

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

(2002/C 227 E/15)

COM(2002) 279 final — 2002/0122(COD)

(Submitted by the Commission on 3 June 2002)

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,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure referred to in Article 251 of the Treaty,

Whereas:

- (1) The 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 Community⁽¹⁾ sets out the requirements in respect of compulsory disclosure of a series of documents and particulars by limited liability companies.
- (2) In the context of the fourth phase of the Simplification of the Legislation on the Internal Market process (SLIM), launched by the Commission in October 1998, a Company Law Working Group issued in September 1999 a Report on the simplification of the First and Second Company Law Directives which contained certain recommendations⁽²⁾.
- (3) The modernisation of Directive 68/151/EEC along the lines set out in those recommendations should not only help to meet the important objective of making company information more easily and rapidly accessible by interested parties, but should also simplify significantly the disclosure formalities imposed upon companies.
- (4) The list of companies covered by Directive 68/151/EEC should be extended to take account of the new types of

companies created at national level since the Directive's adoption.

- (5) Several Directives have been adopted since 1968 with the aim of harmonising the requirements applicable to the accounting documents which must be prepared by companies, namely the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies⁽³⁾, the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts⁽⁴⁾, Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions⁽⁵⁾ and Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings⁽⁶⁾. The references in Directive 68/151/EEC to the accounting documents which are required to be published in accordance with those Directives should be updated accordingly.
- (6) In the context of the pursued modernisation, companies should be able to choose to file their compulsory documents and particulars by paper means or by electronic means. Interested parties should be able to obtain from the register a copy of such documents and particulars by paper means as well as by electronic means.
- (7) Member States should be able to decide to keep the national gazette, appointed for publication of compulsory documents and particulars, in paper form or electronic form, or to provide for disclosure by equally effective means.
- (8) Cross-border access to company information should be improved by allowing, in addition to the mandatory disclosure made in one of the languages permitted in the company's Member State, voluntary registration of documents and particulars in additional languages. Third parties acting in good faith should be able to rely on these translations.

⁽¹⁾ OJ L 65, 14.3.1968, p. 8, as last amended by the Act of Accession of Austria, Finland and Sweden.

⁽²⁾ See the Report from the Commission to the European Parliament and the Council — Results of the fourth phase of SLIM, 4 February 2000 (COM(2000) 56 final).

⁽³⁾ OJ L 222, 14.8.1978, p. 11; as last amended by European Parliament and Council Directive 2001/65/EC (OJ L 283, 27.10.2001, p. 28).

⁽⁴⁾ OJ L 193, 18.7.1983, p. 1; as last amended by Directive 2001/65/EC.

⁽⁵⁾ OJ L 372, 31.12.1986, p. 1; as amended by Directive 2001/65/EC.

⁽⁶⁾ OJ L 374, 31.12.1991, p. 7.

(9) It is appropriate to clarify that the statement of the compulsory particulars in accordance with Article 4 of Directive 68/151/EEC should be made in all letters and order forms, whether they are in paper form or use any other medium. In the light of technological developments, it is also appropriate to provide that these statements be made on any company website.

(10) Directive 68/151/EEC should be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 68/151/EEC is hereby amended as follows:

1. Article 1 is amended as follows:

(a) the third indent is replaced by the following:

‘— In France:

la société anonyme, la société en commandite par actions, la société à responsabilité limitée, la société par actions simplifiée;’

(b) the sixth indent is replaced by the following:

‘— In the Netherlands:

de naamloze vennootschap, de commanditaire vennootschap op aandelen, de besloten vennootschap met beperkte aansprakelijkheid;’

(c) the ninth indent is replaced by the following:

‘— In Denmark:

aktieselskab, kommanditaktieselskab, anpartsselskab;’

2. Article 2 is amended as follows:

(a) Point (f) of paragraph 1 is replaced by the following:

‘(f) The accounting documents for each financial year, which are required to be published in accordance with Council Directives 78/660/EEC (*), 83/349/EEC (**), 86/635/EEC (***) and 91/674/EEC (****).’

(*) OJ L 222, 14.8.1978, p. 11.

(**) OJ L 193, 18.7.1983, p. 1.

(***) OJ L 372, 31.12.1986, p. 1.

(****) OJ L 374, 31.12.1991, p. 7.’

(b) Paragraph 2 is deleted.

3. Article 3 is replaced by the following:

‘Article 3

1. In each Member State, a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein.

2. All documents and particulars which must be disclosed in pursuance of Article 2 shall be kept in the file, or entered in the register; the subject matter of the entries in the register must in every case appear in the file.

Member States shall ensure that the filing by companies of all documents and particulars which must be disclosed in pursuance of Article 2 shall be possible by electronic means as from 1 January 2005. In addition, Member States may impose upon all — or certain categories of — companies the filing by electronic means of all — or certain types of — such documents and particulars as from 1 January 2005.

All documents and particulars referred to in Article 2 which are filed as from 1 January 2005, whether by paper means or by electronic means, must be kept in the file, or entered in the register, in electronic form. To this end, Member States shall ensure that all such documents and particulars which are filed by paper means as from 1 January 2005 are converted by the register to electronic form.

The documents and particulars referred to in Article 2 that have been filed by paper means up to 31 December 2004 do not have to be converted automatically to electronic form by the register. Member States shall nevertheless ensure that they are converted to electronic form by the register on application submitted in accordance with the rules adopted pursuant to paragraph 3.

3. A copy of the whole or any part of the documents or particulars referred to in Article 2 must be obtainable on application. As from 1 January 2005, applications may be submitted to the register by paper means or by electronic means as the applicant chooses.

As from 1 January 2005, copies as referred to in the first subparagraph must be obtainable from the register by paper means or by electronic means as the applicant chooses, whether the documents or particulars have been filed before or after 1 January 2005. However, Member States may decide that all — or certain types of — the documents and particulars that have been filed by paper means up to 31 December 2004 shall not be obtainable from the register by electronic means, if they have been filed before a stated period preceding the date of the application submitted to the register. Such stated period may not be less than 10 years.

The price of obtaining a copy of the whole or any part of the documents or particulars referred to in Article 2, whether by paper means or by electronic means, shall not exceed the administrative cost thereof.

Paper copies supplied shall be certified as "true copies", unless the applicant dispenses with such certification. Electronic copies supplied shall not be certified as "true copies", unless the applicant explicitly requests such a certification.

Member States shall take the necessary measures to ensure that certification of electronic copies guarantees both the authenticity of their origin and the integrity of their contents, by means of an advanced electronic signature within the meaning of Article 2(2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (*).

4. Disclosure of the documents and particulars referred to in paragraph 2 shall be effected by publication in the national gazette appointed for that purpose by the Member State, either of the full or partial text, or by means of a reference to the document which has been deposited in the file or entered in the register. The national gazette appointed for that purpose may be kept in electronic form.

Member States may decide to replace publication in the national gazette with equally effective means, which shall at least entail the use of a system whereby the information disclosed can be accessed in chronological order through a central electronic platform.

5. The documents and particulars may be relied on by the company as against third parties only after they have been disclosed in accordance with paragraph 4, unless the company proves that the third parties had knowledge thereof.

However, with regard to transactions taking place before the sixteenth day following the disclosure, the documents and particulars shall not be relied on as against third parties who prove that it was impossible for them to have had knowledge thereof.

6. Member States shall take the necessary measures to avoid any discrepancy between what is disclosed in accordance with paragraph 4 and what appears in the register or file.

However, in cases of discrepancy, the text disclosed in accordance with paragraph 4 may not be relied on as against third parties; the latter may nevertheless rely thereon, unless the company proves that they had knowledge of the texts deposited in the file or entered in the register.

7. Third parties may, moreover, always rely on any documents and particulars in respect of which the

disclosure formalities have not yet been completed, save where non-disclosure causes them not to have effect.

8. For the purposes of this article, "by electronic means" shall mean that the information is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

(*) OJ L 13, 19.1.2000, p. 12.'

4. The following Article 3a is inserted:

'Article 3a

1. Documents and particulars which must be disclosed pursuant to Article 2 shall be drawn up in one of the languages permitted by the language rules applicable in the Member State in which the company has its registered office.

2. In addition to the mandatory disclosure referred to in paragraph 1, Member States shall allow documents and particulars referred to in Article 2 to be disclosed in accordance with Article 3 in any official language(s) of the Community.

Member States may prescribe that the translation of such documents and particulars be certified.

Member States shall take the necessary measures to ensure that electronic access is provided in each of the official languages of the Community in which such documents and particulars have been disclosed.

3. In addition to the mandatory disclosure as required under paragraph 1, and to the disclosure allowed under paragraph 2, Member States may allow documents and particulars referred to in Article 2 to be disclosed in accordance with Article 3 in any other language(s).

Member States may prescribe that the translation of such documents and particulars be certified.

4. Member States shall take the necessary measures to avoid any discrepancy between the documents and particulars disclosed pursuant to paragraph 1 and any translation disclosed pursuant to paragraph 2 or paragraph 3.

However, in cases of discrepancy, the translation disclosed pursuant to paragraph 2 or paragraph 3 may not be relied on as against third parties; the latter may nevertheless rely thereon, unless the company proves that they had knowledge of the version disclosed pursuant to paragraph 1.'

5. Article 4 is replaced by the following:

'Article 4

Member States shall prescribe that letters and order forms, whether they are in paper form or use any other medium, shall state the following particulars:

- (a) the information necessary to identify the register in which the file mentioned in Article 3 is kept, together with the number of the company in that register;
- (b) the legal form of the company, the location of its registered office and, where appropriate, the fact that the company is being wound up.

Where, in these documents, mention is made of the capital of the company, the reference shall be to the capital subscribed and paid up.

Member States shall prescribe that company websites shall contain at least the particulars mentioned in the first paragraph and, if applicable, the reference to the capital subscribed and paid up.'

6. Article 6 is replaced by the following:

'Article 6

Member States shall provide for appropriate penalties in case of:

(a) failure to disclose the accounting documents required by Article 2(1)(f);

(b) omission from commercial documents or from any company website of the compulsory particulars provided for in Article 4.'

Article 2

1. Member States shall bring into force by 31 December 2004 at the latest the laws, regulations and administrative provisions necessary for them to comply with this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods for making such a reference shall be laid down by the Member States.

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

Article 3

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

Article 4

This Directive is addressed to the Member States.
