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*****I**

REPORT

on the proposal for a directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital (COM(2004)0730 – C6-0169/2004 – 2004/0256(COD))

Committee on Legal Affairs

Rapporteur: Piia-Noora Kauppi

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend the common position
- *** Assent procedure
majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend the common position
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital (COM(2004)0730 – C6-0169/2004 – 2004/0256(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2004)0730)¹,
 - having regard to Article 251(2) and Article 44(1) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0169/2004),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Economic and Monetary Affairs (A6-0050/2006),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1 RECITAL 2

(2) In its Communication to the Council and the European Parliament “Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward” of 21 May 2003 the Commission draws the conclusion that a simplification of the Directive 77/91/EEC would significantly contribute to the promotion of business efficiency and competitiveness without reducing the protection offered to shareholders and

(2) In its Communication to the Council and the European Parliament “Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward” of 21 May 2003 the Commission draws the conclusion that a simplification **and modernisation** of the Directive 77/91/EEC would significantly contribute to the promotion of business efficiency and competitiveness without reducing the protection offered to

¹ OJ C ... / Not yet published in OJ.

creditors.

shareholders and creditors. *Those objectives have first priority but do not affect the need to proceed without delay to a general examination of the feasibility of alternatives to the capital maintenance regime which would adequately protect the interests of creditors and of shareholders of a public limited liability company.*

Amendment 2
RECITAL 5

(5) Public limited liability companies ***should be able*** to grant financial assistance with a view to the acquisition of their shares by a third party up to the limit of the company's distributable reserves so as to increase flexibility with regard to changes in the ownership structure of the share capital of companies. This possibility should be subject to safeguards imposed by the Directive's objective of protection of both shareholders and third parties.

(5) ***It should be open to Member States to permit*** public limited liability companies to grant financial assistance with a view to the acquisition of their shares by a third party up to the limit of the company's distributable reserves so as to increase flexibility with regard to changes in the ownership structure of the share capital of companies. This possibility should be subject to safeguards imposed by the Directive's objective of protection of both shareholders and third parties.

Amendment 3
RECITAL 8

(8) ***Shareholders holding a large majority of a public limited liability company's capital should have the right to acquire the remaining shares for adequate compensation, so as to enable a streamlined and more viable share ownership in listed companies. Likewise, in such a situation, the remaining shareholders should be able to require such acquisition. Nonetheless, the rules applicable according to the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids should not be affected by those rights.***

deleted

Justification

This amendment is made to facilitate agreement with the Council.

Amendment 4 RECITAL 9

(9) In order to ensure that market abuse is prevented, the Member States should take into account, for the purpose of implementation of this Directive, the ***dispositions*** of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and of Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, as well as of Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

(9) In order to ensure that market abuse is prevented, the Member States should take into account, for the purpose of implementation of this Directive, the ***provisions*** of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and of Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, as well as of Commission Regulation (EC) No 72273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

Amendment 5 RECITAL 10 A (new)

(10a) Member States are encouraged, in accordance with paragraph 34 of the Interinstitutional Agreement on better law-making, to draw up, for themselves and in the interest of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

Justification

This amendment is made to facilitate agreement with the Council.

Amendment 6

ARTICLE 1, POINT -1 (new)

Article 1, paragraph 1, indent 21 (Directive 77/91/EEC)

(-1) In Article 1(1), the 21st indent shall be replaced by the following:

"- in Hungary:

***nyilvánosan működő
részvénytársaság".***

Justification

The Second Company Law Directive aims to harmonize capital maintenance rules applicable to public limited liability companies. In Member States where company law makes distinction between public and private limited liability companies, the Directive applies only to public limited companies. The Hungarian National Parliament voted on 21 June 2005 an amendment to the Hungarian Companies Act of 1997, under which limited companies will be required in the future to indicate in the company's name whether they function under the regime of private or public companies. The scope of the Second Company Law Directive has to be adapted accordingly: in Hungary, it should apply only to public limited companies („nyilvánosan működő részvénytársaság”).

Amendment 7

ARTICLE 1, POINT 1

Article 10a, paragraph 1 (Directive 77/91/CEE)

1. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, transferable securities as defined in Article 4(1)(18) of Directive 2004/39/EC are contributed as consideration other than in cash, and those securities are valued at the weighted average price at which they have been traded on one or more regulated market(s) as defined in Article 4(1)(14) of that Directive ***in the 3 months*** preceding the effectuation of the respective consideration other than in cash.

However, where that price has been affected

1. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, transferable securities as defined in Article 4(1)(18) of Directive 2004/39/EC ***or money market instruments as defined in Article 4(1)(19) of that Directive*** are contributed as consideration other than in cash, and those securities ***or money market instruments*** are valued at the weighted average price at which they have been traded on one or more regulated market(s) as defined in Article 4(1)(14) of that Directive ***during a sufficient period, to be determined by national law,*** preceding the effectuation of the respective consideration other than in cash.

However, where that price has been affected

by exceptional occurrences that would significantly change the value of the asset at the effective date of its contribution, Articles 10(1), (2) and (3) shall apply.

by exceptional occurrences that would significantly change the value of the asset at the effective date of its contribution, ***including situations where the market for such transferable securities or money market instruments has become illiquid, a revaluation must be carried out on the initiative and under the responsibility of the administrative or management body. For the purposes of the aforementioned revaluation,*** Articles 10(1), (2) and (3) shall apply.

Amendment8

ARTICLE 1, POINT 1

Article 10a, paragraph 2 (Directive 77/91/EEC)

2. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, assets are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognized independent expert and where the following conditions are fulfilled:

(a) the recognized expert who has carried out the valuation is sufficiently trained and experienced in valuation of the kind of assets to be contributed;

(b) the fair value is determined for a date not more than 3 months before the effective date of the asset's contribution;

(c) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State, which are applicable to the kind of assets to be contributed.

In the case of new qualifying circumstances, that would significantly change the value of the asset at the effective date of its contribution, a re-valuation has to be made on the initiative and under the responsibility of the administrative or management body. ***That body shall inform shareholders whether***

2. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, assets ***other than the transferable securities and money market instruments referred to in paragraph 1*** are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognized independent expert and where the following conditions are fulfilled:

(a) the fair value is determined for a date not more than 6 months before the effective date of the asset's contribution;

(b) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State, which are applicable to the kind of assets to be contributed.

In the case of new qualifying circumstances, that would significantly change the ***fair*** value of the asset at the effective date of its contribution, a re-valuation has to be made on the initiative and under the responsibility of the administrative or management body. ***For the purposes of the aforementioned***

any such new qualifying circumstances have occurred.

*In any event, shareholders holding an aggregate percentage of at least 5% of the company's subscribed capital **may require a re-valuation of the asset concerned, and** may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply.*

revaluation, Articles 10(1), (2) and (3) shall apply.

*In the absence of such a revaluation, one or more shareholder(s) holding an aggregate percentage of at least 5% of the company's subscribed capital **on the day the decision on the increase is taken** may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply. **Such shareholder(s) may submit a demand up until the effective date of the asset contribution, provided that, at the date of the demand, the shareholder(s) in question still hold(s) an aggregate percentage of at least 5% of the company's subscribed capital, as it was on the day the decision on the increase was taken.***

Amendment 9

ARTICLE 1, POINT 1

Article 10a, paragraph 3 (Directive 77/91/EEC))

3. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, assets are contributed as consideration other than in cash whose value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts **have been drawn up in accordance with the requirements of Directive 78/660/EEC and** have been subject to an audit in accordance with Directive 84/253/EEC.

In the case of new qualifying circumstances, that would significantly change the value of the asset contributed at the effective date of its contribution, a revaluation has to be made on the initiative and under the responsibility of the administrative or management body. That body shall inform shareholders whether any such new qualifying circumstances have occurred.

In any event, shareholders holding an

3. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, assets **other than the transferable securities and money market instruments referred to in paragraph 1** are contributed as consideration other than in cash whose **fair** value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been subject to an audit in accordance with Directive 84/253/EEC.

The second and third subparagraphs of paragraph 2 shall apply mutatis mutandis.

aggregate percentage of at least 5% of the company's subscribed capital may require a re-valuation of the asset concerned, and may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply.

Amendment 10
ARTICLE 1, POINT 1
Article 10b, paragraph 1 (Directive 77/91/EEC)

1. Where consideration other than in cash as referred to in Article 10a occurs without an expert's report, ***the persons, companies and firms referred to in Article 3(i) or the administrative or the management body shall***, in addition to the requirements set out in Article 3(h), ***submit to the register for publication*** a declaration containing the following:

- (a) a description of the consideration other than in cash at issue;
- (b) its ***estimated*** value ***and*** the source of this valuation;
- (c) a statement whether the values arrived at correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them;
- (d) ***if appropriate***, a statement ***as to whether*** new qualifying circumstances with regard to the original valuation have occurred.

That ***declaration*** shall be ***published*** in accordance with Article 3 of Directive 68/151/EEC.

1. Where consideration other than in cash as referred to in Article 10a occurs without an expert's report ***as referred to in Article 10(1), (2) and (3)***, in addition to the requirements set out in Article 3(h) ***and within one month after the effective date of the asset contribution***, a declaration containing the following ***shall be published***:

- (a) a description of the consideration other than in cash at issue;
- (b) its value, the source of this valuation ***and, where appropriate, the method of valuation***;
- (c) a statement whether the values arrived at correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par; and, where appropriate, to the premium on the shares to be issued for them;
- (d) a statement ***that no*** new qualifying circumstances with regard to the original valuation have occurred.

That ***publication*** shall be ***effected in the manner laid down by the laws of each Member State*** in accordance with Article 3 of Directive 68/151/EEC.

1a. Where consideration other than in cash is proposed to be made without an expert's report as referred to in Article 10(1), (2) and (3) in relation to an increase in capital proposed to be made under Article 25(2), an announcement containing the date

when the decision on the increase was taken and information listed in paragraph 1 shall be published, in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC, before the contribution of the asset as consideration other than in cash is to become effective. In that event, the declaration pursuant to paragraph 1 shall be limited to a statement that no new qualifying circumstances have occurred since the announcement was published.

Amendment 11

ARTICLE 1, POINT 1

Article 10b, paragraph 2 (Directive 77/91/EEC)

2. Each Member State shall *designate an independent administrative or judicial authority which is responsible for examining the legality of the considerations other than in cash made in accordance with Article 10a and the declaration referred to in paragraph 1.*

2. Each Member State shall *provide for adequate safeguards ensuring compliance with the procedure set out in Article 10a and in this Article where a contribution for a consideration other than in cash is made without an expert's report as referred to in Article 10(1), (2) and (3).*

Amendment 12

ARTICLE 1, POINT 3

Article 19, paragraph 1 (Directive 77/91/EEC)

1. *Where* the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make such acquisitions subject to the following conditions:

1. *Without prejudice to the principle of equal treatment of all shareholders who are in the same position, and to Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)*, the laws of a Member State may permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf. To the extent that the acquisitions are permitted, Member States shall make such acquisitions subject to the following conditions:*

(a) authorization **must** be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and in particular the maximum number of shares to be acquired, the duration of the period for which the authorization is given **and which may not exceed 5 years**, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body must satisfy themselves that, at the time when each authorized acquisition is effected, the conditions referred to in subparagraphs (b), (c) **and (d)** are respected;

(b) the acquisitions, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not have the effect of reducing the net assets below the amount mentioned in Article 15(1)(a);

(c) only fully paid-up shares may be included in the transaction;

(d) the principle of equal treatment of shareholders shall apply; in particular, acquisition and sale by a company of its own shares on a regulated market as defined in Art. 4(1)(14) of Directive 2004/39/EC shall be considered fulfilling that principle.

Member States may also subject acquisitions within the meaning of the first subparagraph to the condition that the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed 10 % of the subscribed capital.

(a) authorization **shall** be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and in particular the maximum number of shares to be acquired, the duration of the period for which the authorization is given, **the maximum length of which shall be determined by national law without, however, exceeding 5 years**, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body must satisfy themselves that, at the time when each authorized acquisition is effected, the conditions referred to in subparagraphs (b) **and (c)** are respected;

(b) the acquisitions, including shares previously acquired by the company and held by it, shares acquired by a person acting in his own name but on the company's behalf, may not have the effect of reducing the net assets below the amount mentioned in Article 15(1), **points (a) and (b)**;

(c) only fully paid-up shares may be included in the transaction.

Member States may, **furthermore**, also subject acquisitions within the meaning of the first subparagraph to **any or all of the following conditions**:

- the condition that the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed **a limit to be determined by Member States. This limit may not be lower than 10 %** of the subscribed capital;

- the condition that the authority of the company to acquire own shares within the meaning of the first paragraph, the maximum number of shares to be acquired, the duration of the period for which the authority is granted or the maximum or minimum consideration is laid down in the statutes or in the instrument of incorporation of the company;

- the condition that the company complies with appropriate reporting and notification requirements;

- the condition that certain companies, as determined by Member States, may be required to cancel the acquired shares provided that an amount equal to the nominal par of the shares cancelled must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; it may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves;

- the condition that the acquisition shall not prejudice the satisfaction of creditors claims.

** OJ L 96, 12.4.2003, p. 16.*

Amendment 13
ARTICLE 1, POINT 3 A (new)
Article 20, paragraph 3 (Directive 77/91/EEC)

*3a. In Article 20(3) the words
"Article 15(1)(a)" shall be replaced by the
words "Article 15(1), points (a) and (b)".*

Justification

This amendment is made to facilitate agreement with the Council.

Amendment 14
ARTICLE 1, POINT 4
Article 23, paragraph 1 (Directive 77/91/EEC)

1. *A company may not* advance funds, *nor*

1. *Where the laws of a Member State*

make loans, *nor* provide security, with a view to the acquisition of its shares by a third party, ***unless such transactions in national legislation are*** subject to the conditions set out in the second to fifth subparagraphs.

The transactions must take place ***on the initiative and*** under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company ***from the third party*** and with regard to security provided to the company ***by the third party*** for the loans and advances referred to in paragraph 1. The credit standing of the third party must have been duly investigated ***and the company must be able to maintain its liquidity and solvency for the next five years. The latter must be credibly demonstrated by a detailed cash flow analysis based on the information at the time of the approval of the transaction.***

The transactions must be submitted by the administrative or management body to the general meeting for *ex ante*-approval, whereby the general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. The administrative or management body must present a written report to the general meeting, indicating the reasons for the transaction, the interest of the company in effectuating such a transaction, the conditions at which the transaction is effectuated, the risks involved in the transaction for the liquidity and solvency of the company and the price at which the third party is to acquire the shares. This report shall be submitted to the register for publication in accordance with Article 3 of Directive 68/151/EEC.

The aggregate financial assistance granted to third parties must ***not have the effect of reducing*** the net assets below the amount specified in Article 15(1)(a).

permit a company either directly or indirectly to advance funds ***or*** make loans ***or*** provide security, with a view to the acquisition of its shares by a third party, ***they shall make such transactions*** subject to the conditions set out in the second to fifth subparagraphs.

The transactions must take place under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company and with regard to security provided to the company for the loans and advances referred to in paragraph 1. The credit standing of the third party ***or, in the case of multiparty transactions, of each counterparty thereto*** must have been duly investigated.

The transactions must be submitted by the administrative or management body to the general meeting for *prior* approval, whereby the general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. The administrative or management body must present a written report to the general meeting, indicating the reasons for the transaction, the interest of the company in effectuating such a transaction, the conditions at which the transaction is effectuated, the risks involved in the transaction for the liquidity and solvency of the company and the price at which the third party is to acquire the shares. This report shall be submitted to the register for publication in accordance with Article 3 of Directive 68/151/EEC.

The aggregate financial assistance granted to third parties must ***at no time result in the reduction of*** the net assets below the amount specified in Article 15(1), ***points (a) and (b), taking into account also any reduction of***

the net assets that may have occurred through the acquisition, by the company or on behalf of the company, of own shares in accordance with Article 19(1). The company shall include among the liabilities in the balance sheet, a reserve, unavailable for distribution, of the amount of the aggregate financial assistance.

Where own shares of the company within the meaning of Article 19(1) *or shares issued in the course of an increase in subscribed capital* are acquired by a third party from the company, that acquisition must be made at a fair price, *in order to avoid dilution of existing shareholdings.*

Where own shares of the company within the meaning of Article 19(1) are acquired *or shares issued in the course of an increase in subscribed capital are subscribed for* by a third party *by means of financial assistance* from the company, that acquisition must be made at a fair price.

Amendment 15
ARTICLE 1, POINT 5
Article 23 a (Directive 77/91/EEC)

“Article 23a

deleted

A shareholder shall have the right to contest the general meeting’s approval of a transaction referred to in Article 23(1) by applying to the appropriate administrative or judicial authority to decide on the legality of that transaction.”

Justification

Follow-on amendment to above. Inconsistent with EU-level legislation.

Amendment 16
ARTICLE 1, POINT 7
Article 29, paragraph 5a (Directive 77/91/EEC)

“5a. Where an administrative or management body of a listed company is given the power to restrict or withdraw the right of pre-emption in accordance with paragraph 5, under the additional condition, that the shares for a future increase in the subscribed capital must be issued at the market price which, at the time of issue, prevails on one or more regulated market(s) within the meaning of

deleted

Article 4(1)(14) of Directive 2004/39/EC, the administrative or management body is exempted from having to present to the general meeting a written report as required under paragraph 4 of this Article.

Shareholders may, however, request the administrative or management body to indicate the reasons for the restriction or withdrawal of the right of pre-emption.”

Justification

This amendment is made to facilitate agreement with the Council. Without this amendment the new regulation would be totally impracticable for the companies. The directive should bring further flexibility by eliminating the need to produce written report. In equity offerings the issue price is generally set at a discount to the prevailing market price in order to guarantee the success of the offering.

Amendment 17

ARTICLE 1, POINT 9

Article 39 a (new) (Directive 77/91/EEC)

“Article 39a

deleted

1. Member States shall ensure that a shareholder who holds at least 90% of the subscribed capital of a listed company, hereinafter referred to as the “majority shareholder”, shall be able to require all the holders of the remaining shares, hereinafter referred to as “minority shareholders”, to sell him those shares at a fair price. However, Member States may set a higher threshold provided that it does not exceed 95% of the subscribed capital of the company.

A company is considered to be a listed company within the meaning of this provision if its shares are traded on a regulated market as defined in Article 4(1)(14) of Directive 2004/39/EC.

2. Member States shall ensure that it is possible to determine when the threshold

is reached.

3. Where the company has issued more than one class of shares, Member States may provide that the right to require the minority shareholder to sell as provided for in paragraph 1 shall apply only in the class in which the thresholds referred to in that paragraph are reached.

4. Member States shall ensure that each minority shareholder concerned may demand an appraisal of the fair price. The appraisal of whether the price is fair shall be carried out by an independent administrative or judicial authority or by an independent expert appointed or approved by such an authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State. The demand for such an appraisal shall be exercised within three months after the minority shareholder was required to sell and the price was announced in accordance with paragraph 1.

5. This Article is without prejudice to Article 15 of Directive 2004/25/EC.”.

Justification

This amendment is made to facilitate agreement with the Council. There is no need to regulate squeeze out and sell out rights.

Amendment 18

ARTICLE 1, POINT 9

Article 39 b (Directive 77/91/EEC)

“Article 39b

deleted

1. Member States shall ensure that minority shareholders in a listed company shall be able to require, jointly or individually, the majority shareholder to buy from them their shares in that company at a fair price.

2. Member States shall ensure that in cases where there is no agreement on the fair price between the prospective parties of the transaction mentioned in paragraph 1, the price is examined by an

independent administrative or judicial authority or by an independent expert appointed or approved by such an authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.

3. The provisions of Article 39a(1) second and third sentence, (2) and (3) shall apply mutatis mutandis.

4. Member States shall ensure an adequate procedure which guarantees a fair treatment of all minority shareholders.

5. This Article is without prejudice to Article 16 of Directive 2004/25/EC.”

Justification

This amendment is made to facilitate agreement with the Council. There is no need to regulate squeeze out and sell out rights.

Amendment 19 ARTICLE 2, PARAGRAPH 1

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by **31 December 2006** 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.*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... * at the latest.

**Eighteen months after the entry into force of this Directive*

EXPLANATORY STATEMENT

1. Introduction

The purpose of the Directive is to ensure the maintenance of the capital of public limited liability companies (PLLCs) in order to protect creditors. In addition, the Directive lays down rules on the equality of shareholders as well as the protection of minority shareholders.

The proposed changes to the Second Company Law Directive (Directive 77/91/EEC) involve simplifications to how PLLCs maintain and can alter their capital. They are partly based on the 2002 recommendations of the high-level working group convened as part of the SLIM-project (Simplification of the Legislation on the Internal Market).

The Commission adopted the proposed Directive on 29.10.2004 and the relevant Council working group began its work on 11.1.2005. The provisional deadline for transposition is set for 31.12.2006.

2. Summary of the proposal

The general aim of the Directive is to improve the competitiveness of PLLCs without weakening the rights of shareholders and creditors. Companies will have the possibility to react in a more flexible and cost-efficient manner to market developments necessitating modifications to their capital and ownership structures. This is achieved via less stringent requirements on external reporting and shareholder consultation under certain conditions.

3. Assessment of the proposal

The proposed Directive forms an important part of the EU's twin agendas on corporate governance and competitiveness. Its emphasis on reducing regulatory and administrative burden, while ensuring shareholder and creditor rights, is extremely laudable. For the most part, it achieves its aims.

On a number of points however, the impact of the proposed measures will be to increase bureaucracy and reporting duties, not the opposite. Furthermore, some of the proposals on harmonising company law in EU Member States constitute new hurdles and arguably go beyond the remit of EU-level legislation in this field. This is notably the case with the problematic "sell out" right in article 39b. It is also questionable whether certain key provisions, for instance dealing with share valuation, would actually increase flexibility and competitiveness, or merely do so on paper.

18.7.2005

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

for the Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital
(COM(2004)0730 – C6-0169/2004 – 2004/0256(COD))

Draftswoman: Margarita Starkevičiūtė

SHORT JUSTIFICATION

I. Current situation/ legislative background

Aiming at co-ordination of national provisions applicable to public limited liability companies as far as their formation, minimum share capital requirements, shareholders distribution and capital increase/reduction are concerned, in 1976 the European Commission presented the so-called *Second Company Law Directive*¹. Its overall purpose was to lay down the conditions needed to ensure that a company's capital is maintained in the interest of creditors. Further on, it aimed at safeguarding the position of minority shareholders enshrining the principle of equal treatment of all shareholders in an identical situation.

In 1996 the Commission launched a multi-annual project streamlining the key Internal Market Legislation - the so-called SLIM project² - examining 17 different legislative areas during five phases in the years 1996-2002 and targeted at identifying ways of simplification of current legislation in order to reduce burdens on businesses. The IV phase highlighted the need to review the provisions of the company law directives.

II. Stimuli for change

The hitherto company law directives were designed more to establish a proper level of

¹ Directive on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ L026 of 31.01.1977.

² Simpler Legislation for the Internal Market

protection to safeguard interested of shareholders and creditors in particular. Notwithstanding proper mechanisms of protection for shareholder and creditors do contribute to greater efficiency (risk reduction), it should be noticed that the primary focus of the EU legislation should be to provide mechanism enhancing efficiency and competitiveness of businesses. In this light some of the above related provision, especially in the area of capital maintenance and corporate restructuring, are considered to be hold-ups on the way to a more competitive market.

It is argued that the 1976 Directive was adopted at a time when the U.S. Model Business Corporation Act eliminated legal capital and mandatory pre-emption rights as futile devices burdening corporate activities with additional costs. The independent report by the Accounting Standards Board and the British Institute of International and Comparative Law concluded also that the hitherto EU corporate legislation "[...] *is not widely relied on in practice by creditors, is complex, expensive and anomalous, producing inconsistent results as between companies within Member States and between different Member States*". To meet the demands of continuously growing need to revise the existing rules in view of the changing economic circumstances, in October 2004 the Commission has proposed a legislative act amending the *Second Company Law Directive*.

III. Commission Proposal

According to former Internal Market Commissioner Frits Bolkenstein "[...] *to maximise the efficiency and competitiveness of European business, we need to simplify and improve EU rules on companies' capital while maintaining strong safeguards for creditors and investors, especially minority shareholders*".

In applying the Second Company Law Directive it has become apparent that some of its provisions would have to be modified, in order to meet the needs of greater flexibility to react more promptly and efficiently to developments of the market. In line with the SLIM recommendations, the Directive Proposal aims particularly at eliminating certain reporting requirements, facilitating acquisitions of shares by the company itself and a third party and streamlining company's ownership in the capital share.

Specifically, the Commission Proposal aims at the following capital related measures of the public limited liability companies:

- *increase of capital* - relaxing unnecessary administrative burden linked to the reporting requirements accompanying increase on capital against consideration in cash (by issue of shares) and the principle of a pre-emptive right to acquire proportional part of the 'new' shares by a shareholder;
- *reduction of capital* - further harmonisation of creditors' protection and elimination of unnecessary delays in cases of undue demands for securities by creditors and establishment of specific judicial or administrative procedures;
- *valuation of assets* - elimination of administrative burden linked to costly, and often undue and imprecise, expert valuation reports by extending number of cases in which such valuations need not be required;

- *acquisition of own shares* - greater flexibility and elimination of administrative burden by increasing the maximum of transaction authorisation period up to five years allowing companies to react properly to market developments;
- *acquisition of shares by a third party* - further protection of shareholders and increased flexibility with regard to changes in the ownership structure by allowing companies to grant financial assistance up to their distributable reserves;
- *'squeeze out' and 'sell out' rights* - greater flexibility and more viable ownership structure by allowing under certain conditions the majority shareholders to buy out minority shareholders at a fair price and the complementary right of minority shareholders to compel the majority shareholders to buy their shares.

All of the aforementioned measures implemented would help provide for a better harmonised legal basis and modernised public limited liability companies given a chance to remain both efficient and competitive in the ever-evolving markets.

IV. Conclusion

Your draftswoman expresses support for the Commission's deregulation proposals for the 2nd Company Law Directive, since its main objective is to reduce administrative burden for the companies. However, it should be noted that on several points the Commission's proposals are not compatible with the already existing regulations on the capital market, while some terms of the proposals are too vague. Therefore with regard to the interests of investors and companies some modifications are needed.

AMENDMENTS

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission

Amendments by Parliament

Amendment 1

ARTICLE 1, POINT -1 (new)

Article 1, paragraph 1, indent 21 (Directive 77/91/EEC)

(-1) In Article 1(1), the twenty-first indent shall be replaced by:

- in Hungary:

nyilvánosan működő részvénytársaság

Justification

The Second Company Law Directive aims to harmonize capital maintenance rules applicable to public limited companies. In Member States where company law makes distinction between public and private limited liability companies, the Directive applies only to public limited companies. The Hungarian National Parliament voted on 21 June 2005 an amendment to the Hungarian Companies Act of 1997, under which limited companies will be required in the future to indicate in the future to indicate in the company's name whether they function under the regime of private and public companies. The scope of the Second Company Law Directive has to be adapted accordingly: in Hungary, it should apply only to public limited companies ("nyilvánosan működő részvénytársaság").

Amendment 2

ARTICLE 1, POINT 3

Article 19, paragraph 1, subparagraph 2 (Directive (77/91/EEC))

Member States may also subject acquisitions within the meaning of the first subparagraph to the condition that the nominal value or, in the absence thereof, the accountable par of the

Member States may also subject acquisitions within the meaning of the first subparagraph to the condition that the nominal value or, in the absence thereof, the accountable par of the

acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed **10 %** of the subscribed capital.”

acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed **25 %** of the subscribed capital.”

Justification

The manipulation of share prices is countered by the specific market regulations; therefore it is not necessary to have such provisions in this directive. Restriction of the acquisition of own shares to 10 %, would limit companies ability to react to market trends.

Amendment 3

ARTICLE 1, POINT 4

Article 23, paragraph 1, subparagraph 2 (Directive (77/91/EEC))

The transactions must take place on the initiative and under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company from the third party and with regard to security provided to the company by the third party for the loans and advances referred to in paragraph 1. The credit standing of the third party must have been duly investigated and the company must be able to maintain its liquidity and solvency for ***the next five years***. The latter must be credibly demonstrated by a detailed cash flow analysis based on the information at the time of the approval of the transaction.

The transactions must take place on the initiative and under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company from the third party and with regard to security provided to the company by the third party for the loans and advances referred to in paragraph 1. The credit standing of the third party must have been duly investigated and the company must be able to maintain its liquidity and solvency for ***at least the term of the loan***. The latter must be credibly demonstrated by a detailed cash flow analysis based on the information at the time of the approval of the transaction.

Justification

The amendment is necessary for the better protection of the creditor rights by extending the time period to the actual loan maturity period.

Amendment 4

ARTICLE 1, POINT 9

Article 39b, paragraph 1 (Directive (77/91/EEC))

1. Member States shall ensure that minority shareholders in a listed company shall be able to require, jointly or individually, the majority

1. Member States shall ensure that minority shareholders in a listed company shall be able to require, jointly or individually, ***any***

shareholder to buy from them their shares in that company at a fair price.

majority shareholder ***who holds at least 95% of the subscribed capital of the listed company*** to buy from them their shares in that company at a fair price.

Justification

When a majority shareholder acquires such a large stake of shares it has negative impact on the market price of remaining shares and inflicts losses for the minority shareholder, however it is necessary to protect company from launching a complicated procedure to ascertain fair price with regard only to interests of minority shareholder therefore this provision shall be applied only for limited number of cases.

Or. en

PROCEDURE

Title	Proposal for a directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital		
References	COM(2004)0730 – C6-0169/2004 – 2004/0256(COD)		
Committee responsible	JURI		
Committee asked for its opinion Date announced in plenary	ECON 10.1.2005		
Enhanced cooperation			
Draftsman Date appointed	Margarita Starkevičiūtė 7.3.2005		
Discussed in committee	18.4.2005	15.6.2005	12.7.2005
Date amendments adopted	13.7.2005		
Result of final vote	for: 28 against: 13 abstentions: 2		
Members present for the final vote	Zsolt László Becsey, Pier Luigi Bersani, Bowles Sharon Margaret, Udo Bullmann, Ieke van den Burg, David Casa, Paolo Cirino Pomicino, Elisa Ferreira, Jean-Paul Gauzès, Robert Goebbels, Benoît Hamon, Gunnar Hökmark, Karsten Friedrich Hoppenstedt, Sophia in 't Veld, Othmar Karas, Piia-Noora Kauppi, Wolf Klinz, Christoph Konrad, Guntars Krasts, Kurt Joachim Lauk, Enrico Letta, Astrid Lulling, Gay Mitchell, Cristobal Montoro Romero, Joseph Muscat, John Purvis, Alexander Radwan, Bernhard Rapkay, Dariusz Rosati, Eoin Ryan, Peter Skinner, Margarita Starkevičiūtė, Ivo Strejček, Sahra Wagenknecht, John Whittaker		
Substitutes present for the final vote	Harald Ettl, Catherine Guy-Quint, Ona Juknevičienė, Jules Maaten, Thomas Mann, Kamal Syed Salah, Corien Wortmann-Kool		
Substitutes under Rule 178(2) present for the final vote	Antonio Masip Hidalgo		

PROCEDURE

Title	Proposal for a directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital				
References	COM(2004)0730 – C6 0169/2004 – 2004/0256(COD)				
Date submitted to Parliament	29.10.2004				
Committee responsible Date announced in plenary	JURI 10.1.2005				
Committee(s) asked for opinion(s) Date announced in plenary	ECON 10.1.2005				
Not delivering opinion(s) Date of decision					
Enhanced cooperation Date announced in plenary					
Rapporteur(s) Date appointed	Piia-Noora Kauppi 20.1.2005				
Previous rapporteur(s)					
Discussed in committee	23.5.2005	20.6.2005	13.7.2005	15.9.2005	29.11.2005
Date adopted	23.2.2005				
Result of final vote	+: 17 -: 0 0: 1				
Members present for the final vote	Maria Berger, Monica Frassoni, Giuseppe Gargani, Piia-Noora Kauppi, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Aloyzas Sakalas, Gabriele Hildegard Stauner, Diana Wallis, Rainer Wieland, Nicola Zingaretti, Jaroslav Zvěřina				
Substitute(s) present for the final vote	Janelly Fourtou, Jean-Paul Gauzès, Adeline Hazan, Eva Lichtenberger, Arlene McCarthy, Toine Manders, Michel Rocard				
Substitute(s) under Rule 178(2) present for the final vote					
Date tabled	28.2.2006				
Comments (available in one language only)	...				