POSITION PAPER

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EUROPEAN COMMISSION PROPOSAL FOR A DIRECTIVE ON CROSS-BORDER MERGERS OF COMPANIES WITH SHARE CAPITAL

COM(2003)703

UNICE COMMENTS

UNICE has taken note of the Commission proposal for a directive on cross-border mergers of companies with share capital. Harmonisation and streamlining of company law procedures to facilitate cross-border mergers have been requested by companies for many years in order to remove the existing obstacle impeding their mobility within the European Union.

At present, cross-border mergers are possible only if the companies wishing to merge are established in certain Member States. Otherwise, companies have often to be wound up before proceeding to the merger with all the consequences flowing from such complex and costly arrangements. In this context, UNICE welcomes very much the Commission intention to address this problem.

However, as we will comment below, the proposed regime for workers' involvement puts at stake the whole added value of the current proposal. Due to its complexity and burdensome nature, it is ill-suited for facilitating cross-border mergers.

1. Employee Involvement

UNICE deeply regrets the incorporation, in article 14 of the Commission proposal, of certain principles and regulations on workers involvement inspired by the *Societas Europaea*.

Firstly, UNICE challenges the assumption, on which the proposed directive seems to be based, that cross-border mergers would be used as a mere tool to avoid national mandatory rules on workers participation. Mergers are carried out to realise strategic decisions, based on economic, financial and industrial considerations, not to circumvent legal obligations on workers involvement.

Secondly, with regard to the aim of protecting Member States' existing co-determination rights, the result of the directive would by far exceed the objective. Co-determination would not only be retained in those countries but also exported across Europe. All Member States will need to create rules on workers co-determination to be applied in the event of cross-border mergers, regardless of whether co-determination is part of their industrial relations system or not.

Thirdly, the proposal is particularly ill suited for SMEs. UNICE wonders how an SME would be able to deal with the heavy election system taken over from Directive 2001/86/EC on the *Societas Europaea* and how SMEs would be able to cover the costs of the creation and

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operation of the special negotiation body, which could lead, for example, to significant travelling and interpretation expenses.

UNICE therefore considers that the only acceptable solution is to refer to the national rules on workers involvement of the country of the newly created company resulting from the merger.

2. Company Law

UNICE welcomes the proposed extension of the scope of application to include all companies with share capital. The previous proposal's restriction to the legal form of public limited liability companies diminished the use of the Directive. It is understandable that partnerships will not be granted this access, as there are considerable differences between the Member States. In the long-term, however, this objective should be pursued further.

According to Art. 4 c) of the draft, each of the merging companies must give an indication of the arrangements made for the exercise of the rights of creditors, as well as those of any minority shareholders of the merging companies. The required "complete" information and the extensive and unlimited legal advice on these arrangements goes too far, and contradicts the fundamental concept of the Directive, which is to leave the protection of creditors to national law (see justification in section 3.2 of the Explanatory Memorandum of the proposal COM(2003)703). Furthermore, an exaggerated right to information automatically entails a high risk of abuse and can also delay the merger. The word "complete" should be cut out.

Art. 13 of the Directive draft aims to simplify proceedings for a merger of two companies of which the acquiring company already has all or a majority of the voting rights of the company to be acquired. In addition to the already permitted waiver on certain steps of the procedure, ratification at the general meeting of the company being acquired should also not be necessary, or at least the Member States should be given this legislative option. This could be achieved by adding the following sentence to Art. 13 Para. 1: "A ratification of the merger plan at the general meeting of the company to be acquired pursuant to Article 6 is not necessary." In addition, in Art. 13 Para. 2 in Line 3 after the word "company," the words "ratification of the merger plan at the general meeting of the company to be acquired and" could be added.

3. Tax Law

On 20 October 2003, the EU Commission presented a proposal [COM(2003)613] to amend the current Directive on taxation applicable to mergers (90/434/EEC of the Council from 23 July 1990). However, the Directive proposal in question here about the merger of companies with share capital and the amendment proposal of the taxation directive make no reference whatsoever to each other. The Directive proposal on mergers is in line with the draft taxation directive regarding the definition of merger through acquisition as well as through founding a new company. This does not mean that the corporate and taxation proposals correspond to each other in detail and we therefore think it would be useful to coordinate the contents of these proposals, as long as this will not delay the approval of the tax directive.

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