Cross-border mergers of limited liability companies

2003/0277(COD) - 18/11/2003 - Legislative proposal

PURPOSE : to lay down provisions to facilitate cross-border mergers between various types of company with share capital governed by the laws of different Member States. PROPOSED ACT : Directive of the European Parliament and of the Council. CONTENT : at present, mergers between commercial companies in different Member States 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 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. The main points of the proposal are as follows: - the scope of the Directive includes all companies with share capital and covers 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; - 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 rights other than those related to participation in the company, vis-à-vis each of the merging companies; - employee participation - 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. The proposal provides that 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 by Council Directive 2001/23/EC, Directive 2002/14/EC and Directives 94/45/EC and 97/74/EC. 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 rightsto old-age, invalidity or survivor's benefits under statutory social security schemes. There are special provisions where the protection of acquired rights of participation is put at risk by the merger. This 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. 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; - the proposal lists the points that have to be included in the draft terms of cross-border merger; - it deals with publication of the draft terms of cross-border merger and the information that must be furnished; - the proposal also lays down provisions on the date on which the cross-border merger takes effect and the disclosure that must be effected upon completion of a cross-border merger. 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.?