INT/154

Disclosure requirements/ companies

Brussels, 11 December 2002

OPINION

of the European Economic and Social Committee

on the

Proposal for a Directive of the European Parliament and of the Council amending Council Directive 68/151/EEC as regards disclosure requirements in respect of certain types of companies

COM(2002) 279 final – 2002/0122 (COD)

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On 16 September 2002, the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

> *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 68/151/EEC as regards disclosure requirements in respect of certain types of companies - COM(2002) 279 final – 2002/0122 (COD)*

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 27 November 2002. The rapporteur was **Mrs Sánchez Miguel.**

At its 395th plenary session of 11 and 12 December 2002 (meeting of 11 December), the European Economic and Social Committee adopted the following opinion by 91 votes to one, with two abstentions.

1. Introduction

1.1 Directive 68/51/EEC was the first Community directive dealing with commercial companies. Its main aim was to create, through legal disclosure requirements, a climate favourable to the protection of the interests of members and third parties in companies whose principal feature is the limited liability of members - i.e. companies limited by share capital.

1.2 Legal disclosure requirements derive from the obligation on commercial companies to be entered on the register of companies maintained by each country for that purpose. The aim of such registers is to protect the interests of members of commercial companies, and of third parties which have contractual relations with them, by publishing information in three areas, namely the instrument of constitution, liabilities arising from the incorporation of the company and the effects of a declaration of nullity of the instrument of constitution.

1.3 In the past, businesspeople were required to disclose this type of legal information when registering with their respective guilds or associations. Commercial companies must now comply with this obligation in order to acquire legal personality. The requirements with which registered companies must comply include the minimum information to be contained in the instrument of constitution and information on persons or bodies empowered to bind the company legally or financially.

1.4 The directive came into force many years ago, and legal and economic changes in the intervening years mean that it must now be amended. The obligation to register has been extended to new types of company (Article 1), and new technologies have emerged for filing and publishing information (Article 3) making it more widely available and accessible, even beyond States' national borders.

1.5 The fourth phase of simplification[1] took place against this backdrop. The Company Law Working Group made a series of recommendations in connection with the First and Second Company Law Directives, including improved access to the information contained in the various registers, the possibility of using more than one language and a review of the kind of companies obliged to register. It also recommended that account be taken of the changes introduced by the Accounting Directives concerning compulsory publication of annual accounts in the companies register.

2. Gist of the proposal

2.1 The proposal to amend Directive 68/151/EEC takes account of the need to introduce new technologies for filing and publishing information and to adapt these new instruments to the requirements of the law to ensure that they comply with the principles of legality and legal certainty which derive from public registration.

2.2 Firstly, it is proposed to extend the content of the directive to cover:

– New kinds of company required to register
– Documents required to be published (accounting documents).

The first proposed change is a result of national law, namely the creation of new types of company in the countries referred to. The second proposed change is in line with the obligation imposed by other Community provisions, namely Council Directive 78/660/EEC of 20.7.1978[2] as last amended by Directive 2001/65/EC of the European Parliament and of the Council[3]; Council Directive 83/349/EEC of 13.6.1983[4] as last amended by Directive 2001/65/EC; Council Directive 86/635/EEC of 8.12.1986[5] as last amended by Directive 2001/65/EC and Council Directive 91/674/EEC of 19.12.1991[6], currently the subject of a Commission proposal for amendment.

2.3 Regarding the most important change – the introduction of new technologies for the registration and publication of information – the following proposals are worthy of note:

– Electronic filing system as from 2007
– Electronic certification of the documents registered
– Effects against third parties of documents published by electronic means

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1 See the Commission's report to the European Parliament and the Council on the Results of the fourth phase of SLIM, 4.2.2000 (COM(2000) 56 final).

2 OJ L 222, 14.8.1978

3 OJ L 283, 27.10.2001

4 OJ L 193, 18.7.1983

5 OJ L 372, 31.12.1986

6 OJ L 374, 31.12.1991

– Registration and publication in more than one language
– Requirement for companies' trading documents to show their registration details.

2.4 All of these changes affect registers only formally, with the underlying principles remaining unchanged. It is also important to bear in mind that as Directive 1999/93/EC[7] on electronic signatures is now in force, legal certainty is guaranteed in the use of electronic systems for certification of the data contained in the registers.

3. General comments

3.1 The EESC welcomes those changes to the current provisions which are in line with the proposals for simplification of Community law, particularly those providing legal safeguards for commercial transactions and ensuring that all the parties to such transactions have access to accurate information.

3.2 However, it should be pointed out that under no circumstances may simplification alter the general principles which are derived from the founding treaty, particularly linguistic diversity, which must be recognised not only within States, some of which have recognised regional languages, but also between all States. The Commission proposal reflects this requirement.

3.3 The proposal states that a computerised system must be in place by 2005 and that all documents registered in the ten year period prior to this date must be made available in electronic form. This proposal may create a degree of legal uncertainty in cases where key documents, such as the instrument of constitution, were registered before the deadline and are not, therefore, covered by this requirement.

3.4 To avoid such uncertainty, a distinction should be made between documents subject to compulsory registration (under Article 2) and those which may be registered on a voluntary basis, almost always statutory in nature. The time limits proposed would then apply only to the former and computerisation of the latter could be postponed.

3.5 The proposal relating to the effects of registered documents against third parties (Article 3(5) of the original directive) is also somewhat confused. Under the new wording of Article 3(4), it is assumed that knowledge of the documents concerned is acquired by one of two means: from the national gazettes or by electronic means. In the latter case, it would be more difficult to prove that information has been accessed, and is therefore legally binding, in the absence of a recorded access system.

3.6 The Committee agrees that the cost of copies of documents should not exceed the administrative cost. This should not, however, include the cost of computerising the information registered.

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7 OJ L 13, 19.1.2000

4. **Specific comments**

4.1 The aim of the proposed changes to the system governing legal disclosure by registered companies is to extend its impact across borders to cover the whole single market. To this end, the proposal deals with both the linguistic arrangements and the use of electronic systems for the registration and disclosure of documents. However, the EESC believes that in all cases it is important to preserve the legal certainty of commercial relations, based on the principles of transparency and the legality of actions.

4.2 Since the proposal is intended to apply across the board, any aspects which may have an effect contrary to that intended must be resolved. The wording of Article 3a(1), under which Member States may select one of the languages permitted by the language rules applicable in that Member State, is a case in point.

4.3 The EESC calls on the Commission to clarify the wording of this paragraph to stipulate that Member States must require the documents referred to in Article 2 to be registered in the official Community language of that State, while being able to maintain regional linguistic identity through the use of other languages in accordance with Article 3(2).

4.4 With regard to the electronic registration system, the EESC wishes to point out that there is an inconsistency in Article 3(5), since the original wording of Directive 68/151/EEC, which specifies a period of sixteen days after which documents and particulars registered may be relied on as against third parties, remains unchanged. This is a very long time span under the new disclosure system. The Member States could shorten this as the use of new technologies develops.

4.5 The EESC proposes that a new sentence be inserted into this paragraph to restrict its application to registers which do not use the electronic system for the registration and disclosure of documents. This would fulfil one of the intended aims of the proposal by ensuring that the information subject to legal disclosure may be accessed speedily and easily.

Brussels, 11 December 2002.

The President of the European Economic and Social Committee	The Secretary-General of the European Economic and Social Committee
Roger Briesch	**Patrick Venturini**