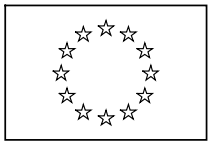

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.11.2003
COM(2003) 703 final

2003/0277 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on cross-border mergers of companies with share capital

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. PURPOSE OF AND GROUNDS FOR THE PROPOSAL

The purpose of the Directive, which is to be viewed against the background of the Financial Services Action Plan and the Communication from the Commission to the Council and the European Parliament of 21 May 2003 entitled *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, is to fill a significant gap in company law left by the need to facilitate cross-border mergers of commercial companies without the national laws governing them – as a rule the laws of the countries where their head offices are situated – forming an obstacle.

At present, as Community law now stands, such mergers are possible only if the companies wishing to merge are established in certain Member States. In other Member States, the differences between the national laws applicable to each of the companies which intend to merge are such that the companies have to resort to complex and costly legal arrangements. These arrangements often complicate the operation and are not always implemented with all the requisite transparency and legal certainty. They result, moreover, as a rule in the acquired companies being wound up – a very expensive operation.

There is an increasing need today in the Community of Fifteen for cooperation between companies from different Member States, as there will be tomorrow in the future enlarged Union, not forgetting the EFTA countries.

For a number of years now, Community companies have been calling for the adoption of a Community legal instrument that meets their needs for cooperation and consolidation between companies from different Member States and that enables them to carry out cross-border mergers.

More than ever, all companies, whether they be public limited liability companies or any other type of company with share capital, must have at their disposal a suitable legal instrument enabling them to carry out cross-border mergers under the most favourable conditions. The costs of such an operation must therefore be reduced, while guaranteeing the requisite legal certainty and enabling as many companies as possible to benefit. The scope of the Directive will therefore be drawn in such a way as to cover above all small and medium-sized enterprises, which stand to benefit because of their smaller size and lower capitalisation compared with large enterprises and for which, for the same reasons, the European company Statute does not provide a satisfactory solution.

2. HISTORICAL CONTEXT

On 14 December 1984 the Commission adopted a proposal for a tenth Council Directive on cross-border mergers of companies.[1] Several committees of the European Parliament examined the proposal, including the Committee on Legal Affairs, which adopted its report on 21 October 1987.[2] However, Parliament did not deliver its opinion owing to the difficulties raised by the problem of employee participation in companies' decision-making bodies. This situation of deadlock, which was linked to the fate of the proposal for a European company

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1 OJ C 23 25.1.1985, p. 11.

2 PE/113303/JUR/FIN, A2/1987/186.

Statute, lasted more than 15 years. In 2001, against the backdrop of a wholesale withdrawal of proposals which had been pending for several years or which had become devoid of purpose, the Commission withdrew this first proposal for a tenth Directive with a view to presenting a fresh proposal based on the latest developments in Community law. A resolution of the European company (SE) question having been reached on 8 October 2001, the work on preparing a new proposal for a Directive on cross-border company mergers accordingly resumed. In the light of this state of affairs and of the fact that the parties have had an opportunity to comment on the broad lines of the proposal, both as part of the consultations carried out by the High-Level Group of Company Law Experts and as part of those on the above-mentioned Commission communication of 21 May 2003, further consultations and impact assessment on the present proposal, the speedy adoption of which is wished for by the interests concerned, have not been considered necessary.

3. FEATURES OF THE PROPOSAL

The present proposal differs from the original proposal of 1984 mainly in scope and in the way it takes account, with regard to the participation of employees in the decision-making bodies of the acquiring company or of the new company created by the cross-border merger, of the principles and solutions incorporated in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)[3] and in Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.[4]

3.1. Scope

The original proposal covered only public limited liability companies. The present proposal extends that scope to include all companies with share capital which, in the unanimous view of the Member States, may be typified as companies having legal personality and separate assets which alone serve to cover the company's debts. It is aimed primarily at companies which are not interested in forming an SE, i.e. for the most part small and medium-sized enterprises.

3.2. Principles governing the cross-border merger procedure

The basic principle underlying the cross-border merger procedure is that – save as otherwise provided by the Directive for reasons to do with the cross-border nature of the merger – the procedure is governed in each Member State by the principles and rules applicable to mergers between companies governed exclusively by the law of that State (domestic mergers).

The aim is to approximate the cross-border merger procedure with the domestic merger procedures with which operators are already familiar through use.

In order to take account of the cross-border aspects, the principle of the application of national law is incorporated - but no more than is strictly necessary – via provisions based on the relevant principles and rules already laid down for the formation of an SE.

Protection under national law is also afforded to the interests of creditors, debenture holders, the holders of securities other than shares, minority shareholders and employees, as regards

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[3] OJ L 294, 10.11.2001, p. 1.
[4] OJ L 294, 10.11.2001, p. 22.

rights other than those related to participation in the company, vis-à-vis each of the merging companies. Reference may be made here to Council Directive 2001/23/EC of 12 March 2001 relating to the safeguarding of employees' rights in the event of transfers of undertakings,[5] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community,[6] and Council Directive 94/45/EC of 22 September 1994[7] and Council Directive 97/74/EC[8] of 15 December 1997, both of which concern the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. These Directives also apply to companies created by a cross-border merger.

The Directive, as is the case for comparable previous legal acts[9], is without prejudice to the application of the legislation on the control of concentrations between undertakings, both at the Community level[10] and at the level of Member States.

3.3. Employee participation and company law coordination

Employee participation in a company created by cross-border merger, which was the reason for the deadlock over the original proposal of 1984, is coordinated by the present proposal for a Directive with a view to ensuring freedom of establishment.

The overriding fear concerning cross-border mergers was that the process might be hijacked by companies which, faced with having to live with employee participation, might try to circumvent it by means of such a merger.

Regulation (EC) No 2157/2001 and Directive 2001/86/EC have come up with a solution which can be used, *mutatis mutandis*, also with a view to coordinating company law under Article 44(2)(g) of the EC Treaty, as is the purpose of this Directive.

The context in which the Regulation and the Directive on the SE operate is different, however, from that surrounding the application of this Directive. By virtue of its Community nature, the SE is not subject to any existing national rules on compulsory participation in the Member State in which its registered office is situated. By contrast, companies created by the cross-border merger operations covered by the present Directive will be companies governed by the law of a Member State. Such companies will accordingly remain subject to the compulsory participation rules applicable in that Member State. It may well be, however, that, following a cross-border merger, the registered office of the company created by the merger is situated in a Member State which does not have this type of rule, whereas one or more of the companies taking part in the merger were operating under a participation system before the merger. To deal with this eventuality, provision is made for extending to companies covered by the present Directive the same protection of rights acquired with respect to participation as is granted under the system set up by the SE Regulation and Directive. The protection of acquired rights of participation is entirely justified in this case. In cases where the national

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5 OJ L 82, 22.3.2001, p. 16.

6 OJ L 80, 23.3.2002, p. 29.

7 OJ L 254, 30.9.1994, p. 64.

8 OJ L 10, 16.1.1998, p. 22.

9 Third Council Directive concerning mergers of public limited liability companies (78/855/EEC) (OJ L 295, 20.10.1978, p.36).

10 Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p.1; corrected version OJ L 257, 21.9.1990, p. 13, Regulation as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1; corrigendum in OJ L 40, 13.2.1998, p. 17.

law of the Member State by whose law the company created by the merger is governed does have rules on compulsory employee participation, such specific protection is unnecessary as the company in question will be subject to those rules.

4. COMMENTS ON THE ARTICLES

Article 1 contains definitions which serve to delimit the scope of the Directive. The definitions of merger by acquisition and merger by the formation of a new company are taken from Directive 90/434/EEC, which also covers mergers between companies from different Member States and forms of company other than public limited liability companies. These definitions are in keeping with those in Directive 78/855/EEC concerning domestic mergers of public limited liability companies.[11] The scope includes all Community companies with share capital which, in the unanimous view of the Member States, may be typified as companies having legal personality and separate assets which alone serve to cover the company's debts. It is wider than that of Directive 78/855/EEC in that it is not limited to public limited liability companies but covers all companies with share capital.

Article 2 is designed to identify the law applicable in the event of a cross-border merger to each of the merging companies. Save as otherwise provided by the present Directive for reasons to do with the cross-border nature of the operation, each company remains subject to its national law on domestic mergers.

As to the protection of employees, the cross-border merger remains subject, with regard to rights other than those of participation in the acquiring company or in the new company created by the cross-border merger, to the relevant provisions applicable in the Member States, as harmonised *inter alia* by Council Directive 2001/23/EC of 12 March 2001 relating to the safeguarding of employees' rights in the event of transfers of undertakings, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community and Directives 94/45/EC and 97/74/EC concerning the establishment of a European works council and the informing and consulting of employees. By virtue of these provisions, the change of employer resulting from the merger operation must have no effect on the contract of employment or employment relationship in force at the time of the merger, which is automatically transferred to the new owner. Likewise protected after the merger are all acquired rights of employees agreed under a collective agreement, and their rights to old-age, invalidity or survivor's benefits under statutory social security schemes.

Article 3 lists the points that have to be included in the draft terms of cross-border merger. It includes the items already harmonised by Directive 78/855/EEC for domestic mergers of public limited liability companies, to which have been added, as in the case of the SE, a number of further items dictated by the cross-border nature of the operation, such as the name and registered office proposed for the new company. The place where the registered office is situated determines which law will be applicable to the new company – an important piece of information as far as all interested parties, including creditors, are concerned. The draft terms must also contain information on the arrangements for employee involvement in decisions taken by the company created by the cross-border merger.

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[11] OJ L 295, 20.10.1978, p. 36.

Article 4 deals with publication of the draft terms of cross-border merger and the information that must be furnished.

Article 5 provides for the possibility, as already laid down by Directive 78/855/EEC for domestic mergers of public limited liability companies and by Regulation (EC) No 2157/2001 for the European company, of providing for a single expert report on behalf of all shareholders.

Article 6 lays down the requirement of approval of the draft terms of cross-border merger by the general meeting. A similar requirement exists in the case of domestic mergers of public limited liability companies and in that of the formation of an SE by merger.

Articles 7 and 8 govern scrutiny of the legality of cross-border mergers. They are based on the corresponding principles and techniques provided for in Regulation (EC) No 2157/2001 for the SE.

Article 9 concerns the date on which the cross-border merger takes effect. The relevant date is to be that provided for by the law of the Member State by which the acquiring company is governed in the case of cross-border merger by acquisition or by which the new company is governed in the case of cross-border merger by the formation of a new company. The date must be after all the checks on all the companies taking part in the operation have been carried out.

Article 10 deals with the disclosure that must be effected upon completion of a cross-border merger. It is based on the corresponding provisions of Article 3 of Directive 68/151/EEC on the safeguards required to protect the interests of members and others,[12] this being the article that governs the publicising of all essential documents relating to companies with share capital.

Article 11 is based on Articles 19 and 23 of Directive 78/855/EEC, which already coordinate the effects of a domestic merger for public limited liability companies.

Article 12 is based on Article 29 of Regulation (EC) No 2157/2001, according to which, after the date on which a cross-border merger takes effect, it is no longer possible to declare the merger null and void, the aim being to ensure absolute certainty for all third parties affected by the merger in the various Member States concerned. It would be highly dangerous for third parties subject to the laws of different Member States to be faced with the nullity of an operation after all the checks in each Member State had been carried out conclusively.

Article 13 seeks to simplify the cross-border merger procedure in the case of a merger between two companies where the acquiring company already holds all or most of the shares or other securities of the company being acquired that confer the right to vote at the latter's general meetings. In such cases, a number of steps can in fact be dispensed with.

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[12] OJ L 65, 14.3.1968, p. 8.

Article 14 deals with the participation of employees in the company created by a cross-border merger where the protection of acquired rights of participation is put at risk by the merger. Article 14 is relevant only in a situation where one of the merging companies has a participation regime, be it compulsory or voluntary and the law of the Member State where the company created by merger is to be incorporated does not impose compulsory employee participation. In all other cases, the national law applicable to the company created by merger determines the rules on employees' involvement. Article 14 reflects the balance already found in the context of the European Company Statute, in particular the negotiation procedure which should enable the interested parties to negotiate an appropriate regime to be applied for employee participation. For this purpose, article 14 incorporates by reference the provisions of Directive 2001/86/EC and Part 3 of the Annex which are specifically relevant to mergers. Accordingly, it is only if the merging companies fail to reach a negotiated solution, that the participation system which best protects the acquired rights of the workers and which already exists in one of the merging companies is extended to the company created by merger.

Articles 15 and 16 contain the usual final provisions concerning implementation, entry into force and the addressees of the Directive.

2003/0277 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on cross-border mergers of companies with share capital

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission,[13]

Having regard to the opinion of the European Economic and Social Committee,[14]

Having regard to the opinion of the Committee of the Regions,[15]

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) The need for cooperation and consolidation between companies from different Member States and the difficulties encountered, at the legislative and administrative levels, by cross-border mergers of companies in the Community make it necessary, with a view to the completion and functioning of the single market, to lay down Community provisions to facilitate the carrying-out of cross-border mergers between various types of company with share capital governed by the laws of different Member States.

(2) The above-mentioned objectives cannot be sufficiently attained by the Member States in so far they involve laying down rules with common features applicable at transnational level; owing to the scale and impact of the proposed action, they can therefore best be achieved at Community level, it being possible for the Community to take measures in accordance with the principle of subsidiarity laid down in Article 5 of the Treaty. In accordance with the principle of proportionality as set forth in that article, this Directive does not go beyond what is necessary to achieve those objectives.

(3) In order to facilitate cross-border merger operations, it should be laid down that, unless this Directive provides otherwise, each company taking part in a merger, and each third party concerned, remains subject to the provisions of national law by which

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13 OJ C [...], [...], p. [...].
14 OJ C [...], [...], p. [...].
15 OJ C [...], [...], p. [...].

the company is governed, being those provisions which are applicable in the event of a merger with other companies governed by the same law.

(4) The common draft terms of cross-border merger must be drawn up in the same terms for each of the companies concerned in the various Member States. The minimum content of such common draft terms should therefore be specified, while leaving the companies free to agree on other items.

(5) In order to protect the interests of members and others, both the draft terms of merger and the completion of the merger must be publicised for each merging company via an entry in the appropriate public register.

(6) The laws of all the Member States provide for the drawing-up of a report on the draft terms of merger by one or more experts on behalf of each of the companies that are merging at national level. In order to limit experts' costs connected with cross-border mergers, provision should be made for the possibility of drawing up a single report intended for all members of companies taking part in a cross-border merger operation. The common draft terms of cross-border merger must be approved by the general meeting of each of these companies.

(7) In order to facilitate cross-border merger operations, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of the completion and legality of the merger should be carried out by the national authority having jurisdiction over the company created by the merger. The latter authority may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the merger takes effect - this being the law to which the company created by the merger is subject - should also be specified.

(8) In order to protect the interests of members and others, the legal effects of the cross-border merger - distinguishing according to whether the company created by the merger is an acquiring company or a new company - should be specified. In the interests of legal certainty, it should no longer be possible, after the date on which a cross-border merger takes effect, to declare the merger null and void.

(9) This Directive is without prejudice to the application of the legislation on the control of concentrations between undertakings, both at the Community level[16] and at the level of Member States.

(10) Employees' rights other than rights of participation should remain subject to the national provisions referred to in Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies,[17] Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings,[18] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general

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16 Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13, Regulation as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1; corrigendum in OJ L 40, 13.2.1998, p. 17.

17 OJ L 225, 12.8.1998, p. 16.

18 OJ L 61, 5.3.1977, p. 26.

framework for informing and consulting employees in the European Community[19] and Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.[20]

(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 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[21] and in Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company[22] should be taken as a basis,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive:

- *"merger"* means an operation whereby:

  (a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company - the acquiring company - in exchange for the issue to their shareholders of securities or shares respresenting the capital of that other company and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or

  (b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form - the new company - in exchange for the issue to their shareholders of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10% of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or

  (c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital;

- *"cross-border merger"* means a merger within the meaning of the first indent which involves companies with share capital formed in accordance with the law of a Member State and having their registered office, central administration or principal

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19 OJ L 80, 23.3.2002, p. 29.
20 OJ L 254, 30.9.1994, p. 64; Directive amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).
21 OJ L 294, 10.11.2001, p. 1.
22 OJ L 294, 10.11.2001, p. 22.

place of business within the Community, provided at least two of them are governed by the laws of different Member States;

- *"company with share capital"* means a company having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Council Directive 68/151/EEC[23] for the protection of the interests of members and others.

Article 2

Save as otherwise provided in this Directive, each company taking part in a cross-border merger shall be governed, as far as the merger formalities are concerned, by the provisions of national law to which it is subject that apply to mergers of this type of company with other companies with share capital subject to the same national law. The said provisions shall include those concerning the decision-making process relating to the merger and the protection of creditors, debenture holders and the holders of securities other than shares to which special rights are attached, as well as of employees as regards rights other than those governed by Article 14.

Article 3

1. The Member States shall provide that each management or administrative organ of each of the merging companies must draw up common draft terms of cross-border merger. The common draft terms of cross-border merger shall include the following particulars:

   (a) the form, name and registered office of the merging companies and those proposed for the company created by the merger;

   (b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any compensation;

   (c) the terms for the allotment of securities or shares representing the capital of the company created by the merger;

   (d) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

   (e) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company created by the merger;

   (f) the rights conferred by the company created by the merger on members enjoying special rights or on other holders of securities or shares representing the company capital, or the measures proposed concerning them;

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[23] OJ L 65, 14.3.1968, p. 8.

(g) any special advantages granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;

(h) the statutes of the company created by the merger;

(i) information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company created by the merger are determined pursuant to Article 14.

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.

Article 4

The Member States shall provide that, for each of the merging companies, the following particulars at least must be published, not less than one month before the date of the general meeting referred to in Article 6, in the manner laid down by the law of each Member State in accordance with Article 3 of Directive 68/151/EEC:

(a) the form, name and registered office of each merging company and those proposed for the company created by the merger;

(b) the public register in which the documents of each merging company are filed and their identification number in that register;

(c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority shareholders of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

Article 5

1. An expert report intended for members and made available not less than one month before the date of the general meeting referred to in Article 6 shall be drawn up for each merging company.

2. As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts, appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the future company, may examine the draft terms of cross-border merger and draw up a single written report to all the shareholders. Depending on the law of each Member State, such experts may be natural persons, legal persons or companies.

The experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 6

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.

2. The general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the involvement of employees in the company created by the merger.

Article 7

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 each merging company subject to its national law.

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.

Article 8

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.

To that end each merging company shall submit to the competent authorities the certificate referred to in Article 7(2) within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting referred to in Article 6.

Article 9

The law of the Member State to whose jurisdiction the company created by the merger is subject shall determine the date on which the cross-border merger takes effect. That date must be after the supervision as referred to in Article 8 has been carried out.

Article 10

The law of each of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements for publicising completion of the cross-border merger in the public register in which each of the companies is required to file documents.

Article 11

1. A merger carried out as laid down in point (a) of the first indent of Article 1 shall, from the date referred to in Article 9, have the following consequences:

   (a) all the assets and liabilities of each company being acquired are transferred, by way of universal succession, to the acquiring company;

   (b) the shareholders of the company being acquired become shareholders of the acquiring company;

   (c) the company being acquired ceases to exist.

2. A merger carried out as laid down in point (b) of the first indent of Article 1 shall, from the date referred to in Article 9, have the following consequences:

   (a) all the assets and liabilities of the merging companies are transferred, by way of universal succession, to the new company;

   (b) the shareholders of the merging companies become shareholders of the new company;

   (c) the merging companies cease to exist.

3. Where, in the case of a merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall be carried out by the company created by the merger.

Article 12

A cross-border merger which has taken effect as provided for in Article 9 may not be declared null and void.

Article 13

1. Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company being acquired, Articles 3(1)(b) and (c), 5 and 11(1)(b) shall not apply.

2. Where a merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at general meetings of another company, reports by the management or administrative body, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company being acquired so requires.

Article 14

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:

(a) Article 3(1), (2) and (3), (4) first subparagraph, first indent, and second subparagraph, (5), (6) first and second subparagraphs and (7);

(b) Article 4(1),(2), point (g), and (3);

(c) Article 5;

(d) Article 6;

(e) Article 7(1), (2) first subparagraph, point (b), and second subparagraph, and (3);

(f) Articles 8 to 12;

(g) Part 3 of the Annex.

Article 15

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within eighteen months of its publication. They shall forthwith inform the Commission thereof and communicate a table of equivalence between those provisions and this Directive.

When Member States adopt such measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such a reference shall be adopted by Member States.

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 16

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

TITLE OF PROPOSAL

Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital

REFERENCE NO

COM(2003) 703

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

In accordance with the principles of subsidiarity and proportionality as laid down in Article 3b of the Treaty, the objectives of the proposed action, namely to facilitate mergers between companies from different Member States, cannot be sufficiently achieved by the Member States acting alone. No one Member State is able to organize the operation in full because it has a dimension which goes beyond national frontiers. These objectives can therefore be achieved only at Community level. The Directive is confined to the minimum required in order to achieve those objectives and does not go beyond what is necessary to that end.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

The scope of the Directive covers all companies with share capital. Besides public limited companies and partnerships partly limited by shares, it includes incorporated private companies and other national forms of company with share capital which offer safeguards as coordinated by Directive 68/151/EEC. The proposal will therefore benefit above all small and medium-sized enterprises (SMEs) as defined in the Commission Recommendation of 3 April 1996.[24] Owing to their smaller size and lower capitalisation compared with large enterprises, SMEs are rarely set up in the form of a public limited company but rather in that of a private company. SMEs account for about nine out of ten enterprises, almost three out of ten jobs, and just over one fifth of value added in the EU. The removal of legal obstacles to cross-border mergers will help to internationalise such enterprises' activities as advocated by the Commission in its Third Multiannual Programme for Small and Medium-sized Enterprises

[24] Commission Recommendation (COM(1996) 261 final) of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ L 107, 30.4.1996, p. 4).

in the European Union (1997-2000).[25] No distinction is made according to sector of activity, size of business or geographical area.

3. What will business have to do to comply with the proposal?

Companies which wish to merge will basically have to draw up draft terms of cross-border merger and publicise them sufficiently in each Member State concerned. The general meeting of each merging company will have to approve the draft terms. The legality of the procedure will have to be certified by the competent authorities. Measures are provided for in order to protect the rights of creditors and the holders of securities. The completion of the cross-border merger will also have to be sufficiently publicised. As in the case of the European company, a single expert report is permitted, which is likely to reduce costs. Most of the measures proposed already exist in Member States' laws on domestic mergers of companies with share capital and in the measures for implementing Directive 78/855/EEC concerning mergers of public limited liability companies. Responsibility for implementing the proposal will rest primarily with the Member States.

4. What economic effects is the proposal likely to have?

The key provisions of the proposal should allow companies which wish to carry out a cross-border merger to benefit from substantially reduced legal and economic requirements, which are currently highly complex and expensive. This benefit will accrue to all companies with share capital in the EU and should therefore have a favourable impact on employment and competitiveness.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements, etc.)?

The proposal is basically attuned to serving the needs of SMEs, which account for about nine out of ten enterprises, but other companies will also be able to benefit from it on the same terms.

CONSULTATION

6. The present proposal is an appropriate response to the needs which companies have been expressing for many years now, and in particular since progress on the original proposal, which was presented in 1984, came to a halt. Other voices have joined in the chorus, including that of UNICE. The High-Level Group of Company Law Experts recently conducted a wide-ranging consultation exercise which elicited numerous responses and expressions of opinion in favour of the present proposal. The Commission's communication to the Council and Parliament of 21 May 2003 on modernising company law and enhancing corporate governance has likewise been the object of extensive consultations. Under the circumstances, it has not been considered necessary to carry out any further consultations, this time on the final draft, all the more so since they would result in the present proposal's adoption being considerably delayed.

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[25] "Maximising European SMEs' full potential for employment, growth and competitiveness" – proposal for a Council Decision adopted by the Commission on 20 March 1996 (COM(96) 98 final; OJ C 156, 31.5.1996, p. 5).