Position

on the compromise reached by the 25 November 2004 Competitiveness Council on the proposal for a European mergers directive

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The leading German business organisations unreservedly welcome the objective of finally providing companies with a legislative instrument for cross-border mergers, after decades of delay. This will avoid complicated legal constructions and unnecessary transaction costs.

Regarding the controversial worker participation provisions, the solution contained in the political agreement reached by the Council on 25 November 2004 points in the right direction but does not yet exhibit the necessary consistency when it comes to the objective of completing a single internal market. In particular, the compromise is insufficient to prevent German companies from being disadvantaged. In addition, bearing in mind the uniquely high level of worker participation in German companies, the German level of worker participation can be avoided only in the case of a German company being the junior partner. Given the many reservations felt about German co-determination, German companies would be at a considerable disadvantage as merger partners.

A prominent element of the Council compromise is rightly the negotiated solution. Negotiations have to be held if one of the companies involved employs at least 500 workers and already has some form of worker participation, or the level of participation rights in the home country of the merger is lower than in one of the companies involved. If negotiations break down, the default solution comes into play if at least one third of the workers in all the companies involved are covered by a worker participation system. Nevertheless, Member States can provide that the proportion of worker representatives in company with a one-tier board structure is limited to one third.

In order to prevent discrimination against companies with worker participation and create a level playing-field, it would be desirable for the worker participation compromise to be improved as follows:

1. Increase threshold value to 50%

The percentage share of workers who have to be covered by some form of worker participation before the default solution comes into play if the negotiations break down should be increased from one third to 50%.

Under the provisions of the European Company Statute (Societas Europaea – SE), the default solution if the negotiations break down comes into play if at least 25% of all workers are covered by some form of worker participation. The Council compromise raises this threshold value to one third. But, even with this higher threshold value, it is possible under certain circumstances for a minority to impose the most extensive worker participation model on the majority. In order to create the same starting position in negotiations for all workers involved, the threshold value should therefore be increased to 50%.

2. Simple majority in all agreements

In addition, the decision not to open negotiations or to break off negotiations that have already started and apply the worker participation provisions that apply in the Member State where the company resulting from the merger has its seat must be possible on a simple majority of the members of the special negotiating body. At the same time, these members must also represent at least 50% of all workers in the merging companies.

Such a simple majority is in line with recognised democratic principles and does justice to the interests of the majority of workers. This route prevents a minority from being able to impose its worker participation model on the majority of workers.

3. One-third quota as the general statutory default solution

A one-third quota should be adopted at the statutory default solution Europe-wide for companies with both a single-tier and a two-tier board structure.

A one-third quota is the participation norm that enjoys some acceptance in a number of Member States. Hence, limitation to a one-third quota should apply not only for the board of directors of a company with a one-tier board structure but also for the supervisory board of a company with a two-tier board structure. This is the only way to rule out discrimination against companies with more extensive participation than the one-third quota. In addition, this solution would be closest to the proposal put forward in the so-called Davignon report, produced by a group of experts in relation to the SE. Article 14 paragraphs 1 to 5 of the draft directive should be amended accordingly. Here, too, one-third participation as the default solution offers simpler and more predictable solutions. This avoids complicated default solutions which differ between the individual Member States.

4. No perpetuation of worker participation models

Article 14 paragraph 6, which provides for perpetuation of the participation model applicable in the merged company for at least three years, should be deleted or at least limited to the case where there would otherwise be no worker participation system in place.

Long-term perpetuation of worker participation is in contradiction with the principle set out, inter alia, in article 14 paragraph 1 whereby the company resulting from the merger should be subject to the national legislation of the country where the company has its seat. Following a merger, the merged company is a national company in the country where it has its seat and the cross-border operation has been completed. The planned protection of the status quo would discriminate against the newly created company in countries without worker participation, since restructuring measures would be rendered more difficult or impossible. To this would be added the danger of a downgraded rating on capital markets because the company thus discriminated against would be unwelcome as a partner for a take-over or a merger.

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