EUROPEAN PARLIAMENT

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Committee on Employment and Social Affairs

2003/0277(COD)

16.3.2005

OPINION

of the Committee on Employment and Social Affairs

for the Committee on Legal Affairs

on the proposal for a European Parliament and Council directive on cross-border mergers of companies with share capital
(COM(2003)0703 – C5-0561/2003 – 2003/0277(COD))

Draftsman: Raymond Langendries

PA_Leg

SHORT JUSTIFICATION

On 18 February 2004 the Employment Committee voted almost unanimously in favour of Mr Menrad's opinion on the Commission proposal on cross-border mergers. Now, that we have a new legislator we have to express our position on that subject again. Your draftsman would like to follow the work done by Mr Menrad because of his expertise and at the same time take into consideration the new elements which have emerged during the discussion in the Council and the unexpectedly quick progress the dossier has made within the Council.

The key problem: Workers' participation

The aim of the directive is to close an important gap in company law by facilitating the merger of companies with share capital from different Member States. Under current Community law, not all Member States permit such mergers. The differences between the legal systems of the various Member States to which the merging companies are subject are sometimes so great that the companies currently have to resort to complex and costly ad hoc legal solutions. This often makes such mergers a risky undertaking, and they do not always take place with the required transparency and legal certainty.

When undertakings from different Member States merge, many (or even all) of them disappear as autonomous legal entities. The company resulting from the merger may, however, freely choose where to have its registered establishment.

The provisions on the participation of workers in a company resulting from a cross-border merger, which led to the failure of the first proposal for a 10th Company Law Directive in 1984, are now to be regulated by means of this proposal for a directive. The main objection to the merger of companies from differing Member States has been the fear that companies from Member States where a right to worker participation[1] exists might misuse this procedure in order to evade this rule. Your draftsman estimates that the statute for a European Company (SE)[2] offer a solution to this issue and will finally bring to an end the more than 20 year lasting debate and stalemate.

The following suggestions to the Commission proposal are regarded as essential:

The Commission Proposal for Article 14 says that national law on participation governs the company resulting from the merger. Where there is no national law on participation and when at least one of the merging companies is governed by participation rules, the Commission proposal requires that the system set up by the SE Regulation and Directive should apply to protect the acquired rights of the employees.

However, this would not adequately provide for the situation where the national law governing the company resulting from the merger provides for a different proportion or level of participation than that enjoyed by the employees of at least one of the merging companies.

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[1] Such systems exist in both the public and private sectors in 12 of the 25 EU Member States: Germany, Austria, Luxembourg, Czech Republic, Slovakia, Slovenia, Hungary, Poland, the Netherlands, Denmark, Sweden and Finland. In France, Ireland, Malta, Lithuania and Greece such practices are prescribed only for state-owned firms. The other Member States (the UK, Italy, Belgium, Cyprus, Estonia, Latvia, Spain and Portugal) have no rules on co-determination.

[2] Regulation (EC) 2157/2001 and Directive 2001/86/EC

Accordingly, the proposed amended text of Article 14(2) provides that, where the national law governing the company resulting from the merger does not afford a level of participation equivalent to that enjoyed by the employees of the merging companies, the SE rules will apply.

Attention has to be taken also on the protection of the participation rights of the employees of a merging company in one Member State who, following the merger, become employees of a new company registered in another Member State, where the laws of that second Member State do not provide for the participation of employees outside its own jurisdiction. The proposed amended text, in Articles 14(2) and 14(4), seeks to strike a balance between the protection of the rights of employees based in another Member State and the requirements of national law on thresholds.

The length of the negotiation process could, in certain circumstances, pose a deterrent to cross-border mergers. Accordingly, a variation of the procedure under the SE model has to be considered, which would enable the merging companies to directly trigger the application of the standard rules without prior negotiation (Article 14(3), first indent).

Similarly, if a special negotiating body (SNB) is established, that SNB may decide to apply the rule on participation governing the company resulting from the merger, subject to certain rules. This procedure is also analogous to that in the SE Directive, and is set out in Article 14(3), second indent.

The draftsman suggests that the company resulting from the merger must be of a form that can accommodate employee participation. The proposed amended text addresses this in Article 14(5).

The Commission proposal did not take in account the possibility of employees losing rights to participation as a result of a subsequent merger with another company in the same Member State. The draftsman proposal for Article 14(6) is based upon Article 11 of the SE Directive and provides for measures to protect the acquired rights of employees in the context of cross-border mergers.

The proposed Article 14(3), third indent, aims at taking into account the situation in those Member States with only a one-tier system of management. If Member States were not allowed to introduce a maximum limit of 1/3 of the members of the administrative board representing employees, the operation of the standard rules could lead to situations where half of the members of the board would be employees' representatives, because that proportion existed in the supervisory board of one of the merging companies.

AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission[1]	Amendments by Parliament

Amendment 1
Recital 9 a (new)

	(9a) Provision should be made for the employees' representatives to enjoy, when exercising their functions, the same protection and guarantees as are provided to employees' representatives by the legislation and/or practice of the country of employment. They should not be subject to any discrimination as a result of the lawful exercise of their activities and should enjoy adequate protection as regards dismissal and other sanctions, in accordance with national practice.

Amendment 2
Recital 10 a (new)

	(10a) The provisions of this Directive should not affect other existing rights regarding involvement and shall not affect other existing representation structures, provided for by Community and national laws and practices. It is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions.

Amendment 3
Recital 11

(11) If ***at least one of the companies taking part in the cross-border merger is operating under a participation system and if the national law of the Member State in which the registered office of the company created by the merger is situated does not impose compulsory employee participation on that***	(11) If ***the national law of the Member State in which the company resulting from the cross-border merger is situated does not provide for the same level of participation as operated in the relevant merging companies (including in committees of the supervisory board that have decision-***

[1] OJ C ... /Not yet published in OJ.

company, the participation of employees in the company created by the cross-border merger and their involvement in the definition of such rights must be regulated. To that end, the principles and procedures ***provided for in Council*** Regulation (EC) No 2157/2001 ***of 8 October 2001 on the Statute for a European company[2]*** and ***in Council*** Directive 2001/86/EC ***of 8 October 2001 supplementing the Statute for a European company[3] should be*** taken as a basis,

making powers) the participation of employees in the company resulting from the crossborder merger must be regulated. To that end, the principles and procedures ***of*** Regulation (EC) No 2157/2001 and Directive 2001/86 EC ***are*** taken as a basis, ***subject, however, to modifications that are deemed necessary because the resulting company will be subject to the national laws of the Member State where it has its registered office. A prompt start to negotiations under Article 14 with the view of not unnecessary delaying mergers, may be ensured by Member States according to Article 3 (2) (b) of Directive 2001/86/EC.***

Amendment 4
Recital 11 a (new)

(11a) For the purpose of determining the level of participation operated in the relevant merging companies, account should also be taken of the proportion of employees in the management group, which covers the profit units of the companies subject to employee participation.

Amendment 5
Article 3, paragraph 1, point c a (new)

(ca) the effects of the merger on employment,

Amendment 6
Article 3, paragraph 1, point (g a) (new)

(ga) the opinion expressed by the employees or the representatives of the employees of the undertakings to be merged,

Amendment 7
Article 3, paragraph 2

2. ***In addition to the items provided for in paragraph 1, the merging companies may, by common accord, include further items in the common draft terms of merger.***	2. ***The management or administrative organ of each of the merging companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees.*** ***The report shall be made available to the members, the employees and their representatives not less than one month before the date of the general meeting referred to in Article 6.***

Justification

It is a fundamental right of employees and their representative to be informed about the (mostly highly complex, uncertain and far-reaching) consequences of a cross-border merger.

Amendment 8
Article 6, paragraph 1

1. After taking note of the expert report referred to in Article 5, the general meeting of each of the merging companies shall approve the common draft terms of cross-border merger.	1. After taking note of the expert report referred to in Article 5 ***and the opinion expressed in the report of the employees or the representatives of the employees of the undertakings to be merged***, the general meeting of each of the merging companies shall approve the common draft terms of *the* cross-border merger.

Amendment 9
Article 7, paragraph 2

2. In each Member State concerned the ***competent authorities*** shall issue to each merging company subject to that State's national law a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.	2. In each Member State concerned the ***bodies referred to in paragraph 1*** shall issue to each merging company subject to that State's national law a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities ***and to the guarantee of***

	employees' rights.

Amendment 10
Article 8, paragraph 1

Each Member State shall designate the authorities competent to scrutinise the legality of the merger as regards that part of the procedure which concerns the completion of the merger and, where appropriate, the formation of a new company created by the merger where the company created by the merger is subject to its national law. The said authorities shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and that arrangements for employee participation have been determined in accordance with Article 14.	Each Member State shall designate the authorities competent to scrutinise the legality of the merger as regards that part of the procedure which concerns the completion of the merger and, where appropriate, the formation of a new company created by the merger where the company created by the merger is subject to its national law. The said authorities shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and that arrangements for employee participation have been determined in accordance with Article 14***, failing which a merger may not take place***.

Amendment 11
Article 14

	1. Without prejudice to paragraph 2 below, the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where its registered office is situated.
	2. However, where at least one of the merging companies has an average number of employees in the six months before the publication of the draft terms of the cross-border merger as referred to in Article 4 that exceeds 500 and is operating under an employee participation system within the meaning of Article 2 point k) of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not
	– provide for at least the same level of

	participation as operated in the relevant merging companies, measured by reference to the proportion of members of the administrative or of the supervisory organ or their committees or of the management group, which covers the profit units of the company, subject to employee representation, or
	– provide for employees of establishments of the company resulting from the cross-border merger and are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the registered office of the company resulting from the cross-border merger is situated,
Where at least one of the merging companies is operating under an employee participation system and where the national law applicable to the company created by the merger does not impose compulsory employee participation, the participation of employees in the company created by the merger and their involvement in the definition of such rights shall be regulated by the Member States in accordance with the principles and procedures laid down in Article 12(2), (3) and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:	***then the rules in force concerning employee participation, if any, in the Member State where the registered office of the company resulting from the cross-border merger is situated do not apply. In such a case, the participation of employees in the company resulting from the cross-border merger*** and their involvement in the definition of such rights shall be regulated by the Member States***, mutatis mutandis and subject to paragraphs 3 to 6 below,*** in accordance with the principles and procedures laid down in Article 12(2), (3) and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:
(a) Article 3(1), (2) and (3), (4) first subparagraph, first indent, and second subparagraph, (5)***, (6) first and second subparagraphs*** and (7);	(a) Article 3(1), (2) and (3), (4) first subparagraph, first indent, and second subparagraph, (5) and (7);
(b) Article 4(1), (2), ***point (g)***, and (3);	(b) Article 4(1), (2), ***points (a), (g) and (h)***, and (3);
(c) Article 5;	(c) Article 5;
(d) Article 6;	(d) Article 6;
(e) Article 7(1), (2) first subparagraph, point (b), and second subparagraph, and (3);	(e) Article 7(1), (2) first subparagraph, point (b), and second subparagraph, and (3);
(f) Articles ***8 to 12***;	(f) Articles ***8, 10 and 12***;

	(g) Article 13(4);
(g) Part 3 of the Annex.	***(h)*** Part 3 of the Annex***, first subparagraph and point (b)***.
	3. When regulating the principles and procedures referred to in paragraph 2 above, Member States:
	– shall confer on the relevant organs of the merger companies the right to choose without any prior negotiation to be directly subject to the standard rules referred to in paragraph 2(h) above, as laid down by the legislation of the Member State in which the registered office of the company resulting from the cross-border merger is to be situated and to abide by these rules from the date of registration;
	− shall confer on the Special Negotiating Body the right to decide, by the majority of two-thirds of its members representing at least two-thirds of the employees, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the Member State where the registered office of the company resulting from the cross-border merger will be situated;
	– may, in the case where, following prior negotiations, standard rules apply that would provide for a higher proportion of employee representatives in the administrative organ of the company resulting from the merger than one-third, notwithstanding these rules, limit the proportion of employee representatives to one-third, unless the national law governing that company provides for the option of a dual board system.
	4. The extension of participation entitlements to employees of the company resulting from the cross-border merger employed in other Member States, referred to in the second indent of paragraph 2 above, does not entail any obligation for

Member States to take those employees into account when calculating the size of workforce thresholds giving rise to participation rights under national law.

5. Where at least one of the merging companies is operating under an employee participation system and the company resulting from the cross-border merger is to be governed by such a system according to the rules referred to in paragraph 2 above, that company shall take a legal form allowing for the exercise of participation rights.

6. Where the company resulting from the cross-border merger is operating under an employee participation system, that company shall take measures to ensure that employees' participation rights are protected in the event of subsequent domestic mergers within five years after the cross-border merger has taken effect, by applying mutatis mutandis the rules as laid down in this Article.

7. Member States shall take appropriate measures with a view to preventing the misuse of subsequent domestic mergers for the purpose of depriving employees of rights to employee participation or withholding such rights.

Amendment 12
Article 14 a (new)

1. This Directive shall be without prejudice to other rights to information, consultation and participation under national law.

2. Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in areas to which it applies.

Justification

In order to clarify that Member States are free to maintain and introduce more protective provisions and should not use the transposition for regression, the usual provisions in labour law directives are introduced.

PROCEDURE

Title	Proposal for a European Parliament and Council directive on cross-border mergers of companies with share capital
References	COM(2003)0703 – C5-0561/2003 – 2003/0277(COD)]
Committee responsible	JURI
Committee asked for its opinion Date announced in plenary	EMPL 16.09.2004
Enhanced cooperation	No
Draftsman Date appointed	Raymond Langendries 27.10.2004
Discussed in committee	31.01.2005 15.03.2005
Date amendments adopted	16.03.20005
Result of final vote	for: 33 against: 1 abstentions: 1
Members present for the final vote	Jan Andersson, Roselyne Bachelot-Narquin, Jean-Luc Bennahmias, Philip Bushill-Matthews, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Luigi Cocilovo, Jean Louis Cottigny, Proinsias De Rossa, Harald Ettl, Richard Falbr, Ilda Figueiredo, Stephen Hughes, Karin Jöns, Jan Jerzy Kułakowski, Sepp Kusstatscher, Jean Lambert, Raymond Langendries, Bernard Lehideux, Elizabeth Lynne, Thomas Mann, Mario Mantovani, Ana Mato Adrover, Csaba Őry, Siiri Oviir, Marie Panayotopoulos-Cassiotou, Jacek Protasiewicz, José Albino Silva Peneda, Anne Van Lancker
Substitutes present for the final vote	Françoise Castex, Magda Kósáné Kovács, Lasse Lehtinen, Elisabeth Schroedter, Patrizia Toia
Substitutes under Rule 178(2) present for the final vote	