

EUROPEAN PARLIAMENT

2004



2009

Committee on Economic and Monetary Affairs

2004/0256(COD)

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

PA_Leg

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 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*.

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

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 draftsman 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 Commission¹

Amendments by Parliament

Amendment 1

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 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.”

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 **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 2

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

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

¹ Not yet published in OJ.

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.

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

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

Amendment 4 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:

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").

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		