

COMMISSION RECOMMENDATION

of 7 December 1994

on the transfer of small and medium-sized enterprises (*)

(Text with EEA relevance)

(94/1069/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Whereas the Council adopted Decision 89/490/EEC⁽¹⁾ relating *inter alia* to the improvement of the business environment; whereas the programme of support for small and medium-sized enterprises set up by that Decision was revised by Council Decision 91/319/EEC⁽²⁾; whereas the Council reaffirmed its commitment to supporting the consolidation of measures for enterprises by adopting the resolution of 17 June 1992⁽³⁾;

Whereas, in its Decision 93/379/EEC⁽⁴⁾, the Council adopted, with effect from 1 July 1993, a programme of measures to intensify the priority areas and to ensure the continuity of policy for enterprise; whereas this programme is concerned first and foremost with improving the legal, fiscal and administrative environment of enterprises and makes specific provision for examining the transfer of enterprises;

Whereas the *White Paper on Growth, Competitiveness and Employment* mentioned the transfer of businesses as a priority area requiring measures to improve the situation⁽⁵⁾;

Whereas the integrated programme in favour of SMEs and the craft sector of 3 June 1994⁽⁶⁾ announced a Commission recommendation on the transfer of businesses, as part of the Community contribution towards improving the business environment;

Whereas the Commission in its communication on the improvement of the tax environment for small and medium-sized enterprises⁽⁷⁾ announced an initiative aiming to limit the fiscal charges on succession or donation;

Whereas in its resolution of 10 October 1994 the Council⁽⁸⁾ invited the Member States and the Commission to examine those measures in existence which caused difficulties for the creation, growth and transmission of enterprises;

Whereas the Commission has now conducted this examination and ascertained that several thousand enterprises are obliged to cease trading every year because of insuperable difficulties affecting their transfer; whereas the winding-up of these enterprises has negative repercussions on the economic fabric of businesses and on their creditors and employees;

Whereas this loss of jobs and economic activity is all the more regrettable for not being caused by market forces, but by insufficient preparation for succession and the inadequacy of certain aspects of Member States' law, especially concerning company law, inheritance law and fiscal law;

Whereas the chances of a successful transfer will be improved by efforts to enhance the awareness of entrepreneurs and to inform and educate them in such a way that they can effectively prepare the succession of their enterprises in their own lifetime;

Whereas, nevertheless, certain changes to the national law of the Member States would greatly increase the number of successful business transfers;

Whereas one of the obstacles to a successful transfer is the difficulty experienced by the successors in financing compensation for their co-heirs who do not wish to participate in the enterprise, and whereas adequate financial instruments should be available in all Member States;

Whereas it may be necessary to change the enterprise's legal form in order to prepare the transfer, giving the enterprise the legal form which is most conducive to the success of the operation; whereas not all Member States have legal provisions which allow changes to be made to an enterprise's legal form without first winding up the enterprise and creating a new entity; whereas these operations entail costs and administrative procedures and mean a period of uncertainty for partners and third parties;

Whereas public limited company status could be one of the legal forms which best meet the requirements of

(*) The explanatory note of this recommendation is published as a communication in OJ No C 400, 31. 12. 1994, p. 1.

⁽¹⁾ OJ No L 239, 16. 8. 1989, p. 33.

⁽²⁾ OJ No L 175, 4. 7. 1991, p. 32.

⁽³⁾ OJ No C 178, 15. 7. 1992, p. 8.

⁽⁴⁾ OJ No L 161, 2. 7. 1993, p. 68.

⁽⁵⁾ White Paper, Part A, 'A more competitive economy', p. 14, and Part B, Section 2.8, 'Proposals and Remedies', p. 86.

⁽⁶⁾ COM(94) 207 final of 3 June 1994.

⁽⁷⁾ OJ No C 187, 9. 7. 1994, p. 5.

⁽⁸⁾ OJ No C 296, 22. 10. 1994, p. 6.

transfer operations; whereas however public limited company status imposes demanding conditions on its creation and day-to-day management; whereas these conditions are generally geared to the needs of limited companies with a broad shareholder base, with a view to protecting the members and third parties; whereas these particular conditions do not appear necessary in cases where an entrepreneur seeks to create a public limited company with other members of his family so as to facilitate its transfer;

Whereas certain methods or legal forms facilitate transfers because the management responsibility and ownership are separated;

Whereas the adoption by an enterprise of the legal form most appropriate to its transfer should not be hampered by fiscal procedures; whereas the same consideration applies to all other operations involved in preparing the transfer, such as transfers of assets, mergers, divisions and exchanges of shares;

Whereas, in most Member States, a partnership is wound up on the death of one of the partners unless the partnership agreement states otherwise; whereas, moreover, unilateral acts of one partner may conflict with the partnership agreement, and the relevant legislation may not indicate which provision takes precedence; whereas, on the death of such a partner, this discrepancy may give rise to a conflict which jeopardizes the continued viability of the firm and may even cause it to go into liquidation;

Whereas, on the death of a partner or sole proprietor, the co-heirs are, in most Member States, required to make a unanimous decision on the continuation of the firm; whereas, as a result, the survival of the firm may be jeopardized if one of the heirs wishes the firm to cease trading;

Whereas one of the main obstacles preventing the successful transfer of a family business is the associated fiscal burden; whereas payment of inheritance or gift tax may threaten the financial equilibrium of the enterprise, and therefore also its survival; whereas this tax regime places European enterprises at a disadvantage *vis-à-vis* their international competitors;

Whereas the requirement of immediate payment of inheritance tax or gift tax may force the heirs of the enterprise to sell some of their shares, sell the enterprise *in toto* or even wind it up;

Whereas the assessment of the value of the enterprise should take into account the possible loss in the value of the enterprise as a result of its transfer;

Whereas it has become more difficult to find a successor within the family; whereas sale of the enterprise is a form of transfer which should be made easier, with a view to guaranteeing its survival, especially where this is not possible under family ownership; whereas it is essential to encourage the entrepreneur to make

arrangements, in his own lifetime, for transfer of the enterprise;

Whereas the employee buy-out is a form of transfer which should be encouraged; whereas such a buy-out safeguards the existence of the enterprise and the transfer of know-how and previously acquired experience;

Whereas some Member States have already taken measures to facilitate transfers of enterprises; whereas certain practices can be adopted by other Member States,

HEREBY FORMULATES THIS RECOMMENDATION:

Article 1

Objectives

Member States are invited to take the necessary measures to facilitate the transfer of small and medium-sized enterprises in order to ensure their survival and to safeguard the jobs which depend upon them.

In particular, they are invited to take the most appropriate measures to extend their own legal, fiscal and administrative systems; in order to:

- make the business owner aware of the problems of transfer and thus encourage him to prepare for such an event within his lifetime;
- provide a financial environment which helps towards successful transfers,
- permit the businessman to prepare effectively for the transfer by offering suitable procedures,
- ensure the continuity of partnerships and sole proprietorships in the event of the death of a partner or the business owner,
- ensure the successful transfer within a family by seeing that inheritance or gift taxes do not endanger the survival of the business,
- encourage the owner, through taxation measures, to pass on his business by selling it or by transferring it to the employees, particularly when there is no successor in the family.

Article 2

Information

Public or private initiatives aimed at stimulating increased awareness, information and training of businessmen should be encouraged in order to ensure the right preparation for the successful transfer of small and medium-sized enterprises.

*Article 3***Financial environment**

Small and medium-sized enterprises should be provided with a financial environment which is conducive to successful transfers.

*Article 4***Preparation for transfer**

Businessmen should be provided with appropriate instruments which will allow the best preparation of the transfer. To this end, Member States are requested to:

- (a) provide for a right of transformation for enterprises which allows them, whilst taking the rights of third parties and members into account, to change from one legal form to another without the need to wind up the firm or create a new legal entity;
- (b) allow small and medium-sized enterprises to establish themselves in the form of public limited companies, with a very small number of shareholders, the establishment and management of which would be simplified in comparison to that of public limited companies whose shares are owned by large sections of the public;
- (c) allow the creation of a public limited company with only one partner in accordance with Article 6 of the Twelfth Council Directive 89/667/EEC ⁽¹⁾;
- (d) when taxing any transactions designed to separate management powers and ownership, recognize the economic need for such legal operations in those cases where the objective is to facilitate transfers and, if necessary, take steps to authorize them and promote them;
- (e) independently of the obligations stemming from Community law, apply the principle of fiscal neutrality to operations for the preparation of transfers such as transfers of assets, mergers, divisions and exchanges of shares; the principle of fiscal neutrality shall also apply to stamp duties, registration fees and other similar taxes.

*Article 5***Continuity of partnerships and sole proprietorships**

The continuity of partnerships and sole proprietorships should be ensured in the event of the death of one of the

partners or the owner. To this end, Member States are requested to:

- (a) provide for the principle that, in the event of the death of one of the partners, a partnership should be kept as a going concern, allowing the remaining partners to decide on the continuation of the business with or without the participation of the deceased partner's heirs, with reimbursement of the share of the deceased; the partnership agreement may derogate from the principle as to the continuation of the business;
- (b) when the possible contradiction between the partnership agreement and the terms of the will or gift is not resolved, introduce a provision in their national legislation to the effect that the partnership agreement shall take precedence over the unilateral actions of one of the partners;
- (c) in the event of the death of a member of a partnership or a sole proprietor, ensure that family law and inheritance law, and in particular the unanimity rule for decisions taken within the framework of joint ownership, do not prevent the enterprise from being kept as a going concern;
- (d) ensure that the reimbursement of the share of the deceased, provided for in point (a), as well as the payment of financial compensation to minority heirs, following on from point (c), do not jeopardize the survival of the enterprise. To this end, if the parties choose payment in instalments, it should be possible for the compensation to be calculated on the basis of the market value of the enterprise, including goodwill, whereas, should a party demand immediate payment, compensation should be calculated strictly on the basis of the book value.

*Article 6***Inheritance and gift taxes**

The survival of the enterprise should be ensured through appropriate fiscal treatment of succession and gifts. To this end, Member States are invited to take one or more of the following measures:

- (a) reduce the taxes on assets exclusively used for the business in the case of transfer by gift or succession, including inheritance tax, gift tax and registration fees, provided that the business is genuinely kept as a going concern for a minimum period;
- (b) offer the heirs the possibility of spreading or deferring payment of the gift or inheritance taxes, provided that they keep the business as a going concern, and shall grant interest exemptions;

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 40.

- (c) ensure that the tax assessment of the business can take account of how the value of the business changes some months after the death of the owner.

Article 7

Transfer to third parties

The businessman should be encouraged to consider a transfer before death to third parties, where this cannot be done within the family. To this end, Member States are invited to:

- (a) waive taxation on at least part of the revenue from the added value or capital gains arising on the assets of a business in the event of sale, in particular when the businessman has reached the age of 55; provide tax incentives for the reinvestment of the profits made on the sale of a business in another enterprise not quoted on the stock exchange and actively engaged in the production or sale of goods and services;
- (b) promote the transfer of the enterprise to the employees, by reducing the taxation on the capital gain realized on the transfer of the shares to the employees, by waiving the registration fees, or through tax advantages for the granting of resources to employees for acquiring the enterprise, or by deferring taxation until the employee sells his shares. These measures should be applied equally to an enterprise or to a workers' cooperative set up by the employees.

Article 8

Concerted action

Member States are invited to inform and consult one another, in liaison with the Commission, with a view to benefiting from exchanges of experience and best practice as regards the transfer of small and medium-sized enterprises, and in particular with a view to implementing the measures provided for in this recommendation.

Article 9

Report

To enable the Commission to evaluate what progress has been made, the Member States are invited to communicate, at the latest by 31 December 1996, the text of any legislation, regulations or administrative provisions which have been adopted in order to put this recommendation into effect, and to inform the Commission of all future proposals in this area.

Article 10

Addressees

This recommendation is addressed to the Member States.

Done at Brussels, 7 December 1994.

For the Commission

Raniero VANNI d'ARCHIRAFI

Member of the Commission