and ensures even more so that the report continues to be available to shareholders if there is a need or a demand for it. In addition this requirement would be in line with the 10th Company Law Directive[6]. Any extra costs that may occur for obtaining shareholders' prior consent would be of a very minor nature, given that smaller companies with a small number of shareholders are the ones envisaged to make use of the proposed relaxation of the current requirement. Moreover, there could also be benefits from having every shareholder's explicit consent on record in terms of legal certainty and increased transparency.

4. COMPARING THE OPTIONS

As the same detail and amount of information will continue to be available when it is needed and adds value to its users under all options, there is no real risk of valuable information being lost. The potential benefits are positive as businesses can spend more purposefully the money that is currently being spent on these reports even when they are not needed by anyone. This means that option 1 should really only be an option if ways with necessary safeguards against loss or lack of availability of useful information cannot be devised or prove too costly.

Options 2 and 3 are alternative ways of making this requirement voluntary while including the necessary caveats so that the information continues to be produced when there is a need for it. When comparing the administrative requirements that both options would entail it is found that option 3 provides a slightly higher level of shareholder protection, whilst in effect not increasing the burden disproportionately, and it aligns the proposed provisions with similar existing requirements. Therefore option 3 is the preferred option.

5. MONITORING AND EVALUATION

As explained above, it is expected that some data will become available during the administrative burden exercise, which should provide sufficient evidence for a more precise indication of the benefits of the proposal and the contribution it makes towards the overall 25% reduction target which the Commission has proposed. There seems to be no compelling reason to introduce a large scale new data gathering obligation regarding how many mergers and divisions of public limited liability companies would go ahead with the report being written. However, where data is already collected one can draw on these sources to obtain a picture of take up and its likely impact.

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6 2005/56/EC