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C o m m e n t s
on the Communication from the Commission on a simplified business environment
in the areas of company law, accounting and auditing
COM (2007) 394 final
Berlin, 2 October 2007

I. General observations

We welcome in principle the initiative launched by the Commission to simplify the legal framework for companies in the areas of company law, accounting and auditing. Lean, non-bureaucratic and efficient regulation in these areas as well would help to ensure optimal competitive conditions and a dynamic economy.

There remain good reasons for harmonisation of these areas. For one thing, harmonisation protects the location competition between Member States against distortions due to differing national legislation. As the instrument used principally in these areas, the directive, aims at an approximation of national legal regimes but not at a unification of law, Member States are also left enough scope for taking national developments and traditions into account. For another thing, harmonisation makes national law comparable; comparability lowers information costs. This is particularly important in the case of mass transactions like those on the capital market.

The Commission's envisaged repeal in full or in part of the Second, Third, Sixth and Twelfth Company Law Directives, which – as the Commission puts it – “ address mainly domestic situations”, therefore meets with fundamental reservations on our part. This purported “simplified approach” is particularly at odds with the Commission's objective of creating an integrated European capital market. The company law directives are an integrative part of

European capital market law. Completely or partly abandoning these directives would nullify the harmonisation achieved in these areas in favour of a less desirable fragmentation of law and ultimately culminate in a “renationalisation” of key parts of capital market law. The cross-border investor – the guiding notion called for by the Commission in particular – would then face 27 different sets of rules in the future. This cannot be seen as any kind of “simplification”. Particularly to ensure a functioning European capital market, minimum standards especially in the area of company law are still required, not least in view of the increased “competition among jurisdictions” opened up by the European Court of Justice’s “Centros”, “Überseering”, “Inspire Art” and “SEVIC Systems” rulings.

The “comprehensive impact assessments” announced by the Commission also in connection with the administrative costs associated with its simplification measures can only be meaningful if in the process the anticipated savings from repealing directives are set against the cost of an internal market with 27 different company law regimes. In addition, the impact assessments would have to take into account the loss of the positive effects of the company law directives protecting shareholders (protection of confidence, investment incentive).

II. Specific remarks

1. Option 1: Placing the focus on cross-border problems

We reject Option 1, the Commission’s clear preference, whereby the company law acquis in the EU would be reduced to “those legal acts dealing specifically with cross-border problems”. This approach runs counter to the envisaged integration of capital markets. Differing national legal provisions mean less willingness to invest across borders. Obtaining information on differences in another Member State with regard to the minimum capital requirements for public limited companies for example would not only be time-consuming but also involve not inconsiderable costs (see specifically in this connection our remarks in section I. above)

As an argument against a repeal of the *Second Company Law Directive*, which serves to protect creditors and shareholders, it must be specifically mentioned that this directive ensures the economic reliability of the debtor’s company EU-wide and thus, contrary to the Commission’s view, does indeed have a cross-border dimension. For one thing, it makes sure that the company has the required minimum capital and sets comparable rules to protect the subscribed capital that potential shareholders or counterparties can rely on across the EU. In particular, the provisions dealing with the participation of the general meeting in capital measures and adoption of the principle of equal treatment ensure a minimum level of shareholder protection. Abolishing the Second Company Law Directive would, for example,

mean that shareholders would face the prospect of their dividend being calculated differently in each Member State. The same goes for their participation, voting and subscription rights¹. The “renationalisation” of these rules is at odds with the aim of creating an integrated European capital market in which shareholders are adequately protected and the efficiency and integrity of the market as a whole are ensured.

That setting common legal requirements for this area is in conformity with the principles of proportionality and subsidiarity is, moreover, something the Commission itself did not challenge when presenting at the end of October 2004 its proposal for a directive on, among other things, the alteration of the capital of public limited liability companies². In addition, the resulting Directive 2006/68/EC of 6 September 2006 allowed Member States to liberalise the existing capital protection regime in different areas. As the deadline for implementing the revised Second Company Law Directive does not expire until 15 April 2008 and the study launched by the Commission on the advantages and disadvantages of an alternative capital maintenance system is still ongoing, it is surprising that the Commission calls the Second Company Law into question at this point in time.

The *Third and Sixth Company Law Directives* should also be retained. Only at first glance do these directives not address cross-border problems. The directives, which regulate the intrastate merger and division of public limited liability companies, also ensure a minimum level of protection for shareholders and creditors of a company involved in a restructuring measure who belong to another Member State. The legal harmonisation in this area therefore serves to enhance investment security for equity and debt capital³. Both directives form the legal foundation for cross-border restructuring⁴. The fact that the Tenth Company Law Directive refers to national law on mergers on the taken-for-granted assumption that this has already been harmonised by the Third Company Law Directive is a further argument against a repeal of the Third Company Law Directive⁵.

2. Option 2: More principle-based, less detailed regulation

The abolishment of central procedural rules of the *Third and Sixth Company Law Directives* suggested by the Commission in *Annex 2 to its communication* meets with the fundamental reservations on our part outlined in sections I. and II.1 above. The legal harmonisation in this

¹ As regards the consequences of the abolishment of the Second Company Law Directive, see in particular *Maul*, SR 2007, p. 273.

² 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.

³ See *Teichmann*, SR 2007, p. 272.

⁴ See also *Grundmann*, *Europäische Gesellschaftsrecht*, 2004, para. 845.

⁵ See *Teichmann*, SR 2007, p. 272.

area serves to enhance investment security for equity and debt capital. Any drifting apart of the harmonised national legal regimes on, for example, the reporting requirements for directors prior to a merger or division should be avoided.

3. Additional simplification measures

As regards the simplification measures put forward for discussion by the Commission in *Annex 3 to its communication*, may we comment as follows:

- We support the Commission's proposal to drop the *requirement* laid down in Article 3 (4) of the *First Company Law Directive* to *publish information* that has to be entered in a Member State's commercial register in a national gazette as well. Publication of the registered data is ensured by the possibility to view the data online. Dropping the requirement to publish such information additionally in a national gazette should – as suggested by the Commission – be accompanied by the provision of a service in the register that gives information on the latest changes to the register.
- We also welcome the proposal to modify Article 4 of the *Eleventh Company Law Directive*. The recognition of certified translations from other Member States would help to reduce costs significantly. In line with the Commission's proposal, acceptance of the certification by the judicial and administrative authorities of the other Member State concerned should be a condition for such recognition. Member States should not be allowed to set any other requirements for the documents that have to be presented.
- The Commission's proposal to review Article 7 of the *European Company (SE) Statute*, which stipulates that the registered office of a SE must be located in the same Member State as the SE's head office, also appears to be a positive step. This provision prohibits companies from another Member State from opting for, for example, the legal form of the SE under German law when establishing a company if the business activity is to be conducted entirely or predominantly from the other Member State. Conversely, a German parent company for example is not allowed to set up its foreign subsidiaries in the legal form of the SE under German law. The envisaged modification of Article 7 would give companies the attractive and cost-cutting possibility to operate their foreign subsidiaries in the legal form of a national SE with which they are familiar or which appears favourable to them.

4. Simplification measures for SMEs in accounting and auditing

We welcome in principle the Commission's efforts to create further simplification for small and medium-sized companies in the area of accounting and auditing. The centrepiece of the proposed measures is the introduction of a "micro entity" category in addition to the existing categories; these "micro entities" are to be completely exempted from the application of the provisions of the Fourth Company Law Directive. Such an arrangement basically makes sense, as companies in this category will normally not need to perform accounting that is comparable EU-wide. The proposed definition of "micro entity" (less than 10 employees, balance sheet total below 500,000 EUR, turnover below 1,000,000 EUR) seems appropriate. The other simplification measures proposed for SMEs also appear likely to considerably reduce the administrative burden for these companies.

As regards the consolidation of subsidiaries of no material significance, we have already stated on a previous occasion that such subsidiaries should be exempt from any consolidation requirement. This is why we firmly support the Commission's initiative on this issue. In accordance with the provisions of the Seventh Company Law Directive, subsidiaries of no material significance should not be subject to any consolidation requirement and consequently not to any requirement to apply IFRS. Any expansion of the consolidation requirement would, in particular, significantly increase the administrative burden for SMEs.

Abolishing the requirement to account for deferred taxes and dropping certain other disclosure requirements appear to be further measures likely to reduce the bureaucratic burden for SMEs in particular.