COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.3.2007
COM(2007) 91 final

2007/0035 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

(presented by the Commission)

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Grounds for and objectives of the proposal

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

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

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

• General context

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

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

One of these "fast track action" proposals concerns Council Directive 78/855/EEC concerning mergers of public limited liability companies and Council Directive 82/891/EEC concerning the division of public limited liability companies. The aim of this proposal is to remove unnecessary administrative burdens on businesses by giving shareholders the direct[1] possibility to renounce to the written expert report on the draft terms of merger or division, if they so desire. This will bring the two directives in line with the current requirements in the Tenth Company Law Directive (Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies).

• Existing provisions in the area of the proposal

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

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

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods

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

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

Summary of responses

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

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

- **Impact assessment**

The Impact Assessment considered three policy options:

Option 1 No-Policy Change.

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

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

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

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposal action**

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

- **Legal basis**

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

- **Subsidiarity principle**

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

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

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

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

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

- **Choice of instruments**

Proposed instruments: Directive

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

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5. ADDITIONAL INFORMATION

- **Simplification**

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

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

- **Correlation table**

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

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission[2],

Having regard to the opinion of the European Economic and Social Committee[3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[4],

Whereas:

(1) Community policies on Better Regulation, in particular the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "A strategic review of Better Regulation in the European Union"[5] and the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "Action Programme for Reducing Administrative Burdens in the European Union"[6], stress the importance of reducing the administrative burdens imposed on enterprises by existing legislation as a crucial element for improving their competitiveness and for achieving the objectives of the Lisbon agenda.

(2) Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies[7] provides for an exemption from the obligation to have the draft terms of merger examined by an independent expert and to have a report established by that expert, if all the shareholders agree that such a report is not needed.

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2 OJ C , , p. .
3 OJ C , , p. .
4 OJ C , , p. .
5 COM (2006) 689.
6 COM (2007) 23.
7 OJ L 310, 25.11.2005, p. 1.

(3) Council Directive 78/855/EEC[8] does not contain any similar exemption, and Council Directive 82/891/EEC[9] leaves it to the Member States whether to provide for such a possibility with a view to the expert report on the draft terms of division.

(4) There is no reason to require such an examination by an independent expert if all the shareholders agree that it may be dispensed with.

(5) Directive 78/855/EEC and Directive 82/891/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 78/855/EEC is amended as follows:

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

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

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

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

Article 2

Directive 82/891/EEC is amended as follows:

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

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

(2) Article 10 is replaced by the following:

"Article 10

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

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

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

[9] OJ L 378, 31.12.1982, p. 47.

Article 3
Transposition

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

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

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

Article 4

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

Article 5

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
SEC(2007)

COMMISSION STAFF WORKING DOCUMENT

Impact Assessment accompanying 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 liability companies as regards the requirement for an independent expert's report on the occasion of a merger or a division

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1. 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 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].

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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.

2 Source: European Commerce Registers Forum 2005 survey.

- 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. 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.

3. 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.

4. 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

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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

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.

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

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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.

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.

5. 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.

6. 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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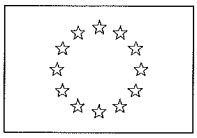
[6] 2005/56/EC



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
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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 liability companies as regards the requirement for an independent expert's report on the occasion of a merger or a division

Impact Assessment Summary

[COM(2007)
SEC(2007)]

COMMISSION STAFF WORKING DOCUMENT

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Executive Summary

The proposal this Impact Assessment accompanies is part of the wide ranging administrative burden reduction exercise. Council Directive 78/855/EEC and Council Directive 82/891/EEC 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. With regards to mergers the requirement of producing this report is currently mandatory which means that even in cases where all the shareholders do not require this information it has to be produced. With regards to division Member States may permit the non-application of the provisions if all the shareholders and the holders of other securities giving the right to vote have so agreed. It is proposed to convert this option into a general rule.

According to estimates available from countries that have already carried out their national administrative burden measurement exercises, the annual administrative costs of producing these reports are considerable, in particular for SMEs. According to figures from the Danish measurement of administrative burdens, the cost of this requirement is approximately EUR 3.500 for every merger or division. The current requirements entail that financial and other resources may be misallocated if these reports are produced even in cases in which there is no need for them. Those resources could be employed more purposefully elsewhere. The impact assessment, therefore, considered the following three options:

Option 1 No-Policy Change.

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

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

Whereas both option 2 and 3 would reduce the burdens on businesses, option 3 provides a higher level of transparency and protection of shareholders while also bringing the requirements in line with those of the Tenth Company Law Directive[1].

[1] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.