



COMMISSION OF THE EUROPEAN COMMUNITIES

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2002/0122 (COD)

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**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

The First Company Law Directive¹ was adopted in 1968 with a view to co-ordinate, for the protection of the interests of members and third parties, the national provisions applicable to limited liability companies in three areas : compulsory disclosure by companies of their documents and particulars, validity of the obligations entered into by companies, and nullity of companies.

With regard to the disclosure by companies of their documents and particulars, the main requirements of the First Directive are as follows :

- compulsory disclosure by companies must cover at least the documents and particulars mentioned in Article 2;
- these documents and particulars must be filed and kept in a register, and subsequently published in a national gazette; a copy of these documents and particulars must be obtainable from the register;
- letters and order forms used by companies must state the particulars mentioned in Article 4;
- Member States must determine by which persons the disclosure formalities are to be carried out and provide for appropriate penalties in defined cases.

In December 1997, the European Commission organised a Conference on Company Law and the Single Market. This Conference² was devoted to three important themes, among which was the impact of modern methods of communication on company law. One of the conclusions of the Conference was that the compulsory disclosure system organised by the First Directive might benefit significantly from the introduction of modern technology, which could help to meet the important objective of making company information more easily and rapidly accessible.

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 Directives³. This report contained detailed recommendations on the areas in which a simplification could be achieved. The main recommendations relating to the First Directive consisted on the one hand of the need to accelerate the filing and disclosure of company documents and particulars by the use of modern technology, and on the other hand of the need to improve the cross-border access to company information by allowing voluntary registration of company documents and particulars in additional languages.

¹ First Council Directive 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 (68/151/EEC), OJ L 65, 14.3.1968, p. 8, as last amended by the 1994 Act of Accession (OJ C 241, 29.8.1994, p. 194).

² Acts of the Conference on Company Law and the Single Market, 15 and 16 December 1997, Brussels, European Commission, published by the Office for Official Publications in April 1998.

³ Recommendations by the Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives, September 1999.

In its Report to the European Parliament and the Council⁴, the Commission stated that it supported the overall objective of the main recommendations relating to the First Directive and that it would examine further how best to amend the First Directive accordingly. The SLIM Group recommendations and their practical implications have been subsequently discussed with Member States company law experts in three meetings (June 2000, March 2001 and June 2001).

From these discussions, it appeared that the main recommendations relating to the First Directive were widely supported. It was felt that the modernisation of the First Directive along the lines set out in these recommendations would not only help to meet the important objective of making company information more easily and rapidly accessible by interested parties, but would also simplify significantly the disclosure formalities imposed upon companies. It was also decided to seize this opportunity to update the First Directive where necessary, namely with regard to the types of companies covered and the references to the Accounting Directives.

2. TIMING AND DATE OF APPLICATION

The proposal uses the date of 1 January 2005 as the deadline for implementation by Member States of the laws, regulations and administrative provisions necessary to comply with this Directive. This date should be regarded as reasonable, in view of the fact that most Member States are already engaged, in some cases for many years, in reforms which aim at introducing modern technology in the filing and disclosure systems applicable to company information.

3. OUTLINE OF THE CONTENTS OF THIS PROPOSAL

3.1. Article 1

Further to the objectives set out above, Article 1 makes those changes necessary to the First Council Directive of 9 March 1968.

3.1.1. Paragraph 1

This paragraph updates the types of companies to which the First Directive applies, by adding those types of companies which have been introduced at national level since the adoption of the First Directive (the “société par actions simplifiée” in France, and the “besloten vennootschap met beperkte aansprakelijkheid” in the Netherlands) or after the accession of the Member State (the “anpartsselskab” in Denmark).

3.1.2. Paragraph 2

This paragraph updates Article 2 of the First Directive, which enumerates the documents and particulars of which disclosure is compulsory, to reflect the subsequent adoption of a series of Directives relating to the accounting documents which must be prepared by companies (“the Accounting Directives”).

⁴ 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).

Article 2 of the First Directive is therefore modified as follows :

- the reference to “the balance sheet and the profit and loss account” is replaced with a reference to “the accounting documents” (i.e. annual accounts – annual report – audit opinion / consolidated accounts – consolidated annual report – audit opinion) which are required to be published in accordance with the Accounting Directives adopted after 1968;
- the transitory provision postponing the application of Article 2 (1) (f) until the date of implementation of a future Directive to be adopted in the accounting area is removed;
- the provision contained in Article 2 (2), which is directly linked to the transitory provision contained in Article 2 (1) (f), is removed.

In the discussions that followed the SLIM Group Report, the suggestion was made to add a series of items (e.g. the website address, the e-mail address...) to the documents and particulars listed in Article 2 of the First Directive. The proposal does not follow this suggestion, which is not deemed to be consistent with the simplification objective. However, it should be observed that the First Directive does not prevent Member States from requiring or allowing the disclosure of other documents and particulars than those listed in Article 2.

3.1.3. Paragraph 3

This paragraph amends Article 3 of the First Directive, which contains the basic rules applicable to the registration and disclosure of company documents and particulars, with a view to making the use of modern technology possible in the fulfilment of its requirements.

Article 3 - Paragraph 1

Paragraph 1 of Article 3 remains unchanged. It should be noted that the Directive leaves it to Member States to decide whether they organise the registration system on a centralised or decentralised basis. The introduction of modern technology does not require an amendment to the Directive in that respect.

Article 3 - Paragraph 2

Paragraph 2 of Article 3 is modified by the addition of a second subparagraph, whereby Member States are required to make the filing of company documents and particulars by electronic means possible as from 1 January 2005. As from that date, companies must in principle be able to choose between a filing by paper means and a filing by electronic means. Member States may impose filing by electronic means upon all – or certain categories of – companies in respect of all – or certain types of – documents and particulars. It is understood that Member States will restrict such an obligation to situations in which it does not create an unreasonable burden for companies.

Where filing takes place by paper means after 1 January 2005, Member States will have to ensure that documents and particulars filed are systematically converted by the register to electronic form in order to be kept in the file or entered in the register, as is foreseen in the new third subparagraph of paragraph 2.

The new fourth subparagraph of paragraph 2 contains provisions related to documents and particulars filed by paper means up to 31 December 2004. Member States are required to ensure that registers will convert such documents and particulars to electronic form at least on application by interested parties (which leaves Member States free to decide to convert all or part of them anyway). This does not prevent Member States that so wish to require that all – or certain categories of – companies provide all – or certain types of – such documents and particulars in electronic form.

It should be observed that the introduction of a requirement for Member States to make possible as from 1 January 2005 the filing of company documents by electronic means does not affect in any way the freedom for Member States to decide 1) by which persons the disclosure formalities are to be carried out, 2) which controls (on the form and/or content of the disclosures) should be performed, 3) which technical standards should be followed (e.g. use of specific softwares), and 4) which fees should be charged to companies for paper and/or electronic filing.

Article 3 - Paragraph 3

Paragraph 3, which organises the delivery of copies of documents and particulars, is amended in such a way that applicants can choose between paper means and electronic means, with regard to both the application submitted and the copy obtained.

The first subparagraph of paragraph 3 is amended in such a way that applications can be submitted by paper means or by electronic means.

The new second subparagraph of paragraph 3 is amended in a such a way that copies can be obtained by paper means or by electronic means. Member States may however decide for practical reasons that documents and particulars filed up to 31 December 2004 will not be obtainable by electronic means if they have been filed by paper means more than 10 years before the date of the application.

The new third subparagraph of paragraph 3 reproduces the current provision contained in Article 3 (copies must be obtainable at a price not exceeding the administrative cost thereof), and extends it to electronic copies.

The new fourth subparagraph of paragraph 3 reproduces the current provision contained in Article 3 (paper copies are normally certified as “true copies”), and does not require electronic copies to be systematically certified because such a provision might lead to high costs whereas electronic copies are requested most of the time for information purposes only.

The new fifth subparagraph of paragraph 3 ensures that certification of electronic copies will be based on the use of an advanced electronic signature, as defined in Article 2 (2) of Directive 1999/93/EC⁵. An advanced electronic signature is indeed necessary to achieve the objectives set to the certification of electronic copies (to guarantee both the authenticity of their origin and the integrity of their contents). This does not prevent Member States from providing that advanced electronic

⁵ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12.

signatures used must have additional characteristics (e.g. be based on a qualified certificate and be created by a secure-signature-creation device, within the meaning of Article 2 of Directive 1999/93/EC), if they wish to ensure that such signatures will have the legal effects foreseen in Article 5 of Directive 1999/93/EC.

Article 3 - Paragraph 4

The first subparagraph of paragraph 4 is modified by the addition of a sentence which explicitly allows the national gazette to be kept in electronic form. The reference to a publication in the national gazette has not been removed from the Directive, because several Member States observed that their national provisions linked the legal value of company information to such a publication.

However, because this problem is not present in all Member States, a second subparagraph is added to paragraph 4 to allow Member States to replace the publication in the national gazette with equally effective means. This is subject to the provision of a central and chronological access to company information, which is the main function performed by a national gazette.

Article 3 - Paragraphs 5 and 6

The amendments to paragraph 4 make it necessary to amend accordingly some expressions used in paragraphs 5 and 6. In paragraph 5, the words “published” and “publication” are replaced with the words “disclosed” and “disclosure”. In paragraph 6, the words “by publication in the press” and “published in the press” are replaced with the words “in accordance with paragraph 4” and “disclosed in accordance with paragraph 4”.

Article 3 - Paragraph 7

Paragraph 7 of Article 3 remains unchanged.

Article 3 - Paragraph 8

A new paragraph 8 is inserted in Article 3, with the aim of defining precisely the words “by electronic means” introduced in the Directive. This definition is comparable to the definitions adopted in other Directives related to the information society (see Article 1 (2) of Directive 98/34/EC⁶, or Article 2 of Directive 2001/115/EC⁷).

Such a definition implies the use of a computer at both ends of the communication channel, and therefore does not include means like voice telephony, ordinary faxes and telexes. It should nevertheless be observed that Member States are not prevented from allowing the use of such means, by companies when they file their documents and particulars and/or by interested parties when they seek to obtain a copy, in addition to electronic means.

⁶ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, p. 37, as last amended by Directive 98/48/EC.

⁷ Council Directive 2001/115/EC of 20 December 2001 amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax, OJ L 15, 17.1.2002, p. 24.

3.1.4. *Paragraph 4*

This paragraph inserts a new Article 3a in the First Directive, with the aim of improving the cross-border access to company information and making sure that translations provided may be relied on by third parties.

Paragraph 2 of the new Article 3a allows companies to disclose their documents and particulars, in addition to the mandatory disclosure made in one of the languages permitted in their Member State, in any official language(s) of the Community on a voluntary basis. Member States are required to ensure that, if companies choose to do so, electronic access in that/those language(s) is provided.

Paragraph 3 of the new Article 3a explicitly permits Member States to allow companies to voluntarily disclose their documents and particulars in any language(s) external to the Community.

Paragraph 4 of the new Article 3a makes sure that translations provided may be relied on by third parties. To this end, Member States shall take the necessary measures to avoid any discrepancy between the different language versions disclosed (as regards for example consistent provision of these language versions over time). In cases of discrepancy, third parties acting in good faith are duly protected.

3.1.5. *Paragraph 5*

This paragraph amends Article 4 of the First Directive, which lists the particulars which must be stated on the letters and order forms used by companies, so as to make clear that this provision applies to all letters and order forms whether they are in paper form or use any other medium (e.g. fax, e-mail, internet, ...).

The name of the register in which the file of the company is kept is one of the particulars listed in Article 4. The words “the information necessary to identify” have been inserted before “the register”, with a view to allow alternative means of referring to the register than its name. This modification is considered desirable in view of the discussions currently being held between registers in Europe, which aim at agreeing on a common system of number identification for companies and registers.

Finally, a new subparagraph is added in Article 4, with the aim of extending to any company website the obligation to state the particulars listed. It does not seem desirable to oblige all companies to have a website, but existing websites should contain the same minimal information as the letters and order forms used by the company. Such a requirement appears necessary in spite of the E-commerce Directive of 8 June 2000⁸, which does contain some provisions relating to the company information which must be present on company websites, for two reasons. On the one hand, the particulars listed in Article 5 of the E-commerce Directive do not include all the particulars listed in Article 4 of the First Directive. On the other hand, the scope of the E-commerce Directive is restricted to natural or legal persons providing an information society service; this notion, defined in Article 1 (2) of

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1.

Directive 98/34/EC, assumes the presence of an economic activity (whether or not remunerated), so that not all company websites are necessarily covered.

3.1.6. Paragraph 6

This paragraph introduces in Article 6 of the First Directive some changes consequential to amendments presented above :

- the reference to “the balance sheet and profit and loss account” is replaced with a reference to “the accounting documents”;
- the provision applicable to commercial documents is extended to any company website.

3.2. Articles 2 to 4 – Final Provisions

The provisions in these Articles deal with the adoption and administration of the proposed Directive.

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

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 Commission⁹,

Having regard to the opinion of the Economic and Social Committee¹⁰,

Acting in accordance with the procedure referred to in Article 251 of the Treaty¹¹,

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 Community¹² 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 recommendations¹³.
- (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.

⁹ OJ C [...], [...], p. [...].

¹⁰ OJ C [...], [...], p. [...].

¹¹ OJ C [...], [...], p. [...].

¹² OJ L 65, 14.3.1968, p. 8, as last amended by the Act of Accession of Austria, Finland and Sweden.

¹³ 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).

- (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 companies¹⁴, the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts¹⁵, Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions¹⁶ and Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings¹⁷. 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.
- (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.

¹⁴ 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).

¹⁵ OJ L 193, 18.7.1983, p. 1; as last amended by Directive 2001/65/EC.

¹⁶ OJ L 372, 31.12.1986, p. 1; as amended by Directive 2001/65/EC.

¹⁷ OJ L 374, 31.12.1991, p. 7.

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 *****.

***** OJ L 13, 19.1.2000, p. 12.

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.”

- 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.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

LEGISLATIVE FINANCIAL STATEMENT

Policy area(s): Internal Market

Activit(y/ies): Company Law

TITLE OF ACTION: PROPOSAL FOR A DIRECTIVE AMENDING THE COUNCIL DIRECTIVE 68/151/EEC

1. BUDGET LINE(S) + HEADING(S)

None

2. OVERALL FIGURES

2.1. Total allocation for action (Part B):

None

2.2. Period of application:

N/A

2.3. Overall multiannual estimate on expenditure:

N/A

2.4. Compatibility with the financial programming and the financial perspective

N/A

2.5. Financial impact on revenue:

N/A

3. BUDGET CHARACTERISTICS

N/A

4. LEGAL BASIS

Article 44(2)(g) of the EC Treaty.

5. DESCRIPTION AND GROUNDS

5.1. Need for Community intervention

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” sets out the requirements in respect of compulsory disclosure of a series of documents and particulars by limited liability companies.

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 Directives¹⁸. The main recommendations relating to the First Directive consisted on the one hand of the need to accelerate the filing and disclosure of company documents and particulars by the use of modern technology, and on the other hand of the need to improve the cross-border access to company information by allowing voluntary registration of company documents and particulars in additional languages.

The modernisation of the First Directive along the lines set out in these recommendations will not only help to meet the important objective of making company information more easily and rapidly accessible by interested parties, but will also simplify significantly the disclosure formalities imposed upon companies. Finally, the First Directive should also be updated where necessary, namely with regard to the types of companies covered and the references to the Accounting Directives adopted afterwards.

5.2. Actions envisaged and arrangements for budget intervention

N/A

5.3. Methods of implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive.

6. FINANCIAL IMPACT

None

¹⁸ 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).

7. IMPACT ON STAFF AND ADMINISTRATIVE EXPENDITURE

The necessary human and administrative resources will be covered within the budgetary allocation attributed to the managing DG.

8. FOLLOW-UP AND EVALUATION

When Member States adopt the necessary provisions, they shall contain a reference to this Directive or 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 Member States.

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.

9. ANTI-FRAUD MEASURES

Given the nature of the action, no specific fraud prevention measures are necessary.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES(SMEs)

TITLE OF PROPOSAL

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.

DOCUMENT REFERENCE NUMBER

COM (2002) xxx

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

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” sets out the requirements in respect of compulsory disclosure of a series of documents and particulars by limited liability companies.

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 Directives¹⁹. The main recommendations relating to the First Directive consisted on the one hand of the need to accelerate the filing and disclosure of company documents and particulars by the use of modern technology, and on the other hand of the need to improve the cross-border access to company information by allowing voluntary registration of company documents and particulars in additional languages.

The modernisation of the First Directive along the lines set out in these recommendations will not only help to meet the important objective of making company information more easily and rapidly accessible by interested parties, but will also simplify significantly the disclosure formalities imposed upon companies. The First Directive will also be updated where necessary, namely with regard to the types of companies covered and the references to the Accounting Directives adopted after the First Directive.

¹⁹ 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).

Over the recent years, several Member States have already adopted or prepared reforms of their national system for compulsory disclosure of company information. One objective of these reforms is to increase the use of modern technology in various ways. Taking account of the principle of subsidiarity, Community legislation nevertheless appears necessary in this area for the following reasons :

- (1) Compulsory disclosure of company information is already regulated at Community level in the First Directive, of which some provisions need to be amended with a view to ensuring that the use of technological developments does not appear incompatible with the current wording of the First Directive.
- (2) Reforms of the national systems for compulsory disclosure of company documents have been adopted or prepared in some Member States only, and they are not comparable in terms of scope and/or timing. Action at Community level is therefore necessary to meet the objectives set by the SLIM Group with respect to modernisation, in a coherent way, of the First Directive.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

The First Directive applies to all types of limited liability companies throughout the EU. No distinction is currently made as regards the sectors of business, the sizes of business or the geographical areas of the Community. However, the specific situation of small and medium-sized firms will be reflected as described below in paragraph 5.

3. What will business have to do to comply with the proposal?

The main thrust of the proposed amendments is to offer more flexibility to companies at various stages of the compulsory disclosure system. Companies will normally be able to choose to file their compulsory documents and particulars by paper means or by electronic means. Interested parties will be able to obtain a copy of such documents and particulars by paper means and by electronic means. Companies will be allowed, in addition to the mandatory disclosure made in one of the languages permitted in the company's Member State, to disclose documents and particulars in additional languages. As a consequence, the responsibility for complying with the proposal will be mainly with Member States.

The proposal contains only one provision with which business would be required to comply : all letters and order forms used by companies, whether they are in paper form or use any other medium, should state the compulsory particulars listed in Article 4 of the First Directive, and the same particulars should be stated on any company website. It should be observed that the particulars currently listed in Article 4 are not extended and that this requirement would only apply to companies which deliberately choose to use modern technology. The requirement in itself does not seem difficult or costly to comply with.

4. What economic effects is the proposal likely to have?

The main provisions of the proposal are expected to make company information more easily and rapidly accessible by interested parties, while at the same time significantly simplifying the disclosure formalities imposed upon companies. This double objective should contribute to reduce the costs faced by companies in filing their information as well as in obtaining copies of the information filed by other companies, which should in turn improve the competitiveness of businesses.

In the longer term, it is expected that the mandatory introduction of modern technology in the systems for compulsory disclosure of company information will lead the responsible bodies to expand the use of modern technology to some of their other functions. One of them is the incorporation of new companies, where the use of modern technology would help to facilitate the creation of new businesses in terms of both time and costs.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

The provision which amends the list of documents and particulars which must be disclosed, as far as the accounting documents are concerned, uses the wording “which are required to be published”, and thereby reflects the existence in the Accounting Directives of certain exemptions – on the basis of certain size criteria - from the obligation to make disclosure in full or in part of these accounting documents.

The proposal contains some provisions allowing Member States to require that all – or some categories of – companies disclose all – or certain types of – documents and particulars by electronic means. It is understood that Member States which choose to do so will properly take into account the situation of small and medium-sized firms, thereby limiting such an obligation to either large companies or documents and particulars which are readily available in electronic form.

Finally, the obligation to state a series of particulars on non-paper letters and order forms and on any website will affect only those companies which choose to make use of modern technology.

CONSULTATION

6. In December 1997, the European Commission organised a Conference on Company Law and the Single Market as a follow-up to the wide consultation exercise launched by the Commission’s questionnaire of February 1997. From the conclusions of both the consultation exercise and the Conference itself, it appeared that the compulsory disclosure system organised by the First Directive might benefit significantly from the introduction of modern technology.

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 and their practical implications have been subsequently discussed with Member States company law experts in three meetings (June 2000, March 2001 and June 2001). From these discussions, it appeared that the main recommendations relating to the First Directive were widely supported.