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THE EU COMMISSION PROPOSAL TO AMEND THE 2ND DIRECTIVE ON COMPANY LAW CONCERNING THE FORMATION OF PUBLIC LIMITED LIABILITY COMPANIES AND THE MAINTENANCE AND ALTERATION OF THEIR CAPITAL

UNICE **COMMENTS**

I. GENERAL COMMENTS

In principle, the EU Commission deregulation proposals for the 2nd Company Law Directive are to be welcomed. Essentially, they follow the recommendations of the SLIM expert group from 1999, as well as those put forward in 2002 by the high-level expert group on company law (the Winter Group). In the course of several consultations, these recommendations were largely supported by interested parties. European business hopes that the proposals facilitating measures related to the capital market and eliminating superfluous formalities will be implemented rapidly.

However, UNICE very much regrets that on several points the Commission does not go as far as the SLIM group recommendations. On other points, the advantages to be gained by simplifying administration have been taken away by unnecessary securities instruments and uncertain legal terms. The sell-out right of the shareholders as a counterpart to the squeeze-out should be rejected as there is no identifiable need for this. The complex procedure regarding the appropriateness of the price also lays it open to abuse.

II. SPECIFIC COMMENTS

a) Valuation of assets, art. 10a

We appreciate in principle the authorisation to eliminate the requirement for an expert's valuation report in certain cases.

The facilitations conceded in paragraph 1 should be introduced throughout the EU. If these were left to the discretion of the Member States, there is a risk that the desired effects of deregulation would not happen in some countries.

Paragraph 2a should be deleted because the terms "sufficient training" and "sufficient experience" are too vague and leave room for possible litigation. For the purposes of the directive, a recognised independent expert would suffice.

In paragraph 2b we consider that the pivotal date to be considered should be the date of the decision to increase capital and not the effective date of the asset's contribution. If it is the effective date of the asset's contribution that is taken into account, the period of 3 months should be extended to at least 6 months.

In paragraph 3, the term “statutory accounts” requires clarification. It is not clear if it refers to balance sheet values. Furthermore, one could question the guarantee given to shareholders in this case, because the “value derived from the statutory accounts” is not necessarily established with a view to evaluation.

We question the suitability of the possibility provided for in paragraphs 2 and 3 for minority shareholders to require re-evaluation of the assets concerned. Indeed, this possibility denies the added-value of the opportunity foreseen to avoid re-evaluation. Especially since avoiding re-evaluation is subject to conditions which are provided for in order to sufficiently protect shareholders’ rights.

c) Acquisition of own shares, art. 19

The proposed selection right of the Member States specified in paragraph 1 last sentence, to limit the acquisition of own shares to 10% could unnecessarily restrict the scope of companies to react flexibly to market trends. The danger of share price manipulation is countered by other specific regulations. Such a general limitation goes well beyond what is necessary. The percentage should therefore be increased to at least 25%.

Under paragraph 1. b, we recommend shares acquired with the aim of facilitating employee acquisition of company shares to be excluded from the total amount of the acquisitions taken into account.

d) Financing the acquisition of shares of the company through third parties, art. 23

The conditions allowing a company to provide financial assistance with a view to acquisition of its shares by a third party are generally too restrictive.

In para. 1 the term “on the initiative” of the administrative or management body should be removed. The term is far too imprecise and can only be meant as an example. The period of five years for the cash flow analysis in the 2nd subparagraph seems too long and should be shortened to two years. More generally, if it is legitimate to report on the conditions, the advantages and risks of acquiring shares, it is inappropriate for an EU directive to set the company’s cash flow over a five-year period as a condition: it is too formalistic and not necessarily the most appropriate to prove the interest of the company in such an operation.

Subparagraph 3 should also be removed as the required approval by the general meeting is not consistent with the authority given to the GM according to company laws. The resolution regarding the financial assistance is a clear example of *management* decision involving technical valuations that should be left to the business judgement of the directors. The responsibility of the administrative body and the management and supervisory boards is sufficient. If necessary, a ratification procedure could be envisaged at the following GM. The procedure would otherwise be far too time consuming and costly, and would not achieve the objective of relaxing art. 23. The case of art. 23 can also not be equated with the acquisition of own shares by the company itself or by a person acting on the account of the company.

e) Shareholders right to contest, art. 23a

This provision is inappropriate whether the requirement of an approval by the GM (art. 23 para. 1) is maintained or not: to allow any individual shareholders to attack a GM decision in this context will run contrary to efficient operation of the company. Furthermore, judicial assessment of the legality of such a GM decision is a questionable intervention by judicial authorities in management decisions.

f) Withdrawal of right of pre-emption, art. 29

Lifting the obligation to present the general meeting with a written report only if the shares are issued at market price lacks flexibility. Indeed, in practice it often happens that shares are issued at a lower price.

g) Reduction of capital, art. 32

In subparagraph 2, the sentence stating that Member States must in all cases ensure that creditors have the right to apply to the appropriate administrative or legislative body for adequate safeguards should be dropped. This instruction to the Member States appears too prescriptive.

It should be left to the Member States to choose how to ensure the implementation of the creditors' right to security.

h) Sell-out right, art. 39b

This article should be deleted. The proposed directive's stated aim of achieving deregulation is incompatible with granting shareholders a superfluous right under EU law to sell their shares. The shareholders are already sufficiently protected by the regulations of the takeover directive[1].

i) Suggestions to modify art. 40

Article 40, which the Commission has not sought to modify with its current proposal, foresees that decisions related to certain issues (withdrawal of pre-emption rights, reduction in the subscribed capital, redemption of subscribed capital without reduction when not provided for by statutes or instrument of incorporation, etc) must be taken by a majority of not less than <u>two thirds of the votes</u> attaching to the securities of the subscribed capital <u>represented</u>.

In listed companies, abstention is often considered as an obstacle to effective decision-making. Indeed, abstentions are taken into account when evaluating the quorum and considered as negative votes when the applicable texts foresee that decisions are taken by a majority of shareholders present or represented.

Careful consideration has been given to this problem in different organisations and a more workable solution could be to calculate the majority taking into account the number of votes cast.

Unfortunately, such a workable solution would be *contra legem* under the current text of the 2nd Company Law Directive.

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[1] **MEDEF, the French business organisation, does not agree with the deletion of art. 39b.**