

Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital'

(COM(2003) 703 final – 2003/0277 (COD))

(2004/C 117/11)

On 3 December 2003 the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the 'Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital' (COM(2003) 703 final – 2003/0277 (COD)).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 March 2004. The rapporteur was Ms Sánchez Miguel.

At its 408th plenary session of 28 and 29 April 2004 (meeting of 28 April), the European Economic and Social Committee adopted the following opinion by 56 votes to 11 with four abstentions.

1. Introduction

1.1 The draft directive on cross-border mergers, presented by the Commission, has been subject to lengthy delays as part of the broader interruption in the legislative process involving the draft company law directives. As well as this proposal for a tenth company directive concerning mergers, the proposals for a fifth directive on management and representation bodies of public limited companies, and for a fourteenth on transfer of registered offices, continue to be deadlocked. There are a variety of reasons for this, but in all cases there has been difficulty in achieving consensus on recognising workers' right to information and participation in the relevant company processes, requiring appropriate legal modifications.

1.2 The adoption of the European Company Statute (ECS) and of its accompanying directive on the involvement of employees⁽¹⁾, together with other directives governing workers' rights to information and consultation, and their protection in the event of company transfers – which also apply to companies created by cross-border mergers⁽²⁾ – has made it considerably easier to reactivate the process of presenting the pending legislation to harmonise European company law. The present proposal on cross-border mergers is a clear example of this. The EESC attaches importance to this new move towards Community harmonisation of company law in the light of European enlargement, bringing in countries with models of company organisation which differ both from those of the present Member States and from each other.

1.3 The proposal, presented in 2003, contains several major differences with respect to the 1985 proposal⁽³⁾.

1.3.1 Firstly, whereas the 1985 proposal applied exclusively to cross-border mergers of public limited companies, the 2003 proposal applies to mergers of companies with share capital, which means that the possibility of cooperation and grouping between companies of different Member States is extended to other types of company more in keeping with the European business fabric: SMEs.

1.3.2 Secondly, the proposals differ in terms of the rules of referral employed. The 1985 proposal refers consistently to the Third Directive on national mergers⁽⁴⁾, whereas the 2003 proposal generally refers to national merger legislation, except for the specifically cross-border aspects of the mergers it covers. Such referral is practicable largely because national legislation has already been harmonised under the terms of the Third Directive, and it has beneficial effects since it simplifies merger forms and procedures and is familiar to the social, legal and economic players involved in mergers, enabling both uncertainty and the high economic cost entailed by such operations to be reduced.

1.3.3 Thirdly, the main difference between the 2003 draft directive and the 1985 proposal is the inclusion, in Article 14, of employee participation in cross-border merger processes, which were explicitly ruled out in the recitals to the 1985 proposal. The inclusion of this aspect of cross-border mergers was clearly rendered necessary by the fact that, for the most part, mergers have repercussions for employees in the undertakings concerned and by the recognition of employees' rights with regard to corporate governance under both Community legal provisions and numerous voluntary agreements. It is our

⁽¹⁾ Regulation (EC) 2157/2001 and Directive 2001/86/EC, OJ L 294, 10.11.2001.

⁽²⁾ Directive 97/74/EC on European works councils, Directive 2000/23/EC on employees' rights in the event of transfers of undertakings and Directive 2002/14/EC on informing and consulting employees.

⁽³⁾ Proposal for a Tenth Directive concerning cross-border mergers of public limited companies. COM(84) 727 final, OJ C 23, 25.1.1985, p.11.

⁽⁴⁾ Directive 78/855/EEC of 9 October 1978, being the third company directive.

belief that referral to the ECS and its accompanying directive, with regard to employee participation in cases where the national laws applicable to the company created by the merger do not impose such involvement, facilitates adoption of the proposed directive, since it avoids the need to repeat discussions within the Community institutions.

1.4 It should be borne in mind that the proposal for a directive is part of the programme to modernise company law and enhance corporate governance in the European Union⁽⁵⁾, which includes an action plan which aims, in the short-, medium- and long-term, to bring about thorough-going legislative changes. These are intended to go beyond implementation of the pending proposals for company law directives, and to launch initiatives both legislative (directives) and non-legislative (recommendations and others), concerning compulsory information on corporate governance, a stronger role for non-executive directors, full shareholder democracy (one share, one vote), etc. More specifically, the present draft directive was on the list of short-term actions (2003-2005) regarding company restructuring and mobility.

1.5 It should also be borne in mind that the present directive represents a step on the way to implementing the European company (SE) as a valid legal vehicle throughout the EU, specially designed to meet the needs of SMEs, and which has met with broad support in the EESC. It should be pointed out in this regard that the Commission's communication of 21 May 2003 took on board the recommendation of the High Level Group that the Tenth Directive on cross-border mergers should be adopted before presentation of a proposal on the SE statute, pending a prior viability study.

1.6 The reform undertaken by the company tax directives⁽⁶⁾, although not mentioned in the present draft directive, is also a relevant issue. It is becoming abundantly clear⁽⁷⁾ that the delay in the constitution of the SE results from the unresolved problem of tax complexity arising from the relevant Community legislation and, in particular, of double taxation arising from mergers. Cross-border mergers governed by the present proposal may be considered to be similarly affected and, given that the proposal is geared principally to SMEs, lower costs should be encouraged in order to make such mergers attractive.

⁽⁵⁾ Communication from the Commission to the Council and the European Parliament COM(2003) 284 final of 21 May 2003.

⁽⁶⁾ Council Directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; Council Directive amending Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. EESC Opinion 312/2004 of 25 February 2004.

⁽⁷⁾ Reference to the conclusions of the task force on SE taxation.

1.7 Lastly, it is also worth pointing out that the tenth directive is needed because at present some EU Member State national laws allow cross-border mergers between their companies with share capital (as has happened in practice, for example between Spanish and Italian companies) while others do not⁽⁸⁾.

2. Gist of the proposal for a directive

2.1 The proposed directive regulates cross-border mergers, considering as such mergers between companies with share capital that have their head offices in - and are governed by the laws of - different EU Member States (Article 1).

2.2 The forms that a merger may take are those recognised by the ECS, i.e. by acquisition, by the formation of a new company or by the transferral of all a company's assets and liabilities to its holding company (Article 1).

2.3 Merger procedures will be subject to the national laws of the countries in which the companies involved in the merger have their head offices. The procedure for carrying out a cross-border merger - whatever form it may take - must however meet a number of specific minimum requirements laid down in the proposed directive (Article 2).

2.3.1 Firstly, the companies involved must draw up common draft terms of merger containing the particulars laid down in Article 3 of the proposal, i.e. the identity of the merging companies, the ratio applicable to the exchange of securities or shares of each company and the rights conferred on holders of such securities or shares and members enjoying special rights. The draft terms must also include information on arrangements for the involvement of employees in the company created by the merger in order for the merger to go ahead.

2.3.2 Secondly, the proposal addresses the prior publication of the merger, once the draft terms have been drawn up. The fact that this must be done not less than one month before the date of the general meeting is particularly relevant, as during this time creditors and minority shareholders can exercise their rights. Article 4 of the proposal refers back to Article 3 of the first company directive 68/151/EEC⁽⁹⁾ establishing the legal procedure for publication. The purpose of this is to guarantee the legal security of all those involved in a cross-border merger.

⁽⁸⁾ The national laws transposing Directive 78/855/EEC established two models regarding the compatibility of authorisations for cross-border mergers. One group, comprising Italy, Luxembourg, Portugal, Spain and the UK, allowed such operations while a second group, made up of the Netherlands, Sweden, Ireland, Greece, Germany, Finland, Denmark and Austria did not. Belgium occupies an intermediate position, only allowing mergers by acquisition.

⁽⁹⁾ Amended by Directive 2003/58/EC, OJ L 221, 4.9.2003.

2.3.3 The proposal also stipulates that experts must draw up a report intended for members (Article 5) before the date of the general meeting of each company, which will approve the common draft terms of merger (Article 6). Owing to its practical relevance in terms of reducing the costs of a merger (an aspect particularly relevant for SMEs), attention should be drawn to the possibility of appointing one or more independent experts for all the companies involved, following a request to the competent authority. This option is also provided in the ECS for setting up an SE by means of a merger.

2.3.4 Once the draft terms of merger have been approved by each general meeting, the competent authority will scrutinise the legality of the merger (Articles 7 and 8), and the conclusions of this scrutiny will be published in the relevant public register (Article 10) in order to determine the date on which the cross-border merger takes effect (Article 9) and its likely consequences, depending on the type of merger: by acquisition (Article 11(1)), by the formation of a new company (Article 11(2)) or by the transferral of assets and liabilities to the holding company (Article 13). The legal security of the merger is guaranteed by the fact that it may not be declared null and void once the process is completed (Article 12).

2.4 Regarding arrangements for the involvement of employees in the company created by the merger, those used in the company created by the merger will apply, subject to national laws. If the new company is not subject to a participation system under the law of the country in which it is created and if at least one of the merging companies is operating under an employee participation system, the rules on participation laid down in both the ECS and the Directive on employee involvement – which provides a legal model in the event that agreement is not reached between employees' representatives and management (Article 14) - will apply.

3. General comments

3.1 The EESC welcomes the proposal for a directive on cross-border mergers, from the point of view of both ongoing legislative policy and the legal techniques employed.

3.2 With regard to the first point, the proposed directive extends the possibility of merger to other companies in the EU, particularly SMEs.

3.2.1 Once it enters into force on 8 October 2004 (Article 70), the adoption of the ECS will enable public limited companies located in different Member States to form an SE by means of a merger (Articles 2, 17 et seq). Once it enters into force, the future directive on cross-border mergers will introduce another type of merger allowing companies with share capital located in different Member States - whether they be public

limited companies, partnerships partly limited by shares, incorporated private companies or other forms of company, such as cooperative societies, meeting the requirements of the first company directive⁽¹⁰⁾ - to merge their assets by means of a cross-border merger, with the company created by the merger being subject to the legislation of one Member State.

3.2.2 Extending this new type of merger – i.e. cross-border mergers – to other types of company will be particularly relevant for SMEs, as these companies tend to be limited companies. Moreover, it is a fact that the EU's real economy is based on a system in which large companies coexist with SMEs, the latter being a key factor for economic development and, in particular, the largest source of employment in Europe, as well as being particularly good at adapting to changing circumstances and cyclical downturns and at innovation. It can therefore be concluded that one of the objectives of Community legislative policy should be to improve the competitiveness of SMEs and that one of the most appropriate tools is that of merging companies to create new legal forms that safeguard cross-border operations while making it easier to obtain financing from banks and the capital markets.

3.3 As mentioned above, the proposal would also seem a positive step in terms of the legal techniques employed, which seek to simplify the legislative model applied to the two most important aspects of the new proposal: the type of company and employee participation.

3.3.1 Regarding the type of company, the proposal addresses only the cross-border aspects of mergers, which, as a general rule, are also governed by the rules on mergers laid down in each of the national laws concerned. These have already been harmonised following the transposition of the Third Council Directive on mergers, though there are a number of significant disparities between the Member States that must be taken into account once this proposal is adopted. This system offers additional legal security to all the parties concerned and is the legal model confirmed by practices in the Member States. In this connection, consideration should be given to including information on the expected effects on jobs and an impact assessment in the draft terms of cross-border mergers.

3.3.2 Regarding employee participation in the merging companies, the system of referral to the European Company Statute and the Directive on employee involvement avoids reopening the debate which caused so many delays in the adoption of these rules and regarding which a broad consensus has been reached among all the interested parties. In terms of employee participation, therefore, Article 14 of the draft directive should, at least, ensure the protection of acquired rights provided for in Directive 2001/86/EC in relation to the establishment of a European company by way of merger. The EESC

⁽¹⁰⁾ Directive 68/151/EEC.

feels that Article 14 should be amended accordingly in order to reduce the risk – inherent in the current version – of lower employee participation standards in the businesses and undertakings concerned. In this regard, the EESC feels that it is essential that the national systems implemented enable all employees of the merged company, including those working outside the country where the company has its headquarters, to have the same rights, in line with the system for involvement set up for each type of company.

3.4 While it welcomes the proposed Directive, the EESC would however like to bring a number of relevant aspects to the Commission's attention.

3.4.1 The legal basis used, which concerns company law (Article 44 TEC), should be broadened to include Article 308 TEC, since it is not only the survival of the merged companies which is at stake, but also that of their employees' jobs. Article 308 also becomes a legal basis for Directive 2001/86 supplementing the Statute for a European company as regards employee participation, which is referred to in Article 14 of the present proposal.

3.4.2 One aspect that may cause confusion when the future directive is transposed is the system for scrutinising the legality of the merger (Articles 7 and 8), according to which each Member State will designate the authorities competent to scrutinise the legality of the merger as regards that part of the procedure which concerns each merging company and the completion of the merger. Article 10 of the 1985 proposal for a directive also laid down a preventative system for scrutinising legality, albeit with a number of derogations regarding which it referred to the procedure laid down in Article 16 of the third company directive ⁽¹⁾. The EESC believes that harmonising the European registry system by basing legitimacy on the content of the register – i.e. the assumption that information is correct and valid – and the principle of legality – according to which the registrar would be responsible for the legality of registered acts and documents – could simplify the system for scrutinising the legality of cross-border mergers by means of a referral.

3.4.3 Another aspect that must be considered by the Commission is the protection of the rights of third parties, including outstanding pay, as a combined interpretation of Article 4(c) and Article 11(3) could in practice undermine these rights. While Article 4(c) requires each of the merging companies to publish the arrangements made for the exercise of the rights of creditors and minority shareholders (who, where appropriate, will have a right to be bought out if such a right, though not recognised in this legislation, is provided in national legislation), Article 11(3) stipulates that the special formalities that must be completed before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties must be carried out by

the company created by the merger. To avoid a potentially damaging interpretation of the rights of third parties, a reference should be included to the right of third parties to oppose the merger in the event that their rights have not been safeguarded, which would seem to be the purpose of Article 11(3).

3.4.4 A third aspect that should be clarified is the definition of the scope and effects of the directive regarding the right to employee involvement.

3.4.4.1 Firstly, it should be borne in mind and indicated in the text that the stipulated information must include, as a minimum, the information required under Directives 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and 2002/14/EC on informing and consulting employees. The EESC considers that national rules on information and consultation are not sufficient, since they do not take account of cross-border issues. The rules on European Works Councils do not always apply, as they only relate to companies that employ at least 1,000 workers, including at least 150 in different countries. For this reason, the EESC again advocates that the proposal should include rules guaranteeing workers the same rights to information and consultation as those that apply to European companies.

3.4.4.2 Secondly, non-compliance with the legal obligation to inform and consult workers in practice has a damaging effect on employment, in the absence of specific measures to protect it.

3.4.4.3 Thirdly, the content of Article 14 should be clarified in order to prevent over-referral to legislation of a transnational nature, such as the ECS Regulation, and that of a national nature, such as the directive on the involvement of employees. It must be made clear that the applicable systems are:

- the national participation system for merging companies;
- the negotiated model, in accordance with the provisions of the directive on employee involvement, if no provision for such involvement is made in national law;
- the mandatory model which would apply in the event of non-agreement between the parties would be that set out in Part 3 of the Annex to the directive on employee involvement.

4. Conclusions

4.1 The EESC reiterates its view that the proposed directive is positive and practical.

4.2 It would, however, like to draw the Commission's attention to two issues that the proposal fails to address.

⁽¹⁾ Directive 78/855/EEC.

4.2.1 Firstly, the proposal fails to regulate the liability of administrators and experts involved in the merger. It must be remembered that Article 15 of the 1985 proposal established a general mechanism for liability, based on Articles 20 and 21 of the third company directive. It would, in general, be perfectly justified to add an article on the liability of administrators and experts to the 2003 proposal, not only because of the broad consensus that exists in all national systems of law, but also because the question of liability is included in many codes of corporate conduct and reports backed by the Commission ⁽¹²⁾.

Brussels, 28 April 2004.

4.2.2 Secondly, this proposal needs to be coordinated with existing directives and the new proposals on tax reform in the area of mergers, etc. ⁽¹³⁾, as cross-border mergers in the EU will only be viable in practice if there are effective company rules providing legal facility and security, as is the objective of this proposal for a tenth directive, and an appropriate ratio between the cost and tax benefits of such mergers. The EESC therefore believes that there is a need for coordination between DG Internal Market and DG Economic and Financial Affairs.

The President
of the European Economic and Social Committee
Roger BRIESCH

⁽¹²⁾ Report of the High-Level Group of Experts on Company Law of 4 November 2002.

⁽¹³⁾ See footnote 6.

APPENDIX

to the opinion of the European Economic and Social Committee

The following amendments, which received at least one quarter of the votes cast (Rule 54(3)), were defeated in the course of the debate:

Amend the second sentence of point 3.4.4.3

'It must be made clear that, in cases where there was employee participation in at least one of the companies involved in the merger, the applicable systems are:'

Reason

Without this addition the text of the opinion is inaccurate. If employee participation is to be applied to the new company, such a scheme must in fact have already applied to workers' representatives.

Result of the vote:

For: 29, against: 41, abstentions: 4.

New point 3.4.4.4

'The EESC is sceptical as regards the application of the mandatory model set out in Part 3 of the Annex to the directive on employee involvement as this may imply the export of codetermination systems to other Member States which have a totally different legal tradition.'

Reason

The application of this mandatory provision could result, for example, in the following situation: an enterprise from country A (where there is no employee participation) merges with an enterprise from country B (which has employee participation) and opts to have the registered office of the new enterprise located in country A. It would then be obliged to apply the law prevailing in country B, even if this is out of step with the company law of country A (monistic and dualistic systems).

Result of the vote:

For: 25, against: 40, abstentions: 4.
