3.2.11 The EESC is of the view that proper consideration of these issues is crucial to achieving the aims that the directive proposes to guarantee, in other words, that consumers of goods and services purchased at a distance should enjoy protection equivalent to the protection rightly provided in contracts concluded face to face.


The President of the European Economic and Social Committee
Dimitris DIMITRIADIS
2. Content of the proposal

2.1 The purpose of this amendment to the Directives on mergers or divisions of public limited liability companies is to align their content with that of the Directive on cross-border mergers with respect to the involvement of experts in drawing up the report on the draft terms of mergers or divisions, provided that all shareholders and holders of securities giving the right to vote have so agreed.

3. Comments on the proposal

3.1 The EESC welcomes the process of simplification, and in particular the reduction in the administrative burden for European companies. It is in this sense that we understand the content of the proposal, which in particular protects shareholders’ interests by requiring their unanimous agreement for not drawing up an expert report on the draft terms of mergers or divisions.

3.2 The EESC nevertheless still sees problems, in particular relating to mergers of large companies, owing to the diversity of shareholders, most of whom are investors. If shares are not managed directly, minority shareholders may be unprotected and obliged to accept agreements adopted by the bodies that manage their securities. Although prevailing rules provide for the right to oppose and withdraw from such agreements in cases where shareholders object to the economic outcome of the operations, especially in relation to share swaps, it will be much more difficult to exercise this right if there is no expert report on the draft terms of mergers.

3.3 By the same token we believe that companies’ creditors and employees are vulnerable if they are kept in the dark for lack of an objective evaluation under the responsibility of experts. The right of creditors to oppose a merger once the merger notices have been published is recognised, provided their claims are not secured. However, it must be borne in mind that neither the Directive on mergers nor the Directive on divisions sets out any right for workers, whereas the Directive on cross-border mergers provides the option of employee participation (Article 16), which promotes a better outcome by means of appropriate information channels.

3.4 The effectiveness of legislation depends on whether it safeguards the rights of all those involved in legal processes — in this case mergers and divisions — since their complexity makes it necessary to promote ways of making them transparent without creating conflicts between all the parties concerned. Abolition of the expert report subject to the approval of all the shareholders should happen in the circumstances set out in Article 10 of Directive 2006/68/EC, i.e. when the assets are in the form of transferable securities or money-market instruments or have recently been valued by independent experts, since the value is then verifiable and has been ascertained in accordance with the relevant standards.

4. Conclusions

4.1 The EESC realises that the proposal to amend the Directives on mergers or divisions of public limited liability companies is part of the plan to reduce the administrative burden on European companies. It must nevertheless be borne in mind that this type of legal process generally involves large limited-liability companies whose shareholders comprise both portfolio managers and individual investors, who have differing interests. Individual investors want to maximise the exchange value of their shares.

4.2 The point of the amendment should be to promote the general interest of all those involved in such legal operations, where expert assessments ensure greater transparency and reliability of the offers contained in the draft terms of mergers or divisions, since the experts are independent and therefore lay down objective criteria for the content of the draft terms.

4.3 In addition, the EESC considers the basic rules for involvement of experts to be contained in Articles 10, 10(a) and 10(b) of the second Directive, where waiving the requirement for an expert report is conditional on the existence of recent, verifiable valuations.

4.4 On the other hand, the EESC believes that account should be taken of the provisions of the 10th Directive, not just because it was published recently, but because it is more in line with the new criteria relating to interests protected by company law, considering not just shareholders and creditors, but also employees, who are part of the company structure. We therefore think that the scope of the present proposal should be widened in accordance with Article 16 of the above-mentioned Directive, since this is more consistent with the objective of aligning national rules on mergers or divisions.


The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS
APPENDIX

to the Opinion of the European Economic and Social Committee

The following amendments, which were voted on together, were defeated despite receiving a quarter of the votes cast.

1. Delete point 3.2:

"3.2 The EESC nevertheless still sees problems, in particular relating to mergers of large companies, owing to the diversity of shareholders, most of whom are investors. If shares are not managed directly, minority shareholders may be unprotected and obliged to accept agreements adopted by the bodies that manage their securities. Although prevailing rules provide for the right to oppose and withdraw from such agreements in cases where shareholders object to the economic outcome of the operations, especially in relation to share swaps, it will be much more difficult to exercise this right if there is no expert report on the draft terms of mergers."

Reason

The purpose of the draft amendment to the Directives on mergers or divisions of public limited liability companies is to align their content with that of the Directive on cross-border mergers with respect to the involvement of experts in drawing up the report on the draft terms of mergers or divisions, provided that all shareholders and holders of securities giving the right to vote have so decided. The proposal to simplify the procedures is designed to promote the efficiency and competitiveness of entrepreneurs, without curtailing the protection granted to the company's minority shareholders and creditors.

Where decisions are made unanimously, the problems referred to in point 3.2 no longer apply. Share management bodies are elected by shareholders in order to defend their own interests. Therefore, the problem of making decisions which run counter to the interests of minority shareholders does not arise, since they will be in favour of the decision.

2. Delete point 3.3:

"3.3 By the same token we believe that companies' creditors and employees are vulnerable if they are kept in the dark for lack of an objective evaluation under the responsibility of experts. The right of creditors to oppose a merger once the merger notices have been published is recognized, provided their claims are not secured. However, it must be borne in mind that neither the Directive on mergers nor the Directive on divisions sets any right for workers, whereas the Directive on cross-border mergers provides the option of employee participation (Article 16), which promotes a better outcome by means of appropriate information channels."

Reason

With reference to point 3.3, it must be pointed out that both mergers and divisions are problems specific to companies. Creditors have the inalienable and acknowledged right to exercise their veto, once the notice/draft terms of merger have been published. The legislation proposed by the Commission is not intended to abolish this right, but rather to simplify the procedures. With reference to the rights of employees, whether or not draft terms of merger have been drawn up or an expert evaluation carried out has no bearing at all on their situation: indeed, the costs inherent in commissioning an expert report are often high, and these funds could be used to improve working conditions and remuneration of employees.

3. Delete point 3.4:

"3.4 The effectiveness of legislation depends on whether it safeguards the rights of all those involved in legal processes — in this case mergers and divisions — since their complexity makes it necessary to promote ways of making them transparent without creating conflicts between all the parties concerned. Abolition of the expert report subject to the approval of all the shareholders should happen in the circumstances set out in Article 10 of Directive 2006/68/EC, i.e. when the assets are in the form of transferable securities or money-market instruments or have recently been valued by independent experts, since the value is then verifiable and has been ascertained in accordance with the relevant standards."


Point 3.4 of the draft opinion refers to Article 10(a) of Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital, which does not apply in this case and is not amended by the draft directive. Article 10(a) of Directive 2006/68/EC provides for a prior fair valuation by a recognised independent expert, and for subsequent revaluation on the initiative and under the responsibility of the administrative or management body. If there is no such revaluation, the minority shareholders (holding at least 5% of the company’s subscribed capital) are entitled to request a valuation by an independent expert. Given that the proposal refers to an extremely rare but clearly defined situation, i.e. the respective unanimity of all shareholders, the problem of creating conflict between different parties, described in point 3.4 of the draft opinion, does not arise.

4. Amend point 4.1 as follows:

‘4.1 The EESC realises that the proposal to amend the Directives on mergers or divisions of public limited liability companies is part of the plan to reduce the administrative burden on European companies, and thus endorses the proposal. It must nevertheless be borne in mind that this type of legal process generally involves large limited liability companies whose shareholders comprise both portfolio managers and individual investors, who have differing interests. Individual investors want to maximise the exchange value of their shares.

Reason
To be given orally.

5. Delete point 4.2:

‘4.2 The point of the amendment should be to promote the general interest of all those involved in such legal operations, where expert assessments ensure greater transparency and reliability of the offers contained in the draft terms of mergers or divisions, since the experts are independent and therefore lay down objective criteria for the content of the draft terms.

Reason
See reasons given for the deletion of points 3.2, 3.3 and 3.4.

6. Delete point 4.3:

‘4.3 In addition, the EESC considers the basic rules for involvement of experts to be contained in Articles 10, 10(a) and 10(b) of the second Directive, where waiving the requirement for an expert report is conditional on the existence of recent, verifiable valuations.

Reason
See reasons given for the deletion of points 3.2, 3.3 and 3.4.

7. Delete point 4.4:

‘4.4 On the other hand, the EESC believes that account should be taken of the provisions of the 10th Directive, not just because it was published recently, but because it is more in line with the new criteria relating to interests protected by company law, considering not just shareholders and creditors, but also employees, who are part of the company structure. We therefore think that the scope of the present proposal should be widened in accordance with Article 16 of the above-mentioned Directive, since this is more consistent with the objective of aligning national rules on mergers or divisions.

Reason
See reasons given for the deletion of points 3.2, 3.3 and 3.4.

Voting
For: 44
Against: 104
Abstentions: 28