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
REPORT

drawn up on behalf of the Committee on Legal Affairs and  
Citizens' Rights

on the proposal from the Commission of the European  
Communities to the Council (COM(84) 727 final -  
Doc. 2-1573/84) for a Tenth Directive based on Article  
54(3)(g) of the Treaty concerning cross-border mergers of  
public limited companies

Rapporteur : Mrs N. FONTAINE

## EXPLANATION OF SYMBOLS APPEARING ON THE COVER PAGE OF SERIES A SESSION DOCUMENTS

-  = Consultation procedure requiring a single reading
-  = Cooperation procedure (first reading)
-  = Cooperation procedure (second reading) which requires the votes of the majority of the Members of Parliament
-  = Parliamentary assent which requires the votes of the majority of the current Members of Parliament

By letter of 31 January 1985, the President of the Council of the European Communities requested the European Parliament to deliver an opinion on the proposal from the Commission of the European Communities to the Council for a Tenth Directive based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies.

At its sitting of 11 February 1985, the President of the European Parliament referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy, the Committee on Social Affairs and Employment and the Committee on Regional Policy and Regional Planning for opinions.

At its meeting of 30 May 1985, the Committee on Regional Policy and Regional Planning decided not to deliver an opinion on this subject.

At its meeting of 28 February 1985, the Committee on Legal Affairs and Citizens' Rights appointed Mr EVRIGENIS rapporteur.

The committee heard an introductory statement by the rapporteur and held an exchange of views on the Commission proposal at its meetings of 23 and 24 May 1985 and 29, 30 and 31 October 1985.

Following the death of Mr EVRIGENIS, the Committee on Legal Affairs and Citizens' Rights at its meeting of 23 April 1986 appointed Mrs FONTAINE rapporteur as his successor.

The committee considered a working document submitted by the rapporteur at its meeting of 24 and 25 February 1987. At its meeting of 25 and 26 June 1987, it considered the draft report and set 15 September 1987 as the deadline for tabling amendments to the Commission proposal. At its meeting of 15 September 1987, it decided to extend this deadline to 30 September 1987.

At its meeting of 20 and 21 October 1987, the Committee on Legal Affairs and Citizens' Rights voted on the amendments to the Commission proposal and on the draft legislative resolution contained in the draft report.

After adopting the amendments to the Commission proposal<sup>1</sup>, the committee rejected the proposal as a whole as amended by the abovementioned amendments by 12 votes to 8 with 1 abstention.

The following took part in the vote: Lady ELLES, chairman; Mrs VAYSSADE and Mr SARIDAKIS, vice-chairmen; Mrs FONTAINE, rapporteur; Mr BARZANTI, Mr BRU PURON, Mr CABRERA BAZAN, Mr DONNEZ, Mr GARCIA AMIGO, Mr GAZIS, Mr HERMAN (deputizing for Mr Casini), Mr HOON, Mr JANSSEN VAN RAAY, Mr LAFUENTE LOPEZ, Mrs MARINARO, Mr MONTERO ZABALA, Mrs NEUGEBAUER, Mr ROTHLEY, Mr STAUFFENBERG, Mr WIJSENBECK and Mr ZAGARI. Mr MEGAHY was also present.

<sup>1</sup> By way of information, these amendments have been annexed to the explanatory statement to this report.

The committee then proceeded to vote on the draft legislative resolution as amended to take account of the vote to reject the Commission proposal and decided, by 12 votes to 8, to recommend that Parliament reject the Commission proposal and call on the Commission to withdraw its proposal.

The following took part in the vote on the draft legislative resolution: Lady ELLES, chairman; Mrs VAYSSADE and Mr SARIDAKIS, vice-chairmen; Mrs FONTAINE, rapporteur; Mr BARZANTI, Mr BRU PURON, Mr GARCIA AMIGO, Mr GAZIS, Mr HERMAN (deputizing for Mr Casini), Mr HOON, Mr JANSSEN VAN RAAY, Mr LAFUENTE LOPEZ, Mrs MARINARO, Mr MEGAHY, Mrs NEUGEBAUER, Mr ROTHLEY, Mr STAUFFENBERG, Mr TURNER, Mr WIJSENBECK and Mr ZAGARI.

The opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Social Affairs and Employment are attached.

The report was tabled on 27 October 1987.

The President will fix the deadline for tabling amendments to this report pursuant to Rule 71(1) of the Rules of Procedure.

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## DRAFT LEGISLATIVE RESOLUTION

embodying the opinion of the European Parliament, pursuant to Article 149(2)(a) of the EEC Treaty, on the proposal from the Commission to the Council for a Tenth Directive, based on Article 54(3)(g) of the Treaty, concerning cross-border mergers of public limited companies

The European Parliament,

- having regard to the proposal from the Commission to the Council<sup>1</sup>,
  - having been consulted by the Council pursuant to Article 54(3)(g) of the EEC Treaty (Doc. 2-1573/84),
  - considering the legal base proposed to be correct,
  - having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Social Affairs and Employment (Doc. A 2-186/87),
  - having regard to the result of the vote on the Commission's proposal,
1. Rejects the Commission proposal (Rule 36(5) of Parliament's Rules of Procedure) and therefore calls on the Commission to withdraw its proposal for a directive;
  2. Instructs its President to forward this legislative resolution to the Council and Commission, as Parliament's opinion.

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<sup>1</sup> OJ No. C 23, 25.1.1985, p. 11 onwards

## EXPLANATORY STATEMENT

I. INTRODUCTION

1. The Commission proposal for a Tenth Directive on cross-border mergers of public limited companies (COM(84) 727 final)<sup>1</sup> represents the second stage in the establishment of a comprehensive body of law governing mergers between public limited companies in the European Community, the right of merger between public limited companies governed by the law of the same Member State (national mergers) having been harmonized by the Third Directive on company law (Directive 78/855/EEC of 9 October 1978)<sup>2</sup>.

2. In its explanatory memorandum, the Commission draws attention to the importance of this measure in the creation of 'a strong, homogenous internal market'<sup>3</sup> in which it has always been recognized that 'it is most important that Community undertakings have at their disposal the instruments which would enable them to adapt their legal status to the dimension of the Community and to achieve cross-border mergers of public limited companies within the Community'. The pursuit of this objective has already prompted two Community measures that sought to facilitate mergers between companies governed by the laws of different Member States. These were:

- the proposal for a Council regulation on the Statute for European Companies, pursuant to Article 235 of the EEC Treaty, which the Commission presented in 1970 and amended substantially in May 1975<sup>4</sup>;
- the negotiations between the Member States on a convention based on Article 220 of the EEC Treaty on international company mergers. These negotiations resulted in 1972 in the presentation to the Council of a draft submitted by the then six Member States<sup>5</sup>. Negotiations resumed with the participation of three new Member States following their entry into the Community in 1973.

3. However, work on these two initiatives progressively slowed down and was finally suspended in 1980. The obstacle which they encountered was - as stated by the Commission in its explanatory memorandum - the lack of equivalent provisions concerning employee representation in the organs of public limited companies in the Community<sup>6</sup>. Those Member States in whose legislation employee representation plays a large part ultimately expressed reservations based on the fear that international mergers would be used as a means of evading such legislation.

<sup>1</sup> OJ No. C 23, 25.1.1985, p. 11 onwards

<sup>2</sup> OJ No. L 295, 20.10.1978, p. 36 onwards

<sup>3</sup> See COM(84) 727 final, p. 1

<sup>4</sup> Supplement 4/75 to the Bulletin of the European Communities

<sup>5</sup> Supplement 13/73 to the Bulletin of the European Communities

<sup>6</sup> See COM(84) 727 final, p. 2

4. Although the problem is far from being resolved - as will become clear - it is nevertheless true that the question of cross-border mergers has become topical again in the light of the Community campaign to complete the internal market by 1992. The White Paper presented by the Commission to the European Council meeting in Milan on 28 and 29 June 1985 regretted 'the absence of a Community legal framework' capable of encouraging 'cross-border activities by enterprises and (...) cooperation between enterprises of different Member States'<sup>7</sup>. Such cross-border cooperation is becoming absolutely essential for the Community in that mobilization of adequate investment resources, particularly in the investment-intensive sectors, is more often than not impossible without a pooling of resources between several undertakings.

5. In order to take better account of this requirement and make still further progress in developing the programme for harmonizing company law, the Commission felt that the time had come to present this proposal for a directive on cross-border mergers of public limited companies<sup>8</sup>. Your rapporteur's aim is to identify the fundamental aspects of the proposal by submitting the main questions raised by its implementation in the laws of the Member States for discussion in the Committee on Legal Affairs and Citizens' Rights. This document concentrates accordingly on three areas:

- legal basis and mechanics of the proposal for a directive;
- the problem of employee representation seen from the angle of cross-border merger;
- additional considerations relating to specific points and proposed amendments to certain provisions in the proposal for a directive.

## II. LEGAL BASIS AND MECHANICS OF THE PROPOSAL FOR A DIRECTIVE ON CROSS-BORDER MERGERS OF PUBLIC LIMITED COMPANIES

### A. Legal basis

6. The Commission's proposal for a directive is based on Article 54(3)(g) of the EEC Treaty which relates to measures for the coordination of 'the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58'<sup>9</sup>. This provision is the basis usually adopted for the harmonization of company law and it was, for example, used as the legal basis for the Third Council Directive of 9 October 1978 (78/855/EEC) concerning mergers of public limited liability companies<sup>10</sup>.

<sup>7</sup> See COM(85) 310 final, p. 35

<sup>8</sup> See references under footnotes 1 and 3 above

<sup>9</sup> Article 58, second paragraph, of the EEC Treaty stipulates that: "'Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making'.

<sup>10</sup> See reference under footnote 2 above



7. As stated above, the first Community initiative on the subject of cross-border mergers was based on the provisions of Article 220, third indent, of the EEC Treaty which empowers the Member States to enter into negotiations with each other with a view to securing for the benefit of their nationals 'the mutual recognition of companies or firms within the meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries'. In view of the failure of the negotiations entered into on the subject, the Commission resorted to the provisions of Article 54(3)(g) of the EEC Treaty, a procedure which is not precluded by Article 220 of the EEC Treaty.

Furthermore, it should be pointed out that, from the time when the Single European Act enters into force, any proposal based on the abovementioned provisions of the EEC Treaty will be subject to the cooperation procedure pursuant to Article 6(1) and (4) of the Single Act - reference should be made here to the Commission document concerning its proposals pending before the Council for which the entry into force of the Single European Act will mean a change of legal basis and/or procedure (Doc. C 2-2/87, Annex I, page 28) and also to the PROUT report on application of the procedures laid down in the Single Act to Commission proposals pending in the Council (Doc. A 2-2/87) adopted by Parliament at its sitting of 9 April 1987 (see minutes of proceedings of that day's sitting, PE 113.704).

8. For the Commission, the solution finally adopted also has a dual advantage in that:

(1) on the one hand, it enables it to legislate 'to a considerable extent'<sup>11</sup> by reference to the already adopted provisions of the Third Directive (78/855/EEC) 'wherever the same treatment is appropriate for cross-border and national mergers';

(2) on the other hand, it ensures uniform interpretation of the texts on mergers by the Court of Justice of the European Communities.

9. On this second point, the Commission's observation is a pertinent one to the extent that a convention based on Article 220 would normally have to be covered by protocol concluded between the Member States that were parties to such a convention for the purpose of conferring powers on the Court of Justice<sup>12</sup>. At the same time, the first point raises a number of objections with regard to the legal mechanics which merit consideration.

<sup>11</sup> See COM(84) 727 final, p. 5

<sup>12</sup> As was the case with the Protocol of 3 June 1971 concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (see OJ No. L 204, 2.8.1975)

## B. Legal mechanics

10. The principle underlying the legal mechanics that characterize the text of the proposal for a directive is that of making continual reference to the provisions of the Third Directive of 9 October 1978 (78/855/EEC) wherever the particular features of a cross-border merger do not require different treatment. The Commission is thus seeking to ensure conformity between the provisions governing national and cross-border mergers and thereby to simplify the task of the legal expert and even of the merger specialist. According to its own words as used in the explanatory memorandum prefacing the proposal for a directive, the Commission takes the view that mergers - whether national or cross-border - should be subject to '(identical) legal mechanics', so that harmonization can be limited to those elements which are different or additional for cross-border mergers compared with national mergers'.<sup>13</sup>

11. In the opinion delivered to our committee, the Committee on Economic and Monetary Affairs and Industrial Policy<sup>14</sup> takes the view that this method is inappropriate and particularly unhelpful as far as the economic environment is concerned. In this committee's opinion, 'a proposal for a directive which consists of 17 articles ... and contains 21 references to a legal instrument issued in 1978 has a discouraging effect on undertakings interested in a merger; in addition, it involves an inordinate amount of time, administration and therefore money spent on obtaining legal advice'.<sup>15</sup> The same view, in somewhat qualified form, is also expressed in the opinion of the Committee on Social Affairs and Employment<sup>16</sup> which felt compelled to ask 'whether there are not other forms of cooperation which would be more effective than cross-border mergers for undertakings from different Member States'.<sup>17</sup>

12. The first question which our committee should consider is whether to endorse the comments of the two other committees asked for an opinion. It is true that the question of lack of 'transparency' in a legal instrument is a problem that may sometimes have considerable implications. However, the 'shortcoming' noted in this particular case should be appraised in the light of the whole problem posed by the very implementation of mergers, whether national or cross-border, in the Community. In particular, it cannot be out of the question that a clearer and more 'transparent' text might conceal problems of a different dimension such as the risk of divergent interpretations depending on whether national or cross-border mergers were involved or even conflicting practice in the actual implementation of the provisions in question. Such confusion might then arise that it would no longer be appropriate to speak of 'identical legal mechanics'<sup>18</sup>; the Commission proposal seeks precisely to avoid the risks of such confusion by establishing a legal instrument designed in principle to regulate all merger operations in the Community. Our committee should therefore address this issue with care and endeavour to verify whether, despite this 'apparent complexity', the text in question is after all more likely to spare companies a certain number of problems when implemented.

<sup>13</sup> See COM(84) 727 final, p. 4

<sup>14</sup> See PE 96.674/fin. (4 June 1985)

<sup>15</sup> *ibid.*, p. 5

<sup>16</sup> See PE 97.986/fin. (22 November 1985), p. 7

<sup>17</sup> *ibid.*, p. 7

<sup>18</sup> See paragraph 10 of this explanatory statement

13. Although our committee accepts the principle behind the legal mechanics that are proposed, the fact remains that the tendency to make continual reference to the Third Directive (78/855/EEC) cannot help sometimes raising a number of genuine problems: in certain cases, a simple reference to the provisions of Directive 78/855/EEC is scarcely sufficient to regulate a situation that has been appreciably altered by the arrangements governing cross-border mergers. For example, the reference to Article 22(1)(g) and (2) of Directive 78/855/EEC does not make much sense seen against Article 11 of the proposal for a Tenth Directive; the reference in Article 2(3) to the provisions of Article 22(1)(b) of Directive 78/855/EEC gives rise to confusion in view of the separate arrangements introduced by Article 15(1) of the proposal for a directive; likewise, the reference in Article 9 of the proposal for a directive to Articles 13 and 14 of Directive 78/855/EEC relating to the protection of creditors of companies does not seem enough to ensure adequate protection of the interests of creditors of the merging company or companies. These are detailed points which must, at all events, be covered by appropriate proposals for amendments that seek to make the text of the proposal for a directive more comprehensive and better adapted to the particular features of a cross-border merger operation.

### III. THE PROBLEM OF EMPLOYEE REPRESENTATION SEEN FROM THE ANGLE OF CROSS-BORDER MERGER

14. This question is of fundamental importance since it was precisely the absence of equivalent rules on employee representation on company bodies that stood in the way of the negotiations that were meant to lead to the adoption of a convention based on Article 220 of the EEC Treaty on cross-border mergers<sup>19</sup>. The Commission is aware of this problem and has incorporated a specific provision in its proposal for a directive that seeks to tackle this difficulty. This is Article 1(3), which states that: 'Pending subsequent coordination, a Member State need not apply the provisions of this Directive to a cross-border merger where an undertaking, whether or not it was involved, would as a result no longer meet the conditions required for employee representation in that undertaking's organs'.

15. When considering the Commission's proposal for a directive, the Committee on Legal Affairs and Citizens' Rights took the view that the provision in question did not properly settle the question. It considered amendment No. 3 contained in the draft report (see Annex to this explanatory statement) which was based on the position unanimously put forward in the opinion of the Committee on Social Affairs and Employment (annexed to this report) and sought to improve the wording of Article 1(3). After lengthy discussion, it took the view that this provision, even though it represented a step forward in relation to the Commission proposal, would not provide sufficient guarantees for safeguarding and/or ensuring employee participation in the bodies of companies involved in a cross-border merger until such time as the Council had adopted the Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs<sup>20</sup>. This being so, it decided to recommend that Parliament reject the proposal for a directive submitted by the Commission and call on the Commission to withdraw it.

<sup>19</sup> See paragraph 2 above

<sup>20</sup> For the amended proposal for a Fifth Directive see OJ No. C 240, 9.9.1983, pp. 2 and 5

**IV. ADDITIONAL CONSIDERATIONS CONCERNING SPECIFIC POINTS AND PROPOSED AMENDMENTS TO CERTAIN PROVISIONS IN THE PROPOSAL FOR A DIRECTIVE**

16. Before rejecting the proposal for a directive as a whole, the Committee on Legal Affairs and Citizens' Rights had adopted the amendments contained in the draft report for the reasons set out in this explanatory statement. These amendments are annexed to this report by way of information.

17. Given that the text of the proposal for a Tenth Directive makes constant reference to the provisions of Directive 78/755/EEC of 9 October 1978 (Third Directive), except where the particular features of cross-border merge necessitate different treatment<sup>21</sup>, this section proposes to examine in more detail more closely at certain provisions in the text proposed by the Commission that give rise or might be supposed to give rise to specific problems.

**A. Cross-border merger by the formation of a new company (Article 4 of the proposal for a directive)**

18. Article 4, which refers to the operation described in Article 4 of Directive 78/855/EEC, deals with cross-border merger by the formation of a new company: it is understood that this new company can be formed only in accordance with the legislation of a Member State of the Community which, for its part, is subject to Community harmonization of company law. As for the legislation that will govern this new company within this Community framework, it will be freely chosen when the merger operation is carried out. There is no reason why this choice should be limited to the legislation that regulated the merging companies before the operation was carried out.

**B. Draft terms of merger (Article 5 of the proposal for a directive)**

19. With regard to the drawing-up of the draft terms of a cross-border merger (Article 5), Article 5(2) of the Third Directive - which is equivalent to Article 5 - comprises a list of minimum data to be specified in the draft terms, whereas Article 5 applicable to cross-border mergers makes this list a restrictive one (actual wording: 'No further details than those listed in paragraph 2 of the abovementioned Article may be required').

20. This restrictive solution, while justified by the fact that what is at issue here are cross-border mergers involving companies governed by different sets of legislation - and by the need to avoid the difficulties arising from the overlapping of the many conditions laid down by each set of legislation - is nonetheless open to criticism because it disregards important details. What about, for example, the requirement to indicate the evaluation of assets and liabilities which it is intended will be transferred to the acquiring company or the new company? Your rapporteur takes the view that the cross-border nature of the merger operation is a sufficient argument for including this piece of information in the draft merger terms (see amendment No. 6).

<sup>21</sup> See above under I B, paragraphs 10 to 13

**C. Judicial or administrative preventive supervision of legality**

21. Article 10(1) of the proposal for a directive lays down the principle that, where the legislation of a Member State provides for judicial or administrative preventive supervision of legality, that legislation applies to the companies involved in the cross-border merger that are governed by that legislation. However, where the legislation of a Member State governing one or more companies involved in a cross-border merger does not provide for such supervision, Article 16(1) of Directive 78/855/EEC requiring in this particular case 'the minutes of the general meetings which decide on the merger and, where appropriate, the merger contract subsequent to such general meetings (to) be drawn up and certified in due legal form' is to apply. (See Article 10(2), first sentence, of the proposal for a directive).

22. The point which should be questioned here as to its appropriateness is that raised in the second sentence of Article 10(2). Here, in effect, the Commission proposal refers to cases where legislation provides for a merger contract to be concluded following the decisions of the general meetings that decide on the merger and stipulates that 'that contract shall be concluded by all the companies involved in the operation'. Unless this provision is unclear, it does not seem necessary as part of the proposal for a directive. The reasons are as follows: if, on the one hand, the phrase 'all the companies involved in the operation' refers to the companies governed by the same legislation (and this is in fact the case envisaged in Article 10(2)), this provision is meaningless since, in any case, companies must conform to the requirements of the legislation by which they are governed; if, on the other hand, this phrase means 'any other company involved in the operation' and what is also understood here is companies involved in the merger but governed by other legislation, this provision would be unacceptable for the simple reason that it would result in the latter companies being made subject to conditions other than those laid down in their own legislation (which might moreover be much more stringent). The Committee on Legal Affairs and Citizens' Rights will therefore propose that this second sentence in Article 10(2) be deleted (see amendment No. 9).

**D. Protection of the interests of creditors  
(Article 9 of the proposal for a directive)**

23. Article 9 concerning the protection of the interests of creditors seems likely to raise a number of problems:

- (a) Some law associations in countries where the system of common law prevails are particularly circumspect in their views about the system of protection established by this article (and, by correlation, by Articles 13, 14 and 15 of Directive 78/855/EEC). This circumspection is due here to the particular nature of the various acts regulating mergers in these countries. In some cases they even go so far as to say that the aim pursued by the Commission of simplifying the procedures for creating or restructuring complex economic entities has significance for these countries solely in the event of a significant reform of their own company law<sup>22</sup>. Given difficulties of this nature, should it be inferred that we are faced here with a task that will be difficult to accomplish within a reasonable timelimit?

<sup>22</sup> Memorandum by the Society's Standing Committee on Company Law (The Law Society), December 1985, p. 2

- (b) It is also appropriate to ask whether, more generally, the system introduced by Articles 13, 14 and 15 of Directive 78/855/EEC (to which reference is made in Article 9) - 'an adequate system of protection of the interests of creditors' and 'adequate safeguards' where certain circumstances so require - is sufficient for operations as complex as cross-border mergers involving two or more sets of national legislation.

The question is particularly appropriate - outside the system of common law as well - with regard to the situation in which the creditors of an acquired company may find themselves where the latter company's assets are transferred to an acquiring company governed by the law of another Member State. The proposal for a directive, in addition to the abovementioned provisions, endeavours to provide additional safeguards in the area of information. For example, Article 6(3) stipulates that 'the disclosure shall also specify for the acquired company or companies the details of the exercise of the rights of the creditors of those companies in accordance with Articles 13, 14 and 15 of Directive 78/855/EEC and Article 9 of this Directive'. This undoubtedly represents an additional safeguard for creditors but your rapporteur takes the view that it is necessary to tighten up these provisions.

24. The question of protecting the interests of creditors in a merger operation is indeed one of the factors in determining the effectiveness of the merger as such. Accordingly, if the Commission considers its proposal for a Tenth Directive as an instrument falling within the framework of the aim of the Treaty of Rome 'to create a strong, homogenous internal market'<sup>23</sup>, it has to be said that the simple reference to Articles 13 and 14 of Directive 78/855/EEC scarcely seems satisfactory. While it is true that Directive 78/855/EEC seeks to harmonize the law governing mergers between public limited companies governed by the laws of a single Member State and should in time lead to a closer alignment of the various sets of legislation, the fact remains nevertheless that Article 13 of Directive 78/855/EEC is couched in terms that are not particularly binding on the Member States since paragraph 1 of that article simply refers to 'an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication'. It is consequently highly likely, in the light of this provision, that divergencies between the various sets of legislation will persist and that this will in time prompt a trend to evade certain legislative provisions in the Member States. To remedy this drawback, the Committee on Legal Affairs and Citizens' Rights proposes an amendment to the wording of Article 9(1) of the proposal for a directive committing the Member States - where necessary, through implementation of the provisions in Directive 78/855/EEC - to the progressive approximation of their laws relating to the protection of the interests of creditors (see amendments Nos. 2 and 7).

<sup>23</sup> See COM(84) 727 final, p. 1

25. Article 13(2) of Directive 78/855/EEC refers to the entitlement of creditors 'to obtain (at least) adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards'. As this provision was more or less conceived of as representing the minimum level of protection to which creditors would be entitled, it seems appropriate to the Committee on Legal Affairs and Citizens' Rights to tighten up its contents through the addition of a new paragraph requiring the Member States to incorporate a provision in their respective legislation that any agreement under which creditors surrendered their entitlement to the safeguards mentioned in Article 13(2) of Directive 78/855/EEC would be invalid (see amendment No. 8). A provision of this nature could have been included in Directive 78/855/EEC but this was not the case. The fact remains, nevertheless, that in the context of cross-border mergers its inclusion in the Tenth Directive is much easier to justify, as long as adequate protection of the interests of creditors remains the main objective.

**E. Nullity of merger (Article 15 of the proposal for a directive)**

26. Article 15, which refers to Article 22(1) of Directive 78/855/EEC, does not make provision for the nullity of a merger resulting from a 'decision of the general meeting (which) is void or voidable under national law'. Apart from considerations of legal certainty as far as the new company, its shareholders and creditors are concerned, is it wise to base such a major operation on the decision of a general meeting which risks at any time being declared void (by a judge in the Member State of the acquired company)?

27. According to the Commission, this reason for nullity is by definition governed by the relevant national law which, in the absence of harmonization in this area, makes it extremely difficult to apply to an operation involving companies governed by different sets of legislation; in order to strengthen legal certainty, it did not therefore include a provision of this nature, the intention being to rule out the risk of the nullity or voidability of a cross-border merger on account of an irregularity, whether of substance or procedure, affecting the decision of the general meeting.

28. The argument as to legal certainty appears a laudable one but the fact remains nevertheless that the same problem of legal certainty can also apply the other way round, i.e. in favour of those with reasons for believing in the nullity of the decision of the general meeting. It would indeed be inappropriate to base company mergers on decisions that run the risk of being declared void.

29. At the same time, the version proposed by the Commission may be considered as a rather bold step to the extent that, with it already no longer being possible to advance a void or voidable decision of a general meeting as grounds for nullity of a merger, Article 15(1), second sentence, goes so far as to stipulate that 'where the law governing the acquiring company does not provide for the nullity of the merger where there has been no judicial or administrative preventive supervision of its legality or where it has not been drawn up and certified in due legal form, it may not be declared void'. It does not seem that a provision of this nature would for its part be in conformity either with considerations of legal certainty: indeed, one might even be tempted to say that it might be a potential source of abuse in view of the fact that it would no longer be possible to advance any of the grounds for nullity set out in Article 22(1) (b) of Directive 78/855/EEC.

30. While disposed to adopt an understanding approach towards the views put forward by the Commission, the Committee on Legal Affairs and Citizens' Rights could not however follow its line of reasoning this far. With amendment No. 10, which amends precisely the abovementioned second sentence of Article 15(1), it believes it can help to strike a certain balance between, on the one hand, the maximalist considerations of the Commission and, on the other hand, its own concern at a situation that is more or less likely but nonetheless absurd for all that, where any company resulting from a cross-border merger - contrary moreover to those resulting from a national merger - would be definitively free from any proceedings on the grounds of nullity.

#### F. Problem of different exchange and conversion rates

31. Articles 3 and 4 - which refer respectively to Articles 3 and 4 of Directive 78/855/EEC - deal with questions relating to the transfer of assets and liabilities to the company resulting from the merger and the exchange of shares and their allocation to shareholders. It would therefore be appropriate for the text of the proposal for a directive to include provisions designed to take account of the problems that would not fail to arise owing to the existence and utilization of different exchange and conversion rates from one Member State to another and to the risk that this state of affairs might be exploited for speculative purposes.

32. On this point, it should be noted that it has not so far been possible to harmonize conversion methods. Yet this is more a problem for the accounting sector where it is true that the degree of harmonization is not very far advanced. However, in view of the impact of certain accounting directives on the directives on company law, certain safeguards do exist against the risk of unfair exploitation of differing exchange and conversion rates. For example, in the context of implementation of Article 11(1)(b) of Directive 78/855/EEC, companies are required to give details of conversion methods in the annex to their accounts which must be made available to all shareholders for the preceding three financial years prior to the general meeting taking a decision on a merger. At the same time, Article 8 of the proposal for a directive concerning the drawing up of the report of the expert or experts refers back to Article 10(2) of Directive 78/855/EEC which specifies that the experts must state in this report 'whether in their opinion the share exchange ratio is fair and reasonable' and even state whether the methods used to arrive at the share exchange ratio proposed seem adequate.



## MINORITY OPINION

(pursuant to Rule 119(1) of the Rules of Procedure)

It is also the view of the minority in the Committee on Legal Affairs and Citizens' Rights that the question of employee representation on company bodies is particularly relevant in the context of the proposal for a Tenth Directive in view of the fact that cross-border mergers bring face to face companies governed by different laws which are far from agreeing on this point.

However, in the opinion of this minority there is an urgent need to provide companies governed by the laws of the Member States with a suitable legal instrument for encouraging their cross-border activities and mutual cooperation with a view to the pooling of their resources and the mobilization of sufficient investment funds for a market of the size of the Community. Seen from this angle, the proposal for a directive in question does not seek, as a legal instrument, to create a uniform body of European Law but rather to approximate, on the basis of Article 54(3) (g) of the EEC Treaty, the legislation of the Member States relating to company mergers referred to in Article 58, second paragraph, of the EEC Treaty. The fact that this approximation is encouraging difficulties or cannot be implemented as wished because of the derogation introduced in Article 1(3) of the Commission proposal is clearly undeniable. Yet this difficulty - which is reflected in the need to incorporate a reservation in the directive on cross-border mergers - should not have a decisive effect in deterring introduction of this directive.

In the explanatory statement to the draft report, serious reservations were expressed as to the appropriateness of this derogation which would not, anyway, go far towards resolving the problem of alleged circumvention of legislation in certain countries. This was why the committee supported the amendment tabled by the rapporteur to Article 1(3) of the proposal for a directive (see Amendments Nos. 1 and 3 set out in the Annex). For the committee members setting out their point of view in this opinion, the inclusion of this amendment in the proposal for a Tenth Directive would be enough to ensure that it was implemented pending adoption by the Council of the proposal for a Fifth Directive. Furthermore, this could also provide a fresh impetus to the debate on this subject by facilitating - through the mechanism which it incorporates - the practical approximation between the various systems of representation on company bodies.

The Committee on Legal Affairs and Citizens' Rights hereby submits to the European Parliament the following amendments to the Commission's proposal and draft legislative resolution together with explanatory statement:

Proposal from the Commission for a  
Tenth Council Directive concerning  
cross-border mergers of public limited companies

Text proposed by the Commission  
of the European Communities

Amendments tabled by the Committee  
on Legal Affairs and Citizens' Rights

Preamble and first four recitals unchanged

Fifth recital

'Whereas the scope of this Directive is essentially the same as that of Directive 78/855/EEC; whereas, however, a Member State should also be empowered not to apply this Directive to companies which, under its law, are governed by provisions concerning employee participation in the composition of the organs of those companies; whereas this exception appears necessary at any rate until the Council has decided on the Commission's amended proposal for a Fifth Directive based on Article 54(3) (g) of the Treaty concerning the structure of public limited companies and the powers and obligations of their organs<sup>1</sup>; whereas in other respects the protection of employees in the event of either cross-border or national mergers is guaranteed by Council Directive 77/187/EEC<sup>2</sup>;

Fifth recital

Amendment No. 1

'Whereas the scope of this Directive is essentially the same as that of Directive 78/855/EEC; whereas this Directive in no way affects the laws of the Member States concerning employee participation in the composition of the administrative, management and supervisory bodies of companies merging at international level; whereas until such time as the Council has decided on the Commission's amended proposal for a Fifth Directive based on Article 54(3) (g) of the Treaty concerning the structure of public limited companies and the powers and obligations of their organs<sup>1</sup> and while the law of the Member State by which the company that has been acquired is governed provides for such participation whereas the law of the Member State by which the acquiring company is governed does not provide for such participation or for equivalent participation, the first mentioned Member State shall lay down the conditions governing the cross-border merger which must be met in the interests of the employees of the acquired company in order to compensate for the fact that no provision has been made for their participation or for their equivalent participation in the composition of the administrative, management and supervisory body of the acquiring company; whereas in other respects the protection of employees in the event of either cross-border or national mergers is guaranteed by Council Directive 77/187/EEC<sup>2</sup>;

<sup>1</sup> OJ No. C 240, 9.9.83, p. 2

<sup>2</sup> OJ No. L 61, 5.3.77, p.26

<sup>1</sup> OJ No. C 240, 9.9.83, p. 2

<sup>2</sup> OJ No. L 61, 5.3.77, p. 26

Sixth to Eleventh recitals unchanged

Twelfth recital

'Whereas the creditors of companies involved in a cross-border merger should benefit from the same system of protection as creditors in the case of a national merger;'

Twelfth recital

Amendment No. 2

'Whereas the creditors of companies involved in a cross-border merger should benefit from the same system of protection as creditors in the case of a national merger; the Member States shall make a particular effort to harmonize their respective legislation in order to prevent the continuation or emergence in the long term of tendencies to evade certain of these legislative provisions;'

Thirteenth to Sixteenth recitals unchanged

Article 1

Article 1

Paragraphs 1 and 2 unchanged

Amendment No. 3

'3. Pending subsequent coordination, a Member State need not apply the provisions of this Directive to a cross-border merger where an undertaking, whether or not it was involved, would as a result no longer meet the conditions required for employee representation in that undertaking's organs.'

'3. This Directive shall in no way affect the laws of the Member States concerning employee participation in the composition of the administrative, management and supervisory bodies of companies merging at international level:

- Where the law of the Member State by which the acquiring company is governed provides for employee participation in the composition of the administrative, management and supervisory bodies of that company, such participation shall also apply to the employees of the company that has been acquired;
- Where the law of the Member State by which the company that has been acquired is governed provides for employee participation in the composition of the administrative, management and supervisory bodies of that company and the law of the Member State by which the acquiring company is governed does not provide

for such participation or for equivalent participation in the composition of the corresponding body, the first mentioned Member State shall, pending subsequent coordination, lay down the conditions governing the effectiveness of the cross-border merger which must be met in the interests of the employees of the acquired company in order to compensate for the fact that no provision has been made for their participation or for their equivalent participation in the composition of the corresponding body of the acquiring company.'

Amendment No. 4

4. Protection of the rights of the employees of each of the companies involved in a cross-border merger shall be regulated in accordance with Directive 77/187/EEC.'

4. The provisions of Directive 77/187/EEC<sup>1</sup> shall apply analogously to the protection of the rights of the employees of each of the companies involved in a cross-border merger.'

<sup>1</sup> OJ No. L 61, 5.3.77, p. 26

Article 2

Article 2

Paragraphs 1 and 2 unchanged

Amendment No. 5

'3. A Member State may apply Articles 3(2), 4(2), 8, 11(2), second subparagraph, 22(1) and (2), 23(4) and 25 to 29 of Directive 78/855/EEC only in respect of those companies involved in a cross-border merger which are governed by its law.'

'3. A Member State may apply Articles 3(2), 4(2), 8, 11(2), second subparagraph, 22(1) and (2) - subject, however, to paragraph 2 above - 23(4) and 25 to 29 of Directive 78/855/EEC only in respect of those companies involved in a cross-border merger which are governed by its law.'

Paragraph 4 unchanged

Articles 3 and 4 unchanged

Article 5

Article 5

'1. Article 5 of Directive 78/855/EEC shall apply to the drawing-up of the draft terms of a cross-border merger. No further details than those listed in paragraph 2 of the abovementioned Article may be required.'

'1. Article 5 of Directive 78/855/EEC shall apply to the drawing-up of the draft terms of a cross-border merger. No further details than those listed in paragraph 2 of the abovementioned Article may be required except for

those relating to the description and  
valuation of the assets and  
liabilities which are due to be  
transferred to the acquiring company  
or the new company.'

Article 5(2) and (3) unchanged

Articles 6 to 8 unchanged

Article 9

'1. Articles 13 and 14 of  
Directive 78/855/EEC relating to the  
system of protection of the interests  
of creditors shall apply to  
cross-border mergers.'

Article 9

Amendment No. 7

'1. Articles 13 and 14 of  
Directive 78/855/EEC relating to the  
system of protection of the interests  
of creditors shall apply to  
cross-border mergers. For this  
purpose and when implementing the  
provisions of Directive 78/855/EEC,  
the Member States shall ensure the  
progressive approximation of their  
respective legislation relating to the  
protection of the interests of  
creditors.'

Paragraph 2 unchanged

Amendment No. 8

'2a. The laws of the Member States  
shall deem to be invalid any agreement  
under which creditors surrender in  
whatever manner their entitlement to  
the adequate safeguards referred to in  
Article 13(2) of Directive 78/855/EEC.'

Article 9(3) unchanged

Article 10

'2. Where the law of a Member State  
governing one or more of the companies  
involved in a cross-frontier merger  
does not provide for judicial or  
administrative preventive supervision  
or where such supervision does not  
extend to all the legal acts required  
for the merger, Article 16 of  
Directive 78/855/EEC shall apply to  
the company or companies concerned.

Article 10

Paragraph 1 unchanged

Amendment No. 9

'2. Where the law of a Member State  
governing one or more of the companies  
involved in a cross-frontier merger  
does not provide for judicial or  
administrative preventive supervision  
or where such supervision does not  
extend to all the legal acts required  
for the merger, Article 16 of  
Directive 78/855/EEC shall apply to  
the company or companies concerned.  
(Remainder deleted).'

Where that law provides for a merger contract to be concluded following the decisions of the general meetings held concerning the cross-border merger, that contract shall be concluded by all the companies involved in the operation. Article 5(3) shall apply.'

Article 10(3) and (4) unchanged

Articles 11 to 14 unchanged

Article 15

'1. Article 22(1) of Directive 78/855/EEC shall apply subject to the proviso in paragraph 1(b) of the said Article that a cross-border merger which has taken effect pursuant to Article 11 of this Directive may be declared void only if there has been no judicial or administrative preventive supervision of its legality or if it has not been drawn up and certified in due legal form, where such supervision or certification is laid down by the law of the Member State governing the relevant company. However, where the law governing the acquiring company does not provide for the nullity of the merger where there has been no judicial or administrative preventive supervision of its legality or where it has not been drawn up and certified in due legal form, it may not be declared void.'

Article 15

Amendment No. 10

'1. Article 22(1) of Directive 78/855/EEC shall apply subject to the proviso in paragraph 1(b) of the said Article that a cross-border merger which has taken effect pursuant to Article 11 of this Directive may be declared void only if there has been no judicial or administrative preventive supervision of its legality or if it has not been drawn up and certified in due legal form, where such supervision or certification is laid down by the law of the Member State governing the relevant company. However, a merger may be declared void on the grounds that the decision of the general meeting is void or voidable under national law only where the latter law does not provide for the nullity of the merger where there has been no judicial or administrative preventive supervision of its legality or where it has not been drawn up and certified in due legal form.'

Article 15(2) and (3) unchanged

Articles 16 and 17 unchanged

OPINION

(Rule 101 of the Rules of Procedure)

of the Committee on Economic and Monetary Affairs and Industrial Policy

Draftsman : Mr MIHR

At its meeting of 27 February 1985 the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr MIHR draftsman.

It considered the draft opinion at its meeting of 20/22 May 1985 and adopted the conclusions contained therein by 24 votes to 1 with 2 abstentions.

The following took part in the vote : Mr Seal, chairman; Mr von Bismarck and Mr Beazley, vice-chairmen; Mr Mihr, draftsman; Mr Aigner (deputizing for Mr Franz), Mr Besse, Mr Beumer, Mr Bonaccini, Mrs Braun-Moser (deputizing for Mr Wedekind), Mr Chaboche, Mr Falconer, Mr de Ferranti, Mr Friedrich, Mr Gautier, Mr Gawronski (deputizing for Mr Wolff), Mrs van Hemeldonck, Mr Mavros, Mr Metten, Mr Muhlen (deputizing for Mr Herman), Mr Novelli, Mrs Oppenheim, Mr Patterson, Ms Quin, Mr Rogalla, Mr Starita, Mr Visser (deputizing for Mr Wagner) and Mr von Wogau.

## I. Introduction

1. On 14 January 1985 the Commission submitted to the Council a proposal for a Tenth Directive of the Council based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies. Under Article 54(3)(g) of the EEC Treaty the safeguards which are required by Member States of companies or firms for the protection of the interests of members and others must be coordinated to the necessary extent with a view to making such safeguards equivalent throughout the Community.
2. The rules on the merger of public limited companies governed by the law of a single Member State were harmonized as long ago as 1978 by the Third Council Directive on company law<sup>1</sup>.
3. With a view to the attainment of a genuine economic union, the Community institutions are, particularly following the meeting of the European Council in Fontainebleau on 25 and 26 June 1984, pursuing the priority objective of 'developing a suitable climate for cooperation between European undertakings by establishing a favourable legal ... framework'<sup>2</sup>.

## II. Objective of the proposal for a directive

1. In areas with a great need for capital expenditure the necessary means have to be found by pooling the resources of several undertakings. For this reason, the proposal aims to facilitate cooperation between undertakings operating in the Community and to encourage mergers between public limited companies from different Member States.

## III. Appraisal of the proposal for a directive

1. The proposal for a directive is based on the Directive concerning mergers of public limited liability companies adopted on 9 October 1978. The 32 articles of that directive however apply only to mergers within a Member State and not to mergers between undertakings from different Member States.
2. As the Commission admits, 'the legal mechanics of national and cross-border mergers are identical'<sup>3</sup>.
3. In view of this fact and of the objective of creating an internal market without frontiers laid down in the Treaties, the committee has two objections:

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<sup>1</sup> See OJ No. L 295 of 20.10.1978, p. 36

<sup>2</sup> Conclusions of the Fontainebleau European Council, Bulletin of the European Communities No. 6/1984, p. 9

<sup>3</sup> See the proposal for a Tenth Directive, p. 4



- (a) it considers that the title of the proposal for a directive, 'cross-border mergers of public limited companies', is inappropriate as it assumes that the internal frontiers will continue to exist and not that they will be abolished; this is incompatible with the requirement laid down in Article 3(c) of the EEC Treaty which provides for 'the abolition .... of obstacles to freedom of movement for persons, services and capital'. Under Article 58(1) of the EEC Treaty, companies or firms formed in accordance with the law of a Member State shall be treated in the same way as natural persons. Public limited liability companies thus have a right under the EEC Treaty to have obstacles to their development in the common market abolished.
- (b) Since the same legal mechanics apply to the merger of public limited companies within the Community as to mergers within a Member State, the method chosen for the proposal for a Tenth Directive is unsuitable. The 17 articles of this proposal contain 21 references to the directive of 9 October 1978.
4. The committee has reached the view that it is appropriate to submit a single new legal instrument on the merger of public limited companies, for the following reasons :
- (a) On 14 January 1985 the President of the Commission stated to the European Parliament that:  
the Commission 'must find realistic ways of achieving its objectives, it must introduce an element of simplicity into its proposals'<sup>4</sup>.
- (b) On 26 February 1985 the Commissioner responsible for industrial affairs stated as follows to the committee :  
'We must make a great effort, in framing basic European legislation, to offer legal forms which do not have what amounts to a deterrent effect on cross-border mergers'<sup>5</sup>.
- (c) A proposal for a directive which consists of 17 articles which is to be adopted after 1985 and contains 21 references to a legal instrument issued in 1978 has a discouraging affect on undertakings interested in a merger; in addition, it involves an inordinate amount of time, administration and therefore money spent on obtaining legal advice.
- (d) The new uniform proposal for a directive should benefit from the experience gained by the Member States in the transposition of the 1978 merger directive to be carried out by 22 October 1981.
5. The proposal for a Tenth Directive does not therefore fulfil the criteria laid down by the new Commission formed in 1985. Nor does it satisfy the requirement that it should save costs for public limited companies within the Community which are interested in a merger.

<sup>4</sup>Text of the speech of 14.1.1985, p. 15

<sup>5</sup>See Notice to Members PE 96.530/Annex 3, p. 4

The obscurity of the text will probably lead to excessive expenditure on obtaining legal advice.

#### IV. Conclusions

1. The Committee on Economic and Monetary Affairs and Industrial Policy submits the following proposals to the committee responsible, the Committee on Legal Affairs and Citizens' Rights, pursuant to Rule 101(6) of the Rules of Procedure:

##### (a) As regards the draft of a Tenth Directive

1. Calls upon the Commission to withdraw the proposal which it has submitted to the Council;
2. Requests the Commission to submit a uniform proposal for a directive concerning mergers of public limited companies within the Community which takes advantage of the experience gained from the Council Directive of 9 October 1978 with regard to public limited companies;

##### (b) As regards paragraphs of the motion for a resolution

1. Recalls the statement made by the President of the Commission on 14 January 1985 to the European Parliament that the Commission 'must introduce an element of simplicity into its proposals';
2. Points out that the Community must offer undertakings legal forms which do not have a deterrent effect on cross-border mergers;
3. Stresses that obscure legal texts cost undertakings an unjustifiable amount of time, administration and money;
4. Points out that when the Member States concluded the Treaty establishing the European Economic Community they affirmed 'as the essential objective of their efforts the constant improvement of living and working conditions' (third recital of the preamble to the EEC Treaty);
5. Agrees upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained (see the first paragraph of Article 117 of the EEC Treaty);
6. Emphasizes that, in view of these declared aims of the EEC Treaty, the rights of employees and their representatives to participate in undertakings acquired in the various Member States must not be prejudiced by the harmonization of legislation.

OPINION

(Rule 101 of the Rules of Procedure)

of the Committee on Social Affairs and Employment

Draftsman : Mr H. PETERS

On 23 April 1985, the Committee on Social Affairs and Employment appointed Mr PETERS draftsman of the opinion.

The committee considered the draft opinion at its meetings of 25-26 June 1985 and 18-19 September 1985 and adopted it on 19 November 1985 by 10 votes to 2 with no abstentions.

The following took part in the vote : Mr WELSH, chairman; Mrs SALISCH, vice-chairman; Mr PETERS, rapporteur; Mr BACHY, Mr CHANTERIE, Mr CHRISTIANSEN, Mrs MAIJ-WEGGEN, Mrs NIELSEN (deputizing for Mr Pininfarina), Mr PORDEA (deputizing for Mr Le Chevallier), Mr RAGGIO, Mr TUCKMAN and Mr VGENOPOULOS.

## INTRODUCTORY NOTE

The proposal for a tenth directive on cross-border mergers of public limited companies, which the Commission submitted to the Council on 14 January 1985, cannot be properly appreciated or judged unless seen against the background of company law as it has evolved in the European Community.

In the face of the economic and political challenges of our time, measures to improve the competitiveness of European industry take on a heightened importance and the creation of a uniform European economic and social area thus becomes a matter of greater urgency than ever before. It is in this context that the evolution of European company and business law must be placed.

### 1. The company law background

To meet the obligations imposed by the EEC Treaty, which equates companies and legal persons engaged in economic activity with natural persons in terms of their rights (Article 58) and stipulates (in Article 220, third indent) that Member States must make provisions for 'the possibility of mergers between companies or firms governed by the laws of different countries', the national provisions of company law need to be approximated.

On the one hand, companies must not be placed at a competitive disadvantage within the Community as a result of divergences in national company and business law. In addition, they must be freely allowed to pool their resources, in order to improve their competitive strength in relation to larger corporate units based in third countries (e.g. USA, Japan). At the same time, of course, the economic and social objectives of the Community must be taken into account: maintenance of competition and participation of employees or their representatives.

As far as the approximation of business and company law is concerned, the following measures have to date been completed or are pending:

- (a) agreements within the meaning of Article 200, third indent,
- (b) creation of legal forms for undertakings governed by Community law, under regulations on the basis of Article 235
- (c) approximation by means of directives on the basis of Article 54(3).

Note to (a) Following negotiations among the Member States on an agreement within the meaning of Article 220 to govern international mergers of companies, a draft was submitted in 1972 by the then six Member States to the Council of the Communities. However, these negotiations, in which the three acceding States took part after the first enlargement, were broken off in 1980<sup>1</sup>.

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<sup>1</sup>Supplement to Bull. EC 13-73

Note to (b) Similarly, the proposal for a regulation under Article 235 on the Statute for European companies, which was submitted by the Commission in June 1970 and heavily amended in May 1975, has so far failed to secure agreement in the Council. This is all the more regrettable, since it would afford an opportunity of establishing a single form of organization under European law, in which the structures could be devised without regard to the legal divergences existing within the Community<sup>1</sup>.

On the other hand, the European Council of March 1984 showed great interest in the proposal for a regulation on the European Cooperation Grouping<sup>2</sup>.

Note to (c) The approximation of company law has since been further advanced by a series of directives and proposals for directives: of the drafts that have been submitted to date, the first to fourth directives and the sixth, seventh and eighth directives have been adopted by the Council. The following are particularly interesting for our purposes:

- the (adopted) third directive concerning mergers of public limited liability companies<sup>3</sup>, which in large part forms the basis for the present proposal for a tenth directive and
- the fifth directive, not yet adopted, concerning the structure of public limited companies and the powers and obligations of their organs<sup>4</sup>, since it is in this directive that the central problems of the proposal for a tenth directive are rooted.

## 2. Justification for, legal basis and content of the proposal for a tenth directive

At present, mergers of public limited companies based in different Member States are either legally inadmissible or made so difficult by national legal rules that they hardly ever occur.

Since, however, 'developments have (supposedly) taken place', with the result that 'in high investment areas, ... adequate means could usually only be found through a pooling of resources by several undertakings', the Commission felt obliged to draw up the proposal for a tenth directive, in order to create the legal preconditions for cross-border mergers of public limited companies<sup>5</sup>.

Various reasons prompted the Commission to select a directive on the basis of Article 54(3)(g) as the legal instrument. The most important was probably the fact that this course affords the possibility of making reference to the third directive, which has already been adopted, bearing in mind that 'the legal

<sup>1</sup>Supplement to Bull. EC 4-75

<sup>2</sup>OJ No. C 103, 28.4.1978

<sup>3</sup>OJ No. L 295, 20.10.1978

<sup>4</sup>OJ No. C 240, 9.9.1983

<sup>5</sup>See proposal for a tenth directive, COM(84) 727 final, pp. 2 and 4

<sup>6</sup>ibid., p. 4

mechanics of national and cross-border mergers are identical<sup>5</sup>. The present proposal for a directive accordingly contains twenty-one references to the third directive, and its seventeen articles are moreover confined to areas where the procedures to be followed in the case of cross-border mergers differ from those applicable to national mergers or where additional provisions are required.

Each of the companies involved in a merger may discharge the obligations incumbent on them, namely the advance publication of the terms and instruments and the obligation of disclosure, separately and in the manner laid down by their respective national laws. All that is needed is the synchronization of certain steps in the procedure:

- the preventive supervision or the drawing up and certification of acts in due legal form for each company in an order fixed by the directive,
- the publicity surrounding the completion of a merger.

In addition, there are certain rules which need to be harmonized more closely than was done under the third directive. This applies in particular to those governing:

- the contents of the draft terms of merger,
- the protection of creditors of acquired companies,
- the date on which the merger takes effect,
- the causes of nullity of mergers<sup>1</sup>.

In an attempt to dodge the problems which may, even under its own terms, arise in connection with the participation of employees or their representatives in the organs of undertakings, this proposal includes a conditional clause, Article 1(3). Since employees must not suffer disadvantage as a result of a cross-border merger, a Member State need not apply the proposed directive to companies where the existing employee representation would be abolished following a merger. This clause will admittedly lapse once uniform Community rules have been laid down in the matter of employee representation.

### 3. Problems and assessment of the proposal for a tenth directive

Even if the proposal for a tenth directive was intended purely as a legal instrument for facilitating cross-border mergers, its implications and problems for economic and social policy cannot be overlooked.

#### (a) Legal and economic policy problems

There is scant evidence to substantiate the Commission's claims, namely that new developments have taken place and a framework of rules is urgently needed, and indeed that the competitiveness of European undertakings would be improved if they were allowed to combine in international mergers. Nor are there details of the experience, if any, which has been acquired in national mergers since the adoption of the third directive in 1978 and its incorporation into national law, which was to have been completed by 1981.

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<sup>1</sup>ibid., p. 7

Undertakings have always based their decisions, including those concerning mergers or majority holdings, on the criterion of profitability, and will continue to do so in the future. Leaving aside the questions whether the impossibility of cross-border mergers is at present really as severe a handicap to European industry as the Commission claims, and, if so, how many undertakings would in the final analysis be concerned, there are serious doubts, even on grounds of legal technicality, as to whether the proposal as it stands is calculated to encourage undertakings wishing to combine in cross-border mergers. The reason for this is that the text is so opaque that undertakings interested in such mergers would be forced to pay out a great deal for legal advice.

The insistence on citing references throughout, twenty-one to the third directive alone, plus references to various other directives and the national law of the Member States, not only results in a multiplication of background sources<sup>1</sup>, but makes the text at best comprehensible to experts. Incidentally, it also runs counter to the imperative recently reformulated by the new President of the Commission, Jacques Delors, who asserted that 'the Commission must introduce an element of simplicity into its proposals'<sup>2</sup>. It might be very difficult for the legal advisers of undertakings which were interested in cross-border mergers to gauge from this text what conditions would need to be satisfied and what would be the consequences. One of the main reasons for this is that the texts of national legislation and implementing rules are generally available only in the language of the Member State concerned. As a result, companies from different Member States could encounter fairly considerable difficulties in determining whether a cross-border merger would be a sensible course for them<sup>3</sup>.

The question remains, then, whether there are not other forms of cooperation which would be more effective than cross-border mergers for undertakings from different Member States.

(b) Social policy problems

However, the most tricky problem of the proposal under consideration lies undoubtedly in Article 1(3), especially since it poses general questions for the evolution of company law.

Six Member States (Federal Republic of Germany, Denmark, France, Ireland, Luxembourg and the Netherlands) already have rules of varying nature and scope on industrial democracy in public limited companies; it is only in Belgium, Greece, the United Kingdom and Italy that rules on this subject do not yet exist.

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<sup>1</sup>For instance: Article 2(3) or Article 6(1) of the tenth directive with their references to articles of the third directive, which themselves quote references to other texts

<sup>2</sup>Statement of 14 January 1985 to the European Parliament by the President of the Commission, Jacques Delors, Supplement to Bull. EC 1-85, p. 15

<sup>3</sup>One instance of this being the protection of creditors (Article 9)

The Commission's plan to sidestep this problem temporarily with the proviso of Article 1(3), so as not to endanger the established rights of employees or their representatives, is unquestionably well-intentioned. However, the poorly chosen wording of the paragraph runs counter to its intention, given that it not only leaves the field free for all manner of interpretation and speculation, but also throws open once again the necessary discussion on the state of employees' rights in the Community.

Since the company law to be applied in a cross-border merger is that of the Member State where the acquiring company has its headquarters, certain rights of participation could lapse, if that Member State does not recognize them and the country of origin of the acquired company, for whatever reason has not invoked the proviso, which is after all not compulsory. This optional provision, then, places employees in an unacceptable position of uncertainty as to what the law actually is.

On the other hand, if the proviso was invoked, it could mean that, say, German public limited companies bound by the German rules on co-determination ('Mitbestimmung') could not be acquired in cross-border mergers where the applicable law made no or less extensive provision for employee participation. They would thus be unable to avail themselves of possibilities open to undertakings from other Member States.

Although this is not mentioned in the Commission's proposal, a conceivable solution might be to make a cross-border merger conditional upon the agreement of supervisory boards where the rights of participation were vested. However, according to a judgment of the German Federal Constitutional Court, this would not be permissible<sup>1</sup>.

To sum up: until the fifth directive is adopted, undertakings from the six Member States which have rules on industrial democracy will suffer discrimination, because, although they could acquire other companies, they could not themselves be acquired by other companies. On the other hand, failure to invoke the proviso could erode rights of employee participation in these six countries.

As far as general principles are concerned, it has to be said that the proposed tenth directive offers yet another example of how unevenly the development of company law is proceeding in the Community. The approximation of laws by means of directives to facilitate the concentration of capital and cooperation among undertakings within the Community is proceeding with immeasurably greater dispatch than in the matter of employees' rights. All the directives aimed at harmonizing the rights of employees have been pending before the Council for years. This applies particularly to the fifth directive in the field of company law, which has still not been adopted, but also to the 'Vredeling directive' on the briefing and consultation of the workforce in undertakings with a complex, and more especially transnational, structure. The question of what benefits employees actually derive from the Community thus arises once more in this connection, although here too it has to be borne in mind that it is a minority of the Member States which is blocking harmonization. It has so far not been demonstrated that public limited companies which allow their employees to participate as full partners on supervisory boards and afford them extensive rights to information and consultation are internationally less competitive; if anything, the reverse seems to be the case.

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<sup>1</sup> BVerfGE 50, p. 290 = DB 1979, 593



It should finally be pointed out that if the objective of an internal market without frontiers, as defined in the Treaties, is taken to mean what it says, then this proposal for a directive represents a logical inconsistency, since it presupposes the continued existence of frontiers, and of divergencies in the law. The question thus remains whether it would not be more sensible to continue work on the existing Statute for European companies, as this would afford the possibility of a single legal form throughout the Community.

#### 4. Conclusions

The Committee on Social Affairs and Employment proposes the following suggestions, pursuant to Rule 101(6) of the Rules of Procedure, to the Committee on Legal Affairs and Citizens' Rights as the committee responsible:

As regards the Commission's proposal for a tenth directive:

1. Calls on the Committee on Legal Affairs and Citizens' Rights to amend the Commission's proposals for Article 1(3) to read as follows :
  - (a) This directive shall have no effect on the laws of the Member States concerning the participation of employees in the appointment of administrative management and supervisory boards of companies involved in cross-border mergers.
  - (b) Where the law of the Member State governing the company operating the takeover provides for the participation of employees in appointing the administrative management or supervisory boards of this company, this provision shall apply also to the employees of the company subject to the takeover.
  - (c) Where the law of the Member State governing the company subject to the takeover provides for the participation of employees in appointing the administrative management or supervisory board of this company, and the law of the Member State governing the company operating the takeover makes no provision for such - or equivalent - participation in appointing the relevant board, the former Member State shall - until such time as the legislation can be coordinated - lay down the conditions of application of the cross-border merger, which in the interests of the employees of the company subject to the takeover must be met in order to compensate for the lack of provision for any - or any equivalent - participation of these employees in appointing the relevant organ of the company operating the takeover.'
2. Urges the Commission before submitting the tenth directive to the Council to exert pressure, as a matter of priority, on the Council, so that the fifth directive and the Vredeling directive may be adopted in the versions which it has itself proposed;
3. Calls on the Committee on Legal Affairs and Citizens' Rights, within the framework of the Rules of Procedure, to find a suitable means of delaying the European Parliament's final vote on the tenth directive so as to exert pressure on the Council to adopt the fifth directive and the Vredeling directive as a matter of priority.

Furthermore, it could also provide a fresh point of view in the discussions on the latter proposal by facilitating, through the mechanism which it incorporates, an actual approximation between the various systems of representation on company bodies.