

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
TWELFTH COUNCIL DIRECTIVE
ON COMPANY LAW CONCERNING SINGLE-MEMBER PRIVATE LIMITED
COMPANIES

(presented by the Commission)

Explanatory memorandum

Background

Com-101f

The programme to coordinate company law through directives based on Article 54 of the Treaty of Rome aims to achieve safeguards which, for the protection of the interests of associates and third parties, are required of companies and firms. To date harmonization has been reached in the disclosure,¹ annual accounts,² consolidated accounts,³ and the approval of auditors,⁴ for all companies, and in addition, in the case of public limited companies only, in requirements relating to information and capital,⁵ and to mergers⁶ and divisions⁷ of companies. The directive now submitted concerns only one very specific aspect of private limited companies, namely the introduction of the single person company.

¹ Directive 68/151/EEC, OJ L 65, 14.3.1968.

² Directive 78/660/EEC, OJ L 222, 14.8.1978.

³ Directive 83/349/EEC, OJ L 193, 18.7.1983.

⁴ Directive 84/253/EEC, OJ L 126, 12.5.1984.

⁵ Directive 77/91/EEC, OJ L 26, 31.1.1977.

⁶ Directive 78/855/EEC, OJ L 295, 20.10.1978.

⁷ Directive 82/891/EEC, OJ L 378, 31.12.1982.

The Community Action Programme for SMEs, approved by the Council on 3 November 1986 implies the development of proposals in the area of company law, in order to encourage the creation and development of SMEs. The European Council has also insisted, on several occasions, on the need to promote the spirit of enterprise in the Community. Promoting the access of individual entrepreneurs to the status of company, which represents the best framework for business development in the internal market, falls within this policy. The Council resolution of 22 December 1986 on the Action Programme on Employment Growth also underlines the need to encourage single-person businesses.

With respect to single member companies the present legal position is that certain Member States allow such companies to be formed, while others maintain the requirement that there be more than one associate, and if all the shares come to be held by a single shareholder require either the winding up of the company or the joint liability of the sole member.

The Member States which allow single member companies to be formed are Denmark (since 1973), Germany (1980), France (1985), the Netherlands (1986) and Belgium (1987). In Luxembourg, draft legislation has been before Parliament since 1985.

Provisions for single member companies do not exist in Spain, Greece, Italy, Ireland or the United Kingdom. Single-member companies are also not allowed in Portugal, but legislation for single-person businesses with limited liability was introduced in 1986.

Amongst those Member States which recognise single-member companies, Denmark, Germany and the Netherlands allow such companies to be formed not only by natural persons but also by artificial persons, while Belgium does not allow

an artificial person to be the sole member. France has an intermediate position, allowing single-member companies to be formed by artificial persons but prohibiting the creation of one single-member company by another (this is also envisaged in the Luxembourg proposal).

In order to harmonize this national legislation, the directive would require that provision be made for single member companies throughout the Community. This arrangement is useful particularly in order to facilitate the formation or continuation in business of the companies, often small companies, which have only one owner. On the one hand, the requirement that there be more than one member means that an individual businessman must secure the cooperation of a second member, often nothing more than a front man, which adds to the cost and complication of running the company. On the other hand, the company form, leaving aside the number of members, provides a legal framework which under existing Community measures and the present directive provides a series of equivalent safeguards, particularly regarding disclosure and the drawing up and auditing of accounts, which allow the company's funds to be kept separate from the sole member's private assets and liabilities.

The sole trader is encouraged to take the risk of setting up a business in company form. This allows him to limit his liability to the funds devoted to a specific activity, not neglecting the need for the protection of third parties with regard to such single member companies. The directive would therefore lay down rules specifically for single member companies. For the rest the ordinary law on limited liability companies would apply.

II. Commentary on the articles

Article 1

The directive applies only to private limited companies. This does not rule out the possibility of introducing the single member companies equally as for public limited companies on the condition that the rules of the directive are followed (see art. 6).

Article 2

The purpose of this article is to ensure that all Member States make provision in their legislation for private limited companies with one member only. Such a company may be set up as a one member company, but it may also arise later, as the result of a concentration of all the shares in the hands of a single shareholder. The legal provisions which derive from the requirement that there be more than one member could not be maintained in force. Article 11(2)(f) of Directive 68/151/EEC, which allows the courts to order the nullity of a company where contrary to the national law governing the company the number of members is less than two, no longer serves any purpose in the case of private limited companies.

To facilitate verification of the fact that a company has only one member and to safeguard transparency when shares are transferred, the directive requires that the shares of the single member company be nominative.

The purpose of introducing the single member company is to supply the individual entrepreneur with a structure of organization which allows him to limit his liability.

For this reason, it is necessary to limit single member companies as far as possible to natural persons and to small and medium-sized companies. In this way, with the aim of avoiding the creation of chains of companies, the directive prohibits single member companies whose single member is an artificial person from being the sole

member of another company. On the other hand, certain limitations are established about artificial persons who are sole members of a company. The directive permits Member States to choose between two options.

The first option is to provide for full responsibility of the artificial person for the obligations of the company which were entered into during their sole membership. However, in the case of an artificial person who becomes the sole member of an existing company, the Member States can provide a more flexible solution. If the situation is regularised within a year, the fact that in this period of time the company had a single member should be of no consequence.

On the other hand, if, after one year the artificial person has not found another member, the sole member is responsible for all the company's obligations entered into from the moment of becoming the sole member.

The second option is to fix a minimum capital for these single member companies and to require that the companies and the artificial persons who are the sole members, are at their balance-sheet dates, small or medium sized companies in the sense of article 27 of directive 78/660/CEE with regard to annual accounts. When the single member company or the artificial person who is the single shareholder exceeds the size of a medium sized company in the sense of the directive and if the situation is not regularised within a year following the balance-sheet date, the sole member is fully responsible for the obligations of the company arising after that date.

The directive does not repeat the laws of some countries (France, Belgium and Luxembourg) which forbid natural persons being the sole associate of many companies, which could be an obstacle to carrying out different activities of an individual entrepreneur.

Article 3

The fact that a company has only one member may be of interest to those dealing with it. It must therefore be disclosed. Where a company has only one member at the time of its formation this will be ensured by the disclosure of the statutes or act of incorporation pursuant to Article 2(1)(a) of Directive 68/151/EEC. However, where a company becomes a single member company after its formation, this directive would require that the information be entered in the register, but does not require that it be published in a national gazette.

Article 4

In a single member company it is the sole member who exercises the powers of the general meeting. Those powers have not yet been harmonized at Community level. It is thus for the Member States to determine the powers of the general meeting. As a rule those powers can be delegated to other persons. Delegation of that kind does not seem appropriate in the case of a single member company, and the directive would prohibit it.

To date there has been no harmonization either of the form to be taken by decisions adopted by a general meeting. But for single member companies, where there is no control in the form of another member, this gap has to be filled. Under the directive therefore, the decisions taken by the sole member in his capacity as general meeting must be recorded in minutes. The directive avoids laying down the effects of failure to comply with this rule. It will be to Member States to make provision for the penalties which seem to them appropriate, for example the nullity or the possibility of cancelling the sole member's decisions.

Article 5

Any agreement between any company, single member or multimember, and one of the members of the company carries the risk of a conflict of interest, and legislation has been enacted on the subject in all Member States. But the danger is clearly much greater in the case of the single member company. As with decisions taken by the sole member in his capacity as general meeting there is a need for a measure of clarity with regard to these agreements too. The directive therefore requires that these agreements must also be drawn up in writing.

But there are circumstances in which the interests involved are even more difficult to distinguish. This is the case where for the conclusion of such an agreement the company is represented by the sole member acting as manager. In that case the directive requires that such an agreement be authorized by the statutes or instruments of incorporation, documents which are accessible to any interested party at the companies register pursuant to Directive 68/151/EEC.

Article 6

The directive must take account of the fact that certain Member States accept the one member company not only for private limited companies but also for public limited companies. To avoid different degrees of protection for associates and third parties across the Community, it is necessary to impose legislation for single member companies on Member States to satisfy the demands of this directive.

Article 7

The directive cannot afford to overlook the fact that for theoretical reasons certain Member States are reluctant to accept the idea of a one member company. Such Member States may nevertheless provide for limited liability for sole traders; this has already been done in one Member State. But Member States choosing this arrangement must provide safeguards covering such traders which are equivalent to those required by Community law in particular the directives concerning advertising, annual accounts and consolidated accounts of private limited companies. Otherwise different theoretical approaches which in practice have the same results in terms of the risks run by a sole trader and by the sole member of a company would ultimately provide varying measures of protection for similar interests throughout the Community.

Proposal for a
TWELFTH COUNCIL DIRECTIVE ON COMPANY LAW CONCERNING SINGLE-MEMBER PRIVATE LIMITED COMPANIES

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

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

Whereas certain safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the Treaty should be coordinated with a view to making such safeguards equivalent throughout the Community;

Whereas in this field Council Directives 68/151/EEC¹, 78/660/EEC² and 83/349/EEC³ concerning disclosure, the validity of commitments, nullity, annual accounts and consolidated accounts apply to all companies, while Council Directives 79/91/EEC⁴, 78/855/EEC⁵ and 82/891/EEC⁶ on formation and capital, mergers and divisions apply only to public limited companies;

Whereas the SME Action Programme was approved by the Council on 3 November 1986;

Whereas reforms in the legislation of certain Member States in the last few years, permitting single-member private limited companies, have created divergences between the laws of the Member States;

Whereas it is important to provide a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Community;

Whereas a private limited company may be a single-member company from the time it is formed, or may become so because its shares have come to be held by a single shareholder; the shares of a single-member company should be nominative and certain conditions should be established for companies with a legal person as their sole member;

¹ Directive 68/151/EEC, OJ L 65, 14.3.1968.

² Directive 78/660/EEC, OJ L 222, 14.8.1978.

³ Directive 83/349/EEC, OJ L 193, 18.7.1983.

⁴ Directive 84/253/EEC, OJ L 126, 12.5.1984.

⁵ Directive 77/91/EEC, OJ L 26, 31.1.1977.

⁶ Directive 78/855/EEC, OJ L 295, 20.10.1978.

Whereas the fact that all the shares have come to be held by a single shareholder should be disclosed;

Whereas decisions taken by the sole member in his capacity as general meeting should be recorded in writing;

Whereas agreements between the sole member and the company should likewise be recorded in writing,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company:

- in Belgium:
la société privée à responsabilité limitée/de personenvennootschap met beperkte aansprakelijkheid;
- in Denmark:
anpartsselskaber;
- in Germany:
die Gesellschaft mit beschränkter Haftung;
- in Spain:
la sociedad de responsabilidad limitada;
- in France:
la société à responsabilité limitée;
- in Greece:
η εταιρία περιορισμένης ευθύνης.
- in Ireland:
the private company limited by shares or by guarantee;
- in Italy:
la società a responsabilità limitata;

- in Luxembourg:
la société à responsabilité limitée;
- in the Netherlands:
de besloten vennootschap met beperkte aansprakelijkheid;
- in Portugal:
a sociedade por quotas;
- in the United Kingdom:
the private company limited by shares or by guarantee.

Article 2

A company may have a sole member, either when it is formed or when all the shares come to be held by a single person (single-member company). Shares in such a company shall be nominative.

2. A single-member company whose sole member is a legal person may not be the sole member of another company.

3. Where the sole member is a legal person, Member States shall provide that either :

(a) the legal person has unlimited liability for the company's obligations arising during the period of the person's sole membership. However, Member States may provide that where a legal person becomes a sole member, because all the shares come to be held by a single person, that liability is not incurred unless another member has not been found within one year

or

(b) a minimum capital is fixed for the single-member company and both the company and the sole member are companies which at their balance-sheet dates do not exceed the limits of two of the three criteria in Article 27 of Directive 78/660/CEE. If one of the companies exceeds the limits and the situation is not regularised in the year following the balance-sheet date, the sole member shall have unlimited liability for the obligations of the single-member company arising after the balance-sheet date.

Article 3

Where a company becomes a single-member company because all its shares come to be held by a single person, that fact shall be recorded in the file or entered in the register within the meaning of Article 3(1) and (2) of Directive 68/151/EEC.

Article 4

1. The sole member shall exercise the powers of the general meeting of the company, and may not delegate them.
2. Decisions taken by the sole member in the field referred to in paragraph 1 shall be recorded in minutes.

Article 5

1. Agreements between the sole member and the company shall be drawn up in writing.
2. The possibility of any agreement between the sole member and the company represented by that member must be provided for in the statutes or instrument of incorporation of the company.

Article 6

Where a Member State allows the formation of a single-member company, the rules of this Directive shall apply.

Article 7

A Member State may decide not to apply this Directive where its legislation provides that an individual businessman may set up an undertaking whose liability is limited to a sum devoted to a stated activity, on condition that safeguards are laid down for such undertakings which are equivalent to those imposed by Community law on the companies to which this Directive applies.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 1990. They shall inform the Commission thereof.

2. Member States may provide that in the case of companies already in existence on 1 January 1990 this Directive shall not apply until 1 January 1991.

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

Article 9

This Directive is addressed to the Member States.

COMPETITIVENESS AND EMPLOYMENT IMPACT STATEMENT

I. What is the main reason for introducing the measure ?

To improve access of the greatest number of small enterprises to incorporation thus improving the protection of third parties, to facilitate succession, improve management and promote self-employment in a harmonised legal framework.

II. Features of the businesses in question. In particular :

(a) Are there many SMEs ?

Yes, the number of individual entrepreneurs in all Member States is very high.

(b) Are they concentrated in regions which are :

I. eligible for regional aid in the Member State ?
not necessarily

II. eligible under the ERDF ?
not necessarily

III. What direct obligations does this measure impose on businesses ?

The transformation of an individual enterprise into a company involves that it conform to the obligations imposed by company law.

IV. What indirect obligations are local authorities likely to impose on businesses ?

- The Member States have the option of extending the provisions of the single-member company to public limited companies.
- If a Member State amends its legislation on private limited companies for matters covered by the first, fourth and seventh directives or by this proposal, this can concern single-member companies.

V. Are there any special measures in respect of SMEs ? Please specify.

The proposal itself is specifically aimed at favouring SMEs.

VI. What is the likely effect on :

(a) the competitiveness of businesses ?

positive : incorporation is the ideal form for developing activities in the internal market.

(b) employment ?

positive : this represents a specific measure in favour of self-employment.

VII. Have both sides of industry been consulted ?
Please indicate their opinions.

All the professional organisations representative of SMEs and the European Trade Union Confederation have been consulted orally and in writing and their global opinion is favourable.