



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.10.2004  
COM(2004) 730 final

2004/0256 (COD)

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**

(presented by the Commission)

{SEC(2004) 1342}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### 1.1 Ground for and objectives of the proposal

The Second Company Law Directive<sup>1</sup> was adopted in 1976 with a view to co-ordinate, for the protection of the interests of members and third parties, the national provisions applicable to public limited liability companies i.a. in the following areas: formation of companies, minimum share capital requirement, distributions to shareholders, increase in capital, reduction in capital.

The overall purpose of the Directive is thus to establish the conditions which must be satisfied in order to ensure that the capital of the company is maintained in the interest of creditors. Furthermore, it aims at protecting minority shareholders and states the principle that all shareholders who are in the same position should be treated in the same way.

The present proposal for amending the Directive aims at facilitating capital related measures taken in public limited liability companies. This is attempted by enabling Member States to eliminate specific reporting requirements under certain conditions, to facilitate, under certain conditions, specific changes in share ownership, and last not least, to provide a basically harmonised legal procedure for creditors under certain circumstances in the context of capital reduction.

By this, companies ought to be enabled, with regard to capital size, capital structure and ownership, to react more promptly and in a less costly and protracted manner to developments in the markets that are relevant to them. As a result, this proposed modernisation of the Second Directive ought to make a contribution to the promotion of business efficiency and competitiveness without reducing the protection offered to shareholders and creditors, as envisaged in the Commission's "Communication<sup>2</sup> to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward".

#### 1.2. General context

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

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<sup>1</sup> Second Council Directive of 13 December 1976 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, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC), OJ No L 26, 31.1.1977, p.1., as last amended by the 2003 Act of Accession (OJ L 236, volume 46, 23.9.2003).

<sup>2</sup> Commission document COM(2003) 284 final.

simplification of the First and Second Company Law Directives<sup>3</sup>. This report contained recommendations on the areas in which a simplification could be achieved. The main recommendations relating to the Second Directive emphasized i.a. the need to eliminate under certain conditions reporting requirements in some cases (share issuance for non-cash consideration; exclusion of pre-emptive rights), furthermore the need to facilitate acquisition by a company of its own shares, to facilitate financial assistance by a company for acquisition of its shares by a third party, and the need to facilitate the streamlining of ownership in a company's share capital.

In its Report to the European Parliament and the Council<sup>4</sup>, the Commission stated that it supported the overall objective of the main recommendations relating to the Second Directive and that it would examine further how best to amend the Second Directive accordingly.

According to the "Report on a Modern Regulatory Framework for Company Law in Europe" (issued in November 2002 by the "High Level Group of Company Law Experts"), most of the SLIM Group proposals were indeed worth implementing. In addition, the High Level Group formulated a few additional suggestions aiming at modernising the Second Directive.

A proposal to amend the Second Directive along these lines has therefore been regarded by the Commission as a priority for the short term, in line with Annex 1 of the above mentioned Communication, which calls for the simplification of the Second Directive on the basis of the SLIM-recommendations as supplemented in the High Level Group's above mentioned report by means of a Directive ("SLIM-Plus").

### **1.3. Existing provisions in the area of the proposal**

With regard to capital related measures of public limited liability companies, which this proposal undertakes to simplify, the main requirements are currently set forth by the Second Directive as follows:

- Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable-par. This prohibition applies to all share issues without exception, not just to the initial share issue in the context of the company's incorporation. This does not imply that subsequent share issues cannot be made at a nominal or accountable par value lower than that of a previous issue, as long as the price at which the new shares are issued complies with the above mentioned obligation.
- Issuance of shares for non-cash-consideration is subject to the requirement of a valuation by one or more independent experts;
- Streamlining of ownership in the company's share capital is, if possible at all, subject in principle to ex-ante authorisation by the statutes, by the instruments of incorporation and/or by the general meeting;

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<sup>3</sup> Recommendations by the Company Law SLIM Working Group on the Simplification of the First and second Company Law Directives, September 1999.

<sup>4</sup> Report from the Commission to the European Parliament and the Council – Results of the fourth phase of SLIM, 4 February 2000 (COM (2000) 56).

- Acquisition by the company of its own shares is subject in principle to approval by the general meeting only for a certain period of time and only for a certain fraction of the company's capital;
- Financial assistance by the company for the acquisition of its shares by a third party is possible only in very limited cases and only up to a certain limit;
- Exclusion of pre-emptive rights in capital increases for cash consideration is subject to approval by the general meeting and to the requirement of a written report by the administrative or management body;
- For cases of capital reduction, it is up to the Member States to lay down the conditions for the exercise of a creditor's right to obtain adequate security.

#### **1.4. Similarities or differences with existing provisions or acts**

Given the similarities and differences between the Articles 39a and 39b of the present proposal on the one hand, and, on the other hand, the provisions of Directive 2004/25/EC on takeover bids that relate to the so-called "squeeze-out" and "sell-out"-rights of majority shareholders and minority shareholders, respectively, it is clearly stated in the proposal, that the latter take precedence over the former in the context of takeover bids within the scope of Directive 2004/25/EC.

#### **1.5. Consistency with other policies**

In its Communication to the Council and the European Parliament "Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward" (issued in May 2003)<sup>5</sup>, the Commission has considered that a simplification of the Second Directive on the basis of the proposals and recommendations as mentioned here above in point 1.2. would significantly contribute to the promotion of business efficiency and competitiveness without reducing the protection for shareholders and creditors.

Accordingly, the above mentioned Communication lists a pertinent proposal for a Directive amending the Second Company Law Directive as one of the most important modernisations of company law which should be executed in a short term.

Furthermore, in its thrust to simplify and reduce administrative burdens for companies, the present proposal contributes to the implementation of the Commission's February 2003 Framework for Action on "Updating and simplifying the Community Acquis"<sup>6</sup>. This initiative is one of the range of actions in the Commission's "Better Regulation" initiative of June 2002<sup>7</sup> which i.a. responds to the objective to improve the regulatory environment in which businesses operate to enhance competitiveness as one of the goals set out in the Lisbon Strategy.

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<sup>5</sup> See Commission document COM (2003) 284 final.

<sup>6</sup> COM (2003) 71; cf. also the First and Second Progress Report thereto: COM (2003) 623 and COM (2004) 432

<sup>7</sup> COM (2002) 278

## **2. RESULTS OF CONSULTATION WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENT**

### **2.1. Collection and use of expertise**

The main provisions contained in the proposal are inspired by the recommendations made by a Company Law Working Group in September 1999, in the context of the fourth phase of the Simplification of the Legislation on the Internal Market (SLIM) process launched by the Commission in October 1998. This Group met three times in 1999 and was composed of Member States officials, company law practitioners and academics.

The SLIM-Group recommendations concerning the Second Directive and their practical implications have been subsequently discussed with Member States company law experts in meetings in June 2000 and March 2001. From these discussions, it appeared that the main recommendations relating to the Second Directive were supported, pending, however, a number of technical issues to be considered in more depth.

On the occasion of the creation of the “High Level Group of Company Law Experts” by the Commission in September 2001, it was felt appropriate to include into the Group’s mandate the task to further consider the possible simplification of corporate rules in the light of the SLIM-report on the Second Directive.

### **2.2. Consultations**

Following an extended public consultation which it held i.a. on possible approaches towards reform of the European capital regime (launched in the second quarter of 2002), the “High Level Group” confirmed in its “Report on a Modern Regulatory Framework for Company Law in Europe” (issued in November 2002), that most of the SLIM Group proposals, as modified to some extent by the “High Level Group”, were indeed worth implementing.

The Commission’s approach towards simplification of the Second Directive, as inspired by the afore mentioned expert groups and by the above mentioned consultation, and as subsequently set forth in the above mentioned Commission Communication, has been strongly re-confirmed by a large majority of respondents to the public consultation of this Communication.

### **2.3. Impact assessment (see also Annex 1)**

The Second Directive applies to public limited liability companies throughout the EU. Two of the proposed amendments relate to listed companies only (Article 39a and b; Article 29(5a)). No distinction is currently made as regards the sectors of business, the sizes of business or the geographical areas of the Community.

With regard to some of the amended or newly inserted provisions, such as Article 39a and b, as well as Article 32(1), the proposal contains provisions that have to be transposed by the Member States into their national law on a compulsory basis. With regard to other provisions, existing options for transposition by Member States are

modified, such as Article 19(1) and Article 29(5a), or newly created, such as Articles 10a and 10b and Article 23(1) in connection with Articles 23a and 23b.

Apart from general implementing measures, Member States will, in some instances, also have to take special implementing measures, especially with regard to certain safeguard procedures, under the amended provisions of the Directive.

Public limited liability companies will then be able to avail themselves of the simplifications that are envisaged with this proposal, while – where necessary – being obliged to comply with the safeguards which are introduced in the interest of shareholders and third parties.

By availing themselves of the simplifications for capital related measures, which this proposal aims to bring about, companies ought to be in a position to react more promptly and in a less costly and protracted manner to developments in the markets that are relevant to them. As a result, this proposed modernisation of the Second Directive ought to make a contribution to the promotion of business efficiency and competitiveness without reducing the protection offered to shareholders and creditors, as envisaged in the Commission's "Communication<sup>8</sup> to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward".

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **3.1. Legal basis**

The proposed Directive is drafted on the legal basis of Article 44(1) of the Treaty.

#### **3.2. Principle of proportionality and subsidiarity**

The proposed simplifications for public limited liability companies necessitate Community action in that they touch on a series of provisions of Community law which up until now exclude or limit the use of these proposed simplifications by public limited liability companies. The proposal is therefore in compliance with the principle of subsidiarity as laid down in Article 5 of the Treaty.

Furthermore, and in compliance with the principle of proportionality, the present proposal tries to limit legislative action to the minimum which is considered necessary to bring about the intended simplifications.

#### **3.3. Choice of instruments**

In order to bring about these intended simplifications, it is indispensable for the Community legislator to introduce changes to the Second Company Law Directive. This can only be done with a proposal for a Directive amending the Second Company Law Directive.

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<sup>8</sup> Commission document COM(2003) 284 final.

**4. BUDGETARY IMPLICATION**

Any budgetary implications are not foreseen.

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**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission<sup>9</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>10</sup>,

Acting in accordance with the procedure referred to in Article 251 of the Treaty<sup>11</sup>,

Whereas:

- (1) The Second Council Directive 77/91/EEC of 13 December 1976 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, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent<sup>12</sup>, sets out the requirements for several capital-related measures taken by those companies.
- (2) In its Communication to the Council and the European Parliament “Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward” of 21 May 2003<sup>13</sup> the Commission draws the conclusion that a simplification of the Directive 77/91/EEC would significantly contribute to the promotion of business efficiency and competitiveness without reducing the protection offered to shareholders and creditors.
- (3) Member States should have the possibility to enable public limited liability companies to attract considerations other than in cash to their capital without them having to resort to a special expert valuation in cases in which there is a clear point of reference

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<sup>9</sup> OJ C [...] [...], p.[...]

<sup>10</sup> OJ C [...] [...], p.[...]

<sup>11</sup> OJ C [...] [...], p.[...]

<sup>12</sup> OJ L 26, 31.1.1977, p. 1, as last amended by the Act of Accession of 2003.

<sup>13</sup> COM(2003) 284 final.



for the valuation of such consideration. Nonetheless, the right of minority shareholders to require such valuation should be guaranteed.

- (4) Public limited liability companies should be allowed to acquire their own shares up to the limit of the company's distributable reserves and the period for which such an acquisition can be authorised by the general meeting should be increased so as to enhance flexibility and reduce administrative burden for companies which have to react promptly to market developments affecting their share price.
- (5) Public limited liability companies should be able to grant financial assistance with a view to the acquisition of their shares by a third party up to the limit of the company's distributable reserves so as to increase flexibility with regard to changes in the ownership structure of the share capital of companies. This possibility should be subject to safeguards imposed by the Directive's objective of protection of both shareholders and third parties.
- (6) Public limited liability companies should be able to increase, under certain conditions, their capital without having to meet reporting requirements linked to the restriction or withdrawal of pre-emption rights of shareholders so as to reduce the administrative burden for listed companies which want to be able to embark on prompt capital increases.
- (7) Creditors should be able to resort, under certain conditions, to judicial or administrative proceedings where their claims are at stake as a consequence of a reduction in the capital of a public limited liability company so as to enhance standardized creditor protection in all Member States.
- (8) Shareholders holding a large majority of a public limited liability company's capital should have the right to acquire the remaining shares for adequate compensation, so as to enable a streamlined and more viable share ownership in listed companies. Likewise, in such a situation, the remaining shareholders should be able to require such acquisition. Nonetheless, the rules applicable according to the Directive 2004/25/EC<sup>14</sup> of the European Parliament and of the Council of 21 April 2004 on takeover bids should not be affected by those rights.
- (9) In order to ensure that market abuse is prevented, the Member States should take into account, for the purpose of implementation of this Directive, the dispositions of Directive 2003/6/EC<sup>15</sup> of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and of Commission Directive 2004/72/EC<sup>16</sup> of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, as well as of Commission Regulation (EC) No 2273/2003<sup>17</sup> of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament

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<sup>14</sup> OJ L 142, 30.4.2004, p.12

<sup>15</sup> OJ L 96, 12.4.2003, p.16

<sup>16</sup> OJ L 162, 30.4.2004, p.70

<sup>17</sup> OJ L 336, 23.12.2003, p.33

and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

(10) Directive 77/91/EEC should be therefore amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Directive 77/91/EEC is hereby amended as follows:

*Article 1*

(1) The following Articles 10a and 10b are inserted:

*"Article 10a*

1. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, transferable securities as defined in Article 4(1)(18) of Directive 2004/39/EC\* are contributed as consideration other than in cash, and those securities are valued at the weighted average price at which they have been traded on one or more regulated market(s) as defined in Article 4(1)(14) of that Directive in the 3 months preceding the effectuation of the respective consideration other than in cash.

*\*OJ L 145, 30.4.2004, p.1*

However, where that price has been affected by exceptional occurrences that would significantly change the value of the asset at the effective date of its contribution, Articles 10(1), (2) and (3) shall apply.

2. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, assets are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognized independent expert and where the following conditions are fulfilled:
  - (a) the recognized expert who has carried out the valuation is sufficiently trained and experienced in valuation of the kind of assets to be contributed;
  - (b) the fair value is determined for a date not more than 3 months before the effective date of the asset's contribution;
  - (c) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State, which are applicable to the kind of assets to be contributed.

In the case of new qualifying circumstances, that would significantly change the value of the asset at the effective date of its contribution, a re-valuation has to be made on the initiative and under the responsibility of the administrative or management body. That body shall inform shareholders whether any such new

qualifying circumstances have occurred.

In any event, shareholders holding an aggregate percentage of at least 5% of the company's subscribed capital may require a re-valuation of the asset concerned, and may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply.

3. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or the management body, assets are contributed as consideration other than in cash whose value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been drawn up in accordance with the requirements of Directive 78/660/EEC and have been subject to an audit in accordance with Directive 84/253/EEC.

In the case of new qualifying circumstances, that would significantly change the value of the asset contributed at the effective date of its contribution, a re-valuation has to be made on the initiative and under the responsibility of the administrative or management body. That body shall inform shareholders whether any such new qualifying circumstances have occurred.

In any event, shareholders holding an aggregate percentage of at least 5% of the company's subscribed capital may require a re-valuation of the asset concerned, and may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply.

#### *Article 10b*

1. Where consideration other than in cash as referred to in Article 10a occurs without an expert's report, the persons, companies and firms referred to in Article 3(i) or the administrative or the management body shall, in addition to the requirements set out in Article 3(h), submit to the register for publication a declaration containing the following:
  - (a) a description of the consideration other than in cash at issue;
  - (b) its estimated value and the source of this valuation;
  - (c) a statement whether the values arrived at correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them;
  - (d) if appropriate, a statement as to whether new qualifying circumstances with regard to the original valuation have occurred.

That declaration shall be published in accordance with Article 3 of Directive 68/151/EEC.

2. Each Member State shall designate an independent administrative or judicial authority which is responsible for examining the legality of the considerations

other than in cash made in accordance with Article 10a and the declaration referred to in paragraph 1.”

(2) In Article 11(1) the first subparagraph is amended as follows:

(a) The word “Article 10” is replaced by “Article 10 (1), (2) and (3)”.

(b) The following sentence is added:

“Articles 10a and 10b shall apply mutatis mutandis.”

(3) In Article 19, paragraph 1 is replaced by the following:

“1. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make such acquisitions subject to the following conditions:

(a) authorization must be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and in particular the maximum number of shares to be acquired, the duration of the period for which the authorization is given and which may not exceed 5 years, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body must satisfy themselves that, at the time when each authorized acquisition is effected, the conditions referred to in subparagraphs (b), (c) and (d) are respected;

(b) the acquisitions, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not have the effect of reducing the net assets below the amount mentioned in Article 15(1)(a);

(c) only fully paid-up shares may be included in the transaction;

(d) the principle of equal treatment of shareholders shall apply; in particular, acquisition and sale by a company of its own shares on a regulated market as defined in Art. 4(1)(14) of Directive 2004/39/EC shall be considered fulfilling that principle.

Member States may also subject acquisitions within the meaning of the first subparagraph to the condition that the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed 10 % of the subscribed capital.”

(4) In Article 23, paragraph 1 is replaced by the following:

“1. A company may not advance funds, nor make loans, nor provide security, with a view to the acquisition of its shares by a third party, unless such transactions in national legislation are subject to the conditions set out in the second to fifth subparagraphs.

The transactions must take place on the initiative and under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company from the third party and with regard to security provided to the company by the third party for the loans and advances referred to in paragraph 1. The credit standing of the third party must have been duly investigated and the company must be able to maintain its liquidity and solvency for the next five years. The latter must be credibly demonstrated by a detailed cash flow analysis based on the information at the time of the approval of the transaction.

The transactions must be submitted by the administrative or management body to the general meeting for ex ante-approval, whereby the general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. The administrative or management body must present a written report to the general meeting, indicating the reasons for the transaction, the interest of the company in effectuating such a transaction, the conditions at which the transaction is effectuated, the risks involved in the transaction for the liquidity and solvency of the company and the price at which the third party is to acquire the shares. This report shall be submitted to the register for publication in accordance with Article 3 of Directive 68/151/EEC.

The aggregate financial assistance granted to third parties must not have the effect of reducing the net assets below the amount specified in Article 15(1)(a).

Where own shares of the company within the meaning of Article 19(1) or shares issued in the course of an increase in subscribed capital are acquired by a third party from the company, that acquisition must be made at a fair price, in order to avoid dilution of existing shareholdings.”

- (5) The following Articles 23a and 23b are inserted:

*“Article 23a*

A shareholder shall have the right to contest the general meeting’s approval of a transaction referred to in Article 23(1) by applying to the appropriate administrative or judicial authority to decide on the legality of that transaction.

*Article 23b*

In cases where individual members of the administrative or management body of the company being party to a transaction referred to in Article 23(1), or of the administrative or management body of a parent undertaking within the meaning of Article 1 of Council Directive 83/349/EEC\* or such parent undertaking itself, or individuals acting in their own name, but on behalf of the members of such bodies or on behalf of such undertaking, are counterparts to such a transaction, Member States shall ensure through adequate safeguards that such transaction does not conflict with the company’s best interest.”

\* *OJ L 193, 18.7.1983, p. 1.*

- (6) In Article 27(2) the second subparagraph is replaced by the following:

“Article 10(2) and (3) and Article 10a and 10b shall apply.”

- (7) In Article 29 the following paragraph 5a is inserted:

“5a. Where an administrative or management body of a listed company is given the power to restrict or withdraw the right of pre-emption in accordance with paragraph 5, under the additional condition, that the shares for a future increase in the subscribed capital must be issued at the market price which, at the time of issue, prevails on one or more regulated market(s) within the meaning of Article 4(1)(14) of Directive 2004/39/EC, the administrative or management body is exempted from having to present to the general meeting a written report as required under paragraph 4 of this Article. Shareholders may, however, request the administrative or management body to indicate the reasons for the restriction or withdrawal of the right of pre-emption.”

- (8) In Article 32, paragraph 1 is replaced by the following:

“1. In the event of a reduction in the subscribed capital, at least the creditors whose claims antedate the publication of the decision to make the reduction shall be entitled at least to have the right to obtain security for claims which have not fallen due by the date of that publication. Member States may not set aside such a right unless the creditor has adequate safeguards, or unless the latter is not necessary in view of the assets of the company.

Member States shall lay down the conditions for the exercise of the right provided for in the first subparagraph. In any event, Member States shall ensure that the creditors are authorized to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the reduction in subscribed capital the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company.”

- (9) The following Articles 39a and 39b are inserted:

*“Article 39a*

1. Member States shall ensure that a shareholder who holds at least 90% of the subscribed capital of a listed company, hereinafter referred to as the “majority shareholder”, shall be able to require all the holders of the remaining shares, hereinafter referred to as “minority shareholders”, to sell him those shares at a fair price. However, Member States may set a higher threshold provided that it does not exceed 95% of the subscribed capital of the company.

A company is considered to be a listed company within the meaning of this provision if its shares are traded on a regulated market as defined in Article 4(1)(14) of Directive 2004/39/EC.

2. Member States shall ensure that it is possible to determine when the threshold is reached.
3. Where the company has issued more than one class of shares, Member States may provide that the right to require the minority shareholder to sell as provided for in paragraph 1 shall apply only in the class in which the thresholds referred to in that paragraph are reached.

4. Member States shall ensure that each minority shareholder concerned may demand an appraisal of the fair price.

The appraisal of whether the price is fair shall be carried out by an independent administrative or judicial authority or by an independent expert appointed or approved by such an authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State. The demand for such an appraisal shall be exercised within three months after the minority shareholder was required to sell and the price was announced in accordance with paragraph 1.

5. This Article is without prejudice to Article 15 of Directive 2004/25/EC\*

\* *OJ L 142, 30.4.2004, p. 12.*

#### *Article 39b*

1. Member States shall ensure that minority shareholders in a listed company shall be able to require, jointly or individually, the majority shareholder to buy from them their shares in that company at a fair price.
2. Member States shall ensure that in cases where there is no agreement on the fair price between the prospective parties of the transaction mentioned in paragraph 1, the price is examined by an independent administrative or judicial authority or by an independent expert appointed or approved by such an authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.
3. The provisions of Article 39a(1) second and third sentence, (2) and (3) shall apply mutatis mutandis.
4. Member States shall ensure an adequate procedure which guarantees a fair treatment of all minority shareholders.
5. This Article is without prejudice to Article 16 of Directive 2004/25/EC.”

- (10) In Article 41 paragraph 1 is replaced by the following:

“1. Member States may derogate from Article 9(1), Article 19(1)(a), first sentence, and from Articles 25, 26 and 29 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings.”

#### *Article 2*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2006 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 texts of the main 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 Union*.

#### *Article 4*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

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*For the Council*  
*The President*



## Annex 1: Preliminary Impact Assessment Statement

### 1. PROBLEM IDENTIFICATION

*Describe the problem that the policy/proposal is expected to tackle:*

***Unnecessarily heavy procedures entailed in certain instruments, which public limited liability companies have at their disposal for purposes of capital formation and alteration.***

*Indicate potentially unsustainable trends associated with the problem,*

***- Economically: Too little flexibility and too high cost for companies which, for financing reasons, have to promptly react to capital market developments***

***- Socially: n.a.***

***- Environmentally: n.a.***

*Indicate the potential inconsistencies between the three dimensions or with other policies*  
***n.a.***

### 2. OBJECTIVE OF THE PROPOSAL

*What is the overall policy objective in terms of expected impacts?*

***Saving cost and time for companies embarking on certain capital related measures***

### 3. POLICY OPTIONS

*What is the basic approach suggested to reach the objective? ***A moderately deregulatory approach.****

*What policy instruments have been considered? ***Modification of the current 2<sup>nd</sup> Company Law Directive.****

*In what way do the options identified respect the subsidiarity and proportionality principles? ***In that they strictly limit themselves to a mere simplification of the 2<sup>nd</sup> Directive itself, which is a main instrument of harmonisation of Company Law in the European Union .****

*Which options can be excluded at this an early stage? ***Changes to the capital maintenance regime of the 2<sup>nd</sup> Directive that would be inconsistent with the minority shareholder and creditor protection objectives of this directive.****

#### 4. IMPACTS – POSITIVE AND NEGATIVE

*On a preliminary basis please indicate the expected positive and negative impacts of the selected options, particularly in terms of economic, social and environmental consequences?*

***Positive: Reduce cost and administrative burden for public limited liability companies through introduction of lighter procedures for the above mentioned categories of transactions.***

***Negative: not perceived***

*Please indicate who is affected and possible severe impacts on a particular social group, economic sector or region (inside or outside the EU), in the short term; in the medium and long term? n.a.*