



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directives 68/151/EEC and 89/666/EEC as regards publication and translation obligations of certain types of companies

(presented by the Commission)

{SEC(2008) 466}

{SEC(2008) 467}

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1.1. Context

Unnecessary and disproportionate administrative costs severely hamper economic activity. In 2005, the Commission therefore launched a programme for measuring administrative costs and reducing administrative burdens in order to improve the business environment for EU companies and to make the EU economies fit to meet the challenges of a more competitive global business environment in which they have to operate.

The Commission outlined the way for achieving this by adopting, on 14 November 2006, an updated simplification programme¹ and the main elements for measuring administrative costs and reducing administrative burdens². Both programmes emphasised the need to generate tangible economic benefits. They were complemented by an Action Programme adopted on 24 January 2007³ which fixed the aim of reducing administrative burdens on businesses in the EU by 25% until the year 2012⁴.

The Action Programme was endorsed by the Spring European Council in March 2007⁵. The European Council underlined that reducing administrative burdens is important with a view to boosting Europe's economy, especially given the potential benefits this can bring for small and medium-sized enterprises (SMEs). It stressed that a strong joint effort of the European Union and the Member States is necessary to reduce administrative burdens within the EU. In March 2007, a number of fast-track proposals were adopted by the Commission in order to achieve a rapid reduction of administrative burdens through minor changes of the EU acquis.

At its meeting of 13/14 March 2008, the European Council called on the Commission to identify new "fast track" legislative proposals in order to reduce administrative burdens⁶. In the fields of company law, accounting and auditing, the Commission had adopted, on 10 July 2007, a communication setting out its ideas for simplification in these areas.⁷ Whereas certain measures envisaged in that communication necessitate a thorough examination and discussion, it appeared already from the Communication that others might allow achieving improvements for European companies rapidly, by way of a "fast track" procedure. These measures that relate to the First and the Eleventh Company law Directives are presented in this proposal.

¹ 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" - COM(2006) 689, OJ C 78, 11.4.2007, p. 9.

² Commission working document of 14/11/2006 – "Measuring administrative costs and reducing administrative burdens in the European Union" - COM(2006) 691.

³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on "Action programme for reducing administrative burdens in the EU" - COM(2007) 23, not yet published in the Official Journal.

⁴ COM(2007) 23.

⁵ Presidency Conclusions of the Brussels European Council - doc. 7224/07 Concl 1.

⁶ Presidency Conclusions of the Brussels European Council – doc 7652/08 CONCL 1.

⁷ Communication from the Commission on a simplified business environment for companies in the areas of company law accounting and auditing - COM(2007) 394, not published in the Official Journal.

1.2. Justification and objectives of the current initiative

The objective of the initiative is to contribute to enhancing the competitiveness of EU companies in the short term by reducing administrative burdens where this can be done without major negative impact on other stakeholders. Therefore, information obligations in the area of company law that do not provide a significant added value for the users of the information need to be targeted.

Under the First Company law Directive, companies need to publish, in the national gazettes, certain information that has to be entered into the Member States' commercial registers. This is, in particular, information about the company's foundation, later changes to this information and the annual accounts that have to be published on a yearly basis. In most cases, the publication in the national gazette entails additional costs for the companies without providing real added value in times where company registries make their information available online. The objective is therefore to remove any additional publication requirements in national law that cause additional costs to the companies.

With a view to the Eleventh Company law Directive, the proposal targets the translation requirements, in national law, for documents to be filed to the branch's register. When registering a branch, companies need to file certain information contained in their file also with the register of the branch. This often leads to a double cost for companies as they not only have to ensure the translation of certain documents into the language of the Member State where the branch is situated but also have to comply with sometimes excessive requirements for certification and/or notarisation of that translation. The objective is to reduce the costs for translation and certification to the minimum.

2. LEGAL BASE

The legal base for the proposal is Article 44(2)(g) of the Treaty. Both directives that are to be modified by the proposal are based on this provision (former Article 54(3)(g)).

3. SUBSIDIARITY AND PROPORTIONALITY

Action at EU level is necessary to deal with these problems because, in the case of the First Directive, the obligations entailing administrative burdens derive from the EU rules. In the case of the Eleventh Directive, the directive explicitly allows Member States to impose such burdens on companies. Under these conditions, an effective reduction of administrative burden can only be achieved through the modification of the relevant EU rules. Action at EU level is therefore justified.

The proposed modifications are limited to what is necessary in order to remove the unnecessary administrative burdens in the areas concerned and are proportionate to this objective.

4. CONSULTATION OF INTERESTED PARTIES

The proposal and the impact assessment that accompanies it are based on a broad consultation process which followed the adoption of the Communication of 10 July 2007 by the Commission.

The Competitiveness Council adopted, on 22 November 2007, conclusions welcoming the simplification initiative⁸, and in the European Parliament, a report was adopted in the Legal Affairs Committee on 27 March 2008. The report reflects broad support for the initiative to simplify European company law and reduce administrative burdens. The adoption of the European Parliament's final report is expected for May 2008.

In addition, eighteen Member States' governments, the government of one EEA country and 110 stakeholders reacted to the invitation, in the Communication, to submit comments on the proposals in writing, by mid-October 2007. These contributions from governments and stakeholders originated from 23 countries in total, including 22 Member States. A number of contributions were also submitted by European bodies and associations. A report on the reactions received from Member States and stakeholders between July and December 2007 is available on the website of the Directorate-General for Internal Market and Services (DG MARKT) at http://ec.europa.eu/internal_market/company/simplification/index_en.htm.

The idea to process proposals concerning the First and the Eleventh Company law Directives in a fast track procedure was submitted to the High Level Group of National Regulatory Experts, appointed by the Member States, where a majority of those representatives who commented on it supported this approach.

Also the High Level Group of Independent Stakeholders was consulted on this matter and welcomed all the proposals in its opinion adopted on 26 February 2008.

5. IMPACT ASSESSMENT

The impact assessment to this proposal shows that there is a significant potential for savings for companies in the areas mentioned above.

5.1. Publication requirements for limited-liability companies

In the impact assessment, the total minimum cost of the current rule on the publication in national gazettes is estimated at around 410 Mio €/year with a view to the publication of annual accounts and about 200 Mio €/year for publications of changes in the registers. To these costs, the internal costs of companies for preparing the information for the publication, and in certain Member States costs of publishing the information in addition in newspapers have to be added. On these latter elements, however, no reliable figures are available at this stage.

In the impact assessment, it is acknowledged that the publication obligation provides important added value for users as it allows them to follow changes in the register in a chronological order. However, the comparison between the different systems used in the Member States shows that achieving this objective does not necessitate imposing additional costs on companies. With estimates indicating that more than 50% of all Europeans use the internet nowadays⁹, a chronological electronic publication, i.e. on the register's website, is

⁸ Council document 15222/07 DRS 48.

⁹ Source: Internetworldstats, www.internetworldstats.com/stats9.htm#eu.

Already the "Information Society Benchmarking Report" of 2005 (available at http://ec.europa.eu/information_society/europe/i2010/docs/benchmarking/051222_final_benchmarking_report.pdf) found: "Internet connectivity has grown steadily and the Community Household survey of 2004 showed 43% of households in the European Union were connected. A slightly lower

sufficient to reach this aim. As the example in a number of Member States (e.g. Denmark and Finland) shows, such publication does not have to entail additional fees being charged to the companies.

In the impact assessment, it is therefore recommended to ensure that the publication in future does not lead companies being charged any additional fee.

5.2. Translation obligations of branches of limited-liability companies

The external costs of the current regime concerning translation obligations of branches are estimated, in the impact assessment, on the basis of the information available at 3.36 Mio € for the translation of the articles of association and of the attestation on the existence of the company and at (yearly) 16.8 Mio € for the annual accounts. For the certification alone the respective figures are estimated to lie at 300,000 € and (yearly) 1.5 Mio €. To these external costs, the internal costs for ensuring that a translation/certification is obtained have to be added. On the level of these costs, no information is available at this stage.

The conclusion drawn in the impact assessment is that, even if Member States, in the interest of third parties, should maintain the possibility to ask for certified translations, translations that have been certified in another Member State should be considered sufficient. Taking into account in particular that some Member States, in their national laws, have not made (full) use of the possibility to ask for certified translations it seems disproportionate to accept that other Member States require multiple certifications, sometimes even through a notary. A sufficient degree of reliability can be assumed where a translation has been certified by a translator who has been officially appointed and sworn in another Member State or by any other person authorised in that Member State to certify translations into the language required.

6. COMMENTS ON SPECIFIC ARTICLES

Article 1: Amendment of the First Company law Directive

Article 1 sets a new minimum publication requirement on the basis of the alternative means of publication contained currently in Article 3(4) First Company law Directive. This minimum requirement takes account of the fact that the use of electronic means is becoming more and more common in all areas.

The fact that the provision sets only a minimum requirement means that Member States have to provide for an electronic chronological access to the information but remain free to prescribe, in addition, the use of the additional means of publication (e.g. paper based national gazette, national or regional newspapers). However, the new second subparagraph of Article 3(4) clarifies that Member States have to make sure that the publication in any case does not lead to any specific fees being charged to the companies.

Article 2: Amendment of the Eleventh Company law Directive

Paragraph 1 maintains the current possibility, for Member States, to require the translation and certification of that translation with a view to certain documents concerning the company.

proportion, 38% of the population aged 16-74, was found to be regular users, going online at least once per week".

It clarified that also the attestation pursuant to Article 2(2)(c) can be required in the language of the host Member State of the branch which in practice is already done by most Member States today. The second sentence then stipulates, however, that any such requirement shall be deemed fulfilled where a translation is submitted that has been certified by a person that, under the rules on certification in force in another Member State, is entitled to issue such a certificate.

Paragraph 2 states that attestations that have been issued in the language required by the Member State of the branch have to be accepted by the register in that state.

Paragraph 3 clarifies that Member States, apart from the formalities described in paragraphs 1 and 2, cannot impose any other formal requirements. This provision covers in particular any requirements for notarisation of already certified documents or their legalisation, for instance by an Apostille under under Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. It is, however, without prejudice to any rules requiring Apostille for the attestation on the existence of the company.

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(Text with EEA relevance)

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 Commission¹⁰,

Having regard to the opinion of the European Economic and Social Committee¹¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty¹²,

Whereas:

- (1) The European Council agreed, at its meeting on 8 and 9 March 2007, that administrative burdens on companies should be reduced by 25% by the year 2012 in order to enhance the competitiveness of companies in the Community.
- (2) Company law has been identified as one area that contains a high number of information obligations for companies, some of which seem outdated or excessive.
- (3) These information obligations need to be reviewed in order to reduce the burdens weighing on companies within the Community to the minimum that is necessary to ensure the protection of the interests of other stakeholders.
- (4) Under First Council Directive 68/151/EEC of 9 March 1968 on co-ordination 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, with a view to making such safeguards equivalent throughout the Community¹³, limited-liability companies need to disclose, by way of publication, certain information that has to be entered into the Member States' central

¹⁰ OJ C , , p. .

¹¹ OJ C , , p. .

¹² OJ C , , p. .

¹³ OJ L 65, 14.3.1968, p. 8. Directive as last amended by Directive 2006/99/EC (OJ L 363, 20.12.2006, p. 137).

register, commercial register or companies register. This publication, in many Member States, has to take place by using the national gazette and sometimes, in addition, through the national or regional newspapers.

- (5) In most cases, the publication obligations entail additional costs for the companies without providing real added value given that company registers make their information available online. Initiatives aimed at facilitating the Community wide access to such registers further reduce the need for publishing this information in a national gazette or in other print media.
- (6) In order to allow for a cost effective publication that provides users with easy access to the information Member States should make mandatory the use of a central electronic platform. They should, furthermore, ensure that this publication and any additional publication duties they may impose on companies in this context, do not lead to any specific fees, in addition to those that may be charged for entries in the register.
- (7) Under Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State¹⁴, certain information concerning the company has to be disclosed. The Member State in which the branch is situated, hereinafter "host Member State", currently is able to require that a limited number of documents in that context have to be translated into another official language of the Community.
- (8) That possibility should be maintained as well as the one, for the host Member State, to require in some limited cases that the translation be certified as the interest of third parties can render it necessary to ensure, through the certification, a sufficient level of reliability of the translation.
- (9) A translation, however, can be deemed sufficiently reliable if it has been certified by a translator who has been officially appointed and sworn in another Member State or by any other person authorised in that Member State to certify translations into the language required. The host Member State should, in this case, not have the possibility to require an additional certification under its own rules.
- (10) The same applies where a document required for the registration of the branch can be produced, by the register where the company's file is held, in the official language of the Community required by the host Member State. Also in this case, an additional certification does not seem justified.
- (11) Member States, also, should not be able to impose any formality relating to the language of the document that goes beyond the certification. In particular, requirements for notarisation of an already certified translation exceed what is required to guarantee a sufficient degree of reliability.
- (12) Since the objectives of this Directive, namely reducing administrative burdens relating to publication and translation obligations of certain types of companies within the Community, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Community level, the Community

¹⁴ OJ L 395, 30.12.1989, p. 36.

may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(13) Directives 68/151/EEC and 89/666/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Amendment of Directive 68/151/EEC

Article 3(4) of Directive 68/151/EEC is replaced by the following:

"4. Disclosure of the documents and particulars referred to in Article 2 shall be effected by publication through a central electronic platform that allows access to the information disclosed in chronological order.

Member States shall ensure that companies are not charged a specific fee in respect of the publication obligation through a central electronic platform or any additional publication obligation imposed by Member States relating to those documents and particulars."

Article 2
Amendment of Directive 89/666/EEC

Article 4 of Directive 89/666/EEC is replaced by the following:

"Article 4

1. The Member State in which the branch has been opened may stipulate that the documents referred to in points (b) and (c) of Article 2(2) and in Article 3 must be published in an official language of the Community other than the official language of the register referred to in point (c) of Article 2(1), and that the translation of such documents must be certified. A translation shall be deemed certified where it has been certified in a procedure accepted by the administrative or judicial authorities of any other Member State.

2. Member States shall accept the attestation referred to in point (c) of Article 2(2) in the language in which it is published in accordance with paragraph 1 of this Article.

3. Member States shall not impose any formal requirement relating to the translation of the documents referred to in paragraph 1 other than those laid down in paragraphs 1 and 2."

Article 3
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2010 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
Entry into force

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
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President