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CCBE response to the Commission proposal on cross-border mergers of companies

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The Company Law Committee of the CCBE has discussed the above proposal for a Directive. The CCBE represents over 700,000 lawyers through their national bars and law societies. Its comments are set out below.

The CCBE welcomes the proposal to facilitate cross-border mergers of companies in different Member States in a cost effective way, whilst also providing appropriate safeguards for existing shareholders and creditors. We welcome the proposal for the Directive to cover small and medium-sized enterprises, as well as large enterprises. We also welcome the basic principle that the procedure should be governed in each Member State by the principles and rules applicable to domestic mergers of companies in that Member State.

The CCBE has the following comments on the draft Articles:

Article 1: The definition of "merger" includes a requirement in paragraphs a) and b) that, if a cash payment is to be made, it must not exceed 10% of the nominal value or the accounting par value of securities or shares to be issued to the shareholders of that transferring company. This assumes that the company to which assets and liabilities are transferred will have shares and that those shares will have a nominal or accounting par value. This may not be so (see our comments on "company with share capital" below). If the intention is to ensure that the Directive only applies where a small amount of cash is paid, we suggest the 10% limit could instead be set by reference to the value of the assets and liabilities to be transferred. As the issuing company can set the nominal value of its shares at whatever amount it wishes, we believe setting the limit by reference to the value of the net assets acquired would be preferable. Whilst we recognise that this 10% limit follows the provisions of the Third Directive and the relevant tax Directive, we would be in favour of allowing this Directive to apply where a larger percentage of the consideration is paid in cash. We believe this would help to facilitate more cross border mergers.

The definition of "cross-border merger" limits the scope of the Directive to "companies with share capital." The definition of "company with share capital" does not appear to require the company to have a share capital and the defined term therefore appears to be misleading. In view of the intention to make the Directive apply as widely as possible we think the defined term this should be changed. We also think that it would be preferable to make it clearer what bodies are intended to fall within the scope of the Directive. Is the intention, for example, to permit co-operative organisations, limited partnerships and foundations to take advantage of the Directive? In particular, it should be clear that companies with no share capital (for example, in the UK companies limited by guarantee) and companies with shares with no par value can take advantage of the Directive. We suggest that the definition be changed so that, as well as setting out a general definition, it refers to a list of the different types of entities which are included within the general definition and so may take advantage of the Directive. This list could be set out in an Annex to the Directive. Each Member State would then propose the entities to be included for that Member State.

We understand that it would be attractive to find an easy way in which to merge UCITS funds in different Member States and that there may be interest in establishing whether this Directive could be extended to cover such situations.

Article 2: We think the drafting of the sentence is unclear. It is not clear whether the words "and the holders of securities other than shares to which special rights are attached" is intended to exclude all shares or is intended to exclude only shares to which special rights are attached. We think national law provisions should apply to protect holders of securities (both shares and other securities) whether or not special rights are attached to them.

Article 3: Although we recognise that the wording of this Article follows the wording of Article 5(2)(g) of the Third Directive, we think the reference in paragraph 1(g) to "special advantages" is rather broad and should be clarified to avoid inconsistencies of interpretation.

Article 4: Although the wording of this Article follows the approach adopted for the Third Directive, we suggest that it should be made clear that the information to be published should include details of how to obtain a copy of the expert's report referred to in Article 5 (unless Article 5 is changed to make it clear that the report must be sent to members).

Article 5: We note that paragraph 2 requires the experts to be independent but that this is not a requirement under paragraph 1. Article 10(1) of the Third Directive requires the expert to be independent. We think there should be a similar requirement here in paragraph 1. Article 5 does not make it clear what the report should cover. Article 10(2) of the Third Directive sets out a minimum list of areas a report should cover. We suggest there should be a similar approach here.

Article 6: Paragraph 1 provides that the general meeting of each of the merging companies "shall" approve the common draft terms of cross-border merger. This should be redrafted to say that a general meeting of the merging companies shall be held to consider whether to approve those draft terms.

Article 11: We think paragraph 1(b) should refer to "the shareholders of each of the companies whose assets and liabilities are being transferred" and paragraph 1(c) should refer to "each of the companies whose assets and liabilities are being acquired" rather than to "the company being acquired" as there may be more than one company and it is the company's assets and liabilities which are acquired, rather than the company itself. We also think it should be made clear that if a person would have had a claim against a merging company, that claim or potential claim may be brought against the merged company on the same basis. We are not convinced that the reference to the transfer of the merging company's liabilities is sufficient to deal with this. There may not be a liability of the company at the time of the merger if events giving rise to a potential claim have occurred, but no claim has yet been made.

We suggest it would be better if Article 11 para 3 were to use the language found in Article 19 para 3 of the Third Directive so that not only the merged company can carry out the formality but also the company whose assets and liabilities are acquired and that such company can satisfy the requirements even after the merger has taken effect.

Article 12: We recognise the importance of ensuring certainty for third parties affected by a merger. However, we have concerns in limited cases, for example if it becomes apparent, after the merger, that the accounts were incorrect and the basis for the merger was therefore defective. We suggest that wording similar to Article 22 of the Third Directive be adopted to allow the merger to be set aside in limited cases.

Article 13: We assume that, in paragraph 2, the 90% is to be calculated by reference to the total number of votes – but this should be made clearer. We also assume that the requirements of the national law are only relevant to those companies subject to that law.

Article 14: We recognise the attraction of adopting the approach agreed for European Companies in the context of cross border mergers. However, we think the Directive should set out the relevant provisions in full, rather than cross referring to the provisions of other Directives. Apart from the fact that setting out the provisions in full will make the Directive much easier to understand and use, it will avoid any confusion or differences of view as to how the provisions are intended to apply. If, contrary to our view, the current approach is maintained, we think there are various clarifications which should be made.

The drafting of Article 14 needs to be clarified so as to make it clear that references to an SE in Directive 2001/86/EC are to be read as references to the company created by the merger. Also, we understand that this Directive only deals with employee participation in the administrative or supervisory body. The European Company Directive also deals with other areas. The cross references do not always make it clear exactly what is required. For example, the only matter upon which the Special Negotiating Body has to reach agreement is arrangements for employee participation (Article 4(2)(g)). However, article 7(1) provides that national governments have to lay down standard rules on employee involvement and sets out when those standard rules will apply. From the context of the cross border merger Directive, it appears that the relevant standard rules are those relating to employee participation, not employee information and consultation more generally. However, this is not clear from the way in which the provisions of the Employee Involvement Directive are incorporated into the cross border merger Directive.