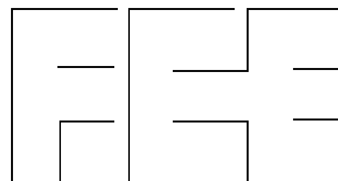
Date

21 April 2005

Le Président

Fédération
des Experts
Comptables
Européens
AISBL

Av. d'Auderghem 22-28
1040 Bruxelles
Tél. 32 (0) 2 285 40 85
Fax: 32 (0) 2 231 11 12
E-mail: secretariat@fee.be



Dr. Alexander Schaub
Director General
European Commission
Internal Market DG
Rue de la Loi 200
B – 1049 BRUXELLES

cc Mr. Pierre Delsaux

Dear Dr. Schaub,

Re: Proposal for a Directive to amend in the Second Directive as regards the formation of public limited liability companies and the maintenance and alteration of their capital

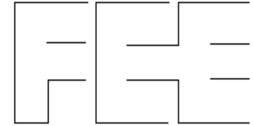
1. FEE (Fédération des Experts Comptables Européens, European Federation of Accountants) welcomes the Commission's initiative to simplify and improve the requirements on companies' capital by providing a more flexible legal capital regime whilst ensuring that the capital of the company is maintained in the interest of creditors. We support the underlying principle that all shareholders that are in the same position should be treated in the same way. We fully support the objective of the modernisation of the Second Directive of making a contribution to business efficiency and competitiveness without reducing the protection offered to shareholders and creditors, as envisaged in the Commission's communication on modernising company law and enhancing corporate governance in the EU – a plan to move forward. We also appreciate that some more fundamental longer term amendments to the Directive are under consideration.

2. In relation to capital maintenance, we refer to our letter of 10 February 2004, in which we provided the Commission with our considerations on this issue. Please find a copy of our letter attached. We again emphasise the need for accelerating the proposed timing of a study into the feasibility of an alternative to the existing capital maintenance regime.

3. Article 10a.:

   It is unclear to us what is meant by the phrases *"weighted average price", "exceptional occurrences"* and *"In the case of new qualifying circumstances"*; It would be helpful if their meanings could be clarified. Further, subjectivity should be minimised (for instance, it might be difficult to determine whether there have been *"exceptional occurrences"*, or *"extreme low liquidity"* as mentioned in the proposal for a Directive and the Commission Working Document.

   It is not clear to us in relation to Article 10a.2, which criteria in respect of "independence" are to be met by the "independent expert" and which individuals are considered suitable to be permitted to undertake valuations. In our opinion, the independence criteria as set out in Article 10 paragraph 1 of the current Second Directive are equally relevant and may be considered to be updated in relation to the current developments on auditors' independence. At minimum it needs to be indicated that the independent expert has to be independent from the company concerned.



4. Article 10a.2:

We would also question, whether the administrative or management body alone should decide that no new qualifying circumstances have occurred which would necessitate a re-valuation. In our opinion, this assessment should need a consent of the independent expert, who undertook the original valuation, that his opinion remains valid. Under these conditions, even a longer time horizon than 3 months (as envisaged in paragraph 2 (b)) since the date of the last valuation could be permitted. In addition, the last subparagraph of paragraph 2, according to which the body shall inform shareholders whether new qualifying circumstances have occurred, would then become obsolete. Because in such cases a re-valuation has to be undertaken anyway, such an information requirement is unnecessary because there would no new information use for the shareholders.

The proposed 5%-rule in the last subparagraph of paragraph 2 of Article 10a indicates that even the Commission itself has some concerns about the proposed simplification. This rule could be omitted, if an independent expert were involved in both the valuation and the subsequent assessment as to whether new qualifying circumstances have occurred.

5. Article 10a.3:

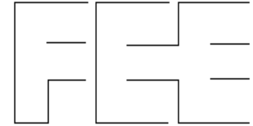
It is not clear to us, what is meant by "…whose value is derived by individual asset from the statutory accounts of the previous financial year…". Maybe the book value is meant. According to Art. 10a.3., 2nd subparagraph a re-valuation has to be made in case of new qualifying circumstances, that would significantly change the value of the asset at the effective date of its contribution. Furthermore, a re-valuation might also exist in cases where fixed assets have not been written off because the reduction in their value is only temporary (see Article 35 (1c) (aa) of the Fourth Directive), the use of the book value can infringe the rule set out in Article 8 (1) of the current Second Directive, according to which shares may not be issued below par. In addition, the book value of an asset is derived under accounting conventions in its specific use in the company which may deviate from its real fair value to a considerable extent. Consequently, we propose to delete paragraph 3 of Article 10a.

Moreover, we wish to observe that, when the financial statements are audited, this does not constitute a guarantee that the individual item's (book) value properly reflects its fair value. A general audit opinion is different from an expert report on an individual assessment of an asset as each activity follows different objectives.

In addition we also wish to observe that paragraph 3 of Article 10a also needs to be amended to make it clear that the reference is to the **transferor's** statutory accounts, and to reflect the fact that not all companies will draw accounts up in accordance with the Directive (some companies will draw up their accounts in accordance with IFRS).

6. Article 10b.1:

In our view, the proposed declaration of the estimated value and the source of this valuation for considerations other than in cash as envisaged in Article 10b paragraph 1(b) is not helpful given it highlights dilution of the contribution in kind. Furthermore, it is confusing to the reader to provide two different amounts. There might also be related tax implications. Moreover there is the liability issue for the independent expert involved. The only relevant point is whether the value of the contribution in kind arrived at corresponds at least to the number and nominal value, or, where there is no nominal value, to the accountable value and, where appropriate, to the premium of the shares to be issued for them; this declaration is already required in (c). The information in b) could be introduced as a Member State option.



7. Article 10b.3: Article 19:

The new concept, of permitting a company to acquire its own shares (either by itself or through a person acting in his own name but on the company's behalf) up to the limit of the company's distributable reserves raises serious concerns.

It is essential to ensure that a certain minimum quota of shares will be maintained in general circulation. Stipulating a quota will help to avoid any potential situation, where a company could acquire all of its own shares and no other shareholder could continue to participate in that company and a minimum level of external control over that company by external shareholders can be ensured. However, the precise determination of the quota should be left to the individual Member States.

It is not clear why the acquisition of own shares can be limited to 10 % of the subscribed capital by means of Member State option as set out in the last subparagraph of paragraph 1 of Article 19. While, in contrast, the general acquisition of own shares would permit this up to the limit of distributable reserves. In our opinion, in case of Member State option, the acquisition of own shares should then be allowed even to a higher percentage than 10 % as long as the company adheres to the envisaged limit of the distributable reserves.

Furthermore, the text of the detailed explanation, that the limit of distributable reserves applies to the aggregate of own shares acquired, and not just to each single transaction, should be included in the Directive itself, in order to prevent circumvention of this limit by multiple acquisitions.

8. Article 10b.4: Article 23:

In our opinion, the protection of shareholders and creditors has to be ensured to the same degree, regardless of whether own shares are acquired by the company itself or by a third party with financial assistance by the company. Therefore, for example, the liquidity and solvency of a company must be ensured in either transaction. However, the criteria, that the company must be able to maintain its liquidity and solvency over the next five years, is not very practicable, as every prognosis is, by definition, uncertain and the prognosis becomes less certain the longer the time horizon. The article could be clarified by requesting the company to be able to demonstrate its liquidity and solvency for the coming years. A period of five years is definitely too long and should be replaced by a requirement that provides a one year cash-flow forecast, with a statement that the directors are not aware of anything that would significantly change the company's solvency in the following year. However, this criterion is linked with the question as to who is liable if the company is not able to maintain it liquidity and solvency. This issue would have to be addressed by the individual Member States. Also the related audit implications of including a prognosis need to be considered.

We would be pleased to discuss any aspect of this letter you may wish to raise with us

Yours sincerely,

David Devlin
President

Encl.