BUSINESSEUROPE

POSITION PAPER

8 October 2007

COMMENTS ON THE COMMISSION'S COMMUNICATION ON A SIMPLIFIED BUSINESS ENVIRONMENT FOR COMPANIES IN THE AREAS OF COMPANY LAW, ACCOUNTING AND AUDITING (COM (2007) 394 FINAL)

SUMMARY

BUSINESSEUROPE very much welcomes the Commission proposal to simplify the business environment for companies in the areas of company law, accounting and auditing and the objective of reducing administrative burdens so Europe's economy is boosted. We are pleased to see that stakeholders are being continuously consulted throughout the process of developing, determining and adopting simplification measures.

It is key that this exercise takes into consideration the principles of better regulation together with subsidiarity and proportionality. Moreover, we consider that it should also include a discussion on instruments that would improve the development of business in the Internal Market. This is in particular the case for the European Private Company Statute and the fourteenth company law directive on the transfer of registered seat, which will help companies to pursue their business providing them with a simplified framework and allowing a real degree of corporate mobility in the EU.

The majority of BUSINESSEUROPE members do not support option 1. We believe that scrapping some or all of the directives which mainly deal with domestic issues could put into doubt the achievements of the internal market, given also the enlargement process and related need to create a common level playing field on company law.

Furthermore, it is generally considered that a targeted approach that favours a "more principle based, less detailed regulation consisting in focusing only on concrete, individual simplification measures in order to help EU companies" can suit the objective of achieving a more favourable regime to companies and reduce administrative burdens by repealing requirements that overlap and by adapting EU legislation to the current business reality.

THE CONFEDERATION OF EUROPEAN BUSINESS a.i.s.b.l.

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

INTRODUCTION

Good and efficient company law and corporate governance are of utmost importance to companies and their stakeholders. Any action in these areas must pursue the objective of increasing competitiveness while respecting the legal environment in which they evolve. Excessive regulatory burdens may ultimately restrict the freedom of companies to do business, thereby holding them back from releasing their potential. This is detrimental to business, to company shareholders and more generally to the EU as a whole.

BUSINESSEUROPE very much welcomes the Commission proposal to simplify the business environment for companies in the areas of company law, accounting and auditing and the objective of reducing administrative burdens so Europe's economy is boosted, however with some caveats.

We have previously considered[1] that any simplification proposals by the Commission in this field should genuinely reduce burdens for business, and we are pleased to see that stakeholders are being continuously consulted throughout the process of developing, determining and adopting simplification measures. This is particularly true as we believe that the Commission will have to ensure that this process does not lead to a reopening of sensitive compromises.

Moreover, we would like to stress that the *raison d'être* of such proposals is simplification and if this process ends up running contrary to this objective, the proposal should be withdrawn. We would also like to reiterate that the first priority should be correct implementation of existing and newly adopted legislation. BUSINESSEUROPE considers it key that the Commission ensures harmonisation of common concepts in the various directives when simplifying, and verifies correct and equivalent implementation at national level.

Therefore, it is key that the Commission takes into consideration the principles of better regulation together with subsidiarity and proportionality, when pursuing the above-mentioned simplification exercise as mentioned in the Communication.

In order to attain the objective of simplifying business environment for European companies, BUSINESSEUROPE would like to stress that this simplification exercise, should also concern the capital markets directives, such as the Transparency and Prospectus directives, which are proving extremely burdensome for companies.

Moreover, this exercise should take a broader perspective and also include a discussion on instruments that would improve the development of business in the

[1] See BUSINESSEUROPE's position paper, "The Future of the Commission Company Law and Corporate Governance Action Plan", 8 November 2006– available at www.businesseurope.eu

Internal Market. This is in particular the case for the European Private Company Statute and the fourteenth company law directive on the transfer of registered seat, which will help companies to pursue their business providing them with a simplified framework and allowing a real degree of corporate mobility in the EU.

- **SIMPLIFICATION AND BETTER REGULATION/COHERENCE WITH OTHER COMMUNITY LEGISLATION**

Better regulation is a central element of the Commission policy for strengthening competitiveness and supporting sustainable growth and employment. Rules should create workable and affordable solutions for clearly identified problems which do not harm Europe's competitiveness. Simplification should render legislation cost-effective by effectively reducing burdens. This is the reason why the Commission has identified simplification as one of the key political priorities through the better regulation agenda.

BUSINESSEUROPE has since the inception of this debate pointed out the better regulation principle as a key principle for an approach to company law, accounting and auditing. We have always considered that impact assessments and proper consultations[2] are the basis of good regulation. Consultation remains one of the basic principles of participatory democracy but consultation needs to be carried out in the right conditions: sufficient time for considered responses and a weighted analysis of responses received are fundamental ingredients for successful consultations.

Although acknowledging that it is vital that simplification proposals really reduce costs for businesses and do not increase burdens that can stifle cross-border trade, it is of primary importance that simplification exercises within the scope of the better regulation agenda do not lead to a reopening of sensitive compromises.

The majority of BUSINESSEUROPE members do not support option 1. We believe that scrapping some or all of the directives which mainly deal with domestic issues could put into doubt the achievements of the internal market, given also the enlargement process and related need to create a common level playing field on company law. The repeal of these directives may have an impact on other company law directives which make reference to it or which are based on principles that come from these directives (e.g. second company law directive) with the unwanted consequence of a complication in the interpretation of the company law directives.

In addition, questions might be asked about the effectiveness of the abrogation as a means of simplifying company law, bearing in mind that the directives have been transposed into national law, often with options. Hence, everything would depend on the attitude adopted by the Member States, and there would be no certainty that legislation would be simplified in the near future, in particular for SMEs.

---

[2] As highlighted by the High Level Group of Company Law Experts that largely inspired the afore-mentioned Commission Action Plan "for both primary legislation and any alternatives, proper consultation is necessary". See "A modern regulatory framework for Company Law in Europe" presented on 4 November 2002, available at the following page on the Commission website: http://europa.eu.int/comm/internal_market/en/company/company/modern/, p. 4.

Therefore, it is BUSINESSEUROPE general view that, as a first step, the Commission should tackle certain provisions of the directives currently into force and which impose extra burdens for companies. Only after this exercise is accomplished and results on its implementation and impact on companies are available, a more radical exercise could be considered.

Furthermore and as already mentioned above, BUSINESSEUROPE reiterates that this exercise should also take into account the capital markets directives and present new mechanisms that will strengthen companies' opportunities to fully benefit from the Internal Market such as the European Private Company Statute and a fourteenth company law directive on the transfer of registered seat.

- **PRINCIPLE OF SUBSIDIARITY, PROPORTIONALITY AND PRINCIPLE-BASED APPROACH**

These principles, together with better regulation, have always been pointed out by BUSINESSEUROPE as main principles to be taken into account regarding the EU approach to company law and corporate governance, accounting and auditing. Therefore, we welcome the Commission statement that the review of existing EU directives must also take account of the principles of subsidiarity and proportionality.

Furthermore, it is generally considered that a targeted approach that favours a "more principle based, less detailed regulation consisting in focusing only on concrete, individual simplification measures in order to help EU companies" can suit the objective of achieving a more favourable regime to companies and reduce administrative burdens by repealing requirements that overlap and by adapting EU legislation to the current business reality.

BUSINESSEUROPE has on several occasions pointed out that a general principles-based approach should prevail over a rules-based approach. This would allow a degree of flexibility necessary for companies to develop the governance model best suited to them, in light of the principles of subsidiarity and proportionality. Indeed, the EU should only intervene when it is proven that the foreseen objective cannot be reached through national action. EU action should not disrupt the delicate balance found at national level, which takes into account national traditions and cultures.

COMMENTS ON SPECIFIC ANNEXES

ANNEX 2: INDIVIDUAL SIMPLIFICATION MEASURES CONCERNING THE THIRD AND SIXTH COMPANY LAW DIRECTIVES (SECTION 3.2.1 OF THE COMMUNICATION)

1. REPORTING REQUIREMENTS UNDER THE THIRD AND SIXTH COMPANY LAW DIRECTIVES

- **ABOLITION OF THE DETAILED WRITTEN REPORT EXPLAINING THE DRAFT TERMS OF MERGERS/DIVISIONS AND SETTING OUT THE LEGAL AND ECONOMIC GROUNDS**

  BUSINESSEUROPE does not agree with the repeal of the provision that the management bodies of companies involved in the merger/division must draw up a written report on the operation. The purpose of this provision is to explain the most important elements of the draft terms, in order to protect also minority shareholders' interests. However, given the fact that the above-mentioned written report is set forth with the only purpose of protecting the shareholders' right to have correct information, it would be better to recognise the shareholders' power to waive, unanimously, the drafting of this report.

- **ABOLITION OF THE OBLIGATION RELATED TO THE DRAFTING OF A EXPERT REPORT IN ORDER TO ASSESS THE PROPOSED SHARE EXCHANGE RATIO**

  BUSINESSEUROPE does not agree with repeal of the provision relating to the report to assess that the proposed share exchange ratio is fair and reasonable. In fact, the purpose of this report is to permit shareholders to evaluate the effects of the merger/division. We also suggest making it clear that the independent expert can be appointed directly by the company among experts duly registered or accepted by judicial or administrative authority.

- **ABOLITION THE NEW ACCOUNTING STATEMENTS IF THE LAST ANNUAL ACCOUNTS REFERRED TO A FINANCIAL YEAR ENDING MORE THAN SIX MONTHS BEFORE THE MERGER/DIVISION**

  A simplification in this field seems appropriate. Moreover, in case of repeal of the above-mentioned obligation, it would be desirable to provide that the directors, in their written report, certify the amount of net assets and the net result for the relevant period (as of a date close to the resolution of the merger/division) and possibly other items on and off balance sheet (e.g. third parties guarantees) that have been decisive in setting the share exchange ratio.

➢ **ABOLITION OF THE OBLIGATION TO DRAFT TWO REPORTS (EVEN BY THE SAME EXPERT) PROVIDED FOR IN THE SECOND AND THIRD AND SIXTH DIRECTIVE**

BUSINESSEUROPE agrees that double reporting should be repealed and considers that it seems appropriate to allow Member States to decide on the reporting requirements to be worked out in connection with the process of mergers and divisions.

2. PROTECTION OF SHAREHOLDERS AND CREDITORS UNDER THE THIRD AND SIXTH COMPANY LAW DIRECTIVE

➢ **ALIGNING THE CREDITOR PROTECTION RULES OF THE THIRD AND SIXTH DIRECTIVE WITH THE NEW ARTICLE 32 OF THE SECOND DIRECTIVE**

It seems reasonable to align the creditor protection provided for under the third and sixth directives, with the new systems provided in the second directive. Please note that the new wording of article 32 of the second directive provides that the creditors must credibly demonstrate to the administrative or judicial authority that, in the event of a reduction in the subscribed capital, their interest "is at stake": it is not sufficient, as in the third and sixth directives, that "no adequate safeguards have been obtained from the company". Moreover, the second directive provides that, if the company's assets are sufficient to protect the creditors' interests, Member States can allow the company not to give safeguards, even if the transaction is dangerous for creditors for other reasons. In case of merger or division, the regulation in force may theoretically be interpreted as permitting creditors to obtain adequate safeguards, even if there is no specific damage.

➢ **EXEMPTING THE APPLICATION OF ARTICLE 29 PARAGRAPH 1 OF THE SECOND DIRECTIVE IN CASE OF MERGERS BY ACQUISITION**

It seems that there is no reason to apply article 29 paragraph 1 of the second directive in case of merger by acquisition. The purpose of this article is to protect (minority) shareholders' interests in order to permit them to have the same participation in the company in case of a capital increase. Moreover, in case of a capital increase, connected to a merger, the protection of shareholders' interests must be found in other provisions and means (which already exist).

➢ **EXEMPTING THE APPLICATION OF ARTICLE 19 OF THE SECOND DIRECTIVE IN CASE OF MERGER BY ACQUISITION WITHOUT A CAPITAL INCREASE**

In general, it seems convenient to modify article 19 of second directive also with reference to the limit currently used (10% of capital share). It seems desirable to provide a different parameter connected for example to net assets.

➢ **LEAVING TO MEMBER STATES TO DETERMINE WHETHER AND IN WHICH CASE THE APPROVAL OF THE GENERAL MEETING OF THE ACQUIRING COMPANY SHOULD BE REQUIRED (IN PARTICULAR IN CASE OF MERGER BY ACQUISITION WHERE THE MOTHER COMPANY ALREADY HOLDS 90% OR MORE)**

BUSINESSEUROPE agrees with the suggestion. It also seems appropriate to apply this provision (in general) also to the reverse merger.

ANNEX 3: ADDITIONAL SIMPLIFICATION MEASURES IN COMPANY LAW (SECTION 3.2 OF THE COMMUNICATION)

BUSINESSEUROPE supports the measures proposed by the Commission regarding simplification of the first and eleventh company law directives. We believe there is a need of revising the publication requirements set up by both directives, mainly considering that those imposed by the eleventh company law directive no longer correspond to rapid technology developments and therefore impose additional and unjustifiable burdens on companies.

The revision of article 7 of the regulation on the European Company Statute is also key for the sake of coherence of between EU legislation and the integration of the European Court of Justice jurisprudence in the EU legal order.

1. PUBLICATION OBLIGATIONS UNDER THE FIRST AND THE ELEVENTH COMPANY LAW DIRECTIVES

➢ **FIRST COMPANY LAW DIRECTIVE: REPEAL OF ARTICLE 3 PARAGRAPH 4**

BUSINESSEUROPE fully supports repeal of the requirement of publication in the national gazette as set up by article 3 paragraph 4 of the first directive. Considering that since January 2007, Member States have had to give companies the possibility to file their documents and particulars by electronic means, BUSINESSEUROPE fully agrees with the statement that the obligation to publish data in the national gazette has become superfluous and should therefore not be required, unless it is an e-version and there is no additional charge for its publication. Moreover, considering that publication of this information through electronic registers is accessible to third parties in all Member States through the European Business Register (EBR), no justification can be found to maintain this requirement which entails further costs for companies.

➢ **ELEVENTH COMPANY LAW DIRECTIVE: REVISION OF ARTICLE 4**

Regarding the Commission proposal regarding simplification of the requirements imposed by the eleventh company law directive, BUSINESSEUROPE considers that the revision of article 4 is key to solve problems companies are facing regarding their branches and particularly on reducing companies expenses related to the

translation of documents. In order to reduce these costs it is essential that Member State where branches are located accept the certified translation prepared in the Member State where the parent company is located and where they have been issue and accepted by the judicial or administrative authorities.

BUSINESSEUROPE also considers that EU initiatives such as the BRITE project that provides a common multi-language interface to access the registers in the form of the European Business Register (EBR) should be further encouraged and improved in order to provide companies with a more business-friendly environment and to help them to benefit fully from the internal market, by eliminating excessive and unnecessary costs.

2. REGISTERED OFFICE OF THE EUROPEAN COMPANY

As mentioned above, BUSINESSEUROPE supports the revision of article 7 of the European Company Statute whereby the registered office of an SE shall be located in the same Member State as its head office and allows Member States to provide in addition that SEs registered in their territory have the obligation to locate their head office and their registered office in the same place.

The European Court of Justice in *Überseering*[3] ruled that a company formed under the law of a Member State and there incorporated, if it moves its seat to another Member State should be recognised and *locus standii* granted. Therefore, companies already registered and recognised in a Member State now have the option of moving their real seat to another Member State and will have to be recognised by the host Member State.

BUSINESSEUROPE believes that a revision of article 7 of the SE statute would lead to a more coherent and favourable framework regarding SEs' mobility if in accordance with the ECJ ruling on *Überseering.*

BUSINESSEUROPE would also like to take this opportunity to reiterate its views on the effective need for a 14th company law directive on the transfer of registered seat. Even if the revision of article 7 of the European Company Statute may have as a consequence an increase in corporate mobility, this will not apply to companies other than registered SEs. A 14th company law directive would improve corporate mobility, key for companies to benefit fully from the internal market.

[3] Case C-208/00, judgment of 5 November 2002

COMMENTS ON ANNEX 4: SIMPLIFICATION MEASURES FOR SMES IN ACCOUNTING AND AUDITING (SECTION 4 OF THE COMMUNICATION) [4]

BUSINESSEUROPE welcomes the Commission proposal to simplify the EU measures applicable to SMEs in accounting and auditing.

Accounting directives currently give Member States a great deal of latitude and the exemption possibilities they offer are used in a wide variety of ways. A streamlining of the arrangements for SMEs must go hand in hand with efforts to identify a common core, in order not to compromise the aim of harmonisation, notably on the particularly sensitive issue of publication of accounts, which has direct implications in terms of companies' competitiveness.

The relieve from publication requirements for small entities, extension of exemptions to medium-sized entities without particular external user and the measures envisaged for simplification for all companies would result in significant reduction of the administrative burden for these companies that would contribute to increasing their competitiveness and help them to fully benefit from the internal market.

In the general remarks, the Commission states: "It is of crucial importance to combine reporting for different purposes (such as tax, statistics, social security, employment reporting) at Member State level and thereby reduce the overall burden of keeping different accounting and reporting systems." In that connection, BUSINESSEUROPE would like to point out that part of the double reporting requirements originates from EU regulation, specifically at statistics level. Therefore, BUSINESSEUROPE urges that the Commission itself also repeals the double reporting.

1. INTRODUCTION OF "MICRO ENTITIES"

BUSINESSEUROPE supports the proposal to exempt micro entities from the field of application of the fourth directive. We support the principle that the micro entities are defined according to the same parameters already in use in the directive today, but consider that it would be better to repeal or increase the criterion related to employees as it could be an obstacle to hiring. Alternatively, it would be possible to raise this criterion to 15/20 employees.

[4] The Federation of Enterprises in Belgium (FEB) does not support BUSINESSEUROPE's views on the exemption of micro entities from the field of application of the fourth Company Law Directive nor on the relief from publication requirements. The FEB considers that in order to ensure a level playing field and fair competition, it is fundamentally important that accounting rules applying to micro entities are laid down at EU level. Moreover, the FEB believes that annual accounts should continue to be published by small entities due to the fact that annual accounts are a crucial factor in both the grant and the cost of bank loans and serve as the basis on which taxation is calculated in countries where there is a link between accounting and taxation.

2. TRESPASSING THRESHOLD FOR SMEs

BUSINESSEUROPE supports the proposal from the Commission to extend transition period from 2 to 5 years considering that providing companies with more flexibility, will reduce administrative burdens.

BUSINESSEUROPE would like the limits, especially regarding the balance sheet total and the turnover, to be raised to a higher level than indicated. The reason for this is that it should be possible for more companies to have a less complex reporting where accounting statistics, tax accounting and financial accounting can be worked out collectively. In order for this to work, flexibility in the conditions of the rules is required, especially in relation to the financial annual report and in relation to the statistic requirements. In this context, BUSINESSEUROPE draws attention to the fact that the statistical requirements in the accounting statistics should be simplified as well.

3. RELIEF FROM PUBLICATION REQUIREMENTS FOR SMALL ENTITIES

BUSINESSEUROPE would like to point out that the publication requirements for accounting cannot be considered an extra burden if:

- the company already has to work out a financial annual report and
- the procedures for reporting to the public authorities, i.e. publication, are sufficiently streamlined.

In those cases where the company has worked out a financial annual report for external use, it will not be an extra burden if the publication requirements can be fulfilled by forwarding a copy of the prepared annual report as a PDF file or in a paper version.

In the long run, the electronic ERP solutions could furthermore support other methods for publication without being an extra burden for the company. This requires, however, that the reporting is possible directly from the ERP programme without separate programming or installation and that data can be sent in a number of formats so that the companies are not bound to one specific software supplier.

BUSINESSEUROPE would also like to note that the publication of annual accounts of smaller companies provides information to companies' competitors that may impact companies' competitiveness and should therefore be considered as an indirect burden of publication requirements.

In relation to the measures regarding consolidation, BUSINESSEUROPE suggests that article 57 of the fourth directive be supplemented with a condition whereupon the subsidiary can make use of exemptions available to companies below the thresholds as well as the options already given in the directive, when the subsidiary is part of the consolidated annual accounts. The requirements for the use of exemptions should not be as restrictive as the definition in article 57 as the requirement in article 57 c) in particular should not apply in such a situation.

Further, BUSINESSEUROPE supports the idea of alleviating the statutory audit requirement as a consequence of the increasing audit responsibility of the group auditor.

4. EXTENSION OF EXEMPTIONS FOR COMPANIES WITHOUT PARTICULAR EXTERNAL USER

BUSINESSEUROPE considers that companies that do not have a wide range of external users of financial statements should be exempted from certain requirements. The risk-based approach proposed by the Commission which will allow certain medium-sized companies to use the regime applicable to small companies will prove less burdensome for these companies and will therefore allow them to improve other areas of their business.

5. SIMPLIFICATION FOR ALL COMPANIES

BUSINESSEUROPE welcomes the Commission proposed measures on consolidation, accounting for deferred taxes and on disclosures.