

# **Exercising voice across borders: workers' rights under the EU Cross-border Mergers Directive**

**ETUI series – Workers' rights in company law**

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Edited by

**Jan Cremers and Sigurt Vitols**

**etui.**



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## Foreword

This book is the second in a new European Trade Union Institute (ETUI) series about workers' rights in company law. Using the same approach as that pursued in the 2016 book about the Takeover Bids Directive, this book takes a closer look at the workers' involvement rights laid down in EU law applying to cross-border mergers. With the Commission's proposed Company Law Package under intense debate as this book goes to print, the aim of this work is to not only better equip trade unions and employee representatives to make use of their participation rights in practice, but also to bring some of the lessons learned to bear upon current debates in EU policy-making.

The research was initiated under the umbrella of the European Workers' Participation Competence Centre (EWPPC), which was set up in 2008 at the ETUI to support workers' representatives in European companies. Its activities are funded by the remuneration received by employee representatives on the boards of European Companies (SE), which is then transferred to the European Workers' Participation Fund.

From the outset, the EWPPC has sought to promote workers' participation in company decision-making, especially across different levels in multinational companies. Participation rights are laid down in as many as 35 different pieces of EU legislation, ranging from employment law to health and safety protection legislation to company law. It soon became apparent that employees and their representatives across Europe needed closely targeted support to make use of those rights, and particularly to navigate the cross-border dimension of workers' participation processes, inputs and outcomes.

That some key participation rights are laid down in company law, rather than the more familiar employment law, poses a particular challenge to industrial relations researchers and trade unions. Company law has foci and motivations that are completely different to those of employment law.

The members of GOODCORP, the ETUI's network of corporate governance and company law experts, have taken on the task of venturing into this previously uncharted territory in order to identify and assess the workers' participation rights embedded in company law.

The 2005 EU Cross-border Mergers Directive was designed to create a basic legal framework to facilitate mergers between companies headquartered in different Member States. The Directive sought to provide an alternative to the hurdles posed by

the sometimes contradictory rules and protections available in national company law regimes. As was the case for other company law directives, such as the SE Directive or the ill-fated SUP and SPE Directives, the risk that European company law could be used to circumvent or weaken established workers' participation, especially with respect to board-level workers' participation, was evident. Accordingly, the Cross-border Mergers Directive does include some solutions already found in the 2001 SE Directive; however, many of these provisions are markedly weaker and less coherent than those in the SE Directive.

Examining the resulting legal frameworks for cross-border mergers in nine Member States, and complementing these with seven specific case studies, this book sheds a critical light on the functioning of the Cross-border Mergers Directive. The authors point to important lessons of relevance to the current discussion of the Company Law Package launched by the EU Commission in April 2018. Drawing directly on the precedent set by the Cross-border Mergers Directive, this Package seeks to establish a European framework for company mobility by laying down rules enabling companies to merge, convert, and divide across borders. The expert findings presented here should not only inform what is essentially a revision of the Cross-border Mergers Directive within the Company Law Package; these findings also have direct relevance for any new EU legislation on company mobility. Past mistakes can be avoided.

The EWPC is built on the conviction that workers' participation is a key vehicle for an effective workers' voice and for trade union presence and activism at the company level; this arguably holds even more at the cross-border level, since it is here that involvement rights can be strategically combined. The analysis and policy prescriptions presented here go beyond mainstream economic approaches. With this work, we hope to contribute to the ability of trade unions and workers' representatives to make good use of their participation rights at all levels of the company, in order to strengthen their capacity to secure genuinely European responses to cross-border challenges. With this unique empirical data, we also hope to contribute constructively to the European debate.

I am very grateful to the editors of this volume and to the members of the ETUI's GOODCORP network for their valuable and insightful contribution to better understanding workers' participation rights and practice.

**Aline Hoffmann**

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at the European Trade Union Institute

# Introduction: an analysis of worker rights under the EU Cross-border Mergers Directive

Jan Cremers and Sigurt Vitols

## 1. Introduction

This book presents the results of a study of worker rights under the EU Cross-border Mergers Directive (2005/56/EC) ('the Directive')<sup>1</sup> carried out by the ETUI's GOODCORP network.<sup>2</sup> This is an important issue for workers because, as intended by the European Commission, implementation of the Directive in the Member States has stimulated an increase in the number of mergers across borders. As mergers are often undertaken to cut costs, they frequently involve substantial reorganisation and can therefore be more threatening to employment levels and working conditions than other types of restructuring (such as acquisitions). Furthermore, since at least one of the companies involved disappears (the acquired or 'merging' company or companies), existing systems of worker representation are endangered by mergers. The fact that companies involved are located in different Member States increases the challenge for workers, because the resulting entity (the acquiring or 'merged' company) may be registered in a country with weaker worker rights than the countries in which the dissolved companies were located.

For workers, it is therefore of crucial importance that the legal framework regulating cross-border mergers provide strong worker rights in at least two respects. First, rights to information, consultation and participation during the merger process should be meaningful, particularly in enabling involvement at an early stage, before the final decision on a merger has been made. Second, existing worker rights need to be protected and, if possible, strengthened in the resulting (merged) company. This is particularly important because the merged company is, as a rule, subject to the company law of the country in which it is registered, and worker rights may be weaker in this country than in the home countries of the merging companies.

1. Several articles of Directive 2005/56/EC on cross-border mergers of limited liability companies were amended in the period 2009 to 2014 (for instance, by Directive 2009/109/EC, Directive 2012/17/EU and Directive 2014/59/EU). Since completion of the study and the book chapters, a number of pieces of company legislation, including the Cross-border Mergers Directive, were codified into one body, EU Directive 2017/1132. Directive 2005/56/EC as amended by several Directives was repealed. This book will refer to the original repealed CBM 2005 Directive and the numbering of its sections, except where explicit reference is made to the Codified EU Directive 2017/1132.
2. GOODCORP is a network of academic and trade union experts on European company law and corporate governance, coordinated by the European Trade Union Institute. For more information on the history and goals of the network see the introduction to Vitols and Kluge (2011).

Although the Cross-border Mergers Directive does contain some protections for workers and other stakeholders, the history of the Directive shows that the European Commission's main priority was to promote freedom of establishment and free movement of capital, rather than to promote worker participation and the 'social dimension' of the Single Market. The 'solution' to the worker participation question found for the Directive was to adopt a weakened version of the provisions in the SE Directive (more properly, Council Directive 2001/86/EC on the involvement of employees in the SE [Societas Europaea or 'European Company']) which, as we shall see, is problematic in a number of respects. As the European Trade Union Confederation (ETUC) has pointed out, experience with worker participation under both the SE Directive and the Cross-border Mergers Directive shows the need for binding European standards for worker information, consultation and participation across European company legal forms and in companies restructured through European cross-border mergers (ETUC 2016).

Given both the increasing importance of cross-border mergers and the significance of the Cross-border Mergers Directive for the discussion on worker rights in Europe, the ETUI's GOODCORP network decided to take a closer look at how these worker rights are defined and how they work in practice. This study follows up on and utilises a similar methodology to that of a recent study of worker rights under the EU Takeover Bids Directive (Cremers and Vitols 2016). The publication of this book is timely, as the European Commission in April 2018 published a 'company law package', which proposes a revision of the provisions on cross-border mergers, as well as rules for cross-border divisions and cross-border conversions of companies. The experiences with the Directive reported in this book show that the Commission's new proposal does not go far enough in protecting worker rights, neither in cross-border merger situations nor in cross-border divisions or cross-border conversions. The lessons to date from cross-border mergers thus show that the provisions regarding worker rights in the company law package should be strengthened, in the interests of protecting this key stakeholder in the company. The key weaknesses in the Commission proposal and suggested revisions are analysed in a recent ETUI policy brief (Hoffmann and Vitols 2018).

In the next section of the introduction we provide some data on mergers in general and cross-border mergers specifically in the EU, to underline the importance of cross-border restructuring. Section 3 situates the Cross-border Mergers Directive in the context of the EU company law programme. Sections 4, 5 and 6 provide some details on the Cross-border Mergers Directive, on worker rights in the Directive and by comparison with the SE Directive. The final section summarises the methodology, content and conclusions of the study, including recommendations for the strengthening of worker rights.

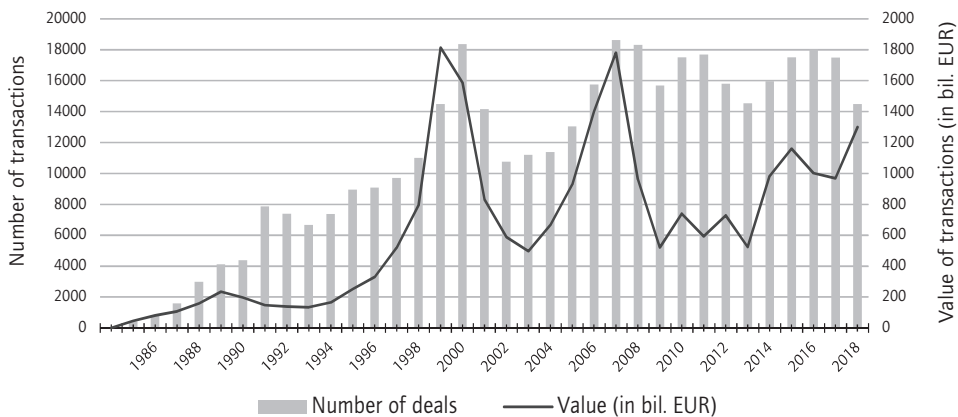
## **2. Mergers and cross-border mergers in the EU**

Over the past few decades an extensive literature has developed about company restructuring in the form of mergers and acquisitions. Although much of this literature is on the United States, nevertheless data and some studies exist for Europe. One general conclusion is that mergers and acquisitions activity is not steady over time, but rather occurs in waves. Peak mergers and acquisitions activity coincides with other indicators

of ‘speculative excess’, such as peaks in the stock market and in lending activity. In particular, the number of very large mergers and acquisitions spikes up in these periods, as credit conditions are very loose and it is easier to restructure companies using cheap credit.

According to data from the Institute for Mergers, Acquisitions and Alliances (IMAA), the total value of mergers and acquisitions in Europe has not regained the peaks it reached in 1999 and 2007 (i.e. the peaks of the global high tech and real estate bubbles, respectively). However, the total number of deals has remained fairly steady at a high level since 2007, fluctuating between about 1,400 and 1,800 deals per year (see Figure 1). Unfortunately, no breakdown is available for mergers versus acquisitions in the data.

Figure 1 Number and value of mergers and acquisitions in Europe, 1985-2018



Note: figures for 2018 are projections.

Source: <https://imaa-institute.org/mergers-and-acquisitions-statistics/>

Due to the lack of easily-accessible summary data specifically on cross-border mergers at the European level and in many Member States, one must be cautious in making statements regarding trends in the level of activity of this type of restructuring. However, it appears that cross-border mergers are becoming increasingly important in the EU. According to the cross-border merger implementation study commissioned by the European Commission, 1,227 cross-border mergers took place within the EU and EEA between 2008 and 2012, with a clearly increasing trend (Bech-Bruun and Lexidale 2013). A study done specifically on cross-border mergers in which a German company was involved in the period 2008–2012 also shows a clearly increasing trend (Bayer 2013).

The interim results of a study on cross-border company mobility commissioned by the ETUI for the period starting in 2013 suggests that the general trend in the number of cross-border mergers in Europe has continued to be upward, although at a slower pace than between 2008–2012 (Biermeyer and Meyer 2018).<sup>3</sup> However, this trend may not be

3. This study is run by Thomas Biermeyer and Marcus Meyer, authors of Chapter 2 in this volume.

uniform within the EU, as Chapter 11 shows no clear tendencies in the annual number of cross-border mergers involving Dutch companies. In any case, the number of cross-border mergers identified as relevant for worker participation in Chapter 2 (75 cases) is quite significant for European workers.

### **3. The EU company law programme**

In the European Commission's view, the diversity of national legislation and company law forms is often seen as a barrier to expansion in the EU's internal market. According to the Commission, having flexible company law rules could help reduce some of the legislative and administrative difficulties European undertakings face. This notion has been a driving force for the elaboration of different corporate forms at EU level, such as the *Societas Europaea* (SE) and *Societas Cooperativa Europaea* (SCE), but also for other company law-related legislative initiatives. According to this philosophy, more uniform company law rules could help companies to expand and save on the costs of setting up and running businesses abroad. Cross-border groups would also benefit from such Community provisions and rules.

Over the years, the EU institutions have taken a number of initiatives in this area. The Cross-border Mergers Directive is one of a long line of pieces of legislation proposed by the European Commission; following the earlier practice of naming directives in the order in which draft legislation has been published, it is frequently referred to as the 'Tenth Company Law Directive'. The first of these company law initiatives was the First Council Directive 68/151/EEC, which required Member States to implement common minimum standards for disclosure, internal governance and winding up of companies. Between 1968 and 1989 a total of nine company law directives and one regulation were approved in Europe, which covered such important issues as minimum capital, accounting, auditing and mergers and divisions at the national level.

Significantly, a number of proposals made during this first phase of activity were blocked, mainly because they touched upon the issues of worker participation and/or the interaction between different national legal systems. For example, the Fifth Draft Company Law Directive, first proposed in 1972, would have required the harmonisation of large company forms based on the German system of two-tier boards and worker representation in the supervisory board. An informal proposal for a cross-border mergers directive was first presented in 1972, but disagreement over the question of how worker participation should be handled delayed the formal publication of a draft directive until 1985, when the Commission adopted a proposal for a Tenth Company Law Directive on Cross-border Mergers. These disagreements led to a long period of stagnation, as not a single new company law directive was passed in the 1990s.

After the year 2000, a number of developments led to renewed activity on the European company law front, as a total of eleven directives were passed in the first

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For more information on the project see <https://www.maastrichtuniversity.nl/research/institutes/item/research/cross-border-corporate-mobility-eu>



decade of the millennium. One such development was a fairly fundamental paradigm shift in the Commission and other institutions' approach towards European company law. Previously, the basic reasoning had been that the harmonisation of a number of minimum requirements would facilitate the freedom of establishment of companies, while at the same time guaranteeing legal certainty in intra-Community operations. The presence of a number of common safeguards was key to the creation of trust in cross-border economic relationships (COM 2003 284 final).

Since the late 1990s, however, the objectives of strengthening shareholders' rights and third parties' protection have gone hand in hand with the aim that company law 'should provide for a flexible framework for competitive business' (High Level Group of Company Law Experts 2002a and b). Improving competition entered as a central objective and the company law-related legislative acts were not supposed to 'introduce restrictions on freedom of establishment or on the free movement of capital' (recital 3 of the Cross-border Mergers Directive). According to the Commission, allowing flexible company law rules across Member States could help reduce some of the obstacles and costs undertakings face and cross-border groups would also benefit from such rules. In this vision, company law became one of the decisive factors in company mobility, comparable with tax incentives, a skilled workforce or good infrastructure. The 2011 ETUI report 'EU and national company law – fixation on attractiveness' demonstrates this shift and argues that EU legislation should not encourage regime-shopping but rather contribute to a more sustainable legal setting (Cremers and Wolters 2011).

In the meantime, this philosophy concerning company law has become mainstream in Europe. For instance, in the 2012 public consultation on the future of European company law, 'improving the business environment and corporate mobility' was chosen by two-thirds of participants as the main objectives of EU company law (EC 2012). The European Court of Justice has also been a key actor given its power to rule on the legality of national and European company law. The trilogy of decisions *Centros* (1999), *Überseering* (2002) and *Inspire Art* (2003) are seen as landmark cases promoting 'freedom of establishment' in Europe.

Subsequent to the completion of the book chapters and during the final production stage of this book a number of important developments have occurred. First, in its *Polbud-Wykonastwo* decision (C-106/16), the European Court of Justice (ECJ) in October 2017 took a major step forward in promoting the freedom of establishment. In this decision, the ECJ ruled that Poland could not forbid a Polish company from a cross-border conversion by switching from a Polish to a Luxembourg legal form, even though the company had no 'real' activity (i.e. no employment or production) in Luxembourg. Legal scholars are debating the implications of this decision. However, the trade union community is concerned that, in the absence of strong EU legislation regulating cross-border conversions, it will be much easier for companies to move their registered seat across borders. This could allow them to convert into a legal form with no worker participation in corporate governance and choose a national regulatory regime that is less strict on taxation and labour standards.

The second major development was the publication by the European Commission in April 2018 of a ‘company law package’, which is the most significant European company law initiative since the European Company Law Action Plan of 2003. This had originally been announced as a ‘company mobility package’ as part of its Work Programme 2017. It consists of two draft Directives. The first, a Proposal for a Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (European Commission 2018a), outlines procedures for three types of company reorganisations involving two or more Member States. The procedure for cross-border conversions, which involves companies exchanging their place of registration and legal form from their original country (‘country of origin’) for a registered seat and legal form from a new Member State (‘destination country’), are new, as there is no European framework in place regulating such activity. The procedures for cross-border mergers, which involve the dissolution (‘swallowing’) of one or more companies by a company in another Member State, revise the framework defined by the 2005 Directive on cross-border mergers. The procedure for cross-border divisions, which involves the splitting up of a company into two or more companies in at least two Member States, is also new. The second part of the EU company law package consists of a Proposal for a Directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (European Commission 2018b). This draft Directive aims to promote the ‘digitalization of company law’ by requiring all Member States to enable the completely online registration of certain types of companies as well as company reporting to national registries.

As will be analysed in detail in the concluding chapter, the lessons learned from this book are quite significant regarding the company law package. The Commission has not proposed strengthening worker rights in the cross-border mergers section of the proposal, and worker rights provisions in the cross-border conversions and cross-border divisions sections are largely copied from the Cross-border Mergers Directive. Thus, in the absence of revision, the weaknesses in the protection of workers and their rights would be spread to a broader set of cross-border reorganisation situations through the company law package.

#### **4. The Cross-border Mergers Directive**

The Cross-border Mergers Directive (Directive 2005/56/EC on cross-border mergers of limited liability companies), also called the Tenth Company Law Directive, was adopted by the Council of Ministers on 26 October 2005.<sup>4</sup> It included the requirement for Member States to transpose the Directive into national legislation by December 2007. The objective of the Directive is to provide a procedure for the merger of two or more companies from different Member States (EU/EEA). Besides the fact that the Cross-border Mergers Directive fits in a long row of company law directives, it can also be seen

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4. The Directive has been amended several times since its adoption, notably by Directive 2009/109/EC (on reporting and documentation requirements in the case of mergers and divisions) and by Directive 2012/17/EU (on the interconnection of central, commercial and companies registers). However, these amendments do not touch upon the themes that are discussed here. See footnote 1.

as part of the 'hard core' of internal-market policy (free choice of contracts, freedom of establishment for firms, deregulation of the 'business environment' and free provision of services). The dominant policy of the Commission (and of most national legislators) was and is to ease the establishment of undertakings and cooperation and restructuring across borders. The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the European Union, enshrined in the Treaty on the Functioning of the European Union (TFEU). Articles 49 and 56 TFEU state that member states are obliged to ensure unhampered right of establishment of EU nationals and legal persons in any Member State.

The main aim of the Cross-border Mergers Directive is to facilitate cross-border restructuring, specifically mergers of limited liability companies from different countries. The Directive applies if at least two of the companies are subject to the laws of different Member States and have their head office or seat within the EU/EEA. Once established after the merger, a single body of national legislation shall be applicable, namely that of the country in which the company's registered office is located. However, each company involved in the merger and each third party concerned remain subject to the applicable national law during the merger process (recital 3).

In general, this also applies for existing national information and consultation rights of workers. The Cross-border Mergers Directive requires the protection of creditors, holders of debentures, securities and shares and the rights of employees of the merging companies. Besides that, the Cross-border Mergers Directive refers (in recital 12) to the national transposition of several EU directives that include information and consultation rights (the directives on collective redundancies, on transfers of undertakings, the Information and Consultation Framework Directive 2002/14/EC [the IC Directive] and the directives on European Works Councils). Thus, the right to act as workers' representatives can partly be found in other parts of EU legislation. The IC Directive provides arguments for enhanced rights at an early stage (Article 4.2. a, b and c) and talks about 'such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation' (Article 4.3). The IC Directive also settles the non-problem of confidentiality for insider information provided for at an early stage in Article 6.1.

The EU European Works Councils Directives (both the 1996 Directive and the recast Directive 2009) also formulate information and consultation rights for employee representatives in case of mergers. Recital 10 of the recast Directive says that

'the functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, an internationalisation of undertakings and groups of undertakings. If economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees who are affected by their decisions.'

Furthermore, Article 12 of the recast EWC Directive prescribes that the Member States shall ensure that the processes of informing and consulting are conducted in the EWC, as well as in national employee representation bodies in cases in which decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged. Finally, the subsidiary requirements refer to information and consultation rights in case of substantial changes. Based on the European Works Council Directives, an EWC has the right to ask for an extraordinary meeting with the management (in the companies concerned) based on ‘exceptional circumstances’.

Cross-border mergers into another Member State are protected by freedom of establishment, but imply by definition a legal and corporate transfer. Therefore, it is appropriate to refer to the information and consultation section in Chapter III of the 2001 Transfer of Undertakings Directive (2001/23/EC). This Directive guarantees that rights shall apply during a legal transfer or a merger. Although the Transfer of Undertakings Directive is only based on the acquisition of shares (the transfer of securities), the outcome for the workforce might be the same. Article 7 of this Directive specifies a list of items that both the transferor and the transferee have to inform their respective employees about. Transferor and transferee must give such information in good time, before a transfer is carried out. Where measures are envisaged in relation to the employees, workers’ representatives have to be consulted in good time ‘with a view to reaching an agreement’ (Article 7.2). The information must be provided and consultations take place in good time before the change in the business (Article 7.3).

## **5. Worker rights in a nutshell**

Besides the reference to existing employees’ rights that can be derived from national provisions the Cross-border Mergers Directive stipulates hardly any additional information and consultation rights for workers. Recital 12 of the Directive formulates how employee information and consultation rights within the scope of acquired rights legislation should continue to apply to the merged company. Information and consultation rights related to topics that might be relevant for workers in merger processes are formulated in a very general way, without defining a specific type of workers’ representation that has to be involved.

One of the items (out of a minimum list of 12 items) in the mandatory common draft terms is the question of the employment impact of the proposed merger on the merging companies. Another item is related to arrangements for workers’ involvement. The common draft terms have to be made available to the public at least one month before the date of the general meetings of shareholders of the merger companies that is to decide on the approval of the common draft terms. It is quite logical that the workers will want to address issues that go beyond these matters, such as future displacements, reallocation, job content and work organisation. However, no other social consequences of the merger on the list have to be explicitly noticed in these terms.

The management or administrative organs of each of the merging companies are required to draw up a report on the cross-border merger, explaining the legal and

economic aspects. Article 7 of the Directive requires that this report by the management or administrative organ explain and justify the merger and its implications for members (shareholders), creditors and employees. These reports must be made available to employees and their representatives at least one month before the date of the shareholders' general meeting that is supposed to decide on the proposed merger. The employees' representatives have the right to give a written 'opinion' on the report, which, if received in good time, must be appended to the management report for consideration at the general meeting.

With regard to the consequences of the merger, Article 14.4 states that the rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of the cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which said merger takes effect. However, the Directive neither gives guidelines on how to deal with such consequences nor any reference to enforcement and sanctioning.

From the beginning it was clear that the worker involvement provisions in the Directive were weaker than those provided by the European Company (SE) legislation (see below). The challenge of protecting existing employee rights to board-level representation made it difficult to reach agreement on a directive. The solution that was found is substantially based on the negotiating model found in the SE Directive. An important consequence of both the Cross-border Mergers and the SE Directives is that employee representatives on the same company board will in future come from different Member States. In our book on the SE legislation we already concluded that this presents both a challenge and an opportunity (Cremers *et al.* 2013).

## **6. Comparison with SE worker involvement**

As was the case for the European Company (SE), the question of how to protect existing employee involvement, notably the right to board-level representation, was quite controversial. The chosen negotiating model can be seen as a method to bridge the different political positions in the debate. In general, the rules on participation of the country in which the company resulting from the merger has its registered seat shall apply (Art. 16 Cross-border Mergers Directive). If one of the merging companies had participation for employees at board level, there are to be negotiations with management on the same basis as for an SE. 'Participation' is defined as the exertion of influence by employee representatives on a company's affairs through the election or appointment of a part of the members of the supervisory board/administrative body or the recommendation/rejection of a portion or all members of these organs (Art. 16 Cross-border Mergers Directive in conjunction with Art. 2k of the SE Directive). It concerns only participation in the management organs of the company, not establishment-level participation.

In order to ensure that existing participation rights in the companies involved in the cross-border merger are not reduced or cancelled, the Directive foresees important exceptions to the principle that the worker participation legislation of the country

in which the merged company has its registered office should apply. Article 16 of the Directive mentions three exceptional cases in which the SE regulations shall substitute for these national laws:

- (i) if at least one of the merging companies had more than 500 employees previous to the merger and was covered by participation rights;
- (ii) if the company law of the Member State in which the company resulting from the merger has its registered office provides for a lower degree of participation rights than is provided for in any of the merging companies; or
- (iii) if the company law of the Member State in which the company resulting from the merger has its registered office does not grant employees in enterprises located in another Member State the same participation rights as employees from the country of incorporation.

Article 5j of the Cross-border Mergers Directive states that one of the common draft terms is ‘where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16’. Employees can demand the same rights at board level as existed previously in one of the merging companies – although, where there is a one-tier board structure with a single board of directors, the proportion of employee members can be restricted to one-third of the total.

Although the solution in the Cross-border Mergers Directive was inspired by the SE legislation, said Directive provides lower standards for worker involvement than is the case in the SE Directive.<sup>5</sup>

Some differences should be highlighted here:

- The SE Directive formulates a legally binding procedure of company-level negotiations for employee representation in the company’s administrative or supervisory board (participation). The statutory status of worker involvement is strengthened through the fact that Article 12 (2) of the SE Regulation prescribes that an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of the accompanying SE Directive (2001/86/EC) has been concluded, or a decision pursuant to Article 3(6) of the SE Directive has been taken (i.e. to not take up negotiations or to terminate negotiations already started), or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded. The Cross-border Mergers Directive waters down this statutory status to a certain extent by allowing management to make the decision to apply the standard rules without opening negotiations. Besides, Article 9.2 of the Cross-border Mergers Directive gives the general meetings of the proposed merging companies the power to reserve the right to make the merger conditional on ratification by the general meetings of the employee participation arrangements in the successor company.

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5. <http://www.worker-participation.eu/Company-Law-and-CG/Company-Law/Cross-Border-Mergers>

- In accordance with the so-called ‘before-and-after principle’ a created SE is obliged to grant participation rights at board level if the employees had such rights before. In the Cross-border Mergers Directive this principle is also applied. However, the threshold for an automatic right for employees to have board-level representation is when at least one-third of employees previously enjoyed these rights, as opposed to 25 per cent in the case of the SE.
- The SE Directive provides for a tailor-made agreement negotiated between the participating companies and a special negotiating body (SNB) made up of employee representatives from the different countries concerned. Additionally, it provides for obligatory standard rules in cases where the negotiating partners fail to reach an agreement. The management or administrative bodies of the participating companies have to take the necessary steps to start – as soon as possible – negotiations with the representatives of the companies’ employees on arrangements for the involvement of employees in the SE. The Cross-border Mergers Directive is less stringent; recital 13 calls for a ‘prompt start to negotiations’ on employee involvement rights, as set out in Article 16, so as not to ‘unnecessarily’ delay a merger. Article 16.4.a opens the door for a circumvention of such negotiations where it says Member States ‘shall confer on the relevant organs of the merging companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation (...), as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration’. Besides, companies which after the merger choose a monistic governance system (possible in member states with the relevant company law) can reduce the number of employee representatives in the administrative organ, if the standard rules are applied.
- The SE Directive contains provisions for a legally binding procedure of company-level negotiations for a transnational employee information and consultation body (the SE Works Council). The Cross-border Mergers Directive, however, contains no provision for the creation of a cross-border information and consultation body.

The negotiating partners have considerable autonomy with regard to the content of an agreement on employee representation in the company’s administrative or supervisory board. There are no minimum requirements with regard to participation arrangements as such.

Nevertheless, a number of minimum requirements concerning the points on which there must be agreement within the framework of the participation agreement can be derived from Article 16.3 of the Cross-border Mergers Directive in conjunction with Article 4 of the SE Directive). These are as follows:

- the scope of the agreement;
- the content of the participation regulation, including the number of members of the administrative or supervisory body that the employees can elect, appoint, recommend or reject, and the rights of the members;
- the date when the agreement will come into force; cases giving rise to new negotiations; and a procedure for new negotiations.

## 7. About this book

This is the fifth book produced by the ETUI's GOODCORP network of academic and trade union experts on European company law and corporate governance. The first three books (Vitols and Kluge 2011; Vitols and Heuschmid 2013; Vitols 2015) elaborated the concept of the Sustainable Company and measures that could promote it as an alternative paradigm to the (still dominant) 'shareholder value' concept of the firm. The network's fourth book (Cremers and Vitols 2016) examined worker rights under the EU Takeover Bids Directive, both in terms of formal legal rights and in practice, through an analysis of country legal frameworks regulating takeovers after implementation of the Directive, and specific cases of takeovers. A complementary book should also be mentioned in this context (Cremers et al. 2013), which many members of GOODCORP were involved in, which examined the roughly ten years of experience with the *Societas Europaea* (SE) following the passage of EU legislation enabling it.

Following the pattern set in the Takeover Bids Directive book, an outline was developed and chapters commissioned for the book during a number of GOODCORP meetings. It was decided that the book should do four things: (i) examine the transversal issues concerning cross-border mergers in the EU; (ii) examine the post-transposition legal framework for cross-border mergers in a number of Member States, with an emphasis on worker rights; (iii) provide a number of case studies of cross-border mergers; and (iv) make recommendations to strengthen worker rights in cross-border merger situations. In contrast with the Takeover Bids book, one challenge was that each specific cross-border merger, by its very nature, involves company law in two or more Member States. As a result it was decided, after presenting the transversal issues involved in Part 1 of the book, to separate the analysis of country legal frameworks (Part 2) from concrete cases of cross-border mergers (Part 3). Specific recommendations for strengthening worker rights in cross-border mergers can be found in Chapter 4 (ETUC demands), as well as in the company law package in the concluding chapter.

To briefly summarise the content of the book, the four chapters in Part 1 of the book examine the transversal economic and worker rights issues in cross-border mergers. Chapter 1 by Blanaid Clarke provides an overview of the Directive, as well as an analysis of the worker rights defined in it. The partial adoption of solutions for worker participation from the SE Directive (possibility for negotiation of participation arrangements and the 'before-and-after' principle), as well as the need for reform are highlighted. The author, however, characterises the Directive as 'dauntingly complex', a fact which makes reform more difficult.

The second chapter, co-authored by Thomas Biermeyer and Marcus Meyer, provides the first comprehensive data available on the number and basic characteristics of cross-border mergers in Europe where worker participation is relevant. A first conclusion that can be drawn is that there is a need for much better reporting and transparency on cross-border mergers in Europe, as it is a major effort just to identify the relevant cases and obtain documentation on cross-border mergers. Frequently, basic information, such as what arrangements on worker participation will be implemented and whether there will be an impact on employment, but even concerning issues such as number of



workers and the relationship of merging companies with each other, are missing. An analysis of cases where there is information available shows that the vast majority of cross-border mergers can be characterised as ‘in-house’, whereby the parent or larger companies within a group ‘swallow’ subsidiaries or smaller companies in a group.

In Chapter 3 Andrew Pendleton analyses the available studies on company restructuring to see what it might say about the impacts of mergers on employment and working conditions. Under the rubric ‘big challenges, little evidence’ he shows that the literature has very little to say about this issue. Firstly, most studies focus on acquisitions (that is, where company owners change but the companies do not disappear) rather than mergers. Secondly, very little of the merger literature addresses cross-border situations, where ‘arbitrage’ between different company, industrial relations or tax regimes may play a role (which would not exist in purely domestic mergers). He outlines a set of challenges that would have to be met to be able to make any solid empirical statements about the impact of cross-border mergers.

Part 1 of the book is wrapped up by Séverine Picard, who outlines a set of demands by the ETUC for a revision of the Cross-border Mergers Directive. She summarises these three overall demands as ‘get real, get involved and be consistent’. The first concerns the need to (re)link company regulation to where its real activity (employment and production) takes place. In company law, this has generally been achieved through the ‘real seat’ principle, where the national regulatory regime that applies is determined by the country in which the company has its headquarters or main operations. The second is related to the need for real worker involvement, both before the merger (particularly at an early stage) and in the post-merger company. The third is related to the need to eliminate the inconsistencies and gaps in worker rights between different EU directives by harmonising upward, as reflected in the ETUC demand for a European framework for worker information, consultation and participation.

The main conclusions that can be drawn from Part 2, which includes – in separate chapters – an analysis of legal frameworks for cross-border mergers in nine countries, can be found in Chapter 5. These chapters highlight the extent to which an ‘uneven playing field’ remains after transposition of the Cross-border Mergers Directive. The ‘unevenness’ refers to the scope of companies covered and to the extent to which protections for different ‘stakeholders’ – not only employees, but also creditors, minority shareholders, ‘holders of other rights’ (such as bondholders), as well as the general public – were implemented at the national level. The chapters also show the major differences that exist between countries with reference to worker rights, as substantive rights for information, consultation and participation in cross-border merger situations are defined primarily by national labour and company law and industrial relations traditions. In addition, Chapter 8 (on Germany) and Chapter 11 (on the Netherlands) provide interesting data on cross-border mergers involving companies from these countries.

Part 3 contains five chapters analysing cases of cross-border merger and other related types of cross-border restructuring. Three of the chapters examine the insurance sector, in which a particularly large number of cross-border mergers has taken place. These

mergers were all driven to a great extent by a change in European insurance industry regulation (specifically the adoption of the Solvency II Directive) which increased the incentives to pool capital in one company and reduce the number of relationships with different national regulatory agencies. In all three cases management claimed that there would be no adverse effects on employment levels or conditions and that the cross-border merger would be beneficial for the company and its workers, a fact that undoubtedly served to reduce the degree of controversy in the restructuring.

In Chapter 16 Helmut Gahleitner looks at a cross-border merger which was part of a complex restructuring project involving converting Austrian, German and Italian companies in the Coface group into branches of a French company (Coface SA). As worker participation already existed in the Austrian and German companies, an SNB was established and negotiations resulted in a board with one-third worker participation; four of the 12 board members were worker representatives, including two from France, one from Austria and one from Germany.

Guy van Gyes and Stan De Spiegelaere, in Chapter 17, look at a cross-border merger as part of a multi-stage restructuring in the Euler Hermes group, which resulted in German and French subsidiaries being converted into branches of a Belgian company, Euler Hermes SA. This cross-border merger is seen as highly significant for a country without a tradition of board-level employee participation, since it is the first Belgian company to have introduced worker participation. Negotiations with an SNB resulted in four worker representatives on the Euler Hermes board, including one representative each from Germany, Italy, France and Belgium.

Chapter 18, authored by Laura Horn, looks at a cross-border merger between Codan and Trygg-Hansa, respectively Danish and Swedish companies within the RSA insurance group. Both had roughly the same number of employees, with the Danish Codan being the surviving (merged) company. Even though the parent in the group was a British company without worker participation, both companies involved in the merger had worker participation and had a positive tradition of social partnership, a factor that helped ease the negotiations.

The other two chapters in Part 3 analyse less harmonious cases of cross-border restructuring. In Chapter 15, Christos Ioannou looks at three cases in which cross-border mergers were used to allow significant companies to effectively 'exit' Greece, the first two cases explicitly using the Cross-border Mergers Directive: the metals group Viohalco moved to Belgium, the dairy company FAGE to Luxembourg and the Coca-Cola Hellenic Bottling Company to Switzerland. In contrast with the insurance company cases analysed above, which were hardly noted in the general press, the Greek cases attracted widespread attention and were opposed by the trade unions.

In the final chapter of Part 3 Holm-Detlev Köhler, Sergio González Begega and Miguel Martínez Lucio look at a case of cross-border restructuring that technically did not use the Cross-border Mergers Directive, but in effect, through a more complex procedure, achieved the same results. At the end of this process two formerly independent companies in the airline industry, British Airways and Iberia, had merged, with the

direction of the company based in the UK headquarters of the former BA within a Spanish company form with a registered office in Spain. As a current discussion in the European Commission is whether the scope of the Cross-border Mergers Directive should be widened to cover more situations (e.g. as cross-border share exchanges, such as were used in this merger), the question should be posed if workers could have had more voice in this restructuring situation through such legislation.

The concluding chapter presents a set of recommendations for strengthening the proposed company law package with regard to worker rights in cross-border reorganisation situations. These address not only the cross-border merger provisions of the package but also the cross-border conversion and cross-border division regulations.

As with all projects of this scope, there are a number of persons and organisations whose contributions we would like to mention. First of all, we would like to thank the GOODCORP network, not only for contributing chapters to this book, but also for improving our understanding of the issues through presentations and discussions. Second, we would like to acknowledge the support provided by the ETUI and the EWPC (European Workers' Participation Competence Centre) in the form of funding and the provision of the administrative support (particularly from Catherine Rihoux) needed to organise the network meetings and run the project. A big thanks to Aline Hoffmann for a careful reading and review of the entire manuscript and numerous suggestions for improvement. Finally, we would like to thank the ETUI Communication and Publications unit especially Géraldine Hofmann, for its help in guiding this book through the publication process, and James Patterson for improving the language and style of the text in this book.

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## **Part 1**

### **Economic and worker rights issues in cross-border mergers**



# Chapter 1

## Worker rights under the Cross-border Mergers Directive 2005/56/EC: an introduction

Blanaid Clarke

### 1. Introduction

This chapter provides an introduction to key aspects of the Cross-border Mergers Directive 2005/56/EC, focusing in particular on worker rights. Directive 2005/56/EC and a number of related Directives were subsequently codified and repealed by EU Directive 2017/1132/EC.<sup>1</sup> The main objective of the Cross-border Mergers Directive (European Parliament 2005) is to facilitate the reduction of obstacles to mergers of companies across national borders that might be due to differences in national laws. A Report produced in 2013 for the EU Commission by Bech-Bruun and Lexidale on the implementation of Cross-border Mergers Directive (Bech-Bruun and Lexidale 2013; hereafter: ('the Report')) concluded that:

'[T]he [Cross-border Mergers Directive] has brought about a new age of cross-border mergers activity. Stakeholders across the continent have consistently reported their satisfaction with the CBMD and its transposition, and consider it to be a vital step in creating a more vibrant and robust market environment within the EU and EEA.' (Bech-Bruun and Lexidale 2013: 2)

A primary concern at the time the Cross-border Mergers Directive was being negotiated was that cross-border mergers would be used as a mechanism to enable companies to avoid the employee participation system applicable in the Member State in which they have their real seat. This was a valid consideration in that, as the Report noted, only 19 Member States have participation systems. Even within these 19, differences exist with regard to their application. For example, some systems apply only to state-owned companies or to companies with a minimum number of employees. Variations also exist in the applicable rules, including: the number of board-level representatives who may be appointed; employees' entitlement in a dualist board system to a seat on the management board or the supervisory board; board members' responsibilities; eligibility for appointment; and the process of appointment (Bech-Bruun and Lexidale 2013: 71–72). By inserting a new company in a jurisdiction without an equivalent participation system, a subsequent merger between the first company and this new company would allow it to choose a new legal system and reduce participation rights.<sup>2</sup> It was thus made

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1. As noted in the Introduction, this chapter was completed as part of a study of worker rights under the EU Cross-border Mergers Directive 2005/56/EC and the law as stated as of December 2016.
  2. For a good summary of the historical origins see Siems (2008).

clear from the outset that mergers should not be facilitated in ways that diminished participation rights. It was agreed that the fundamental principle of the Cross-border Mergers Directive in this respect would be to grant employees of merging companies at least the same standard of participation as they enjoy under their respective national laws. This was referred to as the ‘before and after principle’.

## 2. Background

In December 1984, the Commission published a proposed tenth Directive on cross-border mergers of public limited companies (‘the Proposal’) (European Communities Commission 1985). This was modelled on the Mergers Directive 78/855/EEC (The Council of European Communities 1978) which regulated mergers within Member States. One difficulty with this from an employee protection perspective was that the latter does not involve disputes on conflicts of laws and so the issue of disparities of treatment of employee rights amongst Member States did not arise. The Proposal provided that a Member State did not have to apply the provisions of the Directive to a cross-border merger where ‘an undertaking would as a result no longer meet the conditions required for employee representation in that undertaking’s organs’ (Art. 1(3) of the Proposal). This exemption was expressly stated to be ‘pending subsequent coordination’ and the Recitals explained that the exemption appeared ‘necessary at any rate until the Council has decided on the Commission’s amended proposal for a Fifth Directive’. In the end, neither the Proposal nor the proposal for a Fifth Directive received Parliamentary approval because agreement could not be reached on employee participation in corporate boards. Both were withdrawn in 2001, leading to the High Level Group of Company Law Experts recommending the following year that the Commission urgently bring forward revised proposals (2002:111).

The Cross-border Mergers Directive arose from a further proposal for a Directive on Cross-Border Mergers published in 2003 (European Parliament 2003). The introduction of Regulation (EC) No. 2157/2001 established a Statute for a European Company (SE), creating a uniform legal framework within which companies from different Member States could plan and reorganise their businesses on a Community scale. It enabled cross-border mergers through the formation of an SE. In terms of employee participation, the Cross-border Mergers Directive relies on Directive 2001/86/EC supplementing Regulation (EC) No. 2157/2001 with regard to employee involvement. It was considered that referral to Directive 2001/86/EC would facilitate the adoption of the Cross-border Mergers Directive as it would avoid the need to reopen the contentious debates within Community institutions in circumstances in which ‘a broad consensus has been reached among all the interested parties’ (European Economic and Social Committee 2004: para. 3.3.2). Directive 2001/86/EC provides that if two companies merge to form an SE, and the law of only one of the companies provides for employee participation, participation rights should be preserved through the application of a set of standard rules unless the parties decide otherwise. This incentivises companies and their employee representatives to negotiate mutually agreed arrangements.



A number of points need to be made at the outset about the use of Directive 2001/86/EC in this way. First, the context in which Regulation (EC) No. 2157/2001 and Directive 2001/86/EC apply is different. Because of the Community nature of the SE, it is not subject to any existing national rules on mandatory employee participation in the Member State in which it locates its registered office. By contrast, merging companies to which the Cross-border Mergers Directive applies will be governed by the national law of Member States (Laagland and Zaal 2011: 291). Secondly, the Cross-border Mergers Directive, unlike Directive 2001/86/EC, does not deal with the operation of the representative body and the procedure for employee information and consultation.<sup>3</sup> These issues thus will continue to be governed by national law. For example, the European Works Council Directive (European Parliament 2009) does not apply to the SE but does apply to cross-border mergers. The Report notes that different rules may thus apply in respect of works councils and employee participation issues and a lack of coordination may give rise to ‘parallel procedures in order to make sure that everything is in compliance with the rules’ (Bech-Bruun and Lexidale 2013: 74). Thirdly, the use of cross referencing in Article 16 is cumbersome, making it more difficult to identify the rules that apply to cross-border mergers. While the reference to Directive 2001/86/EC is understandable from a tactical perspective, it does add to the complexity of the instrument, making it difficult to assimilate.

### 3. Cross-border mergers

The Cross-border Mergers Directive applies not just to mergers of PLCs but to mergers of all limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community (Art. 1). To constitute a ‘cross-border merger’, at least two of the merging companies must be governed by the laws of different Member States. Vermeylen has opined that the Cross-border Mergers Directive should also apply where all the existing merging companies are governed by the same *lex societatis* but their assets and liabilities are transferred to a newly incorporated company governed by another *lex societatis* (Vermeylen 2005).

Three distinct types of merger are envisaged:

- (i) a merger whereby one existing company absorbs the other participating companies, which are dissolved;
- (ii) a merger whereby all the participating companies are dissolved and a new company is formed; and
- (iii) a merger of a subsidiary into its parent (Art. 2).

In the first two mergers, the companies being dissolved are dissolved without going into liquidation, and on the date of dissolution their assets and liabilities are transferred to the successor company in return for the issuance to their shareholders of securities or shares representing the capital of the successor company plus a cash payment. This cash

3. Article 9 of 2001/86/EC. See Francois and Hick (2010: 11).

payment must not exceed 10 per cent of the nominal value, or in the absence thereof, the accounting par value of these securities or shares.<sup>4</sup> In the case of the merger of a subsidiary, the latter too is dissolved without going into liquidation and all its assets and liabilities are transferred to its parent.

A distinction may be made at the outset between a merger under the Cross-border Mergers Directive and a ‘takeover’ under the Takeover Bids Directive 2004/25/EC. The latter is defined as ‘a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law’ (Art. 2(1)(a)). In addition, Directive 2004/25/EC applies only to companies whose securities are admitted to trading in a regulated market in a Member State.

The cross-border merger takes effect on the date determined in accordance with the law of the Member State to whose jurisdiction the successor company is subject (Art. 12). On this date, all the merging companies’ assets and liabilities will be transferred, the members of those companies will become members of the successor company, and the other merging companies will cease to exist (Art. 14.1 and 2). If national law requires the completion of certain formalities before the transfer of any of the assets, then rights and obligations by the merging companies become effective against third parties, and the successor company must carry them out (Art. 14(3)). Any rights and obligations of merging companies arising from contracts of employment or from employment relationships existing at the date on which the merger takes effect will be transferred to the successor company on the date the merger takes effect (Art. 14(4)).

Article 4(1)(b) is a core provision of the Cross-border Mergers Directive, providing that unless it provides otherwise, merging companies must comply with the provisions and formalities of the national law ‘to which they are subject’. As has been observed, the use of this phrase obviated the need to make a definitive statement on whether a company is governed by the law where it has its registered office or principal place of business or which rules should apply when, according to the conflict-of-law rules applying in the Member States concerned, a successor company is subject to more than one *lex societatis* (Van Gerven 2010: 12). These national provisions are expressly stated to include, inter alia, those related to the decision-making process concerning the merger, shareholder protection and the protection of employees as regards rights not governed by Article 16.

## 4. Procedure

The management or administrative organ (referred to in this chapter as ‘the board’) of each of the merging companies is required to draw up and publish (Art. 6), within one month of the general meeting referred to below, a single common draft terms of the merger. This should include at least the terms set out in Article 5. These must

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4. See Article 3(1) for an exception to this 10 per cent rule.

include ‘the likely repercussions of the cross-border merger on employment’ (Art. 5(d)) and ‘where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 6’.

One complaint identified in the Report is the lack of a requirement to carry out a social impact assessment (Bech-Bruun and Lexidale 2013: 74). It is argued that such an assessment would provide the parties involved with better information, allowing them to make better decisions. Agreeing common terms may not always be straightforward, given that the rules for agreeing these common draft terms and their contents may differ in each of the Member States governing each of the merging companies.

In addition, the board of each of the merging companies must draw up a management report for their shareholders, explaining and justifying the merger’s legal and economic aspects and explaining ‘the implications of the merger’ for employees, as well as shareholders and creditors.<sup>5</sup> This report has to be made available not only to shareholders but also to the employee representatives or, if there are none, the employees themselves. The timeline for this is not less than one month before the date of the general meeting called to approve the common draft terms. The report must also have attached to it a separate opinion from the employee representatives if it is made available ‘in good time’, as provided for by national law.

These provisions might usefully be compared with the more detailed information requirements mandated in the Takeover Bids Directive for inclusion in the offer document and offeree response circular. It requires that the board of the offeror express a view on:

‘the offeror’s intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror’s strategic plans for the two companies and the likely repercussions on employment and the locations of the companies’ places of business.’ (Art. 6(3)(i) Directive 2004/25/EC)

Article 9 of the Cross-border Mergers Directive provides for the second stage in the process, the approval of the common draft terms by the general meetings of each of the merging companies. In this regard, it provides that the meetings may reserve the right to make implementation of the merger conditional on express ratification by it of the arrangements decided on with respect to employee participation in the new company (Art. 9(2)).

Article 10 requires Member States to designate the court, notary or authority competent to scrutinise the legality of the merger as regards that part of the procedure that concerns

5. Article 7. In addition to the common draft merger terms, provision is made under the Cross-border Mergers Directive for the preparation of an independent expert report, and in certain circumstances, an interim accounting statement.

each merging company subject to its national law. The aforementioned authority in each Member State concerned issues a certificate attesting to the proper completion of the pre-merger acts and formalities. Under Article 11, the legality of completion of the merger will also be scrutinised by the court, notary or authority designated by the Member State whose law governs the company resulting from the merger. This scrutiny also includes the formation of any new company formed. The authority must ensure in particular that the merging companies have approved the common draft terms in the same terms and also, where appropriate, that arrangements for employee participation have been determined in accordance with Article 16. However, the Report identified that there is uncertainty concerning the standard of review involved. It suggests that it includes only a check as to whether an agreement has been concluded or a decision not to negotiate has been taken rather than a review concerning the conclusion of the agreement or its content. A legal adviser is cited as saying that, because non-compliance did not necessarily affect the merger's validity, deadlines might be ignored. The Commission's Consultation posed the question whether Member States should check documents from other Member States when they are checking compliance with their national legal requirements. This would require a particular level of resources and skills, however.

## 5. Employee participation

Article 16 deals with employee participation. The term 'participation' is defined by reference to Article 2(k) of Directive 2001/86/EC as:

'the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:

- the right to elect or appoint some of the members of the company's supervisory or administrative organ, or
- the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.'

The Report confirms the view of some stakeholders that the employee participation system in the Cross-border Mergers Directive is 'overly complex' and that this complexity has resulted in unnecessary costs, delays and problems (Bech-Bruun and Lexidale 2013: 73).

### 5.1 General rule and exceptions

Article 16(1) provides that the successor company will be subject to the 'rules in force concerning employee participation' in the Member State where it has its registered office. If there are no such rules, the new company will have no obligations in this respect.

However, there are a number of exceptions under Article 16(2), in which the rules of the Member State where the successor company has its registered office will not apply. In these cases, the participation system will be established through an agreement

negotiated by a special negotiating body or through the application of Standard Rules as set out in Article 16(3).<sup>6</sup> These exceptions are as follows:

- if at least one of the merging companies has more than 500 employees,<sup>7</sup> on average, in the six months prior to publication of the draft terms of cross-border merger and is operating under an employee participation system (Art. 16(2) first paragraph);
- if the national law relating to the successor company does not provide for at least the same level of employee participation as operated in the merging companies, the level being measured by reference to the proportion of employee representatives in the board(s), board committees or the management group covering the company's profit units (Art. 16(2)(a)); and
- if the national law relating to the successor company does not provide for employees of the new company's establishments situated in other Member States the same participation rights as those enjoyed by the employees in the Member State where the new company has its registered office (Art. 16(2)(b)).<sup>8</sup>

Although the Report notes that Member States have transposed the general concept of special negotiating bodies and Standard Rules 'a considerable number of them have decided to modify the procedure under Article 16' (Bech-Bruun and Lexidale 2013: 114). A number of Member States follow a 'somewhat different version' of the three exceptions by not implementing parts of Article 16(2) or by transposing them differently. For example, the Netherlands did not transpose Art. 16(2)(b). As a result, there are different levels of protection of employee rights in different Member States and there is a concern that this might lead to forum-shopping. The Report suggests a dialogue between Member States to discuss the transposition of Article 16 more comprehensively and to determine whether the differences are based on specific national needs (Bech-Bruun and Lexidale 2013: 116). That said, it notes that stakeholders have not identified this issue as a major problem.

An issue has arisen as to whether the exceptions set out in Article 16(2) are cumulative and whether only two exceptions exist (Bech-Bruun and Lexidale 2013: 73).<sup>9</sup> This might arise if one considers that the circumstances set out in the first paragraph of Article 16(2) – 500 employees and an existing participation system – must apply in addition to either Article 16(2)(a) or Article 16(2)(b). Tepass attributes the confusion in part to Recital 13 of the Cross-border Mergers Directive (Tepass 2012: 126), which states:

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6. When at least one of the merging companies is operating under an employee participation system that, under the Cross-Border Mergers Directive, is to govern the surviving company due to an agreement or the Standard Rules, the surviving company will be obliged to take a legal form that allows participation rights to be exercised (Art.16(6)).
  7. The Report queries whether a Member State's reducing this number to 250 would constitute improper transposition or gold-plating, which might also be frowned upon in some Member States (p. 92).
  8. Art. 16(5) provides that the extension of participation rights to employees of the surviving company employed in other Member States referred to in this paragraph will not entail any obligation for Member States that choose to do so to take those employees into account when calculating the workforce thresholds that give rise to participation rights under national law. For example, German national rules include only employees of establishments in Germany and there is no requirement to change the law to include foreign-based employees.
  9. See also the discussion in Tepass (2012).

‘If employees have participation rights in one of the merging companies under the circumstances set out in this Directive **and** [bold added by author] if the national law of the Member State in which the company resulting from the cross-border merger has its registered office does not provide for the same level of participation as operated in the relevant merging companies, including in committees of the supervisory board that have decision-making powers, or does not provide for the same entitlement to exercise rights for employees of establishments resulting from the cross-border merger...’

Another explanation he proposes for considering the first paragraph of Article 16(2) not to be a standalone exception is the fact that preserving pre-existing participation rights would not seem to require a separate participation system just because the number of employees is more than 500 (Tepass 2012: 127). However, the more persuasive argument is that a literal interpretation of Article 16(2) suggests that there are indeed three exceptions. This relies on the fact that the word ‘or’ appears twice in the text of Article 16(2) itself, after the options. In addition, Tepass opines that it would not be consistent with the objective of preserving the status of participation rights in all companies to limit it to those with over 500 employees (Tepass 2012: 126). It is also worth noting that the European Court of Justice itself in Case C635/11 referred to three exceptions.

A further issue that has given rise to debate pertains to the reference in Article 16(2) (b) to foreign and non-foreign employees of the successor company having the ‘same entitlement’ to participation rights. A question arises as to whether this requires a specific review in respect of the entitlements of the actual employees in the company itself or an abstract review of the participation system in general. It has been argued that the former would be more consistent with both the language and the purpose of Article 16 (Tepass 2012: 126). A second ambiguity in relation to Article 16(2)(b) is whether this exception applies only if the employees are subject to a participation regime at the time the merger becomes effective. The Report notes that this has created some ambiguity in the German transposition (Bech-Bruun and Lexidale 2013: 73). In that context, it also states that there is a lack of clarity as to whether, in such cases, the merging companies could choose to apply the Standard Rules without prior negotiations, as provided for in the Cross-border Mergers Directive (Art. 16(4)(a)) and discussed below.

In the three exceptions referred to above, Article 16(3) provides that employees’ participation in the successor company and their ‘involvement in the definition of such rights’ are regulated by the Member States *mutatis mutandis* in accordance with specified principles and procedures set out already in Regulation (EC) No. 2157/2001 (Art. 12(2), (3) and (4)) and Directive 2001/86/EC<sup>10</sup> and described below. Until the employee participation arrangements are determined, the merger will not be registered or take effect.

10. The following provisions of Directive 2001/86/EC: Article 3(1), (2) and (3), (4) first subparagraph, first indent, and second subparagraph, (5) and (7); Article 4(1), (2), points (a), (g) and (h), and (3); Article 5; Article 6; Article 7(1), (2) first subparagraph, point (b), and second subparagraph, and (3). However, for the purposes of this Directive, the percentages required by Article 7(2), first subparagraph, point (b) of Directive 2001/86/EC for the application of the standard rules contained in part 3 of the Annex to that Directive are raised from 25 to 33 1/3 per cent; Articles 8, 10 and 12; Article 13(4); and part 3 of the Annex, point (b).

## 5.2 Negotiating an agreement

If one of the three exceptions to the general rule set out in Article 16(2) apply, as soon as possible after publishing the draft terms of the cross-border merger or agreeing a plan for the merger, the boards of the participating companies must take the necessary steps to start negotiations with the representatives of the companies' employees on arrangements for employee participation in the successor company. One of these steps is the provision of information about the identity of the merging companies, concerned subsidiaries or establishments and the number of their employees (Art. 16.3(a) (A.3.1 Directive 2001/86/EC). There is no reference as to whom this information – often referred to as the 'initiation notice' – should be provided, but given that the requirement to provide information refers to this as a step in the commencement of negotiations with employee representatives, one can assume it should be to them. In practice, this notice is often issued at an earlier stage in an effort to expedite the process and to allow the cross-border merger to be registered.

For the purposes of the negotiations, a special negotiating body ('SNB') must be established that is representative of the employees of the merging companies and 'concerned subsidiaries or establishments'.<sup>11</sup> The composition of this body and the procedure for the appointment or election of its members are strictly regulated. Its members should, for example, be elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries and establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State that equals 10 per cent, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together (Art. 3.2(a)(i) of Directive 2001/86/EC). Further additional members from each Member State must be added to ensure that the SNB includes at least one member representing each participating company that is registered and has employees in that Member State and that will cease to exist following the merger.<sup>12</sup> If the number representing such companies is higher than the number of additional seats available pursuant to the above rules, these additional seats will be allocated to companies in different Member States by decreasing order of the number of employees they employ (Art. 3(2)(a)(ii) Directive 2001/86/EC).

It is up to Member States to determine the method to be used for the election or appointment of SNB members who are to be elected or appointed in their own territories. They should ensure, however, that as far as possible at least one member representing each participating company that has employees in the Member State are included (Art. 3(2)(b) Directive 2001/86/EC). Member States may provide that SNB members may include trade union representatives, whether employees or not. If there are no employee representatives in undertakings or establishments through no fault of

**11.** Art. 2(d) Directive 2001/86/EC defines this as 'a subsidiary or establishment of a participating company which is proposed to become a subsidiary or establishment of the SE upon its formation'.

**12.** Art. 3(2)(a)(ii) of Directive 2001/86/EC. This is subject to the number of additional members not exceeding 20 per cent of the number designated by virtue of (i), and the composition of the SNB not entailing double representation of the employees concerned.

their own, Member States must provide that the employees have the right to elect or appoint members of the SNB (Art 3(2)(b) Directive 2001/86/EC). The SNB may also invite experts to assist and advise it and they might decide to include, for example, representatives of EU-level trade union organisations (Art. 3(5) Directive 2001/86/EC). Any expenses related to the functioning of the SNB or the negotiations must be borne by the merging companies (Art 3(7) Directive 2001/86/EC).

The SNB takes decisions on the basis of an absolute majority of its members, which must also represent an absolute majority of its employees. Each member has one vote. However, if the result of the negotiations leads to a reduction of participation rights, the majority must be two-thirds of the members of the SNB, representing at least two-thirds of the employees, including the votes of members representing employees employed in at least two Member States (Art 3(4) Directive 2001/86/EC and Article 16(3)(a)).

The SNB and its competent organs are required to negotiate ‘in a spirit of cooperation’ with a view to reaching an agreement on arrangements for employee participation (Art. 4(1) Directive 2001/86/EC. Art 16(3)(b)). That said, the SNB may decide by a two-thirds majority of its members, representing at least two-thirds of the employees, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations and to rely instead on the participation system in force in the Member State where the registered office of the successor company will be situated (Art. 16(4)(b)).

The legislation applicable to the negotiation procedure will be that of the Member State in which the successor company’s registered office is to be situated (Art 6 Directive 2001/86/EC and Art. 16(3)(d)). Negotiations may take up to six months from the establishment of the SNB.<sup>13</sup> It has been pointed out that this timetable is not always consistent with national legislation and the Report cites the example of Austria, where the law requires that the merger be filed with the registry within nine months of the merger’s effective date (Bech-Bruun and Lexidale 2013: 73).

Ultimately, the employee participation agreement reached after the negotiations should take the form of a written agreement (Art. 3(3) Directive 2001/86/EC). In order to facilitate this agreement, the merging companies must inform the SNB of the plan and the actual process of establishing the new company ‘up to its registration’ (ibid.). The agreement must include: the scope of the agreement; the substance of the participation arrangements, including (if applicable) the number of board members the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights; and the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation (Art. 4(2)(a)(g) and (h) Directive 2001/86/EC and Art. 16(3)(b)). The Standard Rules described below will not apply to this agreement unless they so provide therein (Art. 4(3) Directive 2001/86/EC and Art. 16(3)(b)).

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13. Art 5(1) Directive 2001/86/EC and Art 16(3)(c). By joint agreement this period may be extended a further six months.



### 5.3 Standard rules

All Member States are required to set down Standard Rules on employee participation (Art. 7(1) Directive 2001/86/EC and Article 16(3)(e)). These Standard Rules are different from the national rules on employee participation. They must satisfy the provisions set out in the Annex, Part 3 of which contains provisions on employee participation.

Employees are entitled to elect, appoint, recommend or oppose the appointment of a number of board members that is equal to the highest proportion in force in the participating companies before the merger (Part 3 of the Annex point (b) Directive 2001/86/EC and Art. 16(3)(h)). It is clearly stated, however, that if none of the participating companies was governed by participation rules before the merger, the successor company will not be required to establish provisions for employee participation (*ibid.*).

Directive 2001/86/EC sets out the role of the employee representative body in employee participation. In a cross-border merger, the SNB will be responsible for the allocation of board seats as the successor company will not have a representative body (Tepass 2012: 137–138). It will thus perform the role of deciding on the allocation of board seats among the members representing employees from the various Member States. It will also decide on how employees may recommend or oppose the appointment of those board members according to the proportion of employees in each Member State. If employees of one or more Member State are not covered by this proportional criterion, it must appoint a member from one of those Member States, in particular the Member State in which the successor company's registered office is located, 'where that is appropriate' (Directive 2001/86/EC, Annex, Part 3, point (b) and Art. 16(h)). Unlike Directive 2001/86/EC, where it is expressly referenced, under the Cross-border Mergers Directive the Member States are free to determine the allocation of the seats it is given in the administrative or supervisory board. If the Standard Rules are applied following prior negotiations, notwithstanding these Rules, Member States may determine to limit the number of employee representatives on the administrative organ of the successor company.<sup>14</sup> This would allow a Member State to ensure, for example, that the German participation system (50 per cent employee representatives in the supervisory body of companies with more than 2,000 employees) is not exported to the other Member States.

All the members of the board elected, appointed or recommended by the representative body or the employees will be full members, with the same rights (including voting rights) and obligations as those members representing the shareholders (Directive 2001/86/EC, Annex, Part 3, point (b) and Art. 16(h)).

The Standard Rules of the Member State in which the registered office of the successor company is to be situated will apply in three circumstances. First, Member States may confer on the merging companies the right to choose to apply the Standard Rules

14. Art. 16(4)(c). However, if employee representatives in one of the merging companies constituted at least one-third of the board, the limit should never result in a lower proportion than that.

without any prior negotiation (Art. 16(4)(a)). While the Report describes this option as one that offers 'less stringent protection of employees' (Bech-Bruun and Lexidale 2013: 75), its intention is to allow merging companies to complete the merger quickly and without long-drawn-out negotiations. Such a decision does not need to be confirmed by an SNB but, as Tepass has noted, it does not remove the requirement to create a SNB even if by the time this is done the merger has already been registered (Tepass 2012: 136). Even in this scenario, there are tasks that an SNB will be required to undertake, including, as already stated, the allocation of board seats among the Member States in proportion to the number of employees in each Member State. Where the Standard Rules are applied without negotiation, certain issues that are normally addressed in the agreement remain unresolved. Tepass cites the example of the periodic appointment of employee representatives on boards. As each election will necessitate a new allocation of seats among Member States based on the proportional criteria explained above, the SNB will have to be re-established periodically to fulfil this task. This problem can be avoided in a negotiated agreement by making specific provision for the means of filling these posts.

Secondly, the Standard Rules may be chosen where the SNB and the merging companies agree (Art. 16(3)(e) and Art. 7(1)(a) Directive 2001/86/EC). Unless the parties so agree, it is stated thus that the negotiated agreement will not be subject to the Standard Rules (Art. 4(3) of the Directive 2001/86/EC and Art. 16(3)(b)).

Thirdly, the Standard Rules will also apply if no agreement is reached within the prescribed negotiating period and each of the merging companies agrees to continue with the merger using the Standard Rules, and the SNB has not taken the decision to terminate negotiations (Art. 7(1) Directive 2001/86/EC and Art. 16(3)(e)). The idea here was that negotiating parties would always know that there was an alternative to any proposals put forward and that a failure to agree terms would not lead to a failure of protection. However, this is not necessarily the case and the Cross-border Mergers Directive provides that the Standard Rules will apply only:

- if, before registration of the successor company, one or more forms of participation applied in one or more of the merging companies covering at least 33 1/3 per cent of the total number of employees in all the merging companies; or
- if, before registration of the successor company, one or more forms of participation applied in one or more of the merging companies covering less than 33 1/3 per cent of the total number of employees in all the emerging companies and if the SNB so decides (Art. 16(3)(e) and Art. 7(2)(b) 2001/86/EC).

It is noteworthy that the triggering percentage is higher than the 25 per cent laid down in Directive 2001/86/EC, reducing the protection of employees. In any case, if there was more than one form of participation within the various merging companies, the SNB must decide which of those forms must be established in the successor company. Member States may fix the rules applicable in the absence of any decision on the matter for a successor company registered in their territory (Art. 16(3)(e) Art. 7(2)(b) Directive 2001/86/EC).

It is also important to note that the Cross-border Mergers Directive allows Member States to provide that the Standard Rules will not apply (Art. 16(3)(e) and Art. 7(3) Directive 2001/86/EC). This allows a Member State to remove this fall-back position, potentially distorting the choice available to the negotiators. In such a case, the merger could be registered only if the merging companies and the SNB reached an agreement or if none of the merging companies was subject to a participation system. As Francois and Hick point out,

‘in such a scenario, it is reasonable to assume that the participation rules, if any, in force in the Member State where the registered office of the company resulting from the cross-border merger will be located shall apply. This could result in a reduction in or disappearance of existing participation rights and does not seem to accord with the before-and-after principle.’ (Francois and Hick 2010: 31)

## **6. Miscellaneous provisions**

Member States must provide that SNB members or the representative body are subject to confidentiality rules (Art. 8 Directive 2001/86/EC and Art. 16(3)(f)). They are, however, afforded protection in the exercise of their function in the same way as employee representatives would be protected under national law (Art. 10 Directive 2001/86/EC E, Art. 16(3)(f)).

Member States must ensure that the management of establishments of the successor company and the boards of subsidiaries and participating companies situated within their territories and the employee representatives or employees themselves abide by the obligations of the Cross-border Mergers Directive, regardless of whether or not the successor company has its registered office within its territory (Art. 12(1) Directive 2001/86/EC and Art. 16(3)(f)). Member States must have appropriate measures in place in the event of their failure to do so and in particular to ensure the enforcement of obligations arising from the Cross-border Mergers Directive by way of ‘administrative or legal procedures’ (Art. 12 Directive 2001/86/EC and Art. 16(3)(f)).

In order to preserve the existing employee participation rights under national law and/or practice, Member States may take the necessary measures to guarantee that the structures of employee representation in merging companies that will cease to exist as separate legal entities are maintained after the merger (Art. 13(4) Directive 2001/86/EC and Art. 16(3)(g)).

When the successor company is operating under an employee participation system, it must take measures to ensure that employee participation rights are protected in the event of subsequent domestic mergers for the following three years (Art. 16(7)).

## 7. Conclusion

This chapter has discussed key characteristics of the Cross-border Mergers Directive, focusing on worker participation. Similar to other pieces of EU legislation involving worker participation issues, the Directive had a long and controversial history prior to its passage in 2005. The focus of the Commission was on encouraging cross-border mergers and removing barriers to their use on the basis that such transactions are, in general, beneficial for the European economy. Worker representatives feared that this might be achieved at a cost to workers by enabling companies to weaken worker participation or avoid it altogether. This could be done by registering the merged entity in a Member State with weak or no requirements for worker participation.

An important development allowing the passage of the Cross-border Mergers Directive was the application of the approach to worker participation adopted in the European Company (SE) legislation, which aims to protect existing worker participation arrangements through a 'before and after' principle, while also defining a procedure for the negotiation of new worker participation arrangements. As noted above, this allowed the Cross-border Mergers Directive to proceed without having to reopen a 'Pandora's Box' and renegotiate the worker participation rules. The attraction of such an approach was obvious; namely, incorporating a level of worker protection that had already been deemed acceptable.

It is clear that the Cross-border Mergers Directive could be improved and that some of the ambiguities in the text could be clarified. The Directive is dauntingly complex and any efforts to render it more accessible and more comprehensible should be welcomed. It would appear that, while there may be a consensus on the need to do this, the timing of any such reform is not so clear-cut. A recent study for the European Parliament observed that the rules are 'overly complex, burdensome, protracted and costly' and contained many points that are 'unclear and/or controversial' (Schmidt 2016: 21). This led the author of the study to conclude that 'it would seem desirable to subject these rules to a thorough review and, subsequently, reform' (ibid.). Despite this finding, the author recommended that such a review be undertaken in the medium to long term rather than the short term as part of the proposed reform of the Cross-border Mergers Directive. This recommendation stemmed from a concern that 'undoing this carefully balanced legislative compromise package could open [Pandora's box] and ... potentially block any reform for years to come' and also that the close connection between the rules in the Cross-border Mergers Directive, Directive 2001/86/EC and Directive 2003/72/EC would mean that reform of the CBMD would have implications for the other two (ibid.). Whether these concerns are real, the deferring of debate and reform will not be feasible indefinitely and at some stage all stakeholders will have to return to the negotiating table.

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# Chapter 2

## Employee participation issues in cross-border mergers: key empirical findings

Thomas Biermeyer and Marcus Meyer

### 1. Introduction

This chapter summarises the results of research done for the European Trade Union Institute on the extent to which worker participation has been an issue under company mergers regulated by the EU Cross-Border Mergers Directive (CBMD). Worker participation in companies merging across borders has been controversial, among other things because of the concern that registration of the merged entity in a Member State with no worker participation requirements could lead to a weakening or circumvention of existing worker rights. This chapter provides important information regarding the way in which worker participation provisions are working in practice in the merger cases covered by the Cross-border Mergers Directive. The research was carried out for the period 2008 to 2012.

Even though mergers at the national level have been possible since the 1970s, for a long time companies in many EU and EEA Member States could not merge with companies based in other countries. From the first Commission proposal for a Directive on cross-border mergers was published in 1984 (Commission to the Council 1985), it took more than 20 years until a solution was found. In 2005, the Cross-border Mergers Directive of Limited Liability Companies was adopted at the EU level (European Parliament 2005). One of the main obstacles to the adoption of this instrument was the issue of employee participation rights, which exist in about two-thirds of EU Member States.

The Cross-border Mergers Directive was supposed to be transposed by all Member States before 15 December 2007. As part of the European Union's quality assurance mechanisms and regulatory oversight, Article 18 of the EU Cross-border Mergers Directive called for a review five years after the final date of transposition 'in light of the experience acquired in applying it'. This review was carried out by Lexidale, an international consultancy firm that operates a research network of expert lawyers, law firms, economists, and scholars in all 31 EU/EEA Member States and Bech-Bruun, a Scandinavian law firm with extensive experience in mergers and acquisitions. Published in September 2013, the study focused on the transposition of the Cross-border Mergers Directive in all EU and EEA Member States (apart from Croatia, which was not part of the EU when the study commenced). In more detail, the study also examined the benefits, difficulties and trends under the Cross-border Mergers Directive and analysed quantitative findings, such as the overall number of cross-border mergers that took place between 2008 and 2012 (Bech-Bruun and Lexidale 2013).

The matter of employee participation was one of the aspects addressed in the study. However, the discussion on that matter relied on qualitative information provided by stakeholders during interviews and on information gathered in the course of the legal research conducted on the transposition of Article 16 Cross-border Mergers Directive into national legislation. Due to the various issues the study had to address, employee participation (along with other matters) was not dealt with in greater depth.

An additional source of information on cross-border mergers and employee participation is a 2013 study conducted by Professor Walter Bayer for the Hans Böckler Foundation. The study analysed cross-border mergers in Germany, identifying German cross-border mergers where employee participation had been determined in accordance with the Article 16 CBMD procedure (Bayer 2013). However, this study focused only on Germany and did not provide further-reaching information on cross-border mergers. As a consequence, despite the information provided in the studies by Lexidale and Bech-Bruun and Professor Bayer, the issue of employee participation in cross-border mergers remains under-researched.

The goal of the present chapter is to provide a comprehensive overview by identifying cross-border mergers in which employee participation has been an issue for a broader range of countries. The basis of the analysis is the merger plans of the merging and the acquiring companies whose registered office are located in Member States with employee participation systems. The countries examined include: Austria, the Czech Republic, Denmark, Estonia, Finland, France, Hungary, Luxembourg, Norway, Poland, Slovenia, Slovakia and Sweden. This research covers the period from 2008 to 2012. In addition, and in reference to Professor Bayer's study, documents for cross-border mergers of merging and acquiring companies whose registered offices are located in Germany were also collected and analysed for this period.

Based on the findings of this research, it is possible to distinguish certain characteristics of companies involved in cross-border mergers in which employee participation has been an issue (see Section 5 below). Section 2 provides a general analysis of the issue of employee participation in cross-border mergers. Section 3 elaborates on the applied methodology and Section 4 examines the findings from the merger plans. Section 5 concludes.

## **2. Employee participation and the Cross-border Mergers Directive**

An important issue in the context of the Cross-border Mergers Directive is the determination of the employee participation rights applicable in a company resulting from a cross-border merger.<sup>1</sup> Article 2(k) of Directive 2001/86/EC on Employee Participation in European Companies defines employee participation as follows:

“participation” means the influence of the body representative of the employees and/or the employees’ representatives in the affairs of a company by way of:

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1. See also Chapter 1 in this volume on this issue.



- the right to elect or appoint some of the members of the company’s supervisory or administrative organ, or
- the right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ.’

Figure 1 A majority of Member States have an employee participation system



Note: countries with employee participation (light grey), no employee participation (dark grey).  
Source: Lexidale.

One reason for the importance of employee participation in cross-border mergers is that this issue is regulated differently among the EU and EEA Member States. Employee participation rights exist in 19 out of 30 Member States.<sup>2</sup> However, employee

2. Please note that this and the following observations are based on data from Conchon (2011), which has been updated for the purpose of this study by Lexidale country researchers.

participation is not regulated in the same manner in the different countries. For example, in some Member States there is no minimum threshold for the application of employee participation rules, as in the case of Austrian public limited liability companies. In other countries, a minimum number of employees applies, varying from 25 to more than 500 employees (Conchon 2011: 14). Another important difference exists with regard to the number of employee representatives on the company board. This can vary between one representative and half of the company board (parity).

Due to the existing differences between the employee participation systems applicable in the Member States, the concern was raised that cross-border mergers might allow companies to limit the employee participation rights applicable to them. This could, for example, be the case if a German company merged with a company from the United Kingdom. If UK law applied to the successor company, there would be no employee representatives sitting on the supervisory board, even though it was previously required for the German company.

This was also a major obstacle to enacting a directive on cross-border mergers at the EU level, for which a solution was found with the European Company (SE) Regulation in 2001 (Council of the European Union 2001a). The legislative framework for the SE provided a system in which management and employees would negotiate on the content of the employee participation rights applicable after the creation of an SE, or certain standard rules would apply. Those rules were taken over for the Cross-border Mergers Directive, with certain adaptations.

As a general rule, Article 16(1) CBMD provides that the rules on employee participation that shall apply are those of the country in which the company resulting from the cross-border merger has its registered office. However, Article 16(2) CBMD provides for three exceptions:

- (i) One of the merging companies has more than 500 employees and has had an employee participation system for the past six months.
- (ii) If national law after a cross-border merger does not provide for the same level of employee participation as operated in the merging companies.
- (iii) If the applicable employee participation rights discriminate against employees of foreign establishments.

If any of these exceptions apply, either a special negotiating body (SNB) will be formed or the standard rules will apply in accordance with the annex of the SE Directive. Article 16(3) CBMD regulates this procedure with reference to the SE Directive (Council of the European Union 2001b). The main difference between the regime under the SE Directive and the Cross-border Mergers Directive with regard to employee participation is that, for the application of the standard rules, the percentage of employees required to have been previously covered by an employee participation system has been raised from 25 per cent to 33.3 per cent.

### 3. Methodology

The objective of the study summarised here was to identify cross-border mergers where employee participation was an issue during the period 2008–2012, in the following countries: Austria, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Luxembourg, Norway, Poland, Slovenia, Slovakia and Sweden. These countries were selected together with the European Trade Union Institute and share the existence of employee participation rights as a key characteristic.

In order to be able to identify the relevant cross-border mergers, the merger plans of the merging and the acquiring companies in the above-mentioned countries were collected. The content of a merger plan is regulated by Article 5 CBMD: Article 5(j) CBMD stipulates that the merger plan has to address ‘information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16’. Therefore, the relevant cross-border mergers could be identified on this basis. It should be noted that a small number of merger plans for the period 2013–2014 have also been acquired for Austria. These have been included in the analysis.

The merger plans were analysed in order to identify, first, whether a SNB has been set up or the standard rules were applied and, secondly, whether there has been any impact on employment. In addition, general data were collected on both the merging and the acquiring company as well. These findings are discussed in the next section.

### 4. Findings

In addition to identifying cross-border mergers in which employee participation has been an issue, this section also analyses the characteristics of relevant cross-border mergers, including: the dates of the merger plans, the location of the registered office of the merging companies, the number of employees, the field of activity, the company forms, the board structures, the mentioned reasons for carrying out the cross-border merger and the impact on employment.

#### 4.1 Overall list of cross-border mergers found in which employee participation was an issue

Overall, 75 cases were identified in which employee participation was an issue in cross-border mergers based on the above-mentioned methodology. In two cases, however, no merger plan could be obtained and in five cases, the national BLER threshold value for the application of the regime was not reached. A total of 68 cases, therefore, should fall under the framework of Article 16 of the Cross-border Mergers Directive and one of three outcomes would have been possible: 1) the standard rules could have been applied unilaterally by management; 2) a SNB could have been created and an agreement concluded; or c) a decision could have been taken by the SNB not to open negotiations and

apply the standard rules instead. It should be stressed that this case selection concerns not only clear cases in which an agreement was concluded between the management and the employees on the content of the employee participation rights after the cross-border merger takes effect (17 cases), as well as 22 cases in which the standard rules were applied unilaterally by management; it also includes fully 25 cases in which the merger plans were not clear as to which of these possibilities was used, or in which the merger plans merely mentioned an expected impact on employee participation arrangements. Moreover, the selection includes cases that can be interesting for a different reason, for example, if it appears from the merger plan that the company carried out a different corporate operation in order to avoid having to undergo the procedure to determine the employee participation rights applicable after the cross-border merger has taken effect. In four cases, BLER would have been applicable, but the works council(s) decided not to open negotiations in the first place.

Table 1 Cross-border mergers in which employee participation was an issue

Acquiring company	Merging company
Aareal Bank AG	Aareal Bank France S.A.
Aktsielsts Baltem	BCM Baltijas Celtniecibas Masina
Aktsielsts Baltem	Baltijos Statybinės Masinos
Allianz Global Corporate & Speciality AG	Stanislas H. Haine NV
Allianz Global Investors Europe GmbH	Allianz Global Investors Italia SGR SpA
apetito Aktiengesellschaft	apetito Netherlands Holding B.V.
ARAG SE	Assicurazioni Rischi Automobilistici e Generali S.p.A.
ARAG SE	ARAG SE/ ARAG Compania Internacional de Seguros y Reaseguros SA
ARAG SE	ARAG zavarovanje pravne zascite d.d.
ARAG SE	ARAG SA
ARAG SE	ARAG Nederland, Algemene Rechtsbijstand Verzekeringmaatschappij NV
ARAG SE	ARAG Österreich Allgemeine Rechtsschutzversicherungs-Aktiengesellschaft
Arsonsisi Tallinn OÜ	Oy Arsonsisi Finland Ltd
AS Ramirent	SIA Ramirent
AS Ramirent	AB Ramirent
Asko Appliances Holding AB	AM Kodinkoneet Oy
BAWAG P.S.K.	BAWAG banka d.d.
Benteler Deutschland GmbH	Benteler Finance B.V.
Bertrandt Aktiengesellschaft	Bertrandt Spain S.A.

Acquiring company	Merging company
BMW Bank GmbH	BMW Financial Services Iberica establecimiento financiero de credito SA
Boromont Aktiengesellschaft	Hilti Deutschland GmbH
Citibank Europe plc	Citibank zrt
Citibank Europe plc	CEP Czech Republic
Citibank Europe plc	CEP Poland
Citibank Europe plc	Citibank Slovakia
Citibank Europe plc	Citibank Romania S.A.
COFACE S.A.	Coface Deutschland Aktiengesellschaft
COFACE S.A.	Coface Kreditversicherung AG
Coface SA	Austria Holding AG
Compagnie Francaise d'Assurance pour le Commerce Exterieur (Coface)	Coface Assicurazioni SPA
Danske Bank A/S	Aktsiaselts Sampo Pank
Danske Bank A/S	AB Sampo Bankas
Diesel Denmark ApS	Diesel Finland Oy
Diners Club Sweden AB	Diners Club Finland Oy
Diners Club Sweden AB	Diners Club Norge AS
Eismann Tiefkühl-Heimservice GmbH	EISMANN-Tiefkühl GmbH
Eurocard AB	Europay Norge AS
Evli Securities AS (in dissolution proc.)	Evli Securities IBS AS
Evli Securities AS (in dissolution proc.)	FMI AB Evli Securities
Fresenius SE & Co. KGaA	Calea Nederland NV
Gambro Lundia AB	Gambro
Gjensidige Forsikring ASA	Tennant Försäkringsaktiebolag
Grazer Wechselseitige Versicherung Aktiengesellschaft	Grawe Bulgaria Obshto Zastrahovane EAD
Heidelberg Baltic Finland OU	SIA Heidelberg Latvija
Heidelberg Baltic Finland OU	Heidelberg Lietuva
Heidelberg Baltic Finland OÜ	Heidelberg Finland Oy
ING-DiBa AG	Conifer BV
Kennametal GmbH	Kennametal Österreich GmbH
Kennametal GmbH	Kennametal Czech s.r.o.
MAN Diesel SE	MAN DIESEL A/S

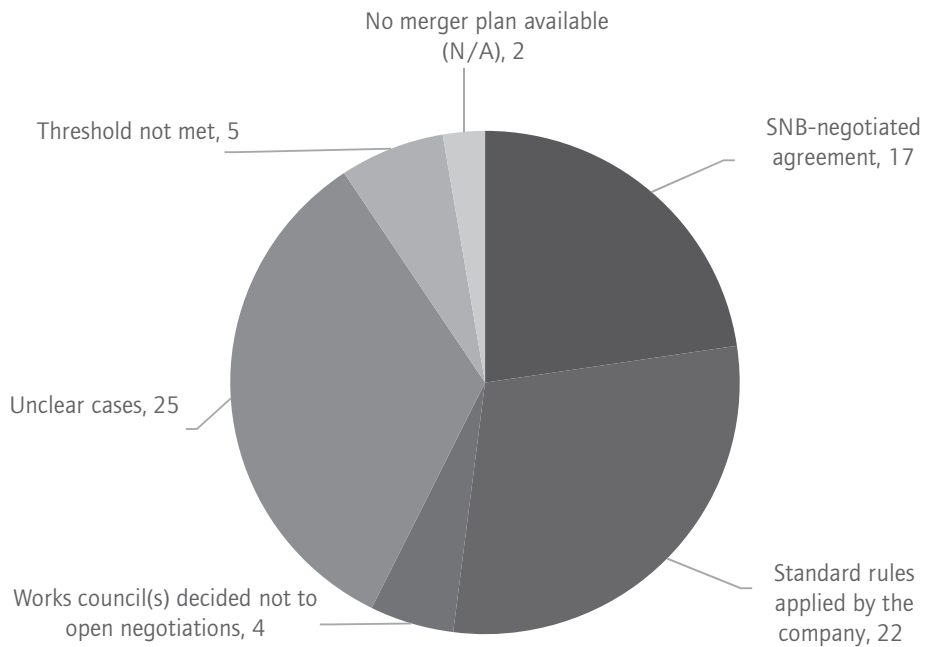
Acquiring company	Merging company
Münchener Rückversicherungs-Ges. AG	Münchener Rück Italia S.p.A
Nokia Sales International Oy	Nokia Svenska AB
Nordisk Handverk AS	Nordic Personnel Solutions ApS
Oxea GmbH	Oxea Hungary kft
Panasonic Marketing Europe GmbH	Panasonic Nordic AB
Procter & Gamble GmbH	Procter & Gamble Austria GmbH
PSI Group ASA	CashGuard AB
QSC AG	Collutio Holding GmbH
RCI Banque SA	RCI Bank GmbH
Rosemount Tank Radar AB	SF Control Oy
Schroder Investment Management (Luxembourg) S.A.	Schroder Investment Management Benelux N.V.
Schroder Investment Management (Luxembourg) S.A.	Schroder Investment Management A/S
SIA "RN Trade"	Baltic Steel Trade OÜ
Siemens Osakeyhtio	AS Siemens
Siemens Osakeyhtio	UAB Siemens
Siemens Osakeyhtio	Siemens SIA
Skandinaviska Enskilda Banken AB	Skandinaviska Enskilda Banken A/S
Skandinaviska Enskilda Banken AB (publ)	SEB Privatbanken ASA
Skandinaviska Enskilda Banken AB (publ)	SEB Gyllenberg Private Bank Ab
StarFox Agents OU	CV Keskus AS
StarFox Agents OU	CV Rinka
StarFox Agents OU	CV Türgus
Teller A/S	Teller AS
UniCredit Bank AG	UniCredit CAIB AG
WestLB AG	WestLB (Italia) Finanziaria S.p.A.

Source: T. Biermeyer, M. Meyer and Lexidale

## 4.2 Date of merger plans of relevant cross-border mergers

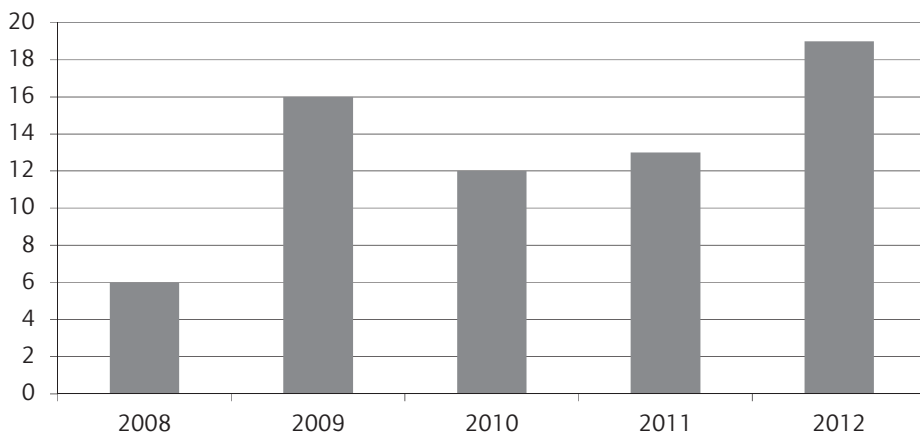
No clear trend is visible concerning the years in which the merger plans of cross-border mergers involving employee participation were registered. It can be noted only that the lowest number (six cross-border mergers) occurred in 2008 and the highest number in 2012 (19).

Figure 2 Realisation of board-level participation rights in the CBMs examined



Source: T. Biermeyer, M. Meyer and Lexidale.

Figure 3 Cross-border mergers in which employee participation was an issue, by year of the merger plan (2008–2012)



Note: information available for 66 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

### 4.3 Location of registered office of the companies involved in relevant cross-border mergers

The second issue examined was the location of the registered office of the acquiring company and the merging company involved in the relevant mergers. With regard to the acquiring companies (see Table 2), there is a clear trend that most located their registered office in Germany (26 companies in total) and therefore that employee participation was most often an issue when a foreign company merged into a German company. The countries with the most acquiring companies after Germany were Estonia (13), Sweden (9) and France (5), followed by Ireland (4), Finland (4) and Denmark (4). Norway has three acquiring companies and Austria and Luxembourg each had two acquiring companies with their registered office in their country. Liechtenstein and Latvia had one acquiring company each with its registered office in their territory.

Table 2 Location of registered office of the acquiring company of relevant cross-border mergers

Germany	26
France	5
Finland	4
Estonia	13
Denmark	4
Austria	2
Sweden	9
Norway	3
Loxembourg	2
Liechtenstein	1
Latvia	1
Ireland	5
<b>Total</b>	<b>75</b>

Note: information available for all 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

The situation is different if one looks at the location of the merging companies' registered office (see Table 3). The country in which most merging companies were located is Austria (8); followed by Finland, the Netherlands and Lithuania with 7 companies; and Latvia with 6 companies; Italy with 5 companies; Denmark, Estonia, Norway and Sweden with 4 companies; and Germany, Slovenia and Spain with 3 companies; Belgium, Czech Republic and Hungary with 2 companies; and France, Poland, Bulgaria and Romania with one company each.



**Table 3 Location of registered office of merging companies of relevant cross-border mergers**

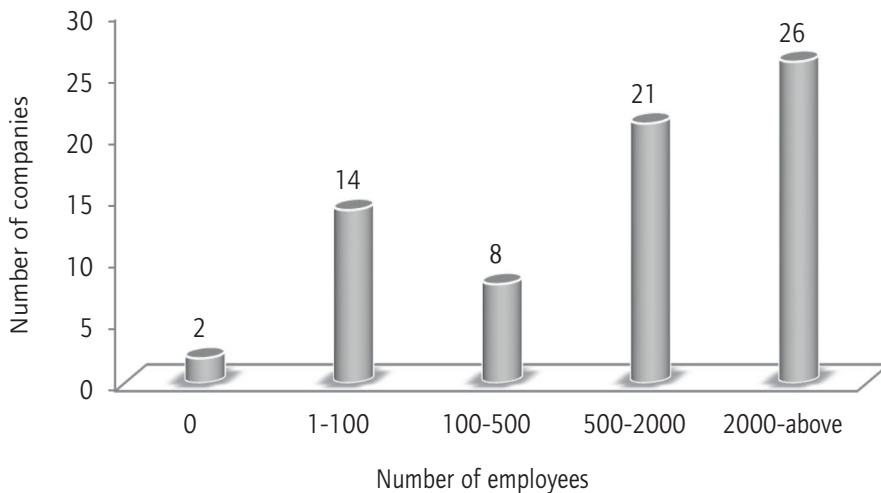
Austria	8	Italy	5	Slovenia	3	Hungary	2
Finland	7	Denmark	4	Spain	3	Poland	1
Lithuania	7	Norway	4	Germany	3	France	1
Netherlands	7	Estonia	4	Czech Republic	2	Bulgaria	1
Latvia	6	Sweden	4	Belgium	2	Romania	1

Note: information available for all 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

#### 4.4 Number of employees involved

A further issue examined was the number of employees in the merging companies. It should be stressed that not all companies provided this information. Again, the data can be split up between acquiring companies and merging companies. Information was acquired for 70 of the acquiring companies and for 51 of the merging companies. As can be seen from Figure 3, most acquiring companies had more than 2,000 employees (26). This was followed by companies with 500 to 2,000 employees (21). 14 companies had between 1 and 100 employees and 8 companies, finally, had between 100 and 500 employees. Noteworthy is the fact that there were also 2 companies involved in relevant cross-border mergers with no employees.

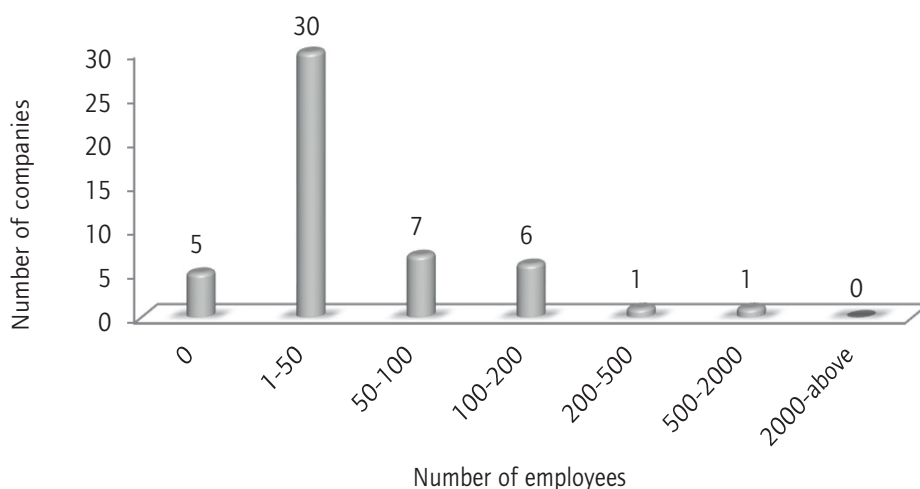
**Figure 4 Number of employees of acquiring companies in relevant cross-border mergers**

Note: information available for 70 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

The situation is different when comparing the acquiring companies with the merging companies (Figure 4). The trend is that the merging companies have fewer employees than the acquiring companies. For example, there was no merging company with more than 2,000 employees and only one company with more than 500 employees. Most companies had between 1 and 50 employees (30). Moreover, seven of the merging companies had between 50 and 100 employees, six between 100 and 200 employees and one had 200–500 employees and another 500–2,000 employees. Also noteworthy is the fact that, according to the information in the merger plans, five of the merging companies did not have any employees.

Figure 5 Number of employees of merging companies in relevant cross-border mergers



Note: information available for 50 out of 75 mergers.  
 Source: T. Biermeyer, M. Meyer and Lexidale.

#### 4.5 Field of activity of companies involved

Further information examined was the field of activity of the companies involved. These data not only stem from the merger plan but were complemented where necessary and if available by public information. Moreover, it should be stressed that the information only includes the activity of the companies involved and not the group of companies of which the company is a part. To provide an example: a company could be in a company group whose overall activity is manufacturing, but the company in question may have as its activity the management of companies. In this case, the activity is the management of companies and not the manufacturing of goods.

As a result, slightly more than half of the relevant cross-border mergers were carried out in financial and insurance activities (55 per cent). Other prominent areas are wholesale and retail trade (16 per cent) and manufacturing (14 per cent). Further relevant fields were the management of companies, telecommunications, professional, scientific and technical services and other service activities.

Table 4 Main sector of companies involved

Financial and insurance activities	55%	Telecommunications	3%
Wholesale & retail trade	16%	Management of companies and enterprises	3%
Manufacturing	14%	Other service activities	3%
Professional, scientific and technical services & other service activities	4%	Manufacturing and other service activities	1%

Note: information available for 73 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

## 4.6 Company legal forms involved

When analysing the company law forms of the companies in the relevant cross-border mergers, the clear trend was that most were public limited liability companies. The situation is the same for merging and acquiring companies; 50 (or 67 per cent) of the acquiring companies and 39 (or 55 per cent) of the merging companies were public limited liability companies; 24 of the acquiring and 30 of the merging companies were private limited liability companies. One of the acquiring and two of the merging companies were of a different company law form.

## 4.7 Company relationships

Another characteristic examined with regard to the relevant cross-border mergers was the relationship between the acquiring and the merging company. Two aspects have been analysed: first, the relationship between the two companies and, secondly, whether both companies belonged to the same company group.

As to the relationship between both companies, it can be noted that in the vast majority of cases the acquiring company held all shares of the merging company (68 per cent of cases). In 6 per cent of the cases, both companies were subsidiaries of the same company and in 24 per cent of cases they were subsidiaries in the same company group, but not of the same company. In one case, it can be inferred from the information in the merger plan that the companies did not have a formal link; they neither held shares in one another nor belonged to the same company group.

A second aspect considered was whether the companies belonged to the same group. The reason for also examining this aspect was that companies that hold each other's shares do not necessarily have to be part of a company group. It should be noted that the data gathered do not constitute a formal definition of a company group but are based on information from the merger plan. This means that a cross-border merger was counted as having taken place within the same group of companies if the merger plan explicitly provided this information. The finding is that, in all but one case, the companies involved belonged to the same company group.

Table 5 Company relationship between merging firms in relevant cross-border mergers

Acquiring company holds all shares of merging company	68%	Subsidiaries in the same company	6%
Subsidiaries in the same group	24%	Not linked	2%

Note: information available for 50 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

## 4.8 Multiple cross-border mergers

One key finding of this study is the fact that the Cross-border Mergers Directive is used frequently by corporate groups for corporate restructurings through multiple cross-border mergers. This is interesting insofar as several legal entities in different jurisdictions and hence different employee participation regimes are affected. Such restructurings by means of the Cross-border Mergers Directive can potentially have an impact on a large number of employees.

Fifteen mergers were identified in which several companies were merged simultaneously. These were the mergers within the ARAG SE group, Coface SA and Kennametal GmbH, which merged with its Austrian and Czech subsidiaries, and Citibank Europe. Another multiple merger was carried out by Heidelberg Baltic Finland with its subsidiaries in Lithuania, Latvia and Finland. It is worth noting here that among the multiple mergers identified, a substantial number were conducted by companies in the financial sector (four out of fifteen).

## 4.9 Impact of cross-border mergers involving employee participation on employment

Article 5(d) of the Cross-border Mergers Directive requires companies to provide information on the repercussions for employment. As a general trend, in 57 out of 59 cases in which this information was provided, the companies stated that there would not be any negative effect on employment. In the merger of Procter & Gamble GmbH and Procter & Gamble Austria GmbH, it was stated that the cross-border merger would not have an impact on employment directly, although, due to a general cost cutting programme, the number of employees might be reduced. In the merger between Rosemount Tank Radar AB and SF Control Oy, it was noted that '[t]he end assembly of the LevelDatic product was transferred from Finland to Rosemount Tankradar AB's production unit in Gothenburg before the merger and does not otherwise affect the production process.' PSI Group ASA and CashGuard AB provided a positive outlook by stating that the company's ambition for growth will create new opportunities for highly qualified employees.

Table 6 Cross-border mergers involving multiple merging companies

Acquiring company	Merging companies
ARAG SE (Germany)	<ul style="list-style-type: none"> <li>– Assicurazioni Rischio Automobilistici e Generali S.p.A. (Italy)</li> <li>– ARAG Compania Internacional de Seguros y Reaseguros SA (Spain)</li> <li>– ARAG zavarovanje pravne zascite d.d. (Slovenia)</li> <li>– ARAG SA (Belgium)</li> <li>– ARAG Nederland, Algemene Rechtsbijstand Verzekeringmaatschappij NV (Netherlands)</li> </ul>
Coface SA (France)	<ul style="list-style-type: none"> <li>– Coface Kreditversicherung AG (Germany),</li> <li>– Coface Assicurazioni SPA (Italy)</li> <li>– Austria Holding AG (Austria)</li> </ul>
Heidelberg Baltic Finland OÜ (Estonia)	<ul style="list-style-type: none"> <li>– SIA Heidelberg Latvija (Latvia)</li> <li>– Heidelberg Lietuva (Lithuania)</li> <li>– Heidelberg Finland Oy</li> </ul>
Kennametal GmbH	<ul style="list-style-type: none"> <li>– Kennametal Österreich GmbH</li> <li>– Kennametal Czech s.r.o</li> </ul>
Citibank Europe (Ireland)	<ul style="list-style-type: none"> <li>– Citibank zrt (Hungary)</li> <li>– CEP Czech Republic</li> <li>– CEP Poland</li> <li>– Citibank Slovakia</li> <li>– Citibank Romania S.A.</li> </ul>
Aktsiaselts Baltem (Estonia)	<ul style="list-style-type: none"> <li>– Baltijas Celtniecības Masina (Latvia)</li> <li>– Baltijos Statybinės Masinos (Lithuania)</li> </ul>
AS Ramirent (Estonia)	<ul style="list-style-type: none"> <li>– SIA Ramirent (Latvia)</li> <li>– AB Ramirent (Lithuania)</li> </ul>
Danske Bank A/S (Denmark)	<ul style="list-style-type: none"> <li>– Aktsiaselts Sampo Pank (Estonia)</li> <li>– AB Sampo Bankas (Lithuania)</li> </ul>
Diners Club Sweden AB (Sweden)	<ul style="list-style-type: none"> <li>– Diners Club Finland Oy (Finland)</li> <li>– Diners Club Norge AS (Norway)</li> </ul>
Evli Securities AS (Estonia)	<ul style="list-style-type: none"> <li>– Evli Securities IBS AS (Latvia)</li> <li>– FMI AB Evli Securities (Lithuania)</li> </ul>
Schroder Investment Management (Luxembourg) S.A. (Luxembourg)	<ul style="list-style-type: none"> <li>– Schroder Investment Management Benelux N.V. (Netherlands)</li> <li>– Schroder Investment Management A/S (Denmark)</li> </ul>
Siemens Osakeyhtio (Finland)	<ul style="list-style-type: none"> <li>– AS Siemens (Estonia)</li> <li>– UAB Siemens (Lithuania)</li> <li>– Siemens SIA (Latvia)</li> </ul>
Skandinaviska Enskilda Banken AB (Sweden)	<ul style="list-style-type: none"> <li>– Skandinaviska Enskilda Banken A/S (Denmark)</li> <li>– SEB Privatbanken ASA (Norway)</li> </ul>
StarFox Agents OU (Estonia)	<ul style="list-style-type: none"> <li>– CV Keskus AS (Estonia)</li> <li>– CV Rinka (Lithuania)</li> <li>– CV Tīrgus (Latvia)</li> </ul>

Source: T. Biermeyer, M. Meyer and Lexidale.

In two cases, it was stated that the merger would negatively affect employment. In the merger between BAWAG P.S.K. and BAWAG Banka d.d., it was stated that '[t]he acquiring company has ca. 4,150 employees. The merging company has 19 employees at the moment. However, a major part of those employment relations will end based on an agreement with the employees on 21.12.2012.' The merger plan for UniCredit Bank AG and UniCredit CAIB AG stated that, as part of the merger, a restructuring would be carried out, which would lead to job losses.

#### 4.10 Companies that applied the procedure under Article 16 of the Cross-border Mergers Directive

We shall now look more closely at the cases in which employee participation was an issue. They can be divided into two kinds of case: those in which the procedure under Article 16 CBMD was applied and those in which it was not, but which are relevant for a different reason. The first category comprises agreements concluded on employee participation as provided for in Article 4 of the SE Directive and standard rules provided for under Article 16 CBMD and the Annex to the SE Directive. The second category comprises cases that are interesting for a variety of reasons: for example, in a number of cases, the merger plan stated that the Article 16 CBMD procedure would be applied. However, it was not stated whether a special negotiating body would be established that would negotiate on the content of employee participation rights after the cross-border merger takes effect, or whether the standard rules would be applied. Other cases reflect that companies carried out other corporate transactions to circumvent the application of the Article 16 CBMD procedure, and so on.

As a general conclusion, it can be stated that in 40 of the 75 cross-border mergers, either the employees negotiated on employee participation rights or the standard rules were applied. Thirty five cases were relevant for another reason. In 22 cases out of the 40 cases in which one of the two possibilities under Article 16 CBMD was used, the standard rules were applied. In 18 cases, the merger plans provided that the employees would negotiate on employee participation rights after the cross-border mergers. Considering this result, it appears that management uses its option to apply the standard rules immediately, as provided for in Article 16(4)(a) CBMD, in about half of the cases.

As stated above, 35 cases were identified that were relevant, but cannot be put in the category of the Article 16 CBMD procedure. In one type of case the information provided in the merger plan was not sufficiently clear. There are a number of cases in which it was not stated whether the standard rules were applied or whether the employee participation rights would be negotiated. A second type includes cases in which no specific information was given at all. For example, in the merger of SIA 'RN Trade' and Baltic Steel Trade OÜ, it was stated in the merger plan that participation of employees of the merging company in the management of the acquiring company takes place as provided for under §41<sup>2</sup> of the Estonian Community-scale Involvement of Employees Act. §41 of this Act,<sup>2</sup> however, is so broad that the consequences remain unclear. In other mergers, such as in the case of Siemens Osakehitiö/AS Siemens, it is stated that the merger does not have an impact on employee participation. However, at the same

time it is stated that the employee representation system will be agreed upon together with the employees' representatives.

Other cases, such as the merger between BMW Bank GmbH and BMW Financial Services Iberica establecimiento financiero de credito SA are important because employee participation rights were not determined during the cross-border merger. Even though the acquiring company would have fallen under German employee participation rules, those were not used by the employees. The cross-border merger of Grazer Wechselseitige Versicherung Aktiengesellschaft and Grawe Bulgaria Obshto Zastrahovane EAD is also noteworthy. The merger plan provides that the cross-border merger falls under employee participation and that the employee representation was asked to form a special negotiating body. However, the Austrian general works council decided not to do so because the merger would not affect existing employee rights and in Bulgaria, the location of the merging company, employee participation does not exist and the works council maintains its rights.

Also interesting are the Finnish cases, such as Nokia Sales International Oy/Nokia Svenska AB. The merger plan provides: 'The merging company is bound by collective bargaining agreement entered into between Almega and certain trade unions. The merging company must summon the unions and negotiate the merger before any decision is made. However, the unions do not have any real influence over the decision.'

A similar case is Panasonic Marketing Europe GmbH and Panasonic Nordic AB. In this case, the merger plan provides that the acquiring company does not have employee participation because it has fewer than 500 employees. Also after the merger, the number of employees will be lower than 500. The merging company had a right to employee representation, but did not make use of it. Moreover, the merger is subject to the Swedish Codetermination at Work Act, which provides for a right of negotiation for the employees' unions. The unions approved the decision.

The merger between RCI Banque SA and RCI Bank AG should also be highlighted. The Austrian company was converted into a company with limited liability (*Gesellschaft mit beschränkter Haftung nach österreichischem Recht*) on 16 March 2011. The rationale for this was that for public limited liability companies, there is no threshold for the application of the employee participation rules in Austria. That means the RCI Bank fell under those rules and would have had to follow the Article 16 CBMD procedure. However, before the merger, RCI Bank AG converted into a private limited liability for which a threshold of 300 employees exists in order to fall under the Austrian employee participation regime. As the merger plan states: 'therefore the Austrian rules concerning employee participation are no longer applicable'.

Finally, the MAN Diesel SE and MAN DIESEL A/S merger is also interesting. In this case, the SE agreement of MAN Diesel SE already regulates restructurings such as cross-border mergers and therefore the companies did not apply Article 16 CBMD.

## 5. Conclusion

The study summarised above provides important information on the EU cross-border mergers in which employee participation has been an issue. The first set of information regards the type of companies involved in cross-border mergers. First of all, acquiring companies tend to be large companies (two-thirds of them have more than 500 employees) whereas the merging companies are almost all small or medium sized (between 1 and 200 employees). Secondly, most of the acquiring companies were established in Germany, whereas the merging companies were not concentrated in a specific country. A slight majority of merging companies were in the financial services industry (banking, insurance, investment) and the rest mainly in the manufacturing or wholesale and trade sector.

Most significantly, in a large majority of cases the merging company is already fully owned by the acquiring company and in over 90 per cent of the cases both companies belong to the same group. As a consequence, also in cases involving an employee participation issue, the cases concern inter-group restructurings. In only one case did a cross-border merger take place between independent companies. This suggests that the cross-border merger is being used almost completely for in-house restructuring, rather than for cross-company restructuring, as originally foreseen by the Directive.

A significant information right provided to workers is the right to information in the merger plan about the anticipated employment impact of the merger. This right is important because the literature on mergers and acquisitions shows that, in many cases, restructuring leads to adverse impacts on employment. However, the vast majority of cases analysed here show that the companies claimed that the cross-border merger would have no impact on employment. This suggests that either the cross-border mergers do not lead to significant restructuring, or that the impact on employment levels is indirect or long-term in this kind of merger.

With regard to employee participation, the analysis suggests that it is not dealt with as originally intended in the Cross-border Mergers Directive. In only 40 of the 75 cases analysed was the Article 16 provision on worker participation clearly applied. In the other 35 cases Article 16 was not applied, for a variety of reasons. This suggests that the procedures for ensuring that worker participation is respected should be strengthened. With regard to the procedure for determining employee participation, in somewhat over half the cases in which Article 16 was clearly applied (22 of 40 cases) the standard rules were unilaterally imposed by management. In less than half of the cases (18 of 40) was an SNB established for the negotiation of worker participation.



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## Chapter 3

# The effects of cross-border mergers on labour: big challenges, little evidence

Andrew Pendleton

### 1. Introduction

Cross-border mergers and acquisitions (M&A) are now a very substantial part of global mergers and acquisitions activity. The number of cross-border deals has increased steadily over the past twenty years and they now account for around 45 per cent of total M&A activity around the world (Erel *et al.* 2012). This growth can be attributed to a variety of factors, including globalisation and the increasing openness of many national business regimes. Within Europe it reflects the lowering of national obstacles as part of the European Union strategy to create a single market. The Cross-border Mergers Directive (CBMD) is one element of this strategy, alongside the objective of facilitating corporate restructuring to encourage growth and innovation.

The Cross-border Mergers Directive was passed in 2005 and transposed into national legislation and regulations in most Member States by the end of 2007. The Directive provides a set of simplified procedures for companies to merge across national boundaries within the European Union and adds to the earlier provisions for the establishment of multi-country European Companies (SEs). It does so by reducing the obstacles arising from differences in national laws and regulations. Since the passage of the Directive the number of cross-border mergers taking place under its aegis has steadily increased, from 132 in 2008 to 361 in 2012. The evaluation of the Directive by Bech-Bruun and Lexidale states that it has had a profound effect on cross-border merger activity between the Member States (2013: 3).

Two key issues for workers arise from cross-border mergers in general and the Cross-border Mergers Directive in particular. The first is the potential impact on employment; the second is the impact on worker participation and representation. The merger of two or more entities may eliminate the need for some activities and hence have a negative impact on total employment. Even where total employment remains more or less unchanged, there may be employment loss in one party to the merger as activities are transferred from one entity to another. The costs to workers are likely to be more acute in a cross-border setting because displaced workers are less likely to be able to transfer to the new entity than in a local merger. Any initiatives that promote cross-border transactions may therefore have adverse effects on workers. As for worker participation and representation, there is a danger that some or all workers in the merged entity may suffer a loss of rights and practices compared with the situation prior to the merger. In a cross-border setting, the arrangements for worker participation in countries with weak participation rights may displace those derived from countries with stronger

systems of worker participation and representation. Companies may engage in ‘regime shopping’ when undertaking cross-border mergers to locate the new company in the most advantageous regulatory context. The potential for companies to do this was an important consideration in the deliberations leading to the passage of the Directive, which has explicit provisions on this.

To date, there has been very little evidence on either of these issues for mergers in general or for mergers implemented specifically under the Cross-border Mergers Directive. Although there is a large literature on mergers and acquisitions, on closer inspection virtually all studies are primarily about acquisitions or else do not differentiate between the two forms of ownership restructuring. This also applies to mergers conducted across borders. As for cross-border mergers in particular, there has been very little research on the employment and participation effects of mergers conducted in accordance with the provisions of the Directive, other than that reported in this volume. The major evaluation of the first five years of the Directive by Bech-Bruun and Lexidale identified ‘technical’ problems with the Directive’s provisions for participation, as seen by corporate and professional advisory personnel, but did not consider its impact on participation. What we know so far, as outlined in the chapter by Biermeyer and Meyer in this volume, is that most CBMD mergers involve intra-company restructuring, with apparently limited effects on employment and worker participation. However, in the absence of more comprehensive research on outcomes of these mergers, this conclusion has to remain tentative. The in-depth case studies presented in this volume show that the implementation of cross-border mergers can have complex labour effects.

The chapter proceeds by considering general issues relating to mergers and their definition. It then considers the main strands of research on mergers and acquisitions, noting that research findings are derived primarily from takeovers and highlighting that the effects of mergers on workers may differ from those of takeovers. The chapter then provides a short outline of the Cross-border Mergers Directive, before considering the possible effects on employment and worker participation. This latter part of the chapter discusses the limitations of what is known, and suggests some avenues for further research.

## **2. The mergers and acquisitions process: research findings**

Although mergers and acquisitions are usually considered together, there are important differences between them. In broad terms, acquisitions and takeovers involve one organisation acquiring the ownership of another, while mergers comprise two or more organisations coming together to form a new, combined entity. As they are often characterised in the literature, mergers can be viewed as a marriage between two partners (although often somewhat unequal), whereas takeovers involve one entity acquiring control of another. In contrast to takeovers, one or more parties to a merger disappear but are not formally liquidated as such. In the case of the Cross-Border Mergers Directive, three types of merger are identified (see Clarke, this volume). In the first, one company absorbs other parties to the merger, with the assets and liabilities of the latter transferring to the successor company. In the second, the participating

companies are all dissolved and absorbed into a new company, with the assets and liabilities of the transferee companies passed to it. In the third, a subsidiary, and its assets and liabilities, are absorbed into the parent company. Mergers of these types fall under the remit of the Cross-border Mergers Directive when at least two of the parties are covered by the laws of different EU Member States.

The primary legal difference between mergers and takeovers is that the companies that are party to a merger are not liquidated, merely dissolved. Mergers are less common than acquisitions. High profile mergers include that of British Steel and Dutch Royal Hoogovens to form Corus (subsequently taken over by Tata Steel); that of British Airways and Iberia to form International Airlines Group (IAG); and that of commodity trader Glencore with mining firm Xstrata. However, the boundary between mergers and takeovers can be somewhat blurred in practice, depending on the extent to which the participating companies can be seen as equal partners. For example, the British Steel–Royal Hoogovens merger may be viewed as more akin to a takeover in that British Steel was the dominant partner in the new company in terms of size and share capital.

A major problem in evaluating mergers and their effects is that the literature nearly always discusses acquisitions and mergers together, even though there are potentially important differences between them. These limitations are also often reflected in official statistics and other data. For instance, the UK Office of National Statistics does not differentiate between mergers and acquisitions. In fact, much of the comment on mergers is based on the experience of acquisitions as these are much more common. A confusing aspect of the literature is a tendency to talk about mergers when it is really acquisitions that are being referred to. As a result, the objectives and effects of mergers are not very clearly identified in the literature, and there is a lack of clear empirical evidence relating specifically to mergers. This means that there is a lack of focused evidence against which use of the cross-border merger can be clearly evaluated. In the following discussion of recent literature, the evidence base is primarily takeovers and acquisitions rather than mergers.

The literature on cross-border mergers and acquisitions has grown significantly in recent years, reflecting the increase in cross-border transactions. To some extent the issues are similar to those arising with domestic M&A but cross-border transactions pose more intensive challenges because of differences in national culture, business systems and regulatory regimes. The literature has three main strands so far (Shimizu *et al.* 2004). The first is concerned with the objectives of cross-border transactions (synergy, market entry and so on) and how these influence the nature of the transaction (joint ventures, acquisitions and so on). The second focuses on the process of the transaction and the challenges faced, such as familiarisation with new regulatory requirements. Most important of all, the challenges of integration, especially cultural integration, are highlighted in this literature. This is a particular focus of the organisational behaviour literature in this area. The third strand of literature is concerned with the short and long-term performance effects of cross-border M&A in terms of share price movements, productivity and profitability. An element of this is concerned with the wages and employment effects of cross-border transactions. There is little research specifically concerned with the impact of cross-border transactions on worker participation and

representation, though the literature on multi-nationals (MNCs) generates some relevant evidence (for example, Almond *et al.* 2005; Almond 2010) (multi-nationals often enter new countries via acquisitions).

The first strand of research focuses on the objectives for cross-border transactions. Aguilera and Dencker (2004) identify three main strategic goals (based on Bower 2001) for cross-border mergers and acquisitions:

- (i) elimination of over-capacity and duplication;
- (ii) expansion of product markets and market growth; and
- (iii) securing access to new skills and organisational capabilities.

The labour implications differ markedly between these objectives. Transactions based on the elimination of duplication seem likely to have adverse effects on employment, at least in the short term, whereas those aimed at enhancing market power may have a more benign impact on labour.

On the whole, elimination of duplication is likely to be a more widespread objective for mergers than takeovers, and hence mergers seem more likely to have adverse effects on employment than takeovers. The extent and distribution of employment changes may well vary between the national business systems in which the parties to the merger are located, with companies based in countries with lower levels of employment protection more likely to shed labour. At the time of the Corus merger, shareholders were promised that substantial savings would arise from the merger with clear implications for employment (Edwards 2004). The bulk of the subsequent job cuts took place in the United Kingdom rather than the Netherlands, in large part because of the rising strength of the UK currency at the time. However, weaker employment protection and worker participation arrangements in the United Kingdom also seem to have been factors in the distribution of job cuts.

A second strand of the literature concerns cultural integration. How far are the parties to the merger compatible in terms of culture and organisational practices? There is a substantial body of literature in organisational behaviour which argues that cultural and organisational differences, and a failure to consider how to resolve these, result in many mergers failing to deliver the benefits sought (Stahl and Voigt 2008). To continue the marriage analogy, the two partners discover that they have some incompatibilities and in some cases this leads to divorce. The merger of Chrysler and Daimler-Benz is widely perceived to have failed because of pronounced differences in organisational and management practices and style (Badrtalei and Bates 2007). This led eventually to a de-merger, with the sale of Chrysler to private equity firm Cerberus. In this type of cultural clash, each party typically blames the other for the problems that arise (Weber and Camerer 2003).

Cross-border transactions are widely thought to accentuate these mismatches of organisational culture, due to the important role of differences in national culture and business systems. The costs of integration in cross-border mergers and acquisitions are therefore predicted to be especially high, particularly when national differences are

marked. The potential danger for employees in both parties to cross-border mergers is that tensions in the integration process lead eventually to restructuring, with adverse effects on employment. Mergers may well suffer from these tensions more than acquisitions because the two or more parties to the merger typically retain some of their former identity post-transaction whereas in takeovers the target typically surrenders its identity from the outset.

From an industrial relations point of view, these issues give rise to a number of areas of concern. One is that clashes of culture lead to a failure to respect long-standing industrial relations and employment practices. A second is the extent to which employment and industrial relations policies and practices are harmonised across the merged entity and, if so, on what terms. The danger is that the least advantageous arrangements for workers and unions within the merged entity will be spread across the new company. From a trade union point of view, this is probably the most important issue arising during the development of the Cross-border Mergers Directive and similar initiatives, such as the European Company Directive (see Cremers *et al.* 2013 for an evaluation of this). Finally, do workers pay the costs (foreseen and unanticipated) of the merger through subsequent restructuring initiatives?

Turning to the third strand, the evidence on performance outcomes of cross-border mergers provides a more upbeat evaluation despite some well-publicised failures. In general, the productivity performance of organisations owned by foreign parents tends to be higher than that of domestic firms (Harris and Richardson 2003), although studies of foreign ownership tend to include all forms of foreign direct investment. This effect may well be due to a selection effect: foreign acquirers take over better-performing targets to compensate for the greater risk of cross-border transactions. More specific to mergers and acquisitions, it has been found that the sales and investment, and in some cases productivity, performance of acquirers is boosted after cross-border M&A (Stiebale and Trax 2011). As for stock price performance, the evidence mirrors that of domestic mergers and acquisitions: the shareholders of target firms receive a significant short-run acquisition premium (Goergen and Renneboog 2004; Campa and Hernando 2004), although it is not clear that cross-border targets have a higher premium than local ones (Danbolt 2004).

As for employment and wages, there is a widespread perception that plant shut-downs and job losses are a widespread result of mergers and acquisitions. However, much of the evidence suggests that the employment effects of cross border transactions tend to be positive rather than negative, probably because of the selection effects referred to above. Bandick and Karpaty (2011) find positive employment effects of foreign acquisitions in Swedish manufacturing, while Balsvick and Haller (2010) find plant-level employment and wages increase after foreign acquisitions in Norway. In a cross-Europe study, Oberhofer finds that targets of M&A have employment growth rates of around 15 per cent post-transaction, and that there is little difference between domestic and cross-border transactions in this respect. As for wages, both Hittunen (2007) and Oberhofer *et al.* (2012) find that wages in acquired establishments and firms experience higher wage growth than matched counterparts. The explanation for these generally positive effects of acquisitions is that targets of cross-border transactions are relatively

strong performers or have highly-skilled employees, with the objective of the transaction being to achieve synergy and growth rather than elimination of over-capacity. However, these results are typically derived from acquisition transactions rather than mergers. In so far as mergers may focus more on eliminating excess capacity and duplication, rather different wages and employment effects might be anticipated.

### **3. The Cross-border Mergers Directive**

The Cross-border Mergers Directive was designed to facilitate cross-border mergers within Europe as part of a more general strategy to reduce the obstacles to trans-national restructuring within the European Union. Specifically, it was designed to enable two or more corporate entities operating in two or more Member States to join together. Prior to the implementation of the Cross-border Mergers Directive, the absence of a cross-border legal framework within Europe gave rise to a set of obstacles to any single company wishing to operate in more than one Member State, let alone cases in which two entirely separate companies from different countries wished to merge. These obstacles included a prohibition on seat transfers between most Member States and the absence of a recognised legal framework for harmonising entities between Member States. Companies wishing to expand their activities into another Member State often had to establish and register a separate company in the new country.

This generated a set of administrative costs related to registration, compliance with local company law and submission of financial reports to regulatory authorities, as outlined in the Bech-Bruun and Lexidale evaluation of the Cross-border Mergers Directive for the European Commission (2013). Transactions between related entities in different Member States could also give rise to tax and VAT liabilities. Any company wanting to operate in more than one Member State therefore potentially faced high administrative costs. Companies aiming to promote a pan-European brand, such as consumer-facing companies and banks, were arguably especially disadvantaged by these obstacles. Variations in national corporate law inhibited harmonisation between entities in different Member States. National law also tended to inhibit transfers of company seats between countries.

The Cross-border Mergers Directive enables a process of rationalisation within companies across national borders by making it possible for companies to convert firms in other Member States into branches, thereby saving on the costs outlined above. In fact, the enhanced capacity to carry out intra-company re-organisations is probably the most significant outcome of the directive: the evidence so far suggests that this may be its single most important use. The Bech-Bruun and Lexidale study found that by 2013 at least 38 per cent of cross-border mergers had been group reorganisations of this sort. The national studies reported in the current volume also highlight the primary role of group re-organisations. Biermeyer and Meyer find that all but one of the cross-border mergers in their study are intra-company re-organisations, often involving multiple subsidiaries.



One type of internal re-organisation appears to be a replacement of European Company structures. Prior to the Directive, one of the main ways cross-border reorganisations could be realised was through the creation of a European Company (SE). As is shown by several chapters in this volume, the Cross-border Mergers Directive has substituted for the European Company, with a number of SEs restructuring away from that company form using the Directive.

#### **4. Employment and participation effects of the Cross-border Mergers Directive**

Evaluation of the employment and participation effects of mergers taking place under the Cross-border Mergers Directive is difficult because of the lack of evidence on its workings and on the effects of mergers more generally. The major evaluation by Bech-Bruun and Lexidale (2013) focused mainly on technical aspects of the Directive, and the data sources were primarily company personnel and members of advisory firms. The studies reported in the present book are the main sources of information so far on the employment and participation effects of mergers using the Directive's procedures. What is clear is that although most of these mergers are intra-company administrative reorganisations, widely seen as 'good house-keeping', they are not without implications for employees and trade unions. This section reviews the potential consequences for labour and considers the type of research necessary to evaluate them.

To comply with the terms of the Directive, merging firms are required to publish the draft terms of the merger, including an assessment of the likely employment and participation consequences for employees. This has to be made available to employee representatives or employees, where the former are not present, and they have the right to express an opinion on the terms of the merger and its consequences (see the chapter by Clarke in this volume). These statements are potentially a useful source of research evidence on the initial impact of mergers, although they refer to predicted rather than actual consequences, and will tend to refer to short-term rather than longer-term effects.

The most contentious element of the Directive from an employee or union perspective is the arrangements for worker participation, given the variation in worker participation systems across the European Union. In response to fears that the Directive may be used to weaken worker participation, the general principle in the Directive is that employees should not suffer a diminution of participation as a result of cross-border mergers. As outlined in the chapter by Clarke, participation arrangements are usually governed by the national laws of the country in which the merged company is registered. However, there are a number of exceptions whereby these rules will not apply, and instead a special negotiating body will reach an agreement on participation arrangements. These exceptions include instances where at least one of the merging companies has more than 500 employees and has operated a worker participation system, and where the law in the host country of the successor does not provide for at least the same level of worker participation (measured by the proportion of employee representatives on governance bodies) as in the merging companies.

Comprehensive evaluations of the impact on worker participation have yet to be undertaken. The Bech-Bruun and Lexindale review highlighted various problems with the worker participation provisions in the Directive but these concerned their role in merger implementation rather than their effects on workers. However, Biermeyer's and Meyer's chapter in this volume provides an illuminating content analysis of the documentation generated for employee representatives during the merger process, finding that around half propose to operate a worker participation system and that just under half of these established a special negotiating committee to determine the participation arrangements. Further research is desirable to track the outcomes of negotiations where these take place. Do employee representatives achieve all or most of what they seek? How far do employers secure their objectives in these negotiations? While the Directive refers to national legal arrangements as the context, previous research tells us that national institutional arrangements do not tell the full story: the strategic actions of the actors within these are also important (Edwards *et al.* 2006). What factors influence the success or failure of the parties to secure their objectives for worker participation?

A deeper issue is the role of worker participation as a reason for the merger. Do some employers use the cross-border procedures to weaken worker participation arrangements, and if so, which ones and why? The evidence suggests that, for the most part, weakening participation is not an important reason for a merger. Simplification of administration and organisation seems to be the driving motivation, given that a large proportion of mergers are intra-company. However, an interest in weakening worker participation might influence the form that mergers take. Further research is needed to evaluate the extent of this, although it is likely to be difficult to collect reliable data on this issue because of the obvious sensitivities. The extant information suggests that dilution of participation is not a major factor influencing merger characteristics as many intra-company mergers have created successors in high participation countries. However, for some companies it will likely be important, and further research is needed to determine which ones, and why.

Even where participation arrangements remain more or less unchanged in a formal sense, the evolution of country-based subsidiaries into branches of a company based elsewhere may make the real locus of decision-making more remote, with the result that workers and their representatives have less influence on decisions that affect them. Rationalisations to secure cost savings may intensify pressures on branches to comply with head office expectations and practices. Thus, head office may become more powerful relative to branches, with a loss of some autonomy and discretion at local level (Edwards *et al.* 2006). The extent to which this occurs will depend partly on the extent to which the head company wishes to centralise or decentralise key decisions. One of the issues with the Daimler-Benz–Chrysler merger was that the German company attempted to centralise decision-making in the merged entity in the German arm.

The second major issue concerns the impact of cross-border mergers on employment, wages and terms of employment. Once again, very little comprehensive data have become available on these issues, although the studies reported in this book provide illuminating case studies. It is likely that the purpose and character of the merger

will influence the extent of employment and wage changes. Mergers involving two entirely different companies may well lead to attempts to reduce duplication of some activities, such as administration and management. However, given that many cross-border mergers are intra-company reorganisations, the effects may be predicted to be more modest. The merger documents studied by Biermeyer and Meyer do not predict significant job losses, consistent with the view that these mergers are simply ‘good housekeeping’. Intra-company mergers may also be less susceptible to culture clashes, and the damaging impact these can have on company performance (and often employment), than inter-company transactions.

Nevertheless, reorganisation of national subsidiaries into branches of companies based elsewhere seems likely to facilitate rationalisation of company administration and removal of duplication, if not necessarily at the time of the merger itself. White-collar administrative and managerial staff are likely to be particularly affected by restructuring of this type. Furthermore, some functions may be shifted from one country to another. While the net employment effect within the company may be more or less neutral, job losses may nevertheless be experienced in those countries losing activities. A particular area of concern here is restructuring away from high-wage economies to those with lower labour costs. Certainly, broader evidence on restructuring within Europe suggests a shift of this type (Eurofound 2013). As yet, however, there is no comprehensive data on shifts in employment associated with the application of the Cross-border Mergers Directive.

Collecting comprehensive data on employment shifts will be challenging. Panel employment data will need to be collected on multi-country firms not experiencing mergers as well as those undergoing a merger, with a difference-in-difference methodology appearing broadly appropriate. However, the nature of the data will probably be problematic as the subsidiaries of the merging company will disappear and hence their employment data will be truncated at the merger. Collection of wage data is likely to be even more challenging.

## 5. Conclusion

Cross-border transactions have grown substantially in recent years. The Cross-border Mergers Directive was designed to facilitate them within Europe by removing some of the obstacles to mergers across borders, thereby enabling multinational companies in Europe to achieve cost reductions and enhance their competitiveness. Since the Cross-border Mergers Directive was passed and incorporated into national legislation, there has been substantial growth in the number of international mergers realised using the Directive’s procedures. However, contrary to initial expectations, relatively few cross-border mergers between independent companies appear to have occurred under its aegis. Instead, the primary use of the Directive so far appears to have been to facilitate intra-company reorganisation across borders. Many of these mergers appear to be motivated by ‘good housekeeping’ (tidying up administrative arrangements) rather than a concern to achieve major shifts in the location of corporate activity.

There is a growing research literature in several disciplines on the nature, process and effects of cross-border transactions, which highlights the challenges arising in these cases. However, it is difficult to generate predictions from this literature on the labour effects of the Cross-border Mergers Directive because it draws primarily on acquisitions rather than mergers. Mergers differ somewhat from takeovers in several respects, with the typical concern to achieve synergies and efficiencies likely to have more adverse effects on labour than takeovers aimed at expanding product markets. The nature of transactions taking place under the aegis of the Directive suggests that there may well be threats to employment levels and extant forms of worker participation (despite the protections in the Directive). So far, there has been little systematic research on the labour effects of mergers realised under the Cross-border Mergers Directive and further research on its effects is clearly necessary. The studies in this volume make a significant contribution to meeting this need.

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# Chapter 4

## ETUC recommendations regarding the Cross-border Mergers Directive: Get real, get employees involved and be consistent

Séverine Picard

### 1. Introduction

It took the EU institutions several decades to agree on a cross-border mergers directive. The first attempts were made in the 1980s but failed because of difficulties concerning board structure and employee participation (Brech-Bruun and Lexidale 2013). Regulation of the applicable employees' representation on the company board is normally determined by the company law of the country in which the legal entity is registered. Considering the wide diversity of national traditions on this issue, however, any merger entailing the creation of a new company board in a different jurisdiction from the one applying to the existing companies puts pre-existing mechanisms at risk. But the European Union was not ready for EU harmonisation of such rights.

The adoption of the SE compromise, with its 'before-and-after' principle, in 2001 cleared the impasse. Directive 2001/86 (on the involvement of employees in the SE) foresees a negotiation procedure between management and employees on an information and consultation body, as well as participation rights. Should the negotiations fail, the participation rights in place before the company changed its regime would remain. The Cross-border Mergers Directive was finally published in 2005, offering a similar – but not identical – protection system with regard to employees' participation rights.

In 2015, the Commission announced plans to look at further modernising the rules on cross-border mergers with particular regard to the use of digital technologies (European Commission 2015). While additional tools seem to be needed to further facilitate a cross-border merger, the Commission assumes that the existing provisions on employees' rights are sufficiently protective.

Early on, the Directive was perceived mainly as an instrument for rationalising group structures. Intra-group operations could be facilitated thanks to the merging of existing subsidiaries established in different Member States. Such formal activities do not at first sight entail closures or takeovers of units. This would explain why the provisions related to employees' rights are to be found in a single article.

The reality is more complex. Most mergers leave employees worried about upcoming restructuring and their terms of employment. For example, a cross-border merger can be used in private equity operations, which are now infamous for their extremely negative impact on employment levels. Typically, in a leveraged buyout, the target company is

merged with an acquiring company, which is formed by the investors specifically for this purpose.

Furthermore, companies that wish to transfer their registered office to another Member State are now encouraged to have recourse to a cross-border merger. A company wishing to relocate to another Member State can establish a subsidiary in this country and then merge into this (former) subsidiary. This is a firm trend. Having started life as a tool designed to reduce organisational costs, the Directive is on the way to becoming the main instrument favouring company mobility in the single market. Trade unions across Europe are concerned about such developments, in particular where they lead to letterbox-type practices.

The European Trade Union Confederation (ETUC) believes that increasing company mobility can be beneficial to the European economy to the extent that it responds to justified business needs, which are linked to a genuine organisational logic. But cross-border transfers cannot be treated as an end in themselves by the EU institutions. Indiscriminate mobility will not fulfil promises of renewed growth in the single market.

The ETUC is therefore calling for a global reflection on the revision of the Cross-border Mergers Directive. Cross-border mergers should be facilitated exclusively where there is a genuine business need. Linking the location of the new registration to the location of real economic activity should be a key element of the reform (Section 2). Also, the impact of cross-border mergers on employment must be recognised. This means in particular that rights to information, consultation and board-level participation must be upgraded (Section 3). In a medium-term perspective, employees' rights to information, consultation and board-level participation should be made more consistent and harmonious in all pieces of European company law, including, in particular, in the Cross-border Mergers Directive (Section 4).

## 2. Get real

The so-called fourteenth company law Directive on the transfer of seat from one Member State to another has long been in the Commission's pipeline (for example, European Commission 2003). The issue is highly political. Some Commissioners take a liberal approach to it: EU law should remove any barrier to the re-establishment of a company in another Member State. Other Commissioners have been delaying the publication of such proposal, fearing that they may be accused of promoting '*délocalisation*' in Europe and its accompanying social dumping.

Meanwhile, businesses face legal difficulties if they wish to transfer their activities from one Member State to another. In the absence of EU legislation governing transfer of seat, a company often has to 'die' in its country of origin and to be reborn in the new country of establishment. When a transfer of seat is possible by virtue of two compatible legal systems, conflicts of national laws still arise. Legal complications are frequent and costly.



Large businesses are therefore encouraged to have recourse to the Cross-border Mergers Directive to solve this problem. A new legal entity is incorporated in the Member State of destination. The company in the Member State of origin merges with this ‘artificial’ new entity and the registered seat is fixed in that new Member State. Such operations are further facilitated by a series of initiatives at EU and national levels, designed to promote the creation of subsidiaries (for example, abolition of minimum capital requirement, digital tools for company registration) (Cremers and Wolters 2011).

The ETUC is increasingly concerned about such activities. A cross-border merger can also be misused as a scheme to avoid or minimise legal obligations under a certain national law. A fictional legal entity is established in a ‘convenient’ jurisdiction and the company is subsequently merged into that parent company, while no real economic activity is carried on in that country. Such behaviour is frequently referred to as ‘letterbox-type practices’.

The choice of the location of registration is an important step in the life of a business as it determines the main national legal regime applicable to it. Allowing companies to establish their registered seat in a different Member State from the real place of business leads to regime competition for all the wrong reasons, including, in particular, tax optimisation and circumventing existing worker rights. In certain cases, letterbox-type practices even lead to extreme exploitation of workers and severe losses for national treasuries (ETUC 2016).

Promoting company mobility can be beneficial to the European economy but only to the extent that it responds to justified business needs which are based on genuine organisational reasons. Against this background, the ETUC considers that the ‘real seat’ principle should be a core principle of the Cross-border Mergers Directive. Businesses should be able to benefit from the Directive only to the extent that they can demonstrate that genuine and substantial economic activity is taking place in the Member State of registration of the newly merged company.

### **3. Involve the employees**

Concerning rights of involvement, Article 16 of the Cross-border Mergers Directive seeks to a certain extent to preserve existing rights to participation in the company supervisory or administrative organ. This article applies if the cross-border merger would result in fewer participation rights than previously existed, or if in one of the merging companies more than 500 employees are under a participation regime. A negotiation between employees’ representatives and management is then triggered, along the lines of the provisions of the SE Directive.<sup>1</sup>

The Cross-border Mergers Directive, however, is silent about rights to information and consultation beyond providing that employees receive a copy of the common draft

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1. The Cross-border Mergers Directive is, however, less favourable than the SE Directive. The standard rules, which would apply in the negotiations, can be relied upon where 33 per cent of the entire workforce was under a participation regime before the merger. In the SE Directive, only 25 per cent is required.

terms and the management report on the cross-border merger one month ahead of the shareholders' meeting that is to decide on it. A cross-border merger has considerable consequences for the workforce. It is particularly important that workers are informed and consulted about the proposed merger with a view to properly anticipating and dealing with the changes.

The Directive should provide for a mandatory social impact assessment, as part of a meaningful information and consultation about the proposed merger. The decision to proceed with the merger must not go ahead before the consultation is terminated in both companies. This means that management should inform employees' representatives at an early stage, as soon as a cross-border merger is envisaged. Links between employees' representatives of each company should also be fostered.

Also, while information and consultation in each of the establishments of the newly merged company continue to be governed by national law, global information and consultation at the company level is currently governed by the law of the registered office. This can be problematic in cases where the registered office is not linked to the place of work. Rules on information and consultation at the level of the company must therefore be designed along the same lines as Article 16 of the Directive. Such a rule should ensure that workers do not lose out on a favourable information and consultation regime because of the merger. Most importantly, continuity of the existing works council(s) must be maintained until the new body is ready to start work. The period immediately following a merger is indeed extremely sensitive as restructurings or other decisions affecting employment are most likely to take place then.

Concerning participation rights, Article 16.2 must not be misread as introducing an employment threshold of 500 workers on top of the before-and-after principle contained in the SE Directive. Negotiations on participation rights have to start for companies with more than 500 workers *or* (and not *and*) where workers would be disadvantaged after the cross-border merger. The Directive could benefit from a little clarification in this regard.

The 25 per cent threshold provided for in Article 7.2 (b) of the SE Directive has been raised to 33 per cent in the Cross-border Mergers Directive (Article 16.3.e) for no other reason than to weaken the SE *acquis*. Similarly, the Cross-border Mergers Directive allows management to restrict workers' participation to one-third of the board, a provision that does not exist in the SE Directive. This lack of coherence is problematic as it encourages companies to pick and choose the national law they prefer. It is also hard to justify why workers in a newly merged cross-border company should be treated differently from workers in an SE. The rules triggering negotiations on participation rights, and accompanying fall-back clauses, should be at least the same as those contained in the SE Directive.

Finally, another important issue is what happens when employees' rights have not been respected. In the current text of the Directive, the definition of sanctions is left to the Member States, which leads to a damaging lack of precision in national legislation. The ETUC demands that adequate sanctions are put in place so that there can be no

impunity, especially in case of grave and persistent violations of worker rights. While financial sanctions are important, it is questionable whether fines alone have sufficient dissuasive effect on larger groups of companies. The implementation of decisions by central management with substantial impact on employees must be suspended until a violation has been addressed. It should be possible for such sanctions to have transnational effect so as to prevent companies from avoiding them by relocating to other countries.

#### **4. Be consistent**

As far as worker rights are concerned, the EU company law *acquis* is inconsistent and often contradictory. The Recast European Works Council Directive (Directive 2009/38) usefully guarantees some continuity in case of a change in the legal form of the company (Article 13 last paragraph). Such a principle is not, however, mirrored in company law instruments. Companies not reaching the complex thresholds of the European Works Council Directive are therefore put in a different situation. As far as board-level participation is concerned, the rules in place in the Cross-border Mergers Directive differ from those in the SE Directive. In addition, several proposals for private companies (SPE, SUP) have been issued, each of them undoing the SE *acquis*.

The ETUC is calling for a level playing field on worker rights to board-level representation at EU level. The idea is not to intervene in purely domestic situations, but to propose a sustainable vision for EU company law. Whenever a business wishes to rely on the opportunities offered by European company law, it must at the same time adhere to shared European values. The new framework would become the single reference on information, consultation and board-level representation for all European company law instruments, including specifically the Cross-border Mergers Directive.

Such a horizontal approach to worker rights would guarantee a more secure and clearer legal situation. Above all, it would be good governance. The ETUC strategy to defend this proposal is to demonstrate its positive impact on the long-term interest of EU companies and smart growth in Europe.

#### **5. Conclusion**

From a trade union point of view the experience with the Directive on cross-border mergers demonstrates the need for specific principles that should be included in a revision of this Directive, as well as within European company law in general. These principles are needed to protect employees and other stakeholders from unlimited company mobility and its negative effects.

Firstly, the ‘real seat’ principle is needed to tie the company’s legal obligations to where its real activity – employment and production – is located. Allowing the registered seat to be disconnected from any real activity – which is what ‘incorporation theory’ allows – opens the door to regime shopping and a race to the bottom. Companies should not

be allowed to simply pick and choose their country of registration based on the ability to avoid labour standards and paying taxes. Although the ‘real seat’ principle is ‘out of fashion’ with many company lawyers, policymakers in other areas (insolvency law, tax law) have chosen to include real seat elements in their regulatory systems as a response to company mobility and regime shopping.

Secondly, the Directive on cross-border mergers sorely needs a revision to strengthen provisions with regards to worker information, consultation and participation. At a minimum, the Directive should be brought up to the standards of the SE Directive regarding worker participation. Furthermore, at a minimum, the Directive should contain a provision on the formation of a cross-border works council, along the lines of the SE Directive. Finally, the Directive should contain a provision for the early information and consultation of worker representatives. For these rights to become effective, dissuasive sanctions need to be put in place in case of violation.

Thirdly, the Directive demonstrates the need to be consistent with regard to worker information, consultation and participation across all European company legislation. Here the ETUC has called for a European framework for worker information, consultation and participation, which would apply to all European company legal forms, as well as to company restructuring through European legislation (for example, cross-border mergers and cross-border transfers of registered seat). The European Commission’s current initiative on EU company mobility illustrates the need for such a European framework.

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## **Part 2**

### **National legal frameworks for cross-border mergers**



# Chapter 5

## An overview of national legal frameworks for cross-border mergers

Sigurt Vitols

### 1. Introduction

A key objective of the Cross-border Mergers Directive ('the Directive') is to create a 'level playing field' for cross-border corporate restructuring in Europe. Although the Directive defines a procedure and certain minimum rules, national legal frameworks post-implementation still deviate substantially from each other. One reason is that the Directive includes a number of options in implementation, and there is quite a bit of variation in the extent to which Member States have used these options. A second reason is that many Member States took the opportunity in their implementing legislation to either go beyond what was required by the Directive, or in some cases, to incorrectly or incompletely implement it (Bech-Bruun and Lexidale 2013). A third reason is that actual practice is influenced by a number of laws and institutions that were not – or only in part – touched upon by the Directive. A significant area here is stakeholder protection; existing systems of labour law and industrial relations define the actors involved and many of the rights that play a role in cross-border mergers, e.g. the right to information and consultation at an early stage, before management has made a final decision.

While a certain amount of diversity is inevitable in a region as heterogeneous as Europe, the degree of variation that exists in the national regulation of cross-border mergers has been identified as a cause of concern by many, including the European Commission, companies and different stakeholders. Not surprisingly, different types of stakeholders have different views on which aspects of diversity are problematic and on how severe the problem really is. From a trade union viewpoint, a key problem is the uneven level of worker rights across countries in cross-border merger situations, which the Cross-border Mergers Directive does not compensate for, given the weakness of the rights that it defines.

As an introduction to Part 2 of the book, which focuses on national legal frameworks for cross-border mergers, this chapter provides some comparative data on the laws and institutions in this area in the nine countries explored in depth in Chapters 6 to 14. The aspects covered are: (i) the scope of implementation of the Directive, (ii) the degree to which stakeholder protections were included in the implementation legislation, (iii) the type of organisation that was defined as responsible for making sure the proper procedures were followed in the cross-border merger (the 'competent authority') and (iv) the basic characteristics of the national worker representation systems. The data were gathered from a number of sources, including the SEEurope network (now known

as the Workers' Participation Europe network), the Cross-border Mergers Directive implementation study (Bech-Bruun and Lexidale 2013) and the author's own research.

## 2. Scope of companies and restructuring situations covered

One important source of variation in Cross-border Mergers Directive implementation is the scope of applicability of the legislation. Scope refers to both the different types of legal forms of companies and the types of restructuring situations covered through the transposition.

Table 1 Expanded scope in Cross-border Mergers Directive national implementation legislation

Area of expanded scope \ Country	Austria	Finland	Germany	Greece	Ireland	Netherlands	Norway	Spain	Sweden
Inclusion of cooperatives		X		X					X
Inclusion of investment companies					X	X			
Companies in liquidation	X	X	X	X	X	X	X	X	X
Cross-border divisions		X					X	X	
Geographical scope	X							X	
Triangular mergers		X				X			

Source: derived from Bech-Bruun and Lexidale (2013: Figure 22)

Regarding types of companies covered, the Directive is targeted at limited liability companies, as defined in Article 1. One type of company that was included in implementation in some countries, but not others is cooperatives. The Directive explicitly allows Member States to exclude cooperatives from implementation, even ones that may meet the Article 1 definition of limited liability. Among the nine countries examined in this section, Finland, Greece and Sweden included cooperatives in their cross-border merger legislation, whereas the other six countries did not.

A second type of company included in cross-border merger regulation in a number of Member States, even though explicitly excluded by the Directive (Article 3(3)), is investment companies. This included two of our nine sample countries, Ireland and the Netherlands. Technically this can be seen as an improper implementation of the Cross-border Mergers Directive, although the Directive implementation study reports that, at least in the case of the Dutch government, there was an expectation that future financial legislation would address this situation (Bech-Bruun and Lexidale 2013).



A type of restructuring situation that was included in almost all countries in their cross-border merger legislation was companies in liquidation. The legal literature has questioned whether this is appropriate, as the Directive states that merging companies cease to exist without being liquidated. Nevertheless, all of the nine countries in our sample include these types of companies in their cross-border merger legal coverage. The Cross-border Mergers Directive implementation study states that almost all Member States have followed this path (Bech-Bruun and Lexidale 2013: Figure 22).

A further type of restructuring situation which was addressed in some but not all Member States was cross-border divisions. Cross-border divisions involve splitting up a company into different entities registered in at least two different countries. In some ways, cross-border divisions can be seen as ‘mirror opposites’ of cross-border mergers, as they divide rather than combine across borders. However, trade unions have cautioned that cross-border divisions involve greater risks for workers than cross-border mergers, because assets and liabilities may be divided by ‘financial engineering’ criteria, leaving one or more of the companies created more vulnerable to financial distress than others. Furthermore, there may be an issue of management choosing to split up companies in such a way that employment numbers in the companies created are below important thresholds for worker participation in the home countries of these companies (ETUC 2017). The Cross-border Mergers Directive implementation study reports that almost half of the Member States have passed such legislation (Bech-Bruun and Lexidale 2013). Three of the nine countries examined in this section – Finland, Norway and Spain – have done so.

Another issue regarding scope is whether cross-border mergers with companies from outside the EEA should be covered or not by a country’s legislation (geographical scope). The Directive only requires that cross-border mergers involving companies from Member States be included. However, a number of Member States have extended their rules to include these ‘extra-EEA’ companies. Two of the nine countries covered in this part (Austria and Spain) have done so in their legislation.

A final ‘scope issue’ is whether triangular cross-border mergers are covered by national cross-border merger legislation. Triangular mergers involve three or more companies in different countries, whereby one company is bought up by a second company and merged into one of its subsidiaries, with the shareholders of the merged company receiving shares in the acquiring company in compensation. Triangular mergers are used when it is important to keep the assets and liabilities of the acquired company separate from those of the parent company. Of the nine countries covered in this section, two (Finland and the Netherlands) have regulations covering this type of cross-border merger.

In summary, it does not appear that there is a clear pattern among the nine countries examined in terms of extension of the scope of cross-border mergers regulation. All nine countries have included companies in liquidation, but the other extensions in scope seem to be distributed almost randomly across the countries.

### 3. Stakeholder protections

A second area in which there is wide variation among Member States is in the implementation of protective members for company stakeholders. An explicit goal of the Cross-border Mergers Directive is to protect stakeholder rights. However, only some measures are mandatory in the Directive (Article 4(2)).

Table 2 Stakeholder protection in national cross-border merger regulation

Type of stakeholder \ Country	Austria	Finland	Germany	Greece	Ireland	Netherlands	Norway	Spain	Sweden
Creditors	x	x	x	x	x	x	x	x	x
Minority shareholders	x	x	x	x	x	x		x	
Holders of other rights		x	x					x	x
Employees		x			x				x
National veto		x				x		x	

Source: derived from Bech-Brunn and Lexidale (2013: Figure 28)

In this analysis it is clear that investors (creditors and minority shareholders) enjoy a favoured status in stakeholder protection (see Table 2). All of the nine countries examined in this section included measures to protect the interests of creditors. And of these nine countries, only one (Norway) did not include protective measures for minority shareholders. Additional rights for investors other than shareholders and creditors ('holders of other rights'), however, were less frequent among the nine countries (four countries, including Finland, Germany, Spain and Sweden).

Article 4(2) also gives Member States the option of granting employees additional protections in addition to those governed by Article 16 and the rights with regard to the management report. Relatively few of the Member States, however, decided to implement this option. Of the nine countries examined in this section, only three (Finland, Ireland and Sweden) elected to grant employees rights above and beyond the Article 16 rights plus the right of information and statement of opinion on the management report.

A final type of stakeholder addressed in the Directive is the general public. Specifically, Member States could provide a right for a national authority to veto a cross-border merger which is 'not in the public interest'. This option was used by only a third, that is, three of the nine countries examined in more detail in this part of the book: Finland, the Netherlands and Spain.

Among the nine countries there is therefore substantial variation in the implementation of stakeholder protection other than for creditors and minority shareholders. Finland chose to include protections for all of the other three types of stakeholders, and Sweden and Spain included protections for two additional types. Austria, Greece and Norway, however, implemented none of these additional protections.

#### 4. Designation of the 'competent authority'

The Cross-border Mergers Directive requires Member States to designate a competent authority to examine whether the procedures and requirements have been fulfilled, both with regard to the individual companies involved in the cross-border merger (Article 10) and the cross-border merger as a whole (Article 11). In the first case the authority is to issue a 'pre-merger certificate', which is valid for six months. In the second case the authority is to examine the procedures followed and the presence of pre-merger certificates not older than six months old and approval by shareholders of the common draft terms of the cross-border merger. The authority is also supposed to check whether the worker participation provisions in Article 16 have been fulfilled.

Table 3 Type of organisation designated as competent authority for cross-border mergers

Type of competent authority \ Country	Austria	Finland	Germany	Greece	Ireland	Netherlands	Norway	Spain	Sweden
National registry		X					X	X	X
Court	X		X		X				
Notary						X			
Public authority				X					

Source: derived from Bech-Brunn and Lexidale (2013)

In practice, different Member States have chosen to designate different kinds of organisations as the competent authority. The most frequent choice has been the national registry (four of the nine countries: Finland, Norway, Spain and Sweden) responsible for accepting and storing documents dealing with firm reporting obligations. The second most popular choice was a specific court (three countries: Austria, Germany and Ireland). The Netherlands designated notaries as the competent authority, while Greece chose a specific public agency to perform this task.

This choice has implications for worker participation insofar as the competent authority has both the knowledge and the capacity to check whether procedures have been correctly and completely followed. The best case is the situation where the competent authority does not just accept a statement by the company that Article 16 requirements have been fulfilled, but rather takes steps to check whether it is in fact true. As reported in some of the country chapters, this does not always seem to be the case.

## 5. Characteristics of worker representation systems

Last in order of presentation in this chapter, but arguably the most important in terms of exercise of worker rights, is the characteristics of the underlying worker representation systems in the different Member States (see Table 4). The existence of worker participation in a company involved in a cross-border merger is a key resource for workers. Firstly, worker participation should give ‘early warning’ access for workers to information about the cross-border merger at an early stage, for example, during initial discussions between the management of the companies involved. Worker participation is also an instrument for influencing the behaviour of management and the outcome of negotiations. Six of the nine countries examined in this part of the book have systems of worker participation for private sector companies (Austria, Finland, Germany, the Netherlands, Norway and Sweden).

Table 4 Characteristics of national worker representation systems

Characteristic \ Country	Austria	Finland	Germany	Greece	Ireland	Netherlands	Norway	Spain	Sweden
Worker participation in private sector	x	x	x			x	x		x
Type of workplace representation	WC	TU	WC	TU	TU	WC	TU	TU	TU
% of workers with local employee representation	53%	72%	56%	30%	65%	63%	89%	64%	75%
Early warning rights for worker representatives	x	x	x			x	x		x

Source: [www.worker-participation.eu](http://www.worker-participation.eu); own analysis of ESENER 2 data

A number of Member States also define ‘early warning’ rights for worker representatives at the company and plant level. Generally, the wording of these rights is that worker representatives should be informed by management about a potential restructuring measure that would affect employees before the final decision is taken. However, these rights are typically linked to the existence of formal representation of workers at the plant or company level. The percentage of workers that have collective worker representation varies widely in Europe. In our group of nine countries, the lowest level was in Greece (30 per cent) and the highest level was in Norway (89 per cent).

## 6. Conclusion

This chapter has shown that the current situation in the regulation of cross-border mergers in Europe is far removed from a ‘level playing field’. One source of variation is the implementation of the Cross-border Mergers Directive, as it includes a number of optional provisions. These provisions include the scope of companies and restructuring situations covered, protections for different types of stakeholders and the types of organisations designated as ‘competent authorities’.

When looking directly at worker rights in cross-border mergers, however, a more significant source of variation is the pre-existing system of worker representation at the national level. This is because the additional information and consultation rights included in the Directive are weak (receipt of management report ahead of the shareholders' meeting and the option of attaching an opinion to this report) and because a significant determinant of worker participation rights in Article 16 is the pre-existence of worker participation ('before-and-after' principle). Thus the existence of worker participation in the private sector and the right of worker representatives to information and consultation at an early stage are crucial determinants of the strength of workers' voice in cross-border merger situations.

The most favoured way by trade unions (see Chapter 4 of this volume) to redress this 'uneven playing field' would be to harmonise worker rights upwards by establishing higher standards. This could best be achieved through the implementation of a 'horizontal' European framework for basic standards for worker information, consultation and participation in European company legal forms and companies undergoing cross-border restructuring.

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# Chapter 6

## Austria

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### 1. Introduction

The national implementation of the Directive on the cross-border mergers of limited liability companies (2005/56/EC, hereafter the Cross-border Mergers Directive) was carried out in Austria without major controversy. The Directive was transposed in two separate legal acts. The provisions concerning the employee participation system (Art. 16 Cross-border Mergers Directive) have been incorporated into the Employment Constitution Act (*Arbeitsverfassungsgesetz*). The Directive was generally interpreted favourably for employee participation. In particular, a special negotiating body (SNB) has to be established, which consists of the employee representatives of the participating companies and is supposed to decide on the distribution of seats and the delegation of employee representatives to the supervisory or management board. Employees' participation rights are protected in the event of subsequent domestic mergers for a period of five years after the cross-border merger has taken effect.

Holding, investment and financing companies, which usually have only a few employees, are the primary targets of cross-border mergers. Frequently, smaller subsidiaries in a group are also merged, especially in the banking and insurance sectors. In contrast, larger operating companies with a substantial number of employees are affected only in a few cases. In the period 2008–2012, Austria had a negative cross-border merger balance (93 outbound versus 70 inbound mergers). Since 2015 the total number of mergers has recovered and reached pre-crisis levels.

### 2. National background

In Austria the transposition of the Cross-border Mergers Directive was split up into two parts. The basic elements of the Directive have been transposed into national law in the EU Merger Act (*EU-Verschmelzungsgesetz*, or EU-VerschG), which came into effect in December 2007. Furthermore, Article 16 of the Cross-border Mergers Directive, which regulates the determination of the employee participation system, has been included in the Employment Constitution Act (*Arbeitsverfassungsgesetz*) through the introduction of a special section (Part III). The Ministry of Justice was responsible for transposition of the parts regarding company law and the Ministry of Economy and the Ministry of Labour for those on employee participation. The ministries organised working groups

in which the social partners (the Chamber of Commerce, the Federation of Austrian Industrialists, the Austrian Trade Union Federation and the Chamber of Labour) were involved. From an Austrian perspective implementation of the Cross-border Mergers Directive was carried out without major controversy. Although there was a difference of opinion between the social partners in terms of the implementation of Article 16 (employee participation), ultimately the Chamber of Labour and the Trade Union Federation, ÖGB, were able to convince the Ministry of Labour to adopt the trade union's position (see below).

In principle, two types of cross-border merger can be distinguished: inbound and outbound. In the case of an inbound merger the company resulting from the merger is subject to Austrian law; in the case of an outbound merger the resulting company is subject to a foreign Member State's law. In Austria, private limited companies (GmbHs), public limited companies (AGs) and companies with the *Societas Europea* (SE) legal form may be involved in cross-border mergers. The law does not restrict cross-border mergers to companies that share the same legal form. However, the authorities must check whether the desired merger combination is allowed under the national law covering the merging partner. Cooperatives, private foundations, savings banks and partnerships are not within the scope of the new law.

Company lawyers claim that the demand for cross-border mergers is increasing constantly. Combined with the effect of universal succession (transfer of all assets and liabilities to the acquiring company, including all contractual relationships, such as employment agreements) and the principle of tax neutrality, the cross-border merger offers some benefits for the businesses, such as simplifying legal and administrative structures, minimisation of risk, freeing up of cash and cost reduction. They argue that cross-border mergers are attractive for multinational companies with several corporate entities spread across Europe that want to restructure the group, and also for companies interested in transferring their registered seat to another EU country (Fabian 2014). In the latter case a company establishes a new subsidiary registered in another EU country and afterwards merges with that subsidiary. Since the EU has not passed a directive on the cross-border transfer of registered office, the cross-border merger is often used as a substitute.

From a trade union perspective there does not seem to have been a substantial increase in the number of cross-border mergers and worker participation seems to be a non-issue in most cases. Only a few shop stewards have contacted the Chamber of Labour or the trade unions asking for advice on this issue. In the cases involving large cross-border mergers (for example, bwin/Party Gaming and Intercell/Vivalis) worker participation was not an issue due to the absence of works councils in the companies concerned. This means that trade unions in Austria have little practical experience regarding cross-border mergers. The trade unions are convinced that such mergers are largely used as a restructuring tool within multinational corporations (that is, for internal reorganisation) and as a tool to transfer the registered seat to another EU country.



### 3. National implementation

#### 3.1 Procedure for a cross-border merger

Procedurally, a cross-border merger involving an Austrian company corresponds in many ways to a domestic merger. However, the protection of creditors and the rights of shareholders opposing the merger are stronger for outbound cross-border mergers than for domestic ones. And the protection of employees in cross-border mergers differs from that in domestic mergers. Regarding company law, the Cross-border Mergers Directive has been transposed into national law as follows:

- Merger partners have to draw up a merger plan, the specifics of which are regulated by law (for example, details of the exchange of securities or shares; consequences for employment and employee participation, description of procedure governing employee participation at the merged company and so on). Management is responsible for drawing up these documents. Normally the managements of the involved companies cooperate when preparing the common draft terms. The draft terms of merger have to be filed with the Commercial Register and must be submitted to the shareholders one month prior to the shareholders' meeting.
- A management report for the merging companies must explain the legal and economic aspects of the merger (for example, share exchange ratio and valuation of the merging companies) and the implications for creditors, employees and employee representatives; this report must be sent to employee representatives or to the employees themselves at least one month prior to the general meeting which decides on the cross-border merger. This may be a joint report by the managers of the companies involved. The report, which must include the annual financial statements for the past three years of all companies involved, also has to be made available at the business premises during the month prior to the shareholders' meeting.
- An independent expert (auditor) appointed by the court must review and report on the share exchange ratio in particular. This report must be available for viewing at the business premises one month prior to the shareholders' meeting. The expert report is not required when all shareholders of all companies involved in the cross-border merger waive this right at the shareholders' meeting. Furthermore, the expert report is not required when the transferring company is a wholly owned subsidiary.
- At the shareholders' general meeting at least 75 per cent of the capital present must approve the cross-border merger. A notary must be present and is responsible for writing up the protocol. There are some exemptions for the approval of the merger by the general meeting, for example when the acquiring company holds all of the shares in the transferring company.
- The agreement on employee participation, or alternatively a declaration of non-negotiation, has to be included with the application to the Commercial Register.
- The merger must then be entered in the Commercial Register. In case of an outbound merger the Companies Register Court examines the merger according to national legal provisions and issues a certificate of legality. This certificate and other documents have to be presented to the commercial registry responsible for the acquiring company. After an examination of all the documents and entry in

the commercial register of the acquiring company the merger legally takes effect. In case of an inbound merger the cross-border merger becomes legally effective upon its registration in the Austrian Companies Register.

The consequences of the merger are that all assets and liabilities of the company being dissolved, including all contractual relationships, such as employment agreements, are transferred to the company resulting from the merger by way of universal transfer; the transferring companies cease to exist without liquidation and are de-registered in the Austrian Companies Register; shareholders in the dissolved companies become shareholders in the company resulting from the merger.

### 3.2 Special protection for minority shareholders and creditors

For outbound mergers, shareholders opposing the merger have an exit right to reasonable cash compensation. Within a period of one month, the shareholders have to accept the offer. Minority shareholders objecting to the merger in the shareholders' meeting have the right to initiate court proceedings to scrutinise the appropriateness of the compensation offered. Furthermore, for outbound mergers, creditors of an Austrian transferring company have the right to demand security or payment for already existing claims. This ex-ante protection of creditors' claims does not apply to domestic mergers.

Austrian law does not allow cross-border mergers that include cash payments of more than 10 per cent of the nominal value (even though Art. 3.1 of the Directive allows cash payments to exceed 10 per cent). This means that in case of an inbound merger an additional cash payment of more than 10 per cent of the nominal capital equal to the shares granted by the company is not permitted.

### 3.3 Employee participation

The Austrian system of employee participation allows the works council to appoint one-third of the company's supervisory board members. There have been some controversial differences of opinion between the social partners regarding employee participation. It is a success for the trade unions that the Cross-border Mergers Directive was generally implemented in a manner favourable for employee participation.

The general principle applied by the Cross-border Mergers Directive is that employees' rights of participation are governed by the national laws of the transferee company (in this case, Austria), unless:

- one of the merging companies has employed more than 500 employees, on average, in the six months before publication of the draft terms and such a company has a security stem of employee participation in place; or
- Austrian law does not provide for the transferee company to offer at least the same level of employment participation as existed at the merging companies prior to the merger; or

- 
- employees working in business operations of such a company in another Member State are not provided with the same employee participation rights as employees in Austria.

Austria has transposed all exemptions into a new special section of the Austrian Employment Constitution Act (Part III). In such situations the procedure for employee participation (Art. 16 par 3e) relies on the SE Regulation and SE Directive. Austria has transposed Art. 16 par 3e in line with the Cross-border Mergers Directive and the minimum percentage of employees required has been raised to one-third (SE Directive: 25 per cent).

The implementation of Art. 16 par 4a ('Member States shall confer on the relevant organs of the merging companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation') into national law was of particular importance; §261 which regulates Art. 16 par 4a contains the following provisions:

- Employees or their representatives shall be informed immediately if management decides not to hold negotiations; in particular, management shall provide detailed information on the companies and workplaces involved, the number of employees and details of existing worker representative bodies in these companies and workplaces.
- A special negotiating body (SNB) has to be established; the Austrian members of the SNB shall be appointed through a resolution by the works council. The invitation to the constituent meeting of the SNB can be made by each of its members.
- The SNB is responsible for deciding on the distribution of seats and on the appointment of employee representatives to the supervisory or management board. The appointment of Austrian employee representatives is made by the works council. The delegation of representatives from other Member States is a matter for each individual country and depends on their legislation. The SNB is responsible for the nomination of delegates only in cases where a Member State does not have legal provisions with regard to the delegation of employee representatives to the supervisory or management board.
- In case of a structural change in the company that affects the composition of the delegation the SNB has to take a new decision on the distribution of seats in the supervisory or management board and, if necessary, on the appointment of employee representatives.
- For the SNB some provisions of the SE transposition apply, including the constitution of the SNB, the holding of meetings, the taking of decisions, the bearing of costs, the duty of confidentiality and the rights of employee representatives.

Other important provisions in the national implementation include:

- Art. 16 par 4c allows Member States to limit the proportion of employee representatives in the administrative organ in particular circumstances. This provision was not transposed.

- Art. 16 par 7 states that, when the company resulting from the cross-border merger is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of subsequent domestic mergers for a period of three years after the cross-border merger has taken effect. The representatives of the Chamber of Labour and the Austrian Trade Union Federation argued that the period of three years is a minimum period and not a fixed period, because the European legislator is not authorised to regulate national company law and therefore it is within the competence of the national legislator to go beyond the three years. Art. 16 Par 7 has been transposed in §262 (*Arbeitsverfassungsgesetz*). According to §262 employees' participation rights are protected in the event of subsequent domestic mergers for a period of five years.
- §260 Par 5 states that employee representatives on the board can have one week of additional training without loss of wages if the company has establishments in at least two Member States.

The Austrian legislator did not find a solution to the question of who should appoint Austrian members of the SNB if none of the Austrian companies involved has a works council. This problem was already discussed in the context of the transposition of the SE Directive without any result.

#### **4. Statistical data**

Figures going up to 2015 show that the total number of mergers, both national and cross-border, dipped in the wake of the financial crisis in 2009/2010 but has since recovered to pre-crisis levels.

Statistical data on cross-border mergers differ considerably by source. According to a study by Bech-Bruun and Lexidale (2013) 128 Austrian companies (both merging and acquiring companies) were involved in cross-border mergers in the period 2008–2012. In comparison with other Member States, Austrian cross-border merger activity appears to be above the EU average. When splitting up the companies into merging versus acquiring companies, the data show that more merging companies (70) than acquiring companies (58) have been involved in cross-border mergers in Austria, giving it a negative cross-border merger balance.

Another data source (cross-border mergers taking place between 2008 and 2012 listed in the company register) provided by the Ministry of Justice and evaluated by the author shows a somewhat different result: 188 Austrian companies (both merging and acquiring companies) were involved in a cross-border merger in the period 2008–2012. According to this source, inbound and outbound mergers balance each other exactly; in the observation period, 94 outbound mergers and 94 inbound mergers took place in Austria. However, 24 inbound mergers and one outbound merger are due to a single property management company, Octopus Liegenschaftsverwaltungsgesellschaft m.b.H. This company initially acquired 24 companies, most of which were registered in Gibraltar and England (Lancaster), and was then merged back into a company registered

in England (Lancaster). This example shows very clearly that cross-border mergers are carried out mainly for tax reasons. Holding, investment and financing companies, which usually only have a few employees, are therefore the primary targets. Often, smaller group units are merged, especially in the banking and insurance sector. In contrast, operating companies with a larger number of employees are affected only in a few cases. Excluding the property management company Octopus, there is a negative cross-border merger balance in Austria (93 outbound mergers versus 70 inbound mergers).

The following cross-border mergers are worth mentioning. Among the outbound mergers:

- Coface Austria Holding AG was merged with Coface SA (France);
- ARAG Österreich Allgemeine Rechtsschutzversicherungs-Aktiengesellschaft was merged with ARAG SE (Germany);
- bwin Interactive Entertainment AG was merged with PartyGaming Plc (Gibraltar);
- Procter & Gamble Austria GmbH was merged with Procter & Gamble GmbH (Germany);
- EISMANN Tiefkühl-Service GmbH was merged with Eismann Tiefkühl-Heimservice GmbH (Germany).

Among the inbound mergers:

- Austrian BMW distribution GmbH (retail) was merged with BMW Polska and BMW Hungary;
- Borealis AG was merged with Borealis A/S (Copenhagen);
- Egger Holzwerkstoffe GmbH was merged with Egger Industrieentwicklung GmbH (Germany);
- BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft was merged with BAWAG banka (Slovenia);
- Grazer Wechselseitige Versicherung Aktiengesellschaft was merged with Grawe (Bulgaria).

Almost 65 per cent of the outbound mergers were with acquiring companies registered in Germany; in contrast, for inbound mergers, only 29 per cent of the inbound mergers were with merging companies registered in Germany.

## 5. Conclusion

From an Austrian perspective the implementation of the Cross-border Mergers Directive was carried out without major controversy, since the procedures involved in cross-border mergers correspond in many ways to those for domestic mergers. Austria has chosen a separate law for the transposition of the company law parts of the Cross-border Mergers Directive (*EU-Verschmelzungsgesetz*). The law came into effect in December 2007. The provisions concerning the employee participation system (Art. 16 Cross-border Mergers Directive) have been transposed into the Austrian Employment Constitution Act (*Arbeitsverfassungsgesetz*).

It is a success of the trade unions that the Cross-border Mergers Directive was interpreted in favour of employee participation. Employees' participation rights are protected in the event of subsequent domestic mergers for a period of five years after the cross-border merger has taken effect. If the management has decided not to hold negotiations (if the standard rules for participation are used), a special negotiating body (SNB) has to be established. The delegation of the Austrian employee representatives is carried out by the works council. The delegation of representatives from other Member States depends on their national legislation. The SNB is responsible for deciding on the distribution of seats and on the delegation of employee representatives to the supervisory or management board.

Statistical data (2008–2012) show very clearly that cross-border mergers are carried out mainly for tax reasons. Holding, investment and financing companies, which usually have only a few employees, are primarily affected by cross-border mergers. Furthermore, smaller group units are merged, especially in the banking and insurance sector. In contrast, operating companies with a larger number of employees are affected only in a few cases. Therefore, worker participation seems to be a non-issue in most cases. According to the statistical data, in the time period 2008–2012 Austria had a negative cross-border merger balance (93 outbound mergers versus 70 inbound mergers).

## References

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# Chapter 7

## Finland

**Maria Jauhiainen**

### 1. Introduction

The Cross-border Mergers Directive ('the Directive'), which was adopted by the Council of Ministers on 26 October 2005, was implemented 'on time' by Finland at the end of 2007. Indeed, implementation went further than required by the Directive; more types of companies were covered than specified. Furthermore, Finland also introduced rules covering additional types of cross-border restructuring, specifically, triangular mergers and cross-border divisions. Finally, Finland was one of the few Member States that introduced a right for national authorities to veto cross-border mergers on the grounds of public interest.

Rights for workers in Finland in cross-border mergers are stronger than required by the Cross-border Mergers Directive, but this is due to legal rights pre-existing implementation. The provisions concerning the worker participation system (Art. 16 Cross-border Mergers Directive) have been implemented in the Act on Workforce Representation in the Administration of Undertakings (Section 9b) in 2007. Based on the Workforce Representation Act, certain parts of the Finnish SE Employee Involvement Act (SE law) become applicable if at least one of the participating companies has organised a workforce participation system prior to the merger. The implementation of these provisions in Finland went beyond what was required by the Directive, in the sense that a threshold of only 150 employees (instead of 500 employees) covered by worker participation was needed to trigger negotiations on worker participation or implementation of the standard rules. This is also due mainly to the pre-existing Workforce Representation legislation. For worker involvement other parts of the already existing national *acquis* are important. On a critical note, however, overall employee rights in case of mergers and acquisitions have long been inadequate in practice.

### 2. National legal background on cross-border mergers

#### 2.1 General information

The Cross-border Mergers Directive has been implemented in Finland through the amendment of a number of laws, particularly the Companies Act. The rules apply to private and public limited companies and cooperatives, but also to credit institutions (savings banks in the form of a limited company) and mutual real estate limited companies.

Prior to implementation there were no company law rules on cross-border mergers. Interestingly, however, there were rules regarding taxation in the case of cross-border mergers (Bech-Bruun 2013: 402). Controls on mergers, aimed at ensuring business competitiveness, began in Finland in 1998, with intervention, where necessary, ex ante with regard to concentrations that might significantly impede effective competition. Chapter 4 of the Competition Act formulates the provisions on merger control. The provisions on the assessment of mergers enshrined in the Competition Act have been reformed in order to conform with EU law.

A Finnish limited liability company may participate in a cross-border merger only if the surviving company or the disappearing company qualify as a limited liability company within the meaning of the Cross-border Mergers Directive.<sup>1</sup>

As a result of the cross-border merger all assets and liabilities of the disappearing companies will be considered transferred without liquidation. The transfer of all rights and obligations shall also apply to contractual relationships in force, including employment contracts and employment relations existing on the date the cross-border merger comes into force.<sup>2</sup>

## 2.2 Common draft terms

The management or the administrative organ of each participating company (in Finland, usually the board of directors) must prepare *common draft terms* for the cross-border merger and this draft has to be sent in written form to the registration authorities (Commercial Register) within one month of its signing. The Commercial Register is to publish notice of this, together with a public notice for any creditors.

The draft terms should include the information according to the Directive 2005/56/EC and its Art. 5. Finnish law also requires that some additional pieces of information have to be provided, including reasons for the merger, amendment of the articles of association, rights of any option-holders, loans, amount of equity, the planned date of registration of the implementation of the merger and so on.

From these common draft terms the most meaningful items for the employees are the following requirements from Article 5 of the Directive:

- (d) the likely repercussions of the cross-border merger with regard to employment; and
- (j) when appropriate, information on the procedures by which arrangements for worker involvement and their rights to participate in the company resulting from the cross-border merger are determined (pursuant to Art. 16).

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1. There are some exceptions when it comes to parent-subsidiary mergers and cooperatives after which the foreign legal entity has to own all the shares of its Finnish subsidiary.

2. Also, the Transfer of Undertakings Directive (2001/23/EC) is applied and the clauses regarding it in the Employment Contracts Act apply, see below.



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## 2.3 Management report

As part of the merger proceedings, the management body of each merging company must prepare a *written report* regarding the implications of the cross-border merger for the company and its stakeholders, including its employees. The report shall be made available to shareholders and the employee representatives or, in absence thereof, to the employees directly no later than one month before the date of the general meeting (of shareholders) is scheduled in order to approve the merger.

The cross-border merger implementation study reports that Finland has included additional requirements for the information content of the management report regarding the merger's impact on shareholders, creditors and employees.

In the event the employee representatives issue an opinion on this management report, this opinion must be attached to the report.

## 2.4 Certificate granting permission to merge

If no creditor has objected to the merger or if it is affirmed by a court, the registration authority (the Commercial Register) shall register the draft terms mentioned above. The registration authority must also be provided with evidence of worker participation in the acquiring company in a manner corresponding to that provided in Art. 16 of the Cross-border Mergers Directive. As far as the trade unions are aware, this requirement has mainly been fulfilled through a short sentence from the management side, and the employees' opinion is seldom attached. This is mainly due to the fact that, even though the provisions are fairly good on paper, the sanctions are virtually non-existent and the employees are kept in the dark until the very last moment.

As the cross-border merger implementation study states, the registration authority (the Commercial Register) has to check whether all measures related to the merger have been taken and whether all formalities required by the law have been fulfilled. This check can be characterised as formal rather than substantive in nature (Bech-Bruun and Lexidale 2013: 414).

Only after the above-mentioned criteria are fulfilled can the registration authority issue the merging company with a certificate granting permission for the Finnish companies to participate in the merger.<sup>3</sup> After this, within the next six months, implementation of the merger can take place and its other legal effects will enter into force only upon final registration.

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3. But given only if the acquiring company is a foreign one, as already mentioned.

### 3. Legal background on worker involvement

#### 3.1 Legal basis

The Cross-border Mergers Directive was implemented in Finland in the Act on Workforce Representation in the Administration of Undertakings (the Finnish BLER law) in 2007 (Section 9 b). Based on the Workforce Representation Act, also certain parts of the Finnish SE Employee Involvement Act (SE Act) become applicable if at least one of the participating companies has organised a workforce participation system. Workforce *participation*, as defined in the Finnish SE Act, is

‘considered to be organized if the employees have a right to elect or appoint some of the members of the company’s supervisory or administrative organ or such management groups or equivalent bodies which together cover the company’s profit units, or if the employee representatives have a right to recommend or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ.’ (SE Act)

But if this means taking part in, for example, management appointments in the company or appointing trade union members to company positions – as it is usually imagined – there appears to be little evidence of it happening in Finland (the latter is not even possible according to Finnish legislation). Rather it seems to indicate some sort of copy/paste approach to implementing these clauses in Finnish law.<sup>4</sup> Also, Council Regulation (EC) No. 2157/2001, 12 Article 2-4 is applied in these cases.

If at least one of the merging companies *already provides for* worker participation, the company resulting from the merger shall be governed by the system in place and said participation must take a legal form that allows the exercise of the relevant rights. These matters shall also be negotiated with the workforce and usually an SNB is established to that end.

If *no corresponding employee participation system* has been implemented in any of the companies involved in the cross-border merger, there is no obligation under the Finnish law to organise such a system following the merger.<sup>5</sup> The participating companies may, however, decide to *apply the secondary (standard) rules* on organising worker involvement (representation or some form of participation) provided for in the SE Act as of registration of the merger and even without negotiating with the employees on these matters first.

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4. The applied clauses are §2.1, §4–12, §14, §16.1 ( 7–9), §16.2, §18.1, §19, §28.2, §28.3, §29 and §30 and also §18.2 (2) of the Workforce Representation Act is applied, so that instead of the abovementioned 25 per cent rule the one-third rule will be applied

5. SE Directive, Annex, part 3, b.

## 3.2 SNB

Unless a decision to apply the secondary (standard) rules for organising workforce participation has been made pursuant to the SE Act – very rare in Finland – the management or administrative organs of the participating companies shall, as soon as possible after publishing the merger proposal, take the necessary steps to start negotiating with the employees on the arrangements for worker involvement.

For this purpose an SNB should be formed representing the employees of the participating companies. There are no specific provisions in the law(s) regarding these elections, but the representatives from Finland are likely to be shop stewards, according to Finnish national custom.

The management or the administrative organs of the participating companies shall, as soon as possible after publishing the merger proposals, take the necessary steps – including providing information about participating companies, concerned subsidiaries and establishments and the number of their employees – in order to start the negotiations with the representatives of the companies’ employees on the arrangements with regard to worker involvement.<sup>6</sup> In reality and as far as the trade unions are aware the same worker involvement model that has been in use before – at least in Finnish acquiring companies – is simply transferred to the new company, perhaps with a few additional board seats, and no specific and longer-term negotiations take place on the subject.

## 3.3 Application of the Workforce Representation Act where there are more than 150 employees

Nevertheless the Workforce Representation Act must always be applied to limited liability companies with 150 or more employees (regardless of what was mentioned above<sup>7</sup>) and at least when the merged company *in the future* reaches the threshold of 150 employees.

The purpose of the Workforce Representation Act is to:

- improve enterprise functioning;
- intensify cooperation between the enterprise and its employees;
- increase the employees’ possibilities for exerting influence in the enterprise.

To achieve this the workers shall have the right to participate in decision-making in the executive, supervisory or advisory bodies of the undertaking, when these bodies are handling matters of importance to the business operations, finances and/or to the workers’ position. All in all, the worker involvement (representation) shall be arranged as provided for in the Workforce Representation Act. Unfortunately, the loose legal provisions allow a wide range of ‘employee involvement models’, which are all

6. SE Act, section 4.

7. SE Directive, annex, part 3, b.

deemed valid according to the law, even though they differ greatly in their levels of real importance and degree of influence in the company. They vary from a coffee with the CEO twice a year to a full-fledged place on the board of directors.

It should also be noted that this threshold is considerably below that required in the Cross-border Mergers Directive. The Directive specifies that negotiations on worker participation, or alternatively the unilateral imposition of the standard rules on worker participation by management, is to be triggered if one of the merging companies already has a system of worker participation and at least 500 employees.

## **4. Other applicable legal provisions**

### **4.1 Act on Cooperation within Undertakings**

In Finland, matters affecting the workforce that are caused by the transfer of the undertaking to another place or by other similar changes in business operations can in principle be covered by cooperation negotiations (at companies that employ more than 20 persons). However, these negotiations are triggered only by potential substantial changes for employees. The relevant issues can include changes in duties, working methods, work arrangements and work premises, transfers from one duty to another, but not matters that are expected to result in termination of employment contracts or temporary lay-offs.<sup>8</sup> In cases of cross-border restructuring it is often claimed by management that there will be no substantive implications for workers; therefore these negotiations are not triggered.

However, in cases where there will be lay-offs, employment contracts reduced to part-time work or temporary lay-offs, first the employer has to issue a proposal five days prior to commencement of the negotiations.

Second, the employer is supposed to provide the representatives of the employees concerned with any information available, in writing, concerning:

- the reasons for the intended measures;
- initial estimates of the amount of terminations, lay-offs and transformation of employment contracts into part-time contracts;
- the principles used to determine which employees shall be served notice of termination or laid off or which ones will have their contract of employment reduced to a part-time contract; and
- an estimate of the time needed to implement the said terminations or lay-offs and the introduction of the said part-time contracts.

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**8.** This is a Finnish instrument for addressing a temporary lack of money or available work in the company. A person is put out of work for a certain period of work during which he/she is receiving unemployment benefit instead of salary. After this crisis is over in the company, the employee has to be called back to work. The employment contract stays in force during this whole period.

These matters have to be handled in the cooperation negotiations and in a spirit of cooperation to obtain consensus.<sup>9</sup>

If the employer is considering actions of the kind mentioned that are likely to affect fewer than ten employees (or temporary lay-offs of less than 90 days) the employer shall be considered to have fulfilled his duty to negotiate referred to above once 14 days have elapsed since commencement of the merger. If the employer is considering actions that will affect at least ten employees (or temporary lay-offs of more than 90 days) six weeks must elapse before negotiations.

#### 4.2 The Employment Contracts Act, assignment of business (transfer of undertaking)

Assignment of the employer's business refers to assignment of an enterprise, business, corporate body, foundation or an operative part thereof to another employer, if the business or part thereof to be assigned, disregarding whether it is a central or ancillary activity, remains the same or similar after the assignment. When an enterprise is assigned as referred to above, rights and obligations and employment benefits related to them under employment relationships valid at the time of the assignment devolve to the new owner or proprietor.

The assignor and the assignee are jointly and severally liable for the employees' pay or other claims deriving from the employment relationship that have fallen due before the assignment. The assignee may not terminate an employee's employment contract merely because of assignment of the enterprise as referred to above.

But when an employer assigns its enterprise in the manner prescribed above employees shall be entitled to terminate their employment contracts as from the date of assignment, regardless of the period of notice otherwise applied to the employment relationship or of its duration, if they have been informed of the assignment by the employer or the new proprietor of the enterprise no less than one month before the date of assignment.

### 5. Assessment and conclusions

All in all, it seems that the employee rights are much better safeguarded in the event of cross-border mergers than in other restructuring situations, such as takeover bids, but they frequently do not seem to be used in practice. This may be due to the way cross-border mergers are used in Finland, namely to 'devour' competitors rather than to eliminate unprofitable subsidiaries.

Even the wording in the Finnish legal provisions seems quite unclear after numerous copy/paste exercises and it is hard to say what is really meant by some of the clauses: are

9. Not a co-decision procedure, as in Sweden or a codetermination procedure as in Germany.

they meant to be applied only to SEs<sup>10</sup> and only to their worker involvement practices or are they to be applied also to other limited liability companies with some other kind of worker involvement? Cross-border mergers are few and far between in Finland, so there has not been time to form any case law yet. But it has to be said that analogically all the clauses on cross-border mergers seem to refer to all kinds of company forms with all kinds of worker involvement practices. This also seems to be the meaning of this regulation in general and also at the European level. These issues have been brought to the Finnish Cooperation Ombudsman's attention<sup>11</sup> and he is expected to issue a statement on these matters at some point. It is also evident that the work of the trade unions on these matters has to be strengthened and made more visible.

There are hardly any SEs in Finland at the moment so these rights are not generally known nor by trade union officials for that matter. Particularly the employee rights in these situations have been something of a 'sleeping beauty' for a long time, but more attention will be drawn to these issues in the future.

The Finnish Workforce Representation Act is weaker than those in some other EU countries, because it does not confer a right to a place on, for example, the board of directors: a seat can be allocated where deemed 'appropriate' by the management and, as already mentioned, even a private meeting with the CEO can be enough and fulfil the letter of the law.

The handling of confidential matters in these cases often hampers the rights of the employees to proper information and consultation at an appropriate level. Even though the Finnish Cooperation Ombudsman has stated that such confidentiality does not give the employer the right to omit information and consultation at any level, unfortunately that is regularly the case.

## References

Bech-Bruun and Lexidale (2013) Study on the application of the Cross-border Mergers Directive for the Directorate General for the Internal Market and Services, European Union. <http://dx.doi.org/10.2780/96404>

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10. The wording of the Finnish law, as these clauses are very rarely applied, if at all, is very unclear, but seems to refer only to this aspect.

11. [https://www.tem.fi/en/ministry/organisation\\_of\\_the\\_ministry/co-operation\\_ombudsman](https://www.tem.fi/en/ministry/organisation_of_the_ministry/co-operation_ombudsman)

# Chapter 8

## Germany

Roland Köstler

### 1. Introduction

This chapter examines the implementation of the Cross-Border Mergers Directive in Germany and also presents some statistical data on cross-border mergers in this country, as well as a typology. The national background is the Transformation Act of 1994, which contains certain protections for workers' board-level representation, information rights for works councils and for collective agreements and individual work contracts.

National implementation of the Cross-border Mergers Directive took place during a debate about reforming national participation law. The law implementing the worker participation part of the Directive affirmed national works council rights in cross-border mergers. If a German company involved has worker representation on the supervisory board, more or less the same rules for negotiations apply as in an SE. One exception is the option for management, based on Article 16 of the Directive, to unilaterally impose the standard rules for worker participation without negotiation.

Empirical data on cross-border mergers in Germany shows that the number of cases of worker participation in supervisory boards was low (only 6 per cent of cross-border mergers involving German companies). The typology includes a large number of cases involving an SE. The 'before-and-after' principle introduced with the SE legislation has functioned as a protection for worker participation, with German worker representatives gaining seats in a number of foreign companies.<sup>1</sup>

### 2. National implementation of the Cross-border Mergers Directive

In 1994 the German Parliament (*Bundestag*) approved a thorough reform of the law regulating the transformation of companies, which includes the various types of transformation (especially merger, division and conversion of the company's legal form) in one consolidated law, the German Reorganisation Act (*Umwandlungsgesetz*, UmwG). The three different types of worker participation in Germany are regulated in separate Acts (Coal and Steel Codetermination Act of 1951, Codetermination Act of 1976 and Third Participation Act of 2004). In Germany, large companies have a two-tier

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1. For the notion of the 'before-and-after' principle as introduced by the SE Directive, see Cremers et al. (2013: 13–16).

structure (supervisory board and management board), with workers being represented on the supervisory board.

Whereas the national transposition of the SE and SCE legislation was done with one law, the transposition process for the Cross-border Mergers Directive started with drafts for two different bills. The company law aspects of cross-border mergers were covered in the draft Second Act on the Amendment of the German Reorganisation Act (BR-Drucksache 548/06 *Zweites Gesetz zur Änderung des Umwandlungsgesetzes* 11.8.2006). Worker participation aspects were covered in the draft Act on Employee Participation in Cross-Border Mergers (BR-Drucksache 540/06 – *Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung*, also from 11.8.2006). The debate in Parliament on the worker participation aspects of the proposal was controversial.

The Federal Council of Germany (second chamber of parliament, the *Bundesrat*) also had strong objections to the bill concerning worker participation rights. It was said that the draft was more than a ‘one to one’ transposition of the Directive, specifically with regard to guaranteed seats for trade union representatives in the special negotiating body (SNB) and on the board, and how a loss of participation was defined. As at that time a Government Commission on Worker Participation in Germany (so-called Biedenkopf II<sup>2</sup>) was working, the Council demanded that nothing should prejudice development of the national participation law. The Grand Coalition government (CDU/CSU and SPD) answered that, insofar as there is creative leeway in the transposition, the draft law will be oriented to the SE and SCE legislation. And, as the Biedenkopf Commission was only responsible for making proposals for the development of national participation law, there were no conflicts with cross-border legislation.

The bill for transposition of the worker participation rights section of the Cross-border Mergers Directive was adopted by parliament on 9 November 2006, with only the Liberal Party (FDP) voting against. This was perhaps fortunate timing as a few days later it was made public that the Biedenkopf Commission had failed to achieve consensus between trade unions, employers and experts on worker participation. The resulting law on worker participation granted, apart from general rights on information for the economic committee in the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG, § 106 ff.), rights for workers’ representatives to be informed by managers about planned mergers (§ 6 MgVG). The economic committee has to be informed even earlier (in accordance with §106) about a merger of companies, including in cross-border cases. The bill on company law aspects came into force on 25 April 2007, whereas the bill on worker participation in cross-border mergers was implemented some months earlier (on 22 December 2006).

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2. Three academic members with Professor Biedenkopf as chair, three from the employer side and three from the union side.



### 3. Worker rights in cross-border mergers

The draft law originally included a provision that, in certain cases, would have led to a reduction of worker participation in supervisory boards, while in other cases it would have strengthened worker participation. However, at the end of the parliamentary debate a section was included (§325 UmwG) which preserved the existing thresholds for board-level employee participation in Germany (500, 1000 and 2000) as long as the new number of workers was not less than 25 per cent of the previous number.

For the works council, information rights in the different types of transformation were included in the Reorganisation Act itself. In particular, the draft merger plan and management report on it have to be made available at the latest one month before the shareholders' general assembly decides on the merger (§5). This must include information about the 'consequences of the merger for the employees, their representatives and the measures insofar as foreseen'. Also, rules for the continuity of works councils in cases of company divisions were integrated into the law. Finally, rules for a certain continuity for collective agreements and individual works contracts were included.

The general legal opinion is that the domestic provisions of this law apply only to legal entities with a registered seat in Germany. But for some time there has been a debate about how to deal with transnational cases, and this debate was not ended with the decision on the Cross-border Mergers Directive in 2005. The Directive as implemented in the German Transformation Law (§§ 122 a- l UmwG) covers only certain company forms, specifically private and public limited liability companies and partnerships limited by shares (§ 122 a para 2 UmwG). The debate about including other company forms in accordance with European law is not described further here, as the theme of this chapter is the implementation of the Cross-border Mergers Directive.

One controversy in the legal literature concerns the obligation to provide the workers with the merger plan (common draft merger terms). One opinion is that, in contrast to national mergers (§5 UmwG), the merger plan must not be sent to the works council – even though §122 c UmwG speaks of the expected effects on employment and of rules about the procedures for worker participation in the planned company. The opinion is that the works council or the workers themselves shall be informed by the management report, which is intended to explain and justify to the shareholders the legal and economic aspects of the cross-border merger, and furthermore to explain the implications of such a merger for members, creditors and employees. This shall be made available not less than one month before the date of the general meeting (§122 e UmwG). There is even a debate on whether the results of the merger for the employees and the planned measures – as is required for domestic mergers – or only the impacts for the workers have to be in the report in cross-border cases. The opposite opinion is that there is no difference in obligations between domestic and cross-border mergers. In practise it depends on the general relationship between the management and the works councils. Thus, in the absence of a reform of the Directive, national law should eliminate the differences between domestic and cross-border mergers. In the merger report (§122 e UmwG) information should be provided about the individual and collective impacts

of the merger (for example, change of employer as a consequence of the merger) for the workers in Germany. Workforce reductions via mergers are not allowed (§324 UmwG, §613 a BGB – Transfer of Undertakings Directive).

In the Reorganisation Act (UmwG) there are no penalties for false statements by management and no minimum required period for the validity of statements regarding employment impact. Furthermore there is no implementation of the provision in Art. 7 para 3 of the Cross-border Mergers Directive, which reads: ‘Where the management or administrative organ of any of the merging companies receives, in good time, an opinion from the representatives of their employees, as provided for under national law, that opinion shall be appended to the report’.

However, it has to be kept in mind that the rights of German works councils defined in the Works Constitution Act (*Betriebsverfassungsgesetz*) also apply in cross-border mergers. There are several rules that apply to the early stages of a cross-border merger, especially, as already mentioned, the early information rights of the economic committee. In addition, works councils have the right to hire an external expert (§40 BetrVG) who should be paid by the company (§80 BetrVG).

Regarding transfer of employment rights, Art. 14 para 4 of the Cross-border Mergers Directive reads:

‘The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect.’

The general opinion is that the law on national mergers (§324 UmwG, §613 a BGB, Transfer of Undertakings Directive) is valid for cross-border mergers, too.

With regard to works councils, para 29 MgVG protects the continuity of works councils that already exist. It is based on Art. 16 para 3g of the Cross-border Mergers Directive, which refers to Art. 13 para 4 of the SE Directive. If a national legal entity is merged into an entity in another Member State, or if the other company is in the same country but it is a merger by means of new formation, the old national entity can cease to exist. For these two cases, it is stated that the works councils and their structures should continue. The problem in reality is how to secure in such cases the rights of works councils when the management is located in another Member State, rather than locally.

According to recital 12 of the Cross-border Mergers Directive, the opinion of the authors of the Directive was that specific rights for cross-border information and consultation bodies (‘works councils’) were not necessary (see, in contrast, Art. 4 of the SE Directive). If one considers that the thresholds in the EWC Directive of 2011 (1,000 altogether, with at least 150 in at least two countries) are relatively high, one can say that this weakness is relevant in many cross-border mergers. On the other hand, in several of the larger merger cases European Works Councils (EWCs) already existed, and in one case an

EWC was negotiated after the merger (Fresenius). And, as several of the cross-border mergers took place in combination with an SE, it is not easy to say, based on empirical evidence, whether a demand for lowering the thresholds in the EWC Directive to deal with cross-border mergers is the right way to deal with the problem. Instead, there should be a general solution to cross-border information and consultation bodies in the Cross-border Mergers Directive itself.

#### 4. Worker participation in cross-border mergers

The starting point with regard to worker participation in the Cross-border Mergers Directive is that the company resulting from the merger shall be subject to the rules in force concerning employee participation – if any – in the Member State where it has its registered office. However, the negotiations in the EU resulted in a problematic part of Art. 16, which has its core in para 2:

‘However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply, where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger as referred to in Article 6, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of Article 2(k) of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not

(a) provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation, or

(b) provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.’

In §5 MgVG, the complete wording is repeated and, at the beginning, there were efforts to interpret these clauses as cumulative, which would have made it more difficult to trigger worker participation provisions in cross-border mergers. However, one can prove that this is incorrect by examining the history of Article 16, and in June 2013 the European Court of Justice decided so in an infringement procedure against the transposition of Article 16 into Dutch law.<sup>3</sup> Apart from that, in our opinion even the new rules in Denmark and France on seats for workers whose workplace is not in these countries would not prevent the application of §5 MgVG No. 2 or No. 3.

3. ECJ, 20.06.2013 - C-635/11. Die Aktiengesellschaft AG 2013, 592–94.

Simply stated, if the German company involved has supervisory board membership of workers (which applies if at least 500 workers are in Germany, regardless of how many seats) the idea of the German legislator was to follow the same procedure for cross-border mergers as for negotiations for the SE and SCE. Therefore, the rules in §§6–22 MgVG are more or less similar to the rules for SEs in the SEBG (the German implementing legislation for worker participation in the SE).

There is no understandable reason for the increase in the threshold for the applicability of the fall-back solution from at least 25 per cent of workers covered by worker participation for SEs created by merger to 33 per cent in cross-border mergers (Art. 16 para 3 e, §23 para 1 sentence 2 MgVG). But in the cases we analysed, this has not yet been a problem. And to underline: even if the figure is less than 33 per cent the SNB can vote for participation (§23 para 1 S. 2 Nr. 2 MgVG).

The key problem is para 4 of Article 16, which confers on the relevant organs of the merging companies the right to impose, without any prior negotiation, the standard rules for participation. These rules are referred to in paragraph 3(h), as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office. The merged company is to abide by those rules from the date of registration (see §23 MgVG). In the typology of cases we will show that law firms recommend that management use this ‘opportunity’ and that it is often practised in reality. But even then, according to our opinion, there should be a committee to decide on the distribution of seats (which is explicitly called for in the Austrian transposition law), though this is often neglected in these cases.

The other alternative is that the SNB can decide not to negotiate or to stop negotiations over worker participation (§18 MgVG). This could be useful for a Germany company with worker representation on the supervisory board, because if the SNB says no, the German participation rules existing in that company continue to be valid. The Codetermination Act is better with regard to the casting vote rules and especially the procedures for appointing managers in the companies with board parity. To sum up, either parties agree about participation (§22 MgVG) or participation is settled via the fall-back rules (§§23 ff. MgVG) or through Germany’s participation law as previously applied.<sup>4</sup>

The standard or fall-back rules (§§23 ff. MgVG) state that employees have the right to elect a proportion of the supervisory board or board members. The proportion is determined by the highest proportion that existed in the company organs of the involved companies before the merger. As in the SE law, the seats are distributed according to the proportion of employees in the various Member States (see the sentence above about the distribution of seats). The rules on elections for the ‘German’ seats are the same as those for the SNB in SE mergers. The German legislator has not used the option in Art. 16 para 4 in the Cross-border Mergers Directive to limit the number of worker representative seats in the monistic system to one-third. As the dualistic system is valid in Germany, they saw no need for such a solution.

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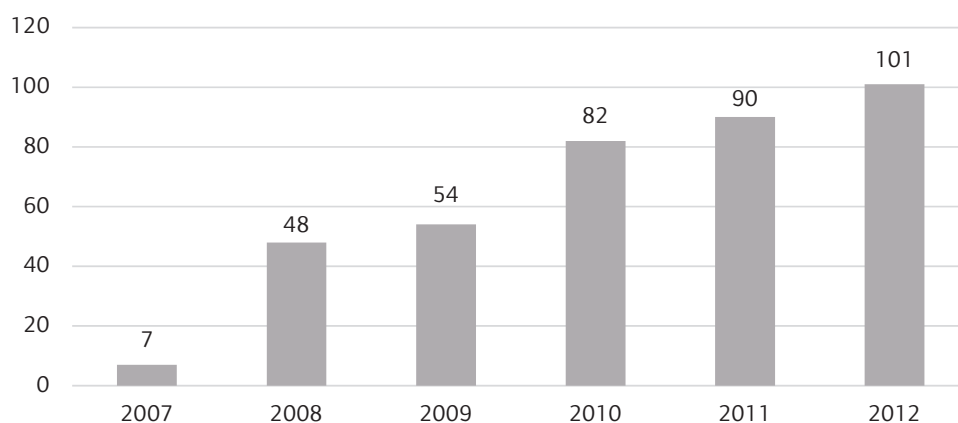
4. See the typology with regard to the latter two cases.

Art. 16 para 7 of the Cross-border Mergers Directive demands a solution to secure participation rights for three years after the registration of the cross-border mergers in case there is a subsequent domestic merger. Board-level employee representation could disappear or be weakened if this subsequent merger is in a country with no or weaker worker participation rights. The German solution is contained in §30 MgVG: in subsequent domestic mergers the national law comes into force if it guarantees the same or a higher level of participation compared with the company resulting from the cross-border merger. In cases in which the national rights do not guarantee the same level of participation, the existing rules on participation continue for three years after the registration of the domestic merger.

## 5. Statistical data

To find out what effects the cross-border merger legislation has had, the Hans Böckler Foundation commissioned Walter Bayer, a professor at the University of Jena specialising in company law, to research the period from 2007 (the year the cross-border merger legislation took effect) to 2012 (Bayer 2013). As can be seen in Figure 1, there is a clear trend of an increasing number of cross-border mergers involving German companies over the period examined. Bayer stated that the trend for 2013 would be at least the same as in 2012.

Figure 1 Number of cross-border mergers in Germany by year, 2008-2012)



Note: starting date for 2007 is 25 April.  
Source: Bayer (2013)

In Table 1 it can be seen that the legal form of the vast majority of German companies involved in cross-border mergers were private limited companies (GmbHs), followed by public limiteds (AGs), SEs (European companies) and partnerships limited by shares (KGaAs). In the almost 400 cross-border mergers German companies were involved in in the period, there was a far greater number of 'inbound' (mergers where the resulting

company was German) than ‘outbound’ mergers (mergers where the resulting company was outside Germany).

Table 1 Legal form of German companies involved in cross-border mergers, 2007–2012

Legal Form	Number involved in CBMs
GmbH (private limited)	325
AG (public limited)	39
SE (Societas Europaea)	15
KGaA (Partnership limited by shares)	2
Total	381

Source: Bayer (2013)

The particular focus of Bayer’s research was worker participation in supervisory boards. When looking at all cross-border mergers pertaining to German companies, only 6 per cent (22 cross-border mergers involving 17 companies) were relevant for worker participation. Two more cases started in his research period, but were completed later. An updated survey was executed, commissioned by the German unions, for 2013–2014: there were only four cases (one of them in Bayer’s study already, but, as stated, after his research period).<sup>5</sup> The number might be a little higher, as the trade unions were not aware of all the cross-border mergers in Bayer’s list for 2007–2012, as works councils sometimes act without informing the unions. We may conclude that there is a big contrast between what is said by law firms promoting cross-border mergers as an alternative to mergers via SE and the empirical facts on cross-border mergers and ‘normal’ SEs.

## 6. Typology of cases<sup>6</sup>

### 6.1 Mergers involving an SE

A large number of cross-border mergers have occurred involving an SE, either as the acquiring company or as a newly founded company involved in the merger. One case is the diesel engine producer MAN Diesel, which was converted into an SE in 2006. Other group companies were merged via cross-border merger to form MAN Diesel & Turbo in 2010, as a result of which the supervisory board was increased in size from 10 to 12 members. Several cross-border mergers also took place within the financial services group centred on Allianz SE. Global Corporate & Specialty AG (which later in 2013 changed its form to an SE with its own agreement on worker participation) and Global Investors Europe GmbH, both with one-third participation in the supervisory board, had foreign companies merged into them, but retained one-third participation.

5. In one case Bayer found that a company should have had but did not in fact have board membership, as it had 1,814 employees. After a merger in 2011 workers received one seat in the monistic board of the acquiring company in Liechtenstein. In the other two cases workers got board membership after an inbound merger in Germany.

6. Remark: all cases hereafter happened within a group, no mergers between companies with no connection before.

The insurance company Euler-Hermes effectively moved to Belgium in 2014 via a cross-border merger and gained one-third representation in a monistic board.

The insurance company ARAG became an SE via conversion in 2011 and in a second step only a few months later six of its foreign subsidiaries were merged into it. A new agreement on worker participation for the cross-border merger replaced the SE agreement. At the chemicals group Clariant a shelf SE was renamed Clariant SE and then six foreign subsidiaries were merged into that entity. As an SNB had already been established for the SE, the workers continued negotiating and in the end reached an agreement on a supervisory board with one-third participation (three worker representatives in a nine-member board). An EWC that had previously existed on a voluntary basis continued to operate.

The health care company Fresenius had been an SE since 2007 with a supervisory board of 12 (although with more than 20,000 employees it should have had 20 members). Since the German law on public limited companies, which defines requirements for the size of the supervisory board based on the number of employees, no longer applied, Fresenius was able to effectively ‘freeze’ the size of its supervisory board at 12. Problems arose for the major owner, a non-profit foundation, due to the need to increase their capital stock, which was solved by converting the SE into a German partnership limited by shares (KGaA). The new partner in this legal construction was a new ex shelf SE involving management. As a KGaA under German law would have to establish a supervisory board with 20 members, they merged a Dutch subsidiary into it immediately after conversion, enabling the supervisory board to remain at 12 members, but with international representation on the employees’ side. Furthermore, there were negotiations on founding an EWC, which led to an agreement.

## 6.2 Parity of supervisory board ‘before and after’

Among the cross-border mergers taking place, some companies were involved that already had a supervisory board with parity worker representation. This proportion was preserved (with one exception), even though there were mergers with foreign subsidiaries. Two examples are the auto components supplier Benteler and the tool manufacturer Kennametal. In the case of the insurance group Munich Re a failed effort was made by management during the negotiations to downsize the supervisory board. In the case of the banking group Unicredit-HVB, management opted in the end to implement the fall-back solution and the size of the supervisory board decreased to 12. In the cases of ING Diba and LBB Berlin the SNBs decided not to negotiate §18MgV, therefore these companies are still under the German Codetermination Act 1976, which is a little bit better than the fall-back rules.

## 6.3 One-third representation ‘before and after’

Apart from the cases already mentioned (ARAG and Allianz), many cases can be found in which company management tried to ‘freeze’ the one-third proportion of worker

representatives on the supervisory board, frequently with at least one seat for a foreign employee (insurance company HDI Gerling, auto supplier Bertrandt, Aareal Bank and frozen-food manufacturers Apetito – which also has an SE in the group, Eismann and the consumer goods group Procter & Gamble).

#### 6.4 Companies over the 500-employee threshold with a supervisory board after the cross-border merger

According to the merger plans, there were three cross-border mergers with companies that already had more than 500 employees when the mergers started. At BMW Bank and the chemical company Oxea GmbH, the result was that after the merger the employees gained one-third participation in the supervisory board. Another case belonging to that category, which also involved the export of worker participation, was the tool manufacturer Hilti Deutschland GmbH. This company had 1,814 employees in Germany but no supervisory board when the negotiations started about a merger into Liechtenstein (into a subsidiary of Hilti AG Liechtenstein, which had no employees). After a discussion in the SNB, management decided to use the fall-back clause unilaterally. But as a result, the German employees received one of the three seats in the monistic board of the resulting Boromont AG. The end of the story is that this company was later renamed Hilti Deutschland AG, based in Liechtenstein, with an establishment in Germany.

#### 6.5 Seats for workers from Germany in foreign companies

Apart from the Hilti (Liechtenstein) and the Euler-Hermes (Belgium) cases, there was another company in which participation was ‘exported’ via cross-border merger, namely Coface, where one-third participation existed in two companies in Germany. They were merged into French subsidiaries and in the monistic French board German employees get one representative in a board with one-third participation.

## 7. Conclusion

The German transposition of the Cross-border Mergers Directive was not without controversy. However, the trade unions were able to influence the government to get this directive implemented in a way that provides some protection for existing worker participation arrangements. As the information and consultation rights in the Directive are weak (no provision for an international works council, only a right to receive the management report one month ahead of the shareholders’ meeting), works councils must depend on their rights in the works council legislation to receive information and be consulted.

The number of cross-border mergers with German companies involving worker participation in the supervisory board is surprisingly low. Interesting is the high number of cross-border mergers in which an SE is involved. And the ‘before-and-after’ principle



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has proven to be very useful in protecting worker participation. Also surprising is the very modest ‘export’ of worker participation, as seen in the small number of seats for foreign worker representatives.

Worker representatives have been disappointed when the employees wanted to negotiate but management decided to directly impose the standard rules. This is an aspect that has to be considered and changed in a reform of the Cross-border Mergers Directive. There is somewhat less disappointment about the lack of a provision for negotiations on the foundation of an international works council. Many of the relevant cases have involved an SE (which has rights to negotiate over an SE works council). Furthermore, many cases involved in-group mergers, where there was already a EWC or where the merging subsidiary was fairly small.

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# Chapter 9

## Greece

**Christos A. Ioannou**

### 1. Introduction

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (hereafter the Cross-border Mergers Directive) was transposed in Greece by means of Law 3777/2009 on ‘cross-border mergers of limited liability companies and other provisions’. The transposition went slightly further than was required by the Directive, specifically by including cooperatives and companies in liquidation within the scope of companies covered. However, Greece did not implement any stakeholder protection provisions above and beyond protection for creditors and minority shareholders (Bech-Bruun and Lexidale 2013).

Implementation of the Directive attracted hardly any attention outside a small community of concerned company lawyers. Since the transposition of the Directive, however, there have been several high-profile cases of cross-border merger registered in Greece (described in Chapter 15 of this book). Some of these cases attracted a lot of attention, mainly because of the employment rights concerns on the labour side. Particularly since 2012, in the second stage of the Greek crisis, there has been increasing use of the EU company law directives (namely, on cross-border mergers, takeovers and transfers of undertakings) as a means for initiating an exit from Greece and indeed as part of wider company restructuring procedures in the context of the financial crisis. Two case studies – of FAGE and of the Coca-Cola Hellenic Bottling Company – have highlighted this new aspect of the Greek crisis and have indicated that there has been little room for exploring worker involvement rights in the context of long-established adversarial industrial relations.

In this chapter, we examine the key elements of the Greek legislation and the worker involvement relevant for or related to the Cross-border Mergers Directive. The Directive has not strengthened the relatively weak information and consultation rights in Greek law, and to date there has been no known extension of worker participation rights in a Greek company due to a cross-border merger.

## 2. Key aspects of the Greek cross-border merger legislation

The standard vehicle for EU law transpositions in Greece is the Presidential Decree. The transposition of the Cross-border Mergers Directive by means of law is in that respect an exception. The main reason is that previously existing legislation had to be amended and harmonised. This is also the case in the area of the Greek company law and Greek corporate governance legislation; the latter was non-existent prior to the year 2000.

Prior to transposition, activities similar to cross border mergers were allowed under national legislation only in the context of transfer of seats. This, however, required an especially large majority in the shareholders' general assembly. The Cross-border Mergers Directive transposition offered a new regime with modernised standards, but some of the bureaucratic restrictions of the previous national regulatory framework were preserved. For instance, after the common draft terms of a cross-border merger are approved by the general meeting of each of the merging companies, Greek law requires an additional step. According to Article 11 of Law 3777/2009, after the general meetings have approved the merger and before proceeding to registration, the merging companies have to enter into a merger contract before a notary, in which they declare that they are merging.

The transposition and national implementation of the Cross-border Mergers Directive was anything but controversial. It evolved as a low-profile issue among a small number of company law scholars. Normally, stakeholders are invited to express their views in the parliamentary process for transposition. In the relevant parliamentary committee, from the list of those normally invited to testify on such matters, only four representatives participated: the chair of the Central Association of Chambers of Greece, a director of the banking sector regulator from the Central Bank (Bank of Greece), the chairman of the National Confederation of Hellenic Commerce and a member of the board of the Economic Chamber of Greece.

There is no evidence yet of any noticeable effect of Cross-border Mergers Directive implementation on the regional division of labour in mergers and acquisitions, specifically on whether the transposition has altered the patterns of the past two decades with regard to the attractiveness of the Greek mergers and acquisitions market. Here, in the European division of labour (Georgopoulos 2003), northern EU countries (for example, Germany and the Netherlands) were mostly net purchasers, while firms in the southern economies, such as Greece, were targets more often than bidders. Only since 1997 and in the first years of the euro zone does this trend seem to have been reversed due to the considerable level of acquisitions made by Greek firms in the Balkan region.

However, there is some evidence that in recent years, because of the economic and financial crisis the possibilities arising from the cross-border merger framework have been explored by companies trying to avoid the severe implications of the local financial crunch. From this evidence we have traced a number of cases worth studying in terms of worker involvement rights (see Chapter 15 in this volume).

Overall, during the transposition period in 2009 and since then the national trade unions do not appear to have taken a position on the issue, beyond generally supporting worker representatives' rights. In part, this is due to the dominance of the Greek trade union movement by the public sector. Sectoral/industry level unions may have had more interest in tackling these issues.

### **3. Worker representatives' rights after transposition**

In the rather restricted literature on the Cross-border Mergers Directive transposition in Greece, one scholar succinctly summarised the dominant attitude towards worker representative rights, as follows:

'A final feature of the cross-border merger, unknown in a Greek merger unless the latter is made for the formation of an SE, is the participation of employees in the management organs. This constitutes a complicated mechanism, which is introduced by Law 3777/2009 mainly by reference to Presidential Decree 91/2006 governing participation in SEs. The basic principle is the maintenance of pre-existing participation schemes (the so-called 'before-and-after principle'), so that the cross-border merger does not become a device for avoiding the national participation requirements. Otherwise, Greek law does not provide for compulsory participation.' (Perrakis 2010: 843)

In the Greek transposition, the minimum rights for workers as defined by the Cross-border Mergers Directive are respected. The Directive requires that existing employment rights be transferred to the new company (note the overlap with the Transfer of Undertakings Directive here). Note also that no minimum period is defined (Article 14). In the Greek transposition law the rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the merger takes effect are transferred to the company resulting from the merger on the date on which the merger is registered with the General Commercial Register (Art. 12 par. 4 Law 3777/2009).

Furthermore, as required by the Cross-border Mergers Directive, the common draft terms of the merger are to be made available to employees at least one month before the shareholders' general assembly. These are supposed to include 'the likely repercussions of the cross-border merger on employment' and any arrangements for worker participation made under Article 16 (Article 5). In the transposition law the common draft terms of merger should include 'the likely repercussions of the cross-border merger on employment' (Art. 5 par. d Law 3777/2009) and any arrangements for worker participation made under Article 14 of the Law (Art. 5 par. i, Law 3777/2009). Together with the common draft terms this information is submitted for review by the Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development. Following the review, the common draft terms are filed with the General Commercial Register, at the General Secretariat of Commerce, at least one month before the shareholder meeting is convened. An extract of the common draft terms must be published in the Greek Government Gazette (Art. 4

Law 3777/2009). Nothing whatsoever is said about whether these should be made available directly to employees or worker representatives.

In the Greek transposition, such an obligation is straightforward with regard to the management report. The Cross-border Mergers Directive provides that the report of the management or administrative organ has to be made available to employees at least one month before the general assembly. Employees can attach a diverging opinion to this report (Article 7). In the transposition law the management report should be made available to worker representatives or, in the absence of such representatives, directly to the employees at least one month before the general assembly (Art. 5 par. 2, Law 3777/2009). Where the management or the administrative organ of the Greek merging company receives, in a timely fashion, an opinion from employee representatives, as provided for under Presidential Decree 240/2006 (transposing ICD 2002/14/EC), that opinion shall be appended to the report (Art. 5 par. 3, Law 3777/2009). In any case the management report is filed with the General Commercial Register at the General Secretariat of Commerce at least one month before the date of the shareholders' meeting.

The direct reference to Presidential Decree 240/2006 (transposing ICD 2002/14/EC) implies compliance with national rules on worker information, consultation and participation (Article 4(2)) the standards of which have been to a certain extent consolidated with the transposition of ICD 2002/14/EC.

In practice, before the transposition of the Cross-border Mergers Directive and ahead of any proposed merger employees have had rights linked to their company unions and to works councils at the company level. The local 'primary level' unions have been the most important form of employee representation in Greece. They have clear legal rights covering information, consultation and negotiation. The law has also provided for works councils. But in reality, works councils are found in only a few companies, and where they exist, they work closely with the local or company union. Primary level union organisations have extensive rights to information and consultation under the 1982 Trade Union Democracy Act, and in 1990 these rights were extended to negotiations.

Works councils can exist alongside the primary level unions, under legislation passed in 1988, but their position is clearly less powerful than that of the union and they have not been widely set up, other than in larger companies. In reality, only a few companies have works councils, and if there is no union, there will almost never be a works council. As well as the basic trade union tasks, such as collecting trade union subscriptions, union workplace representatives in Greece have information, consultation and negotiation rights, although these are defined fairly generally. The information and consultation rights begin with the monthly meeting with the employer, at which the two sides are supposed to attempt to resolve any problems relating to workers or their union organisation. Trade union representatives can also be present at inspections carried out by the Ministry of Labour. In addition, as part of the negotiating process, the trade union representatives have a right to ask for information on the company's economic position and plans, as well as its personnel policies.

Issues on which the union representatives are supposed to be consulted in advance include large-scale redundancies, changes in the legal form of the business and changes in working conditions, where the two sides should try to reach an agreement through negotiation. The law sets out the information and consultation rights of the works council more exactly. The works council should be kept informed of the overall economic position of the business, including its annual report and accounts. It has rights to advance information on: changes in the legal form of the business; any transfer or major change of production capacity; the introduction of new technology; changes in the structure of the workforce, including increases or decreases; the planning of any overtime; and yearly health and safety investment plans. Provisions on the trade union side bringing in external expertise at the expense of the management side exist only in the provisions related to the SE.

In this context, in the event of a forthcoming merger employees may mobilise all the above-mentioned rights arising from the transposition of the Cross-border Mergers Directive or the labour law rights on information, consultation and collective bargaining. However, there are no specific requirements in the national implementation provisions on the impacts on employees and employment, specifically in the case of common draft terms and reports by management/administrative organs. On those matters the transposition follows the Cross-border Mergers Directive word for word. Nor are there any penalties for false statements regarding employment impact, or any minimum period concerning the validity of statements regarding employment impact. And in the national regulatory framework for cross-border mergers there are no additional provisions for further worker rights at hearings of the national merger control authority; that is, at the preliminary stage when the common draft terms are submitted for review by the Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development, or at a later stage when the same Department issues a certificate attesting to the proper completion of the pre-merger acts and formalities. Part of this certificate (Art. 10 par. 1 Law 3777/2009) refers – where appropriate – to cases in which the arrangements for employee participation have been determined in accordance with Article 14 of Law 3777/2009 (in line with Article 16 of the Cross-border Mergers Directive).

The worker participation provisions of the cross-border merger implementation follow the requirements of the Directive. The rules for the special negotiating body (SNB) and the ‘standard’ fall-back rules for worker participation are borrowed from the SE implementation legislation. Up to now, there has been no known case of a Greek company involved in worker participation negotiations due to a cross-border merger.

#### **4. Conclusion**

Although the transposition of the Cross-border Mergers Directive was initially considered a routine issue of no major importance, in the context of the global financial crisis and the Greek sovereign debt crisis, it has emerged as an important issue, as there have been several prominent cross-border mergers involving Greek companies, and the tendency seems to be increasing.

Some of these cases (see Chapter 15) attracted a lot of attention, mainly because of the labour side's employment rights concerns. These cross-border mergers have taken place during a later stage of the Greek crisis, during which an increasing number of major Greek companies have sought to use the EU company law directives (on cross-border mergers, takeovers and transfers of undertaking) as means for initiating a Greek exit and as part of wider company restructuring procedures in the context of the financial crisis.

In this context, the national regulatory framework appears to give preference to the prerogatives of company management rather than to protect the interests of labour. The Cross-border Mergers Directive has not served to change this balance of power in a substantial way. For trade unions and worker representatives, the cross-border restructuring of the past few years has proven to be unknown territory that requires exploration.

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# Chapter 10

## Ireland

Kevin P. O'Kelly

### 1. Introduction

In Irish legislation, mergers and acquisitions are covered by both company and competition laws. In this context, the Cross-border Mergers Directive (2005/56/EC) ('the Directive') was, in part, transposed into company legislation by a statutory instrument in May 2008, some two and a half years after it was adopted by the Council of Ministers and the European Parliament and thus only slightly later than the transposition deadline of December 2007. The company law aspects of the transposition followed the minimum requirements of the Cross-Border Mergers Directive fairly closely. Regarding scope, only companies in liquidation and investment companies were added to the types of companies covered. With respect to stakeholder protection, such protections were included for creditors, minority shareholders and employees, but not for holders of other rights such as bondholders. The optional national veto right in the public interest was also not implemented (Bech-Bruun and Lexidale 2013).

The worker participation aspect of the Cross-Border Mergers Directive was transposed into an employment relations system that still, to a large extent, functions through traditionally adversarial industrial relations. The transposition followed closely the outline and wording of the Directive, with a few notable exceptions. One of the interesting aspects of the transposition was how Article 16, on employee participation, was dealt with. The original European Company (SE) Directive (2001/86/EC), referred to in Article 16.2 and 16.3, was 're-transposed' by the statutory instrument, having been originally transposed into law in 2006. This was done in its entirety, with just one difference: the amendment to Article 7 of the SE Directive by Article 16 of the Cross-Border Mergers Directive, regarding the threshold for implementation of employee involvement rights. However, while the Cross-Border Mergers Directive has been transposed, its application to cross-border mergers involving Irish enterprises is not a factor in assessing such mergers by the designated 'competent bodies'.

### 2. National background to cross-border mergers

The Irish Competition Authority was established by legislation in 2002.<sup>1</sup> It is an independent statutory body that enforces Irish and European competition laws. Its

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1. Competition Act 2002, amended by the Competition (Amendment) Act 2006 and the Competition (Amendment) Act 2012. Competition legislation was again updated by the Competition and Consumer Protection Act 2014. See also Global Legal Insights (GLI) (2015: 109).

mission is to ensure that markets work well for Irish consumers, business and the economy. It does this by taking action against anti-competitive practices, such as price-fixing, blocking anti-competitive business mergers and informing government, public authorities, businesses and the wider public about competition issues. Part 3 of the Competition Act 2002 deals specifically with mergers and acquisitions and sets out the responsibilities and powers of the Competition Authority in examining and approving such activities.

The Competition and Consumer Protection Act, 2014, merged the Competition Authority with the National Consumer Agency to form the Competition and Consumer Protection Commission (CCPC). The Act states that the primary duty of the CCPC is 'a) to promote competition and b) to promote and protect the interests and welfare of consumers' (Section 10(1)(a):(b)). This legislation updated the regulation of mergers by introducing a number of key amendments designed to make mergers and acquisitions easier.

One such amendment is an increase in the thresholds before notification to the CCPC is required, to (as of 1 January 2019) (i) not less than €60 million of aggregate turnover in Ireland of the companies involved (from a worldwide turnover of more than €40 million of the undertakings involved in the merger or acquisition, as set out in the 2002 Act), and (ii) the turnover in the Member State of each of two or more of the undertakings involved is not less than €10 million. The change means that if two (or more) parties were involved in a merger or acquisition then the transaction would have to be notified to the CCPC where the combined turnover in the Member State of: (a) the acquirer (in its entirety); and (b) the target business exceeded €60 million in the previous year and the turnover of the business being bought was more than €10 million.

As a result of the adjustment to the financial thresholds for mandatory notification, there has been a significant increase in the number of mergers notified to the CCPC. The intention of the revised thresholds was to create a better-targeted regime, focusing more closely on mergers that have a potential competitive impact in Ireland (CCPC 2015).

A second important amendment is the removal of the obligation on firms to notify a merger within any specific time period and the extension of the maximum time periods for review of notified mergers. This change has resulted in a lengthening of the review period during which the CCPC shall approve or reject a merger or acquisition, from 27 days in 2014 to 37 days in 2015. The Act also has a number of amendments to the merger regime for the media sector, set out in the 2002 Act.

The CCPC functions within the framework of this Act and EU Council Regulation (EC) No. 139/2004, known as the Mergers Regulation. The Cross-border Mergers Directive is not referred to or taken into consideration by the CCPC in assessing proposed mergers.

Another recent change is in company legislation. The legal regulation of companies goes back to the original 1862 British legislation, which has been amended a number of times in the past century and a half, in particular in substantial legislation 1908 and again in 1963. In 2014 all existing company law – some 17 different pieces of legislation –

was consolidated and completely updated by the Companies Act 2014, which came into force in June 2015. This was the biggest reform of company law in over 50 years. For the first time there is a statutory process in company law, as distinct from competition law, for the merging of Irish enterprises, as the Act incorporates Council Regulation (EC/139/2004) and Directive 2005/56/EC. Part 9 of the Act (*Reorganisations, Acquisitions, Mergers and Divisions*) includes the definitions and other provisions of the Directive, albeit not exclusively applying these to cross-border mergers, but also to company mergers in general.<sup>2</sup>

### 3. Transposition of Directive 2005/56/EC into Irish law

Statutory instruments are a legal mechanism for introducing secondary legislation without having to take primary legislation through all legislative stages in the two houses of the *Oireachtas* (parliament) and are defined by the Statutory Instruments Act, 1947, as being *an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute*. A statutory instrument sets out legislation through a series of ‘Regulations’. They are available to members of the *Oireachtas* for scrutiny for 21 days and become law when signed by the relevant minister and published in the Official Journal of the State (*Iris Oifigiúil*).

Statutory Instrument 157 of 2008 (‘the Statutory Instrument’) transposed Directive 2005/56/EC into Irish law. This statutory instrument has been subsequently amended to take account of further EU directives on company mergers, such as Directive 2009/109/EC (on reporting and documentation requirements in the case of mergers) and Directive 2012/17/EC (for ‘the interconnection of central, commercial and companies registers’). This statutory instrument divides the legislation into three parts: Parts 1 and 2 are incorporated into company law, while Part 3 is a ‘standalone’ set of laws relating to worker involvement:

- Part 1 deals with what are called ‘Preliminary and General’ issues, which include terms and definitions used in the first two parts of the Statutory Instrument;
- Part 2 deals with company law to be followed and adhered to during a merger process. Parts 1 and 2 are incorporated into Irish company law and are to be considered together with the Companies Act, 1963 to 2006 (consolidated by the Companies Act 2014);
- Part 3 on the Regulations for Employee Participation.

#### 3.1 Access to pre-merger reports – articles 5 and 7

In general, the text of the Statutory Instrument closely follows the wording in the Directive. For example, with regard to the ‘Common Draft Terms’ document the text is exactly the same, including Article 5.(d) of the Directive on the ‘likely repercussions

2. Companies Act 2014. See also assessment by Orpen Franks Solicitors at: <http://www.orpenfranks.ie/the-companies-act-2014-spotlight-on-mergers-corporate/>

of the cross-border merger on employment’ – this is reproduced as Regulation 5.(2).(d) in the SI, while Article 5.(j) is transposed as Regulation 5.(2).(i), with reference to ‘arrangements for the involvement of employees ... are determined under Part 3’.

A significant divergence from the Directive is in relation to the reports to be drawn up by the management or administrative organs of the merging companies (Article 7). The Statutory Instrument requires the directors of the Irish company involved in a merger to draft this report, thus putting the legal onus on the members of the company board, rather than management, for preparing such a report.

The Common Draft Terms, the directors’ report and an ‘expert’s report’ (if any) are to be made available for:

‘a period of one month immediately preceding the general meeting of an Irish merging company ... [by] the members of the company and its employee representatives (or, if there are no representatives, the employees) shall be permitted, free of charge, to inspect at its registered office during business hours ... (for) a period of no less than 2 hours in each day ... (Regulation 9.(1))’

While in Article 7 of the Directive, employee representatives are entitled to provide an ‘opinion’ on the proposed merger to be appended to the report of the management or administrative organ, this is not incorporated as a right in the Statutory Instrument and is referred to only in Regulation 9.(1).(b), as follows: ‘the directors’ explanatory report together with the *opinion* thereon, if any, received from the employee representatives’ (italics added).

### 3.2 General meetings – Article 9

Under Article 9, having noted these reports, general meetings of the proposed merging companies are required to approve ‘the common draft terms of the cross-border merger’.<sup>3</sup> The approval of the general meetings is subject to the ‘express ratification of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger’ (Article 9.2). Regulation 10.(2).(a) incorporates this sub-article into the Statutory Instrument, which again refers to the arrangements as set out in Part 3.

### 3.3 Approval of cross-border mergers – Articles 10 to 13

Articles 10 and 11 require each Member State ‘to designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger ...’ and the Irish legislation designates the High Court, which incorporates the Commercial Court (Regulation 4), and the Competition Authority (Regulation 16.(1)) as the competent

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3. An exception to requiring the holding of a general meeting is set out in Article 8 of Directive 2011/35/EC, that repealed Directive 78/855/EC referred to in Article 9 of Directive 2005/56/EC.

bodies. The Competition Authority already had responsibility for scrutinising mergers under the legislation setting it up in 2002.

If the successor company is registered in Ireland, the High Court may make an order confirming that all the legal procedures have been completed, including any arrangements for worker participation in the successor company, as set out in Article 11.1 of the Directive (Regulation 14.1). Such an order can be made, however, only when the Competition Authority confirms that the merger conforms to the terms of the Statutory Instrument and other existing national and EU legislation on mergers and takeovers, including the Takeover Panel Act, 1997 (Regulation 16).

Regulation 17 requires the order of the High Court to be sent to the Company Registrar, who will then publish it in the CRO Gazette within 14 days and the Irish company involved in the merger must also notify the Registrar, within 14 days of receiving the High Court order, the date on which the cross-border merger will take effect.

The Registrar is also required to inform the company registry authorities in the other EEA Member States of the involved companies in the merger under the terms of Directive 2012/17/EC (for ‘the interconnection of central, commercial and companies registers’). This also operates conversely, in other words, it is the duty of the Registrar to remove an Irish company from the CRO register if the successor company is to be located in another EEA Member State, on notification of that registration of the successor company from the company registry authority of that Member State (Regulation 18).

### 3.4 Consequences of a cross-border merger – article 14

Regulation 19 transposes Article 14. While the text is similar, there are some small differences in phraseology, for example:

- Article 14.1.(c) states: the company being acquired shall cease to exist;
- Regulation 19.(1).(c) states: the transferor companies are dissolved.

With regard to Article 14.4 on the transfer of ‘the rights and obligations of the merging companies arising from contracts of employment or from employment relations ...’ into the terms of employment of the employees of the successor company, this is incorporated in Regulation 19.(1).(f). However, this Regulation refers only to contracts of employment and does not mention any obligations arising from ‘employment relations’.

### 3.5 Worker participation – article 16

Part 3 of the Statutory Instrument transposes Article 16. However, rather than just refer to the relevant articles of the SE Directive (2001/86/EC), as in Article 16.2 and 16.3.(a) to (h), Part 3 reiterates in detail the rights and obligations set out in that Directive. It requires any successor company registered under Irish legislation to establish the participation of employees in accordance with the Regulations in Part 3 (22 to 44), plus

Schedules 1 and 2, and ‘the rules in force in the State concerning employee participation, if any’. However, Regulation 23, setting out this general principle, is qualified by sub-regulation (3) that transposes Article 16.2 of the Directive. Furthermore, sub-regulation (4) transposes, almost word-for-word, Article 16.3 (on the regulation by the Member States of worker participation in the successor company). The following sub-sections are an analysis of Part 3 of the Statutory Instrument:

### **Chapter 1 – Preliminary and general**

Regulation 22 outlines the definitions of terms used in this Part 3, including the following, all of which closely follow the definitions in the SE Directive:

- ‘Consultation’ means the establishment of dialogue and exchange of views between the representative body or the employees’ representatives (or both) and the competent organ of the successor company at a time, in a manner and with a content which allows the employees’ representatives, on the basis of the information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the successor company.
- ‘Employee participation’ means the influence of the representative body or the employees’ representatives (or both) in the affairs of a company by the way of (a) the right to elect or appoint some of the members of the company’s supervisory or administrative organ, or (b) the right to recommend or oppose, or both to recommend and oppose, the appointment of some or all of the members of the company’s supervisory or administrative organ.
- ‘Information’ means the informing of the representative body or the employees’ representatives (or both), by the competent organ of the successor company on questions which concern the company itself and any of its subsidiaries or establishments situated in another EEA state or which exceed the powers of the decision-making organs in a single EEA state at a time, in a manner and with a content which allows the employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the company.
- ‘Involvement of employees’ means any mechanism including information, consultation and employee participation, through which employees’ representatives may exercise an influence on decisions to be taken within the company.

### **Chapter 2 – Negotiations and the SNB**

As soon as possible after the publication of the Common Draft Terms for a merger, the management or administrative organ of each company that proposes to be involved in the merger is required to take the necessary steps to start negotiations with the representatives of the employees of that company on arrangements for the involvement of those employees in the successor company. To begin negotiations, the company(s) must provide the employee representatives with information about the identity of the other merging companies, the number of employees in each (identified according to the

EEA Member State in which they are located) and the number of employees covered by an existing employee participation system (Regulation 24).

In giving effect to Article 16.4.(b), Regulations 25 to 31 set down, in detail, the rules regarding the special negotiating body (SNB), including:

- (i) the allocation of members in proportion to the involved EEA Member State;
- (ii) those employees who are qualified to be appointed/elected, including the right of trade union officials from a union recognised by the company and nominated by at least two employees;
- (iii) the conduct of the elections for national representatives;
- (iv) its remit to negotiate a written agreement with management of the merging companies;
- (v) the voting procedures for decision-making, which includes a ‘double-lock’ procedure, that is, a majority of members of the SNB and a majority of employees in the involved companies represented by the members of the SNB (if at least 25 per cent of the overall number of employees are covered by existing employee participation rights and the result of the negotiations would result in a reduction of these rights);
- (vi) in approving a final agreement for employee involvement in the successor company, a ‘triple-lock’ procedure is required, as follows:
  - two-thirds of the members of the SNB voting in favour;
  - votes in favour representing at least two-thirds of the total workforce of the merging companies;
  - including the votes of SNB members representing at least two EEA Member States;
- (vii) the right to engage experts, including from EU/EEA-level trade union organisations (European trade union industrial federations);
- (viii) the right to inform relevant organisations, including trade unions, of the negotiations;
- (ix) expenses for the SNB are to be covered by the merging companies.

All of these closely follow Article 3.2 to 3.7 (Creation of a special negotiating body) of the SE Directive (2001/86/EC).

### **Chapter 3 – Negotiations and agreement**

Regulation 32 closely follows Article 4 of the SE Directive, including negotiating ‘in a spirit of co-operation’.

With reference to the content of an agreement, Regulation 33 sets out, word for word, Article 4.2 of the SE Directive, covering:

- the scope of the agreement;
- the arrangements for worker participation, including ‘the number of members of an administrative or supervisory body of the successor company whom the employees will be entitled to elect, appoint, recommend or oppose’;

- the procedures for election/appointment of these employee representatives;
- the date on which the agreement comes into force, its duration and the procedures for its re-negotiation.

Regulation 34 transposes Article 5 of the SE Directive with regard to the duration of the negotiations. It also transposes Article 3.6 on the termination of negotiations and the voting requirements for such a decision, which are the same as those set out in the SE Directive (see point vi above).<sup>4</sup>

#### Chapter 4 – Supplementary issues

The Statutory Instrument is completed by the addition of a number of ancillary Regulations, such as:

- Regulation 37 (transposing Article 16.7 of the Cross-border Mergers Directive) requires companies registered in Ireland and operating a worker participation arrangement to ensure that these worker rights are protected in the event of a domestic merger for a period of three years after the merger has come into effect.
- Article 10 of the SE Directive, on the protection of members of the SNB or a representative body and employee representatives undertaking functions set out in the Statutory Instrument, in the event of his/her dismissal or other actions by management that are ‘*prejudicial to his or her employment*’, including selection for redundancy, is covered by Regulation 39.
- The provision of ‘reasonable’ facilities for members of the SNB and employee representatives to undertake their duties under the Statutory Instrument. However, while these facilities are not defined, they should not impair the ‘*efficient operation of the company*’.
- Disputes between the company and employees and/or their representatives on any of the Regulations in Part 3 may be referred to the Conciliation Service of the Labour Relations Commission (LRC) and, if no resolution to the dispute is reached at the LRC, to the Labour Court.<sup>5</sup>

Regulation 38, which deals with the issue of confidential information, closely follows the conditions set out in Article 8 of the SE Directive. Article 8.4 requires Member States to provide for an administrative or judicial appeal procedure in the event of a dispute regarding the withholding of information that the management of a company deems to be ‘confidential’ and Regulation 39.(5) and (8) set out how the Labour Court, on hearing all the evidence, should deal with such a dispute, including assistance from a panel of experts to decide on what constitutes ‘confidential information’.

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4. Article 3.6 of the SE Directive states that ‘the majority required to decide not to open or to terminate negotiations shall be the votes of two-thirds of the members representing at least two-thirds of the employees, including members representing employees employed in at least two Member States’.

5. The Workplace Relations Act, 2015, merged the Labour Relations Commission, the Employment Rights Authority, the Rights Commission Service and some of the functions of the Employment Appeals Tribunal into a new independent statutory body, the Workplace Relations Commission.



Schedule 2 of the Statutory Instrument also allows for an individual employee involved in a dispute related to Regulation 39 to take a case to the Rights Commissioner Service for resolution. Failure to implement a determination of the Labour Court or a decision of a Rights Commissioner can be brought to the Circuit Court as a complaint and that Court can make an order directing the offending party to carry out the determination of the Labour Court or the decision of a Rights Commissioner. This order can be appealed by either party to the dispute to the High Court on a point of law. This is in accordance with the normal industrial dispute procedures of the State.

### **Schedule 1 – Standard Rules**

Schedule 1 and the Standard Rules closely follow the rules set out in the Annex to the SE Directive. Part 1 (Composition of Body Representative of Employees) details how such a representative body (that is, a European Works Council) in the successor company is to be constituted; its members elected or appointed; the allocation of seats; and the setting up of a select committee. This representative body can decide, after four years, to re-open negotiations on an agreement, or decide to continue to operate under the Standard Rules. If it decides to re-open negotiations, then a new SNB must be established. However, if this new SNB still cannot reach agreement, then the Standard Rules of the Statutory Instrument will continue to apply.

While Schedule 1 set out the Standard Rules in detail, Regulation 33.2 states that unless the agreement reached by the SNB provides otherwise, a negotiated agreement is not subject to these Rules. However, Regulation 35.(1) states that the Standard Rules will apply to a successor company registered in Ireland, from the date of registration, if:

- (a) the SNB agrees;
- (b) the management of the merging companies decide to accept the Standard Rules; and
- (c) the SNB fails to reach agreement, as set out in Regulation 29 (2).

Part 2 outlines the Standard Rules for information and consultation. In these, the representative body has the right to:

- be informed and consulted;
- receive reports on the progress of the business of the successor company, including:
  - the economic and financial situation;
  - probable development of the business;
  - trends in employment;
  - investments;
  - substantial changes to the business, including organisation, introduction of new work practices, cut-backs, closures, and collective redundancies;
- meet management at least once a year;
- receive agenda for meetings of the administrative, management and supervisory organs and documents submitted to general meetings of shareholders;

- be informed in the event of relocations, transfers, closure of establishments or undertakings, or collective redundancies ‘significantly’ affecting employees and in a situation of urgency, the right of the select committee to request a meeting with management;
- be assisted by experts of its choice (this also applies to the select committee);
- training, without loss of wages, to enable members to fulfil their duties as members of the representative body.

If the management of the successor company decides to ignore the opinion of the representative body and/or the select committee on a proposed measure, the representative body has the right to request a further meeting with management with a view to reaching agreement. For such meetings, the members of the representative body who represent employees affected by the proposed measures have a right to join with the select committee members and to hold a pre-meeting, without management representatives being present.

Part 3 of the Schedule deals with the Standard Rules for worker participation. Referring back to Regulation 35 (6), which states that it is possible to reach agreement to limit the proportion of employee representatives on the administrative or supervisory organs of the successor company. However, where one of the merging companies already has two-thirds employee representation on the administrative or supervisory board, then Regulation 36 (7) requires any proposed limit to be agreed by the representative body, again on the principle of ‘double-lock’ voting; in other words, a majority of at least two-thirds of employees, including employees in two Member States; or two-thirds of the members of the representative body, representing at least two-thirds of the total workforce of the successor company, including the votes of members representing employees in two Member States.

Subject to these qualifications, employees of the successor company and/or their representatives ‘have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the company, equal to the highest proportion in force in the merging companies concerned before registration of the successor company’.

The representative body can decide on the allocation of seats on the administrative or supervisory organ, proportionate to the numbers of employees in the EEA Member States involved, ensuring that there is representation from all the Member States the successor company proposes to operate in. These members have the same rights and obligations as members representing shareholders, including the right to vote. However, one key difference with regard to the SE Directive is a raising of the threshold for the continuity of these employee participation rights in the successor company from 25 per cent to one-third (Regulation 35.2.(a)), meaning that with a merger under the Cross-Border Mergers Directive it is more difficult to ensure the continuation of worker involvement on the administrative or supervisory board of a successor company than is possible under the SE Directive. Furthermore, if none of the merging companies had worker participation arrangements before the cross-border merger, then the successor company is not required to provide for worker participation after the merger.

## 4. Worker involvement rights in Ireland

Within the public sector, commercial state-owned companies and state agencies have statutory works council-type bodies for information and consultation – so-called sub-board or partnership structures – as part of a general framework of employee participation.<sup>6</sup> However, there is no such statutory requirement for permanent employee representation in the private sector. Those who work in unionised workplaces – about one-third of total private sector employment – have representation through their trade unions.

New procedures were introduced as a result of the EU Information and Consultation Framework Directive (2002/14/EC), to promote and advance employee involvement arrangements. This includes a Code of Practice *to assist employers, employees and their representatives to develop effective arrangements for communications and consultation*.<sup>7</sup> However, in most cases, employees continue to be represented through the unions, or not represented at all (O'Mara 2003).

The European Company Survey (ECS), 2013, shows, however, that some organisations have set up works council-type bodies on a voluntary basis. In most cases, these are in addition to trade union representation. The ECS indicated that there is still a long way to go before information and consultation of workers in the policies and strategies of the companies and organisations in which they work would be the *modus operandi* of Irish employment relations (Eurofound 2013). The findings of the ECS show that just 28.4 per cent of all enterprises have some form of employee representation structures within the workplace. This percentage rises to almost 80 per cent in larger companies:

Table 1 Employee representation structures in Irish establishments (by size – %)

Size of Establishment	% with employee representation structures
10 to 49	24.5
50 to 249	52.1
250 +	79.5
All	28.4

Source: Eurofound (2013)

However, various forms of 'direct participation' are more popular and used for the involvement of employees in the organisation of work, generally for the dissemination of company 'information', but this does not progress to 'consultation'. Table 2 shows

6. See the Worker Participation (State Enterprises) Acts, 1977 and 1988.

7. See Statutory Instrument No. 132 of 2008.

examples of some findings on these direct participation forms, which indicate that holding regular meetings with all staff is the most common form of information dissemination and direct participation.

Table 2 Forms of direct participation for employee involvement in the organisation of work (%)

Size of Establishment	% of establishments with specific type of participation		
	Information to employees	Employee surveys	Regular employee meetings
10 to 49	46.7	23.4	66.9
50 to 249	65.0	47.7	69.8
250 +	83.7	78.8	84.8
All	49.2	26.9	67.4

Source: Eurofound (2013)

The indications from other surveys of worker involvement were that the worker director system in state-owned companies and agencies has worked well, but that the political environment has shifted against such workplace-based participation arrangements (TASC 2012). Second, company-level information and consultation arrangements are not widespread in the private sector or effective in workplaces and, where there were information and consultation structures operating at different levels within workplaces, there was a lack of connection or coordination of these different structures, with employee representatives operating independently of each other within enterprises and organisations.<sup>8</sup>

As with much EU employee rights legislation, the employee rights under the Cross-Border Mergers Directive were superimposed on this adversarial system of employment relations, in which information, consultation and participation, on the whole, do not function.

## 5. Cross-border mergers in Ireland

Statistics on mergers are not readily available from the State agencies that deal with the regulation of enterprises. The following are just some of the 'scraps' of information available.

8. See, for example, the National Centre for Partnership and Performance (2009) and the findings of the ICTU INFORMIA: [http://informiaproject.org/language/en/uploads/files/materials\\_\\_o/events\\_\\_c2bdb89e7c93db367821deb65560e8e6.pdf](http://informiaproject.org/language/en/uploads/files/materials__o/events__c2bdb89e7c93db367821deb65560e8e6.pdf)

## 5.1 Competition and Consumer Protection Commission (CCPC)

In the five years 2008 to 2013 the Competition Authority examined and approved some 183 proposed mergers. However, in its reports it does not differentiate between national and cross-border mergers. Of the top ten mergers and acquisitions in 2015, by value, only one could be considered an ‘internal’ EEA transaction, that been the acquisition of certain assets of cement manufacturer Holcim und Lafarge by the dominant cement company in Ireland, CRH plc, in a deal worth €6.5 billion (GLI 2016).

The CCPC is required to attend and participate in EU mergers advisory committees when it considers there is a significant Irish interest. During 2016 the CCPC was actively involved in the European Commission’s investigations into six proposed mergers that had an Irish interest (CCPC 2016).

Table 3 Mergers examined by the Competition Authority, 2009–2016

	Merger notifications	Approved mergers
2009	27	24 (3 approved in 2010)
2010	46	40 (6 approved in 2011)
2011	40	36 (4 approved in 2012)
2012	33	27 (6 approved in 2013)
2013	37	33 (4 approved in 2014)
2014 (Jan-Oct)	31	25 (6 carried over into 2015)
2014 (Nov) – 2015 (Dec)	88	78
2016	67	70 (11 carried over from 2015)

Source: Competition Authority and Competition and Consumer Protection Authority, annual reports

## 5.2 Company Registry Office (CRO)

In contrast, however, according to the 2015 annual report of the Irish Company Registry Office (CRO), there have been some 100 cross-border mergers, either acquired or absorbed, since the Directive came into force in May 2008 (2009 was the first full year of implementation). However, the CRO does not provide a breakdown of these mergers by business sector or identify the home Member State of the non-Irish companies involved in these cross-border mergers.

Thirty-nine company acquisitions and 69 absorptions were completed using the cross-border merger legislation between 2008 and 2016 (see Table 4).

Table 4 Cross-border mergers in Ireland, 2009 to 2016

	Completed acquisitions	Completed absorptions	New companies
2009	5	8	
2010	6	7	
2011	4	22	
2012	4	8	1
2013	4	7	
2014	6	9	
2015	7	4	
2016	3	4	

Source: Company Registry Office (2016: 19)

### 5.3 Other statistical sources

#### William Fry M&A reviews

The corporate legal company, William Fry, based in Dublin, publishes quarterly and annual reviews for mergers and acquisitions (M&A) for Ireland (William Fry 2016). Unfortunately these reviews do not distinguish between mergers and acquisitions. The 2016 review estimated that there were 213 M&A transactions involving Irish enterprises during that year. This was made up of 84 Irish enterprises merging or acquiring companies in other jurisdictions (outbound); 79 where Irish companies were merged with or acquired by non-Irish enterprises (inbound) and 50 were domestic M&As. However, the value of these deals increased from €16.1 billion in 2015 to €26.8 billion in 2016, as a result of very large mergers, by value, involving major pharma enterprises and including a substantial bid by Johnson Controls (a US car batteries, heating and ventilation equipment manufacturer) of €14.9bn for Tyco International plc, which was announced at the very start of 2016 – this was an ‘inversion’ transaction.<sup>9</sup> The main sectors involved in M&As in 2016 were: business services (16%); hospitality and leisure, industrial and chemicals, financial services (all 12%); and the pharma, medical and biotechnology sectors (11%). The number of Irish outbound M&A deals, at 40% of activity, was among the highest in the EU.

The review also quotes Mergermarket data, a global online tracker of mergers and acquisitions, which estimated that across Europe there were 6,507 M&A deals in 2015 and just 3,110 in the first half of 2016, compared to 6,667 transactions in 2014. This report noted a slowing of M&A activity in 2016 as a result of the BREXIT referendum result and the US administration to move against ‘inversion’ transactions. It should be noted, however, that the majority of the transactions involve non-EU enterprises.

9. The GLI report estimated this deal at €16.6 billion.

## Global Legal Group Report

The GLI report estimated that there were 422 mergers and acquisitions during 2016. The pharma sector continues to be a key M&A sector and the source of ‘mega-deals’. Also, the aircraft leasing sector saw one of the biggest deals during the year with Avolon, the Irish aviation leasing company, merging with Bohai Leasing Co., Limited, part of the Chinese HNA Group, for €9.3 billion. This transaction will make Avolon the third-largest aircraft-leasing company in the world. With regard to US involvement in M&As with Irish companies, the report notes that, to deal with the increase of ‘inversion’ transactions:

‘On 4 April 2016, the US Department of the Treasury announced that it was introducing further measures to “rein in” corporate inversion transactions which see US-parented multinational corporate groups acquiring smaller foreign companies and then altering the tax domicile of the merged group to that of the foreign-acquired company in order to reduce or avoid paying tax in the US. ... Despite the US Treasury’s guidance, inversion transactions had become quite a prevalent feature of the Irish corporate landscape in recent years due to the low rate of corporate tax payable in Ireland once a US company re-domiciles to Ireland.’<sup>10</sup>

## 6. Conclusion

Mergers are covered by a number of statutes in Irish legislation. For example, the series of Acts for controlling competition, culminating in the Competition and Consumer Protection Act 2012 and also the Companies Act 2014, which incorporates the EU Cross-Border Mergers Directive, introducing for the first time into company law statutory procedures for company mergers.

With a particular focus on the Cross-border Mergers Directive, a Statutory Instrument transposed this legislation into Irish law.<sup>11</sup> The relevant Statutory Instrument closely follows the text of the Directive, with some minor exceptions, but with one significant difference. Article 16, on worker participation, is transposed by incorporating the SE Directive (2001/86/EC) in full into this legislation. The only modification to the SE Directive in this ‘re-transposition’ is the change to the threshold set out in Article 7.2.(b) (for application to Part 3 of the Annex), for the continuity of worker participation in a new merged entity, which is increased from 25 per cent to one-third of the workforce by Article 16.3.(e) of the Cross-border mergers Directive.

While there is now a substantial body of national legislation dealing with mergers, in the assessment of such mergers the employee information, consultation and participation rights are not part of the appraisal as to whether a merger meets all necessary legal requirements before being approved. The CCPC and the High Court are the ‘competent

10. GLI Report 2017 – see: <https://www.globallegalinsights.com/practice-areas/mergers-and-acquisitions/global-legal-insights---mergers-and-acquisitions-6th-ed./Ireland>.

11. Statutory Instrument (SI) 157 of 2008.

bodies' designated to ensure that, under Irish law, all these requirements are fulfilled by the merging enterprises; these statutory bodies do not include legal employee rights as part of their assessments. The only focus of any formal assessment of a proposed merger is its impact on competition in the relevant business sector. The statutory rights of employees are not a consideration.

Detailed statistics are not readily available on the number of cross-border mergers involving Irish enterprises that might be covered by the Directive; where such information is available, such as in the Company Registry Office annual reports, there is no detailed analysis of the mergers. Consequently, it is difficult to assess the number of employees involved or in which other EEA Member States the merging companies are located.

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# Chapter 11

## The Netherlands

Robbert van het Kaar

### 1. Introduction

In the Netherlands, the Directive on cross-border mergers of limited liability companies (2005/56/EC, hereafter, the Cross-border Mergers Directive) was implemented without major controversy. The Directive was transposed in one act, adding a chapter to existing legislation on mergers and divisions. The provisions on the employee participation system (Art. 16 Cross-border Mergers Directive) were transposed into one article (2:333k Civil Code). Implementation brought little change to the system of worker involvement (both information and consultation and board-level representation) already in place in the Netherlands. This system is characterised by strong information and consultation rights, including the right for works councils to bring merger cases to court. It is noteworthy that the European Court of Justice (EJC) ruled that Dutch implementation in its original shape was not in conformity with the Directive. After the ECJ's ruling the legislation was amended in 2015; the main issue was the exclusion of foreign workers from board-level representation in the original implementing legislation. An analysis of almost 700 announcements of cross-border mergers in the Official Register in the period 2009–2014 shows that intra-group restructuring is the main driver of such mergers in which Dutch firms are involved. Board-level representation barely seems to be an issue in Dutch firms' cross-border mergers.

### 2. National background

Before the Cross-border Mergers Directive rules on national mergers and divisions were already in place, based on the third and sixth European company law directives. These rules are laid down in Dutch company law (Book 2 of the Civil Code, Title 7).

Before implementation of the Cross-border Mergers Directive, there was also an extensive system of worker involvement with regard to mergers and acquisitions. On the whole, the Cross-border Mergers Directive brought little change to this system, with the exception of the rules on board-level representation, as laid down in Article 16 of the Directive. The main elements of the system of worker involvement – with regard to both information and consultation and board-level representation – will be described in more detail in Section 4.

### 3. Implementation of the Cross-border Mergers Directive

#### 3.1 General

The Cross-border Mergers Directive has been added to Title 7 of Book 2 of the Civil Code on mergers and divisions, in Chapter 3A. Chapters 1 and 2 of Title 7 contain the general provisions on mergers and divisions, including definitions and scope. Article 2:313 and 2:314, 4 stipulate that merger plans must contain details of the foreseen consequences of the merger, and, if there are any, comments by the works council and the unions. Chapter 3 contains provisions that are specific to public and private limited companies, and Chapter 3A those specific to cross-border mergers.

According to Article 2:333b the Cross-border Mergers Directive can be used by public and private limited companies and European Cooperative Societies (*Societas cooperativa Europaea* or SCE). It must be noted that Chapter 3A also covers the SE, although that is not tackled in the present chapter.

#### 3.2 The rules on board-level representation

The implementation of the cross-border merger rules on worker participation is laid down in Article 2:333k Civil Code.<sup>1</sup> We will focus on this Article in this section.

Paragraph 1 of Article 2:333k defines employee participation by reference to the SE legislation (Article 1:1 WRW, which implemented the SE directive).<sup>2</sup> Paragraph 2 states that the participation legislation of that country shall apply in which the statutory seat of the company established as a result of the Cross-border Mergers Directive is located. This is the basic rule. Paragraph 3 contains the exception to paragraph 2 and transposes the core of Article 16 of the Directive (the so-called ‘three exceptions’). According to paragraph 4 the merging companies have to establish a special negotiating body (SNB) as soon as possible after publication of the merger proposal. Reference is made to the SNB rules in the SE legislation (Articles 1:4, 1:7–1:10, 1:16 and 1:26 par. 3 WRW). According to paragraph 5, the SNB and the merging companies should negotiate an agreement on worker participation, taking account of Articles 1:11 and 1:12 WRW (which contain the basic rules on negotiations, following the SE directive). Paragraph 6 contains minimum requirements for the content of the agreement, referring to the corresponding rules for SE agreements. Paragraph 7 covers the duration of the negotiations, namely six months, with the possibility of agreeing to extend them by another six months. Paragraphs 8 and 9 cover the decision-making process in the SNB, referring to the corresponding rules for the SE (Article 1:14 WRW). Paragraph 9 contains the rules on negotiation processes that are not started or ended – which requires an SNB majority – after which the relevant national participation legislation in the country where the company is registered will apply.

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1. See [http://wetten.overheid.nl/BWBR0003045/Boek2/Titel7/Afdeling3A/Artikel333k/geldigheidsdatum\\_02-11-2015](http://wetten.overheid.nl/BWBR0003045/Boek2/Titel7/Afdeling3A/Artikel333k/geldigheidsdatum_02-11-2015)

2. See [http://wetten.overheid.nl/BWBR0018115/geldigheidsdatum\\_02-11-2015](http://wetten.overheid.nl/BWBR0018115/geldigheidsdatum_02-11-2015)

The wording of Article 2:333k is extremely complex, with many cross references to other articles. This complex wording was reduced slightly in 2015 (see the next sub-section), but it is still a far from easy read.

### 3.3 ECJ: Dutch implementation incorrect

In 2011, the Dutch trade union federation FNV lodged a complaint at the ECJ that implementation of the Cross-border Mergers Directive violated the rules on worker participation. The complaint appeared justified: on 20 June 2013 the ECJ ruled<sup>3</sup> that the Netherlands had to change its legislation on this issue. The core of the ECJ ruling was that the Netherlands did not grant foreign employees sufficient (if any) access to its participation system. The defence put forward by the Dutch state – namely that the directive does not rule out the possibility that participation rights can be diminished in case of mergers between smaller firms and that therefore firms do have to grant participation rights to employees from other countries in firms resulting from a cross-border merger – was rejected. The same was true for the argument that the directive does not aim to extend participation to workers from other countries. Therefore, the legislator had to commence a revision process. The law (Article 333k Book 2 BW) was amended on 11 February 2015 (entering into force on 1 July 2015).

## 4. The Dutch system of worker involvement

Dutch legislation on worker involvement is quite extensive, including rules on both information and consultation and board-level representation. Compared with other EU countries, the rules in particular on information and consultation – including the right to go to court in case of mergers and acquisitions – can be considered strong. In the next sub-sections we will take a closer look at board-level representation (4.1), information and consultation (4.2), the right to address the general meeting of shareholders (4.3 and 4.4) and union rights with regard to mergers (4.5).

### 4.1 Employee board-level representation

Larger companies – defined as those with issued capital of more than €16 million, at least 100 employees and a works council (obligatory for companies with more than 50 employees) – are supposed to provide for indirect representation of employees at supervisory board level. The supervisory board appoints and dismisses the management and approves major management decisions. These arrangements apply only to companies which have a majority of their employees in the Netherlands. International groups most of whose employees are outside the Netherlands are exempt from these requirements, although their holding companies for Dutch subsidiaries are covered, albeit by less stringent arrangements.<sup>4</sup>

3. ECJ 20 June 2013, nr. C-635/11.

4. See for the so-called structure law [http://wetten.overheid.nl/BWBR0003045/Boek2/Titel4/Afdeling6/geldigheidsdatum\\_02-11-2015](http://wetten.overheid.nl/BWBR0003045/Boek2/Titel4/Afdeling6/geldigheidsdatum_02-11-2015)

The works council has special nominating rights for one-third of the seats on the supervisory board. In order to ensure that one-third of supervisory board members are indeed nominated by the works council, the latter has the right to nominate a candidate for every other vacancy until the one-third proportion is reached. This system is also laid down in the definition of participation in the SE directive, as the alternative to direct appointment rights.

However, one very important element of the legislation is that employees of the company or members of a union involved in collective bargaining with it are specifically excluded from being members of the supervisory board. The main reason for this is that supervisory board members may not act as representatives of partial interests, be it shareholders, banks or employees. Members of the supervisory board should act in the interest of the company as a whole. This is a core feature of the Dutch system. This also means that works council members, for example, cannot be on the supervisory board and those who are chosen are probably somewhat distant from the workforce's day-to-day concerns. They are typically academics, perhaps with a broad sympathy for trade union positions, individuals with a human resource background and in some cases former senior trade unionists.

Moreover, practice is of crucial importance. There are some 450 structured finance companies in the Netherlands.<sup>5</sup> Research (although not very recent) seems to indicate that only some of the works councils at these companies actually use their right of (enhanced) nomination.<sup>6</sup> In reality, the total number of employee representatives on the board may be well below 150. There are several reasons for this. One is resistance by the existing supervisory (and often management) boards or dislike of 'outsiders'. The boards just go their own way, neglecting – and in a formal sense violating – works council rights, or pushing works councils to accept their own preferred candidates (sometimes labelling them as having been nominated by the works council). From an employee point of view, a second reason seems more important: either works councils are not aware of their rights or, more relevant, they consider them as ineffectual, or at least less powerful than their rights deriving from the Works Council Act (see below). In a material sense, this may be a valid argument: workers and union officials are not allowed on boards, board members may not represent specific interests (including worker interests) and works councils can only nominate, and not appoint, board members. In this sense, Dutch rights with regard to board-level representation are much weaker than in, for example, Germany, Austria and Sweden. Nevertheless, failing to exercise this right is also a missed opportunity to play a (arguably minor) role in the company's centre of power.

Thus the board-level representation system in the Netherlands is much weaker than in countries such as Germany, Austria or Sweden. In the case of mergers and takeovers (especially of listed companies) a relevant feature is that the supervisory board must act in the interests of the company as a whole, and not solely in the shareholders' interests.

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5. Based on my own research. The commercial register gives a much higher number, but this includes a large amount of branches from several large companies, such as Rabobank and ING. Earlier research also indicates numbers in the range of 450–500. See Honée (1979) and (1986).

6. See van Beurden *et al.* (2009), Honée (1979 and 1986) and van het Kaar (1995).

## 4.2 Works councils: rights to information and consultation and judicial appeal

By far the most important piece of legislation with regard to worker influence on cross-border mergers is the Works Council Act (*Wet op de ondernemingsraden*, WOR).<sup>7</sup> Every undertaking in the Netherlands with at least 50 employees is obliged to set up a works council (WC, *ondernemingsraad*, OR) with a range of information and consultation rights. In addition, undertakings with between 10 and 50 employees are required, at the request of a majority of employees, to set up a personnel delegation (PVT), a body with some of the powers of the works council. This right is not frequently exercised. Some industry-level collective agreements also provide for works councils at companies with lower numbers of employees, normally 35.

The law provides the works council with three main types of rights: information rights, consultation rights and approval rights. In addition, the works council has powers to make proposals to which the employer must respond – the right of initiative.

The information rights mean that management is obliged automatically to give the works council information on a range of financial/economic issues, including: the structure and organisation of the company, its links with other companies and the make-up of the management (when the works council is first set up); trends in employment and social policy and the company's own report and accounts (both annually); the company's prospects and trends in activity, particularly its investment plans (twice a year); and details of long-term corporate plans (if available). The works council also has the right to ask for all the information it reasonably needs to carry out its tasks (see Articles 31-31f Works Council Act).

Consultation rights concern economic questions, not only with regard to the consequences for the workers, but also the issues as such, including mergers. Management must consult (this is called the right to advise, Article 25 Works Council Act) if it plans to: sell all or part of the company; take over other companies; end all or a large part of the company's activities; change the company's activity or organisation; relocate the company; undertake large-scale recruitment or the recruitment of temporary workers; make major investments; seek large loans; introduce new technology; make changes which will affect the environment; and introduce new ICT systems. The works council thus has to be consulted in case of an intended cross-border merger.

On all these issues the employer must seek the works council's views and delay taking action for at least a month if the works council disagrees with the proposal. During this period the works council can appeal to the Companies Chamber of the Court of Appeal in Amsterdam (*Ondernemingskamer Gerechtshof Amsterdam*; see Article 26 Works Council Act). When the employer has neglected its information and consultation duties, or has taken insufficient account of the employees' interests, the court may block the decision and even undo steps already taken to implement the decision. There are several examples of mergers and takeovers that have been blocked in this way (although not yet in the case of cross-border mergers).

7. See for an English version of the Works Council Act: <http://www.ser.nl/en/publications/publications/2013/works-councils-act.aspx>

The works council has the right to draw on external (or internal) expertise, if necessary (Article 16 Works Council Act). The costs are to be borne by the employer, within reason. The works council should notify the employer before hiring the expert(s), but is not obliged to ask permission.

When the *employer* resorts to external advice (for example, in connection with an intended merger or cross-border merger), the employer has to ask the advice of the works council on this issue as well (Article 25 para 1n Works Council Act).

### 4.3 Works councils: right to a voice in the general meeting of shareholders

Since 2010, the works councils of public limited companies (both listed and unlisted) have had the right to speak at the general meeting of shareholders on major management decisions that require the meeting's approval (see Articles 2:107a, 2:134a, 2:135a and 2:144a Civil Code). These include:

- decisions that have a major impact on the identity of the company, including mergers, takeovers and divestments;
- appointment and dismissal of members of the management or supervisory board;
- remuneration policies.

Through this right of speech, the works council can try to influence decision-making at the general meeting. However, there are no sanctions when this right is not observed, and moreover the general meeting of shareholders is completely free to ignore the views of the works council. As yet, no clear picture has emerged of the extent to which works councils make use of this right and possible results.

### 4.4 Right of speech as a form of participation?

In the academic legal literature<sup>8</sup> it has been argued that the works council's right of speech at the general meeting should also be seen as a form of participation. According to Articles 2:134a Civil Code and 2:144a Civil Code, the works council can give opinions at the general meeting concerning the appointment, suspension or dismissal of members of the executive or supervisory boards in public limited companies. There are no (legal) consequences when this right is violated, or when the works council's opinion is neglected. These rights were introduced in 2010 and therefore did not exist during the period participation was being discussed during the legislative debates in the course of introducing the SE.

Formally, one could argue that Articles 2:134a and 144a Civil Code qualify as a form of participation: the works council can voice an opinion on the composition of the executive and/or the supervisory board (or, in a one-tier structure, on the combined board). However, in a material sense, these rights are far weaker than the right to

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8. See in particular Laagland (2013).

actually nominate members of the board ('structure law' in the Netherlands), let alone the right to appoint or dismiss members of the board (Germany, Austria, Sweden and so on).

This is an important issue. If the right to voice an opinion is legally considered to be a form of participation, then ironically, according to the Cross-border Mergers Directive, this will be the strongest form of participation, stronger than, for example, the German or Swedish systems. The cause lies in the numbers involved. The SE Directive (and therefore also the Cross-border Mergers Directive) uses the *number* of board members covered by participation rules as the decisive criterion and does not take account of the nature of these rules (for example, the difference between right of appointment, nomination and right to speak). Therefore, without modification, the Dutch system always comes on top when comparing different national systems of participation. This seems to contradict the principle behind the two directives, namely, that participation should not be at a lower level after a merger (or the establishment of an SE) than before.

#### 4.5 Unions: Merger code: information and consultation rights in case of takeovers and mergers

In case of mergers and acquisitions that involve at least 50 employees, the SER merger code (SER-besluit Fusiegedragsregels (see <http://www.ser.nl/nl/publicaties/overige/2010-2019/2015/fusiegedragsregels.aspx>) applies. This code is not (hard) law, but a code of conduct (soft law). At an early stage of the merger negotiations, the unions must be informed and consulted, both on the merger decision as such and on the foreseen consequences for the employees. When the employer(s) concerned do not comply with information and consultation obligations, the unions can lodge a complaint with the SER Merger Conflicts Committee (Geschillencommissie Fusiegedragsregels). If the complaint is found to be valid, however, there are no consequences for the merger decision or the merger. The maximum sanction is a public announcement that the merger code has been breached.

The employer(s) may also lodge a complaint. In practice this happens rarely – twice so far – when the unions have breached their duty of confidentiality during the information and consultation process. Both cases concerned public offers.

## 5. Statistical data

The author of this chapter has compiled and analysed the cross-border merger announcements made during the period 2009–2015. In what follows we will look more closely at the database, including number of announcements, the country background of the firms involved and the characteristics of the announced mergers.

## 5.1 The database

The data are derived from the Dutch Official Publications register.<sup>9</sup> By searching for the relevant entry words and the relevant articles in Dutch company law, one can (presumably) find all or almost all announcements of intended cross-border mergers. (See for a recent (typical) example <https://zoek.officielebekendmakingen.nl/noindex/stcrt-2015-40395.html>.)

These announcements are brief, consisting of the names of the firms that are party to the intended merger, their legal form, seat and sometimes information on shareholder structure. Moreover, the announcement specifies which firm will be the acquirer, and which firm will cease to exist after the cross-border merger, making it clear whether the merger is either inbound or outbound (from a Dutch perspective). The total number of announcements up to 9 October 2015 was 884.<sup>10</sup> In this chapter announcements made until 21 November 2014 are analysed.

## 5.2 Number of announcements and validity

An important question concerns the extent to which the number of *announcements* mirrors (or at least to some extent reflects) the actual number of cross-border mergers *finalised*. For now, I can only speculate on this issue. At first sight, there are no compelling reasons to expect a large gap between the two figures. The parties intending a cross-border merger have to take the trouble to draw up a proposal, which is a precondition for filing an announcement in the official register. Drawing up such proposals takes time and involves costs, so it is not undertaken lightly. An announcement also presupposes general agreement between the parties involved. Following this line of reasoning, there is no reason to expect a large gap between the number of announcements and the actual number of cross-border mergers.

However, there are other indications that such a gap exists. The Bech-Bruun/Lexidale report on the number of cross-border mergers in which Dutch companies were involved during the period 14 December 2007–1 March 2013 showed much lower numbers than the number of announcements I found in the same period. The total number for the Netherlands in the Bech-Bruun/Lexidale report is 108 inbound mergers and 215 outbound mergers (a total of 323). The total number in the database of announcements over the same period is 455. There may be several explanations for this difference. The first explanation that comes to mind is that the figure of actual cross-border mergers is incomplete. It is well known that registers (both national and even more so at the EU level) are incomplete. In other words, the relevant registers underestimate the actual number of cross-border mergers. The second explanation of course is that a large proportion of planned cross-border mergers are simply not finalised. At this stage, one can only speculate why this would be the case; further research is needed.

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9. See <https://zoek.officielebekendmakingen.nl/>

10. Possibly including some (but very few) double counts due to repeated (amended) announcements.



The Bech-Bruun/Lexidale report puts the Netherlands in third place among the EU countries it covers, after Germany (376) and Luxembourg (324), with Italy (234) in fourth place, followed by the United Kingdom (168) and Austria (131). All other countries are below the 100 level.

### 5.3 Outbound or inbound

Of the total number of announcements in this analysis, 423 are outbound, and 260 inbound. This is more or less in line with the findings of the Bech-Bruun/Lexidale report, in which the proportion of outbound cross-border mergers was even a bit higher. ‘Outbound’ means that the Dutch firm will cease to exist as a separate legal entity after the cross-border merger and ‘inbound’ means that the *foreign* firm will cease to exist, while the Dutch firm acts as the acquirer. The remainder are either unclear (22 announcements) or fall in another category of transaction (cross-border *transformation*, seven announcements).

To a certain extent, the finding that there are more outbound than inbound cross-border mergers is counter-intuitive, at least when based on the assumption that tax is a main driver. The Netherlands are generally considered to be a tax-friendly country, even a tax-haven. In that case, one would expect the proportion of inbound-transactions to be higher than the proportion of outbound-transactions. However, this is clearly not the case.

The Bech-Bruun/Lexidale report shows that there are quite a few inbound countries (i.e. countries where there is a significantly higher number of inbound than outbound cross-border mergers) and outbound countries (vice versa). Inbound countries include Germany, to some extent Luxembourg, Italy, Estonia and Malta. Typical outbound countries (besides the Netherlands, which was at the top of the list) are Belgium, Ireland, Lithuania, Spain, Poland, Hungary, Portugal and Romania.

We will return to the inbound/outbound issue when looking at intra-group cross-border mergers (see below).

### 5.4 Country directions

Table 1 (see next page) shows the spread of the total number of announcements across different countries. It contains more or less unsurprising figures, but also some really unexpected ones. It is no great surprise that the number of transactions with neighbouring countries Belgium and Germany is high. On the other hand, taking account of the size of their economies, the numbers for nearby France and the United Kingdom seem rather low. What is striking are the high figures for Italy and Luxembourg and, given the size of its economy, Cyprus.

Table 1 Number of non-Dutch companies in CBMs involving Dutch firms, by country (outbound and inbound)

Country	Number of firms	Country	Number of firms	Country	Number of firms	Country	Number of firms
Austria	19	Finland	4	Luxembourg	128	Slovenia	4
Belgium	75	France	40	Malta	7	Spain	27
Bulgaria	1	Germany	126	Norway	5	Sweden	24
Cyprus	26	Hungary	4	Poland	9	UK	23
Czech Republic	12	Ireland	17	Portugal	6		
Denmark	10	Italy	107	Romania	2		
Estonia	1	Lithuania	2	Slovakia	4		

Source: author's own calculations from Dutch company registry data

It is interesting to combine the country figures with the figures on inbound and outbound mergers. We focus on those countries that are far away from a 50/50 distribution of inbound and outbound. The main countries (in ascending order of importance) are Poland (a small number, but all eight cross-border mergers are out of Poland and into the Netherlands), Luxembourg (32 into, and 95 out of the Netherlands) and Italy (11 into and 82 (!) out of the Netherlands). At present, there is no clear explanation for these skewed distributions. This requires an in-depth analysis of tax issues (including bilateral treaties between the Netherlands and the other countries), but possibly also regulatory reasons (mainly in the financial sector). Further analysis is necessary with regard to Cyprus: the number of mergers is rather high taking account of the size of the economy (although the distribution between inbound and outbound is more or less even).

Comparing these figures with the findings of the Bech-Bruun/Lexidale report, the pattern is confirmed for the four countries mentioned above (Poland as an outbound country and the others as inbound).

## 5.5 Developments over time

Over the years, there have been no dramatic changes in the annual number of announcements, although the drop in 2012 is striking (see Table 2).

The number for 2015 may well have risen significantly in the last two months of 2015; many cross-border mergers take place just before year-end (again pointing to fiscal motives). All in all, there seems to be no growth in popularity of the cross-border merger instrument over time as far as Dutch firms are concerned. For the EU as a whole, however, the Bech-Bruun/Lexidale report however shows a steady increase over the period 2008 (132) to 2012 (361).

Table 2 Annual number of cross-border merger announcements by Dutch firms (inbound and outbound)

2009 (1 May-31 December)	100
2010	122
2011	138
2012	93
2013	143
2014	140
2015 (up to 1 November 2015)	95

Source: author's own calculations from Dutch company registry data

## 5.6 The 'big guys': intra-group transactions, multiple transactions

A significant number of cross-border mergers involving Dutch companies are intra-group transactions. In business circles this is called 'corporate housekeeping': optimising the group's (legal) structure. One way is to merge companies, with the effect that there are fewer separate legal entities (and more separate branches without legal personality).

Although it is impossible to draw definite conclusions from the database, one clear indication of intra-group transactions is simply the names of the companies: similar names point to their being part of the same group. Starting with this premise, the database indicates that at least 297 of the merger announcements in which Dutch companies were involved took place in the same group. This indicates that 'corporate housekeeping' is a major driver of cross-border mergers. The announcements included names as Yamaha, Mitsubishi, James Hardie, Allianz, Toshiba, RWE, BASF, Telefonica, ECCO, Henkel, Volkswagen, Vattenfall, Gazprom, Benckiser, Heineken, Fiat, Nokia and Tomtom. The Bech-Bruun/Lexidale report estimated that of all cross-border mergers in the EU in the period 2008–2013, at least 38 per cent were intra-group (in the study designated 'reorganisation cross-border mergers').

The hypothesis that corporate housekeeping is a major driver in groups of companies is supported by the occurrence of multiple transactions involving the same group, often on the same day (or within a period of only a few days). Examples include ECCO (at least 16 announcements in mid-2011) and TomTom (five announcements on 29 December 2010). These announcements in many cases boil down to merging (and dissolving) a number of foreign subsidiaries.

The Netherlands are known for playing host to a disproportionately large number of holding companies, often registered in Amsterdam. From this perspective, one would expect a high proportion of *inbound* intra-group transactions. However, this is not the case; the distribution between inbound and outbound is almost 50/50.

## 5.7 Involvement of SEs

Eight years before the Cross-border Mergers Directive, another cross-border instrument was introduced, the European Company (SE). The SEEurope database on SEs shows that this instrument has not become very popular. The total number of SEs lies below 2,500, of which only a relatively small proportion (319 on 1 October 2014) are active and have (at least five) employees. In the Netherlands there are 13 of these so-called ‘normal’ SEs. Moreover, the establishment of new SEs seems to show a significant drop since 2014.<sup>11</sup>

The database shows that in a relatively large number (at least 22)<sup>12</sup> of cross-border merger announcements SEs are involved either as an actor or as a result of the cross-border merger. In some cases, the announcements even involved more than one subsidiary.

One example is ECCO SE. This is a Danish company, which has board-level representation. As already mentioned, this company has used the cross-border merger instrument to restructure its group structure (corporate housekeeping). In June 2011, ECCO submitted a large number of intended cross-border mergers, in which the Dutch subsidiary was the acquiring company, ‘swallowing up’ subsidiaries from Belgium, Denmark, Germany, Italy, Norway, Portugal, Cyprus, Spain, France, Hungary, Sweden, the Czech Republic and Poland (August 2011). Other SEs using the cross-border merger instrument include Clariant and Fresenius.

ECCO already had the status of an SE before the transactions mentioned above. In some other announcements, an SE was actually the intended result of the merger. Examples include announcements on 1 April 2010, 17 September 2012 (RWE Group) and 3 October 2013. It would be interesting to find out the reason(s) why the parties involved chose the legal form of SE instead of the available national form. One hypothesis is that familiarity with new legal techniques such as the SE and the cross-border merger may explain the fact that these combinations of cross-border mergers and SEs occur. Law firms might play an active role here.

## 5.8 Conversions and transfers of seat

Transfer of seat and cross-border conversion are related subjects, with cross-border conversion as a variety of transfer of seat. In both cases, a company moves its seat from one country to another. In case of a ‘pure’ transfer of seat, the original legal form remains intact (for example, a German GmbH moving to the United Kingdom, while keeping the GmbH legal form). In cases of cross-border conversion, the company moves abroad, while simultaneously changing its legal form.

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11. There may be several reasons for this. One is the change in Czech legislation as of 1 January 2014. Before that, over 60 per cent of the total number of SEs were established in the Czech Republic. Since 2014, this number has fallen dramatically. Another reason may be the introduction of the cross-border merger legislation, which can be used as an alternative to the establishment of an SE, and in several respects – from a business perspective – is more flexible.

12. Considering the total number of SEs in the EEA (fewer than 2,500) and in the Netherlands (34).

The main complication here is the approach taken to company seats in different countries. It goes beyond the scope of this chapter to cover this issue extensively; it suffices to point out the crucial difference between two different systems. First the inbound situation. In the so-called registered seat system, countries recognise legal forms from other countries (maybe not all countries, but at least in the EU or the EEA) as a valid alternative to their own ‘homegrown’ legal forms. By contrast, in the real seat system, countries in principle recognise only their own legal forms. With regard to outbound situations, countries may either allow or not allow firms to move across the border while keeping their legal form. Since the famous *Daily Mail* ruling, the ECJ has made several decisions on transfers of seat, increasingly restricting the right of countries to block such transfers. For details, I refer to the cases<sup>13</sup> and the increasing body of literature on this issue.

After these introductory remarks, I return to the Netherlands and the announcements in the database. The Netherlands uses the registered seat system and at present has no statutory arrangement for cross-border conversion. An internet consultation has been held on a preliminary draft of a bill on the subject, but no more.<sup>14</sup> Due to the lack of statutory arrangements, cross-border conversions would seem out of reach for Dutch firms at present. However, the database contains some ten announcements of such a conversion. There is somewhat of a tradition on ‘illegal’ cross-border transactions in the Netherlands: in the 1990s several cross-border mergers took place, long before the Cross-border Mergers Directive was adopted. These cross-border mergers were never challenged in court, and found support in the academic literature of the time.<sup>15</sup>

## 6. Assessment: Dutch cross-border mergers and worker participation: a non-issue?

As far as Dutch companies involved in cross-border mergers are concerned, participation does not seem an important issue. A large proportion of the firms are too small to be covered by participation. Intra-group restructuring may involve firms covered by a participation regime. In that case, cross-border mergers can have consequences for participation regimes and structures. In most intra-group cross-border mergers, separate legal entities are converted into branches (without a separate legal form). Here one should distinguish between two situations. In the first, there is a form of participation in the legal entity that will cease to exist as a result of the cross-border mergers; it will become a branch. In that case, Article 16 of the Directive – not designed for intra-group transactions – should provide protection against a loss of participation rights (although thresholds may cause problems here): the acquiring firm will have to

13. The main cases are ECJ 27 September 1986, case 81/87 (*Daily Mail*), ECJ 9 March 1999, C-212-97 (*Centros*), ECJ 5 November 2002, C-208-00 (*Überseering*), ECJ 30 September 2003, NJ 2004/394 (*Inspire Art*), ECJ 13 December 2005, C-411/03 (*Sevic*), ECJ 16 December 2008, C-2010/06 (*Cartesio*) and ECJ 12 July 2012, C-378/10 (*Vale*).

14. See [https://www.internetconsultatie.nl/grensoverschrijdende\\_omzetting](https://www.internetconsultatie.nl/grensoverschrijdende_omzetting). The preliminary draft bill does contain an arrangement to safeguard existing participation rights.

15. S.G. van Solinge (1992), *Grensoverschrijdende fusie*, Deventer: Kluwer.

apply some form of participation. However, this seems very unlikely. This brings us to the second situation: if there is a form of participation, it will exist at the higher level (the acquiring firm). In the normal case, employees at the lower level will then be represented at the higher level, in accordance with their relative number. In that situation, it does not make any difference whether the lower level is a separate legal entity or a branch.

In the literature six cross-border mergers were identified in which a Dutch firm was involved and in which participation might have been an issue. All cases concerned intra-group transactions.<sup>16</sup>

Also, the direction (inbound or outbound) of the cross-border merger gives no indication with regard to participation issues. I will restrict myself to outbound mergers because the Netherlands has board-level representation, it is hard to see how inbound mergers can be used get rid of participation, although the possibility cannot be completely ruled out. When we make a division between countries with or without board-level representation, we see that the number of outbound mergers to countries with board-level representation (218) is almost the same as the number of outbound mergers to countries without it (222). Considering the fact that the total number of outbound mergers for Dutch firms is higher than the number of inbound mergers, this is at least another indication that (avoiding) worker participation in the board is no major driver for cross-border mergers.

## **7. Concluding remarks: new EU company law instruments and their use – the tension between theory and practice**

The main purpose of both the SE and the Cross-border Mergers Directives is to foster the creation of an internal market by encouraging companies to extend their cross-border operations. To a considerable extent, however, these new legal instruments seem to have been used (mainly) for other purposes. A significant majority of SEs have been of the ‘empty’ type. A significant proportion of cross-border mergers – at least as far as the announcements in the Netherlands are concerned – seem to be used mainly for so-called ‘corporate housekeeping’ (simplifying the legal structure, reducing administrative and reporting costs, liquidity allocation and reducing minimum capital requirements in the financial sector). Tax reasons seem an important driver for many cross-border mergers, whether intra-group or not.

These outcomes should force the European legislator and other policymakers to rethink the issue of creating new instruments to foster the internal market. The presumption that these instruments will actually be used for their intended purpose is naive. This is a major lesson from the introduction of both the SE and the cross-border merger and warrants more attention for possible and maybe unexpected side-effects.

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16. Biermeyer and Meyer (2015).

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# Chapter 12

## Norway

**Bernard Johann Mulder**

### 1. Introduction

The Norwegian cross-border merger legislation has wide scope, covering not only private and public limited liability companies but also European Companies (SEs). However, in comparison with other countries, Norway has taken a fairly moderate approach to implementing other aspects of the Cross-border Mergers Directive. Only companies in liquidation and companies undergoing cross-border divisions have been added to the list of companies covered by transposition. Norway has also taken a minimalistic approach to stakeholder protections. According to the Cross-border Mergers Directive implementation report, only creditors enjoy special protections; minority shareholders and employees do not receive such special protections, and Norway also chose not to include a national veto right over cross-border mergers for public interest reasons (Bech-Bruun and Lexidale 2013: 121 and 136).

In principle, Norwegian workers enjoy strong rights of information and consultation prior to a cross-border merger. According to the requirements of the leading Basic Agreement (Hovedavtalen)<sup>1</sup> between the Norwegian Confederation of Trade Unions (LO) and the Confederation of Norwegian Enterprise (NHO) the employer has to discuss any important decision with the representative of the trade union bound by the collective agreement with the employer before any action is taken by the management. Companies without a collective agreement are instead covered by the Act of 17 June 2005, No. 62 relating to working environment, working hours, employment protection and so on, the so-called Working Environment Act (see in particular Chapter 8).<sup>2</sup>

Regarding worker participation, after a cross-border merger, if the resulting (merged) company is Norwegian, the employees are entitled to board representation according to the Public Limited Liability Companies Act and the Private Limited Liability Companies Act. In cases in which the Norwegian company is the transferor (merging) company, according to the cross-border merger legislation, the rules of the EEA/EU state to whose jurisdiction the acquiring company will be subject will be set aside under certain conditions. This means that the fairly extensive employee participation rights under Norwegian legislation will apply when the transferor company is a Norwegian one.

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1. See for an English version: <https://www.nho.no/siteassets/nhos-filer-og-bilder/filer-og-dokumenter/lonn-og-tariff/hovedavtalen-2014-2017eng.pdf>
  2. See for an English translation <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>.

## 2. National legal background

Norway is not a member of the EU, but rather a party to the EEA Agreement, in which framework the Cross-border Mergers Directive was implemented in 2006.<sup>3</sup> The national implementation was approved by the parliament in 2007. Pursuant to the dualistic approach to international treaties, Norway had to implement the directive into national legislation and thus incorporated it by amendments to the 1997 Public Limited Liability Companies Act (Chapter 13.VII and Chapter 14.III), and to the 1997 Private Limited Liability Companies Act (Chapter 13.VII and Chapter 14.III). Furthermore, the legislator adopted the 2008 Regulation regarding Employee Representation Rights.

The Cross-border Mergers Directive establishes a framework in which each merging company is governed by the provisions of its national law applicable to domestic mergers and the national authorities are competent to scrutinise the legality of and register mergers. Prior to transposition, Norwegian legislation, including the implementing of the Directive concerning domestic mergers of public limited liability companies (78/855/EEC), did not include provisions on cross-border mergers, as it only governed domestic mergers.

The national registry, the Brønnøysund Register Centre (brreg.no), is supposed to confirm that a merger has been registered as completed, and issues a merger certificate for the Norwegian company. The Brønnøysund Register Centre's electronic bulletin for public announcements is the official state gazette for the publication of company information (Section 1-1 of the 1985 Business Register Act).

This legislation on cross-border mergers also, in principle, sets aside the uniform rules in the EU concerning the law applicable to contractual obligations.

## 3. Key elements of the Norwegian cross-border merger legislation

### 3.1 Scope

The cross-border merger rules apply to both public and private limited liability companies, as well as European Companies (but not to cooperatives). Section 2 para. 1 of the 2005 Act on European companies states that the provisions of the 1997 Public Limited Liability Companies Act (hereafter Public LLC Act) shall apply to SEs (see also Berge and Bondeson 2010).

The limited company laws also include provisions enabling, under certain conditions, Norwegian companies to participate in cross-border divisions. This covers the right to transfer the assets of a company governed by the laws of one Member State to another Member State by way of a cross-border division.<sup>4</sup> Member States are not prevented from taking measures in the interests of creditors, minority shareholders and employees, even if such measures imply restrictions on freedom of establishment, in accordance

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3. See OJ L 333, 30 November 2006 p. 59.

4. Cf. *Sevic Systems*, C-411/03, EU:C:2005:762 para. 18 and 30.

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with Article 49 TFEU (cf. Article 31 EEA Agreement).<sup>5</sup> Section 14-12 in both the Public LLC Act and the 1997 Private Limited Liability Companies Act (hereafter Private LLC Act) state, in compliance therewith, that the companies can benefit from the cross-border division if the laws governing the recipient company prescribe that employee representation rights should be at least as good as those laid down in Article 16 of the Cross-border Mergers Directive. Furthermore, the cross-border division must be permitted under the laws governing the other companies participating in the division.

With regard to remuneration, the shareholders of the transferor company are entitled to receive shares in the acquiring company, but also cash payments (Section 13-1 in both the Public LLC Act and the Private LLC Act).

The legal consequences of a cross-border merger are the same as the legal consequences of a domestic merger (cf. Article 14 of the Cross-border Mergers Directive). Regarding employee rights, the Norwegian implementation goes further than the Cross-border Mergers Directive and the Transfer of Undertakings Directive. Section 13-33 of the Public LLC Act and Section 13-25 of the Private LLC Act state that the merging company's rights and obligations resulting from employment contracts and employment relationships shall be transferred to the acquiring company.

The cross-border merger is effective when the acquiring company performs an act of perfection by registration in different registers, including the Norwegian Register of Business Enterprises.

### 3.2 Procedure

The board of directors of the Norwegian company participating in the cross-border merger and the competent management organs of the involved foreign companies shall together prepare common draft terms for the cross-border merger (Section 13-26 Public LLC Act and Section 13-25 Private LLC Act). At the latest one month before the date fixed for the general meeting, or the board meeting, which is to decide on the merger, the draft terms must be filed with the Norwegian Register of Business Enterprises (Section 13-33 Public LLC Act and Section 13-25 Private LLC Act). The Register of Business Enterprises shall publish a notice of the cross-border merger in the Brønnøysund Register Centre's electronic bulletin (Section 13-13 Public LLC Act and Section 13-25 Private LLC Act).

The board of directors of the Norwegian merging company must prepare a report on the cross-border merger (Section 13-9 Public LLC Act and Section 13-9 Private LLC Act). The report shall provide a legal and economic explanation and justification for the reasons for the merger and the consideration to the shareholders in the transferor company. Additionally, the report must describe any difficulties encountered in determining the consideration and the implications of the merger for shareholders, creditors and employees. This report shall be made available to the shareholders and the employee representatives at least one month before the general meeting that is to decide on the

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5. Cf. *Sevic Systems*, C-411/03, EU:C:2005:762 para. 28.

draft terms of merger (Section 13-27 Public LLC Act and Section 13-25 Private LLC Act). Any written comments on the cross-border merger received from the employees or the employee representatives shall be appended to the report.

The boards of the companies participating in the cross-border merger shall ensure that an independent expert's report on the merger is prepared (Section 13-28 Public LLC Act and Section 13-25 Private LLC Act). Pursuant to the same provisions, no report is required if so agreed by all shareholders of the merging companies.<sup>6</sup> The experts qualified for preparing such a report are state-authorised public and registered auditors (Section 13-28 Public LLC Act and Section 13-25 Private LLC Act, cf. Article 8 of the Cross-border Mergers Directive and Article 10 of the Directive concerning domestic mergers of public limited liability companies). They are subject to authorisation by the Norwegian Financial Supervisory Authority.

The resolution on a cross-border merger shall be adopted by the general meeting of the shareholders of the companies approving the draft terms by a majority of two-thirds of both the votes cast and the share capital represented at the general meeting (Section 13-3 and 13-25 Public LLC Act and Section 13-3 and 13-25 Private LLC Act). The board of directors can approve the draft terms in the transferor company when the cross-border merger is an absorption of a wholly owned subsidiary (Section 13-36 Public LLC Act and Section 13-25 Private LLC Act).

Any failure or misconduct in preparing and implementing the merger, including the preparation of the management report and the independent expert's report, can be subject to civil and criminal liability (Chapter 17 and 19 in both the Public LLC Act and the Private LLC Act).

The cross-border merger, where the acquiring company is subject to Norwegian law, enters into force when the Register of Business Enterprises registers the merger (Section 13-33 Public LLC Act and Section 13-25 Private LLC Act). A cross-border merger in which the acquiring company is subject to another EEA/EU state's legislation shall be entered in the Register of Business Enterprise when it receives notice from the competent authority in the other EEA state that the merger has come into effect (Section 13-32 Public LLC Act and Section 13-25 Private LLC Act). A cross-border merger which has entered into force cannot be declared null and void (Section 13-35 Public LLC Act and Section 13-25 Private LLC Act, cf. Article 17 of the Cross-border Mergers Directive).

#### **4. Worker representatives' rights after transposition of the Cross-border Mergers Directive**

##### **4.1 Employee involvement after a cross-border merger**

The 2008 Regulation regarding employee representation rights implements the rules in Article 16 of the Cross-border Mergers Directive and applies to an acquiring company

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6. Cf. Ot.prp. (Government Bill) no 78 (2006–2007) p. 43.

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that is to have its registered office in Norway (Section 2 of the 2008 Regulation regarding Employee Representation Rights, cf. Section 4 of that Regulation).

If the employees so demand, they are entitled to board representation if the number of employees in the company exceeds thirty. Thus, employees in companies with more than thirty employees are under Norwegian law entitled to representation on the board of directors or on the corporate assembly of the company (Section 6-4 Public LLC Act and Private LLC Act). They are entitled to elect one member and one observer (with deputies) to the board of directors. When a company has fifty or more employees, they are entitled to elect one-third and a minimum of two members of the board of directors (with deputy members).

If the company has more than two hundred employees, it is supposed to set up a corporate assembly in which the employees shall be represented by one-third of the members, regardless of whether a demand for representation has been made by the employees (Section 6-35 Public LLC Act and Private LLC Act). If a corporate assembly is set up, it shall elect the board of directors. However, the company and a majority of the employees, or trade unions representing two-thirds of the employees, may agree that the company shall not have a corporate assembly. In that case, the employees are entitled to elect one member (with deputy) or two observers to the board of directors, in addition to the employee representation that follows when the company has more than fifty employees (Section 6-4 Public LLC Act and Private LLC Act). Special rules apply if the company is a part of a corporate group: after application from the group, trade unions representing two-thirds of the group's employees, or from a majority of the employees in the group, the employees of the group may also be entitled to elect members of the board of directors in the parent company (Section 6-5 Public LLC Act and Private LLC Act).

Concerning employee participation, the company resulting from the cross-border merger shall be subject to the rules in force in the EEA/EU state where the merged company has its registered office (Section 4 of the 2008 Regulation regarding employee representation rights, cf. Article 16 of the Cross-border Mergers Directive). However, pursuant to the same provision, this is not true if (i) one of the merging companies has more than five hundred employees, (ii) the national law applicable to the acquiring company does not provide for at least the same employee involvement level as operated in the merging companies, or (iii) the national law applicable to the merged company does not provide for the same entitlement to exercise employee involvement in the establishment of the acquiring company as is enjoyed in the other EEA/EU state. Due to the fairly extensive employee involvement rights provided for by Norwegian law, exceeding the level of most EEA/EU states' employee involvement legislation, the national rules governing the acquiring company will probably be set aside. In these cases, when the national legislation comprising the acquiring company is set aside, a special negotiating body (SNB) shall be established (Section 4 of the 2008 Regulation regarding employee representation rights). The procedures for this employee involvement are then quite similar to the procedures provided for in the SE Directive (2001/86/EC).

If a subsequent domestic merger takes place within three years of the date the cross-border merger takes effect, the employees' involvement rights still are protected pursuant to Section 2 of the 2008 Regulation regarding employee representation rights.

The members of the SNB and the members of the representative body enjoy the same protection and guarantees provided for employees' representatives by Norwegian legislation (Article 16 of the Cross-border Mergers Directive). Although this is not expressly stated in the Norwegian legislation, any alleged breach by the companies of the employee involvement rights may be brought before the courts.

## 4.2 Special Negotiating Body

If the rules of the EEA state in which the acquiring company has its registered office are set aside, an SNB shall be established. By Sections 5–15 of the 2008 Regulation regarding employee representation rights the Norwegian legislator implements Article 16 of the Cross-border Mergers Directive.

Each EEA/EU state shall be represented in the SNB (Section 5 of the 2008 Regulation regarding employee representation rights). The merged companies from each Member State are entitled to appoint one member for each 10 per cent or fraction thereof out of the total number of employees in the merging companies.

The seats in the SNB are allocated to the merging Norwegian companies based on the number of the employees in each company in descending order (Section 6 of the 2008 Regulation regarding employee representation rights). Who is to be appointed is governed by Section 7 of the 2008 Regulation regarding employee representation rights. Thus, trade unions representing two-thirds of the employees are entitled to appoint members of the SNB. If the numerical requirements are not met, or if the trade unions disagree on who shall be appointed, the members of the SNB can be elected directly by and among the employees, in accordance with the 1998 Regulation on representation in private and public limited liability companies (see Section 7 of the 2008 Regulation regarding employee representation rights).

For the purpose of reaching an employee participation agreement with the merging companies, the companies shall provide information to the SNB on the draft terms and process of the merger (Section 8 of the 2008 Regulation regarding employee representation rights). The negotiations shall be initiated immediately after the establishment of the SNB and may proceed for six months, unless the parties agree upon extending the period for a maximum of twelve months (Section 10 of the 2008 Regulation regarding employee representation rights). Pursuant to Section 8 of the 2008 Regulation regarding employee representation rights, decisions of the SNB are taken by a majority vote. Reducing employee involvement rights, however, requires a two-thirds majority, according to the same provision.

The employment involvement agreement shall be in writing (Section 9 of the 2008 Regulation regarding employee representation rights). The agreement shall specify its

scope, the substance of the arrangements agreed upon for involvement, the duration of the agreement, under what circumstances the agreement shall be renegotiated and the procedures for such renegotiation. The Regulation does not, however, contain sanctions when these requirements are not met. This implies that the requirements are not formally binding, but mere instructions.

In the annex to the 2008 Regulation regarding employee representation rights, standard rules for employee involvement are laid down. They apply if no employee involvement agreement is successfully negotiated, or if the negotiating parties agree upon using these standard rules. They also apply directly without negotiations taking place with the SNB if the merging companies so decide (Section 11 of the 2008 Regulation regarding employee representation rights). The standard rules concern the right to representation (1), allocation of the seats in the administrative or controlling body (2) and the employee representatives standing in these bodies (3).

### 4.3 Other provisions regarding employee rights

The legal consequences of a cross-border merger are the same as those of a domestic merger (Article 14 of the Cross-border Mergers Directive). Regarding employee rights, the implementation legislation does not go further than the Cross-border Mergers Directive and the Transfer of Undertakings Directive. When a cross-border merger implies transfers not only of shares, but also of assets and liabilities, such a merger may imply the application of the Transfer of Undertakings Directive (2001/23/EC) if the conditions for a legal transfer or a merger according to the Directive are met.<sup>7</sup> Section 13-33 of the 1997 Public LLC Act and Section 13-25 of the 1997 Private LLC Act state that the transferring company's rights and obligations resulting from employment contracts and employment relationships shall be transferred to the acquiring company. However, the Norwegian cross-border merger provisions stipulate the transfer of employee contracts or employee regulations in such a merger. The Transfer of Undertakings Directive is applicable when certain conditions are met: when there is a change in the employer's person after a transfer of an economic entity which after the transfer retains its identity (cf. Article 1 of the Transfer of undertakings directive, and Chapter 16 of the 2005 Working Environment Act). The legislation does not require that the conditions in the Transfer of Undertakings Directive or in Chapter 16 of the 2005 Working Environment Act are met, but the mere fact that there is a cross-border merger according to the Cross-border Mergers Directive has the consequence that the acquiring company has to succeed in the employment contracts or the employment relationships. As for the employment terms and conditions or the collective agreement that the transferring company might be obligated to respect, neither the Cross-border Mergers Directive nor the Norwegian implementation legislation takes these issues into account.

7. Cf. eg. *Amatori and others*, C-458/12, EU:C:2014:124, *CLECE*, C-463/09, EU:C:2011:24, and Rt. 2015 s. 718 *Kirkens Bymisjon*.

As mentioned above, the 2008 Regulation regarding employee representation rights implements the rules in Article 16 of the Cross-border Mergers Directive and applies to an acquiring company which shall have its registered office in Norway (Section 2 of the 2008 Regulation regarding employee representation rights, cf. Section 4 of that Regulation). Thereby, the uniform rules concerning the law applicable to contractual obligations, such as employment contracts and collective agreements, in the EU laid down in the 1980 Convention on the law applicable to contractual obligations (Rome Convention) and in the Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) are set aside.

## 5. Conclusion

In Norway the national implementation closely followed the basic requirements of the Cross-border Mergers Directive. Coverage was extended to companies in liquidation and also rules for cross-border divisions were introduced. However, a broader range of company forms – such as cooperatives – was not included.

Regarding worker participation, in the case of a cross-border merger, this is not primarily a matter of labour law regulation because the involvement is to take place at board level, in the intersection between company law and labour law. As a consequence, in the implementation of the Cross-border Mergers Directive, no amendments were introduced in the labour law legislation besides the adoption of the 2008 Regulation regarding employee representation rights; the amendments have been made, as shown above, in the company law legislation. The basic general obligations on the employer to inform and consult with the trade unions and, to some extent, the employees, derived mainly from domestic rather than EU legislation – specifically, pursuant to the 2005 Working Environment Act and the Basic Agreements – shall prevail.

Due to the fairly extensive employee involvement rights provided for by Norwegian legislation, which exceed the level of those in most EEA/EU states, the national rules governing the acquiring company will be set aside if certain conditions are met. This of course can be disputed when the company claims that the other Member State's legislation is similar to or has even more extensive employee involvement rights than the Norwegian legislation. In these cases, when the national legislation governing the acquiring company is set aside, an SNB shall be established. The procedures for this employee involvement are then fairly similar to the procedures provided for in the SE Directive (2001/86/EC).

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# Chapter 13

## Spain

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### 1. Introduction

National transposition of the Directive on Cross-border Mergers into Spanish law (2005/56/EC) was accomplished without significant parliamentary debate. Previous to implementation, Spanish national law did not refer to cross-border mergers, although it allowed mergers and transfers of company headquarters outside Spain (González and Pereda Espeso 2006). The transposition of the Cross-border Mergers Directive, which was accomplished in a single law (Law 3/2009 of April 3), by and large implements the Directive's minimum requirements. A proposal by trade unions to require an examination of the potential territorial and sectoral impacts of proposed mergers, which was introduced in the national Economic and Social Committee (ESC), was opposed by the employers and did not find its way into the legislation.

The transposed Directive introduces several safeguards with regard to employee participation. As a general rule, in Spain there is no legally enforced board-level employee participation system or rights for employees to take part in company decisions beyond information and consultation. Pursuant to the SAL (*Ley de Modificaciones Estructurales de las Sociedades Mercantiles*), the possibility to negotiate board-level employee participation rights in cross-border mergers is established explicitly for the resulting company if (at least) one of the companies involved in the merger had more than 500 employees and was governed by an employee participation system. The implementation of the Cross-border Mergers Directive also modified Law 31/2006 of 18 October on Employee involvement in European joint stock companies and cooperatives (EIL), by introducing a new Title IV (Arts. 39 to 45). Thus the implementation of the Cross-border Mergers Directive represents another mechanism for introducing worker participation into a country in which this form of worker representation has not played a significant role.

### 2. National background

The Cross-border Mergers Directive was implemented in Spain through Law 3/2009 of 3 April on structural amendments relating to commercial companies (*Ley de Modificaciones Estructurales de las Sociedades Mercantiles*) (SAL) (BOE No 82, 4 April 2009). The Cross-border Mergers Directive was transposed in one single legal act. Directives 2006/68/EC (on the formation of public limited liability companies and

their capital) and 2007/63/EC (on the need for an independent expert's report in the case of domestic mergers and divisions of public limited liability companies) were also transposed into national regulation by Law 3/2009. The rules applicable to cross-border mergers are provided in Articles 54–67 of the SAL, which also introduced other relevant changes in company regulation. Cross-border mergers within the European Union involving Spanish-owned companies are regulated by the SAL and, on a subsidiary basis, by the general legislation governing domestic mergers (Tapia Hermida 2007).

Cross-border mergers were in practice sanctioned and accepted in Spain inasmuch as compatibility of legislation and commercial proceedings allowed for it. The transposition of the Cross-border Mergers Directive into Spanish legislation established a common regulatory framework for companies operating in the EU and sped up the normal development of cross-border transfers of seat of Spanish-owned companies between different Member States. The Ministry of Justice was in charge of the transposition of the Cross-border Mergers Directive and the preparation of the Law. The proposed legislation was discussed by the parliamentary judiciary committee in late 2008 without controversy.<sup>1</sup> The Law was presented to the Parliament and discussed in plenary session on 18 March 2009.<sup>2</sup> The SAL was approved by a large majority with only a few proposed amendments, which were incorporated into the text. Those amendments did not relate to the transposition of the Cross-border Mergers Directive, but to other elements of the Law. Previous to the submission of the Law to the Parliament, the Ministry of Justice initiated a mandatory consultation with the social partners. The Economic and Social Committee (ESC) delivered an opinion on the draft legislation in December 2007, which stressed several aspects on the 'territorial and sectoral impact of corporate decisions involving cross-border mergers and transfers of seat'.<sup>3</sup> The social partners did not agree on the terms of these impacts and how they should be addressed by the regulation. Trade unions and employers have different positions on this issue (see below). The draft law submitted to the Parliament did not include any explicit reference to these territorial and sectoral impacts. They were not incorporated into the Law during the parliamentary procedure. The SAL only establishes a number of procedures to guarantee the 'required protection' of shareholders, employees and creditors.

The following companies governed by Spanish regulation may take part in a cross-border merger within the EU: joint stock companies (*sociedades anónimas, S.A.*), limited liability companies (*sociedades de responsabilidad limitada, S.L.*), partnerships limited by shares (*sociedades comanditarias por acciones*) and the legal form of European Company (SE). In 2011, cross-border mergers between credit entities and savings banks were also included. Cross-border mergers involving a cooperative company or a company deemed a collective investment undertaking are not subject to provisions referring to cross-border mergers within the EU contained in Articles 54–67 SAL. In general, two main forms of cross-border merger can be distinguished: inbound and outbound mergers. In the case of an inbound merger, the resulting company is subject to Spanish law. In the case of an outbound merger, the resulting company is subject to a foreign

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1. [http://www.congreso.es/public\\_oficiales/L9/CONG/DS/CO/CO\\_163.PDF#page=2](http://www.congreso.es/public_oficiales/L9/CONG/DS/CO/CO_163.PDF#page=2)

2. [http://www.congreso.es/public\\_oficiales/L9/CONG/DS/PL/PL\\_069.PDF#page=43](http://www.congreso.es/public_oficiales/L9/CONG/DS/PL/PL_069.PDF#page=43)

3. <http://www.ces.es/documents/10180/18507/Dico72007>

Member State regulation. Article 27(2) SAL regulates cross-border mergers between companies of different nationalities which are not deemed cross-border mergers within the EU. Provisions of the respective national laws are mandatory with regard to mergers with non-EU/EEA companies. The SAL has been modified several times since then. Law 27/2009 expanded the scope of the regulation to include cross-border mergers between credit entities. Law 25/2011 introduced some changes to the availability and timing of the expert's report on the draft terms of cross-border merger. Law 1/2012 simplified some general administrative procedures (Brech-Bruun and Lexidale 2013).

The government did not take into account the ESC's opinion in the draft legislation prepared by the Ministry of Justice. No clauses related to the public interest and/or social and economic impact in case of cross-border transfer of seat resulting from a merger were included in the Law Proposal submitted to the Parliament. The social partners agreed on the need to improve regulation on cross-border mobility of companies within the EU. The implementation of the Cross-border Mergers Directive was considered positively by the employers' associations represented in the ESC (CEOE and CEPYME). In their view, the Directive had some benefits for businesses. It included the principle of tax neutrality, simplified legal and administrative structures and enabled the possibility to transfer assets and liabilities from the acquired to the acquiring company with reduced risks and lower financial costs. In the case of a multinational company with two or more national units in different European countries, the cross-border merger could be used as a tool to transfer the registered seat of the company from one subsidiary to another.

However, the employers refused to accept the introduction of a sectoral and/or territorial impact clause, as had been suggested by the trade unions (UGT and CCOO). From the viewpoint of CEOE and CEPYME, capital mobility and transfer of seat were both fundamental business freedoms guaranteed by EU law, not to be bound by restrictive regulation or considerations of sectoral and/or territorial impact. The employers decided not to back the ESC's opinion. Controversy in the process of non-binding consultation with the social partners was one reason why the ESC opinion was finally not taken into consideration by the Ministry of Justice. However, from the trade union point of view the implementation of the Cross-border Mergers Directive had some positive effects. In case of cross-border mergers with EU/EEA companies, employee participation and protection rights are substantially reinforced. Furthermore, employee representatives are allowed to negotiate board-level representation rights for the resulting company.

### **3. Implementation of the Cross-border Mergers Directive**

#### **3.1 Procedure for a cross-border merger**

The procedure for a cross-border merger under the SAL correlates broadly with that of a domestic merger. However, the protection for minority shareholders, creditors, debenture holders and employee representatives in cross-border mergers is different from that of a domestic merger. The Spanish regulation sets out the cross-border merger procedure as follows:

- **Draft terms of a cross-border merger.** The management bodies of the companies involved in the cross-border merger will elaborate the draft terms of the merger (that is, merger plan) (Art. 59.1 SAL). The general shareholders' meetings of the companies involved in the cross-border merger have six months to approve these draft terms; without this approval the merger will not take effect (Art. 30.3 SAL). The documentation is supposed to be deposited with the Commercial Registry responsible for each company involved, and a notice of this legal act will be published in the Official Gazette of the Commercial Registry. The Commercial Registry is responsible for checking whether the necessary procedures have been followed and, if satisfied, it is responsible for issuing a pre-merger certificate. The draft terms of cross-border merger will be made available to the shareholders, debenture holders, holders of special rights and employee representatives upon calling the general shareholders' meeting (Art. 39.1 SAL).
- **Management report.** The management body of the companies involved in the merger will prepare a report explaining and substantiating the legal and financial aspects of the cross-border merger, with specific mention of the share exchange ratio and the implications of the merger for the shareholders, creditors and employees (Arts. 33 and 60 SAL). The management report will be made available to the shareholders, creditors and employee representatives at least one month prior to the date of the general shareholders' meeting. Employee representatives may request the delivery or dispatch or a free copy of these documents (Art. 60.1 SAL). If the management body of the company receives an opinion from employees on the management report, this opinion should be annexed to the report (Art. 60.2 SAL).
- **Expert's report.** The management body of the companies involved in the cross-border merger will request the appointment of an independent expert (or experts). The expert(s) will issue a report on the draft terms of the cross-border merger (Art. 34.1 SAL). The Commercial Registrar corresponding to the registry offices of the companies involved in the merger will appoint its own independent expert(s). The expert report will audit the following issues: justification of the exchange ratio; validation of the methods used to set the exchange ratio and resulting values; identification of possible valuation problems; equivalence of the companies' assets and liabilities, subject to dissolution of the share capital of the resulting company (Art. 34.4 SAL). The expert's report will not be necessary if so decided by all voting shareholders of the companies involved in the merger (Art. 34.5 SAL) or if one of the companies to be merged is the direct holder of a share equal to or greater than 90 per cent of the share capital of the transferring company (Art. 34.5, 49.1.2 and 50.1 SAL). The expert's report will be made available to shareholders, debenture holders, holders of special rights and employee representatives at the time of calling the general shareholders' meeting (Art. 39.1 SAL).
- **Merger balance sheet.** The management body of the companies involved in the cross-border merger will treat their last approved sheet as their merger balance sheet (Art. 31.1.). The management body will make available its last approved balance sheet to shareholders, debenture holders, holders of special rights and employee representatives at the time of calling the general shareholders' meeting (Art 39.1 SAL).

- **General shareholders’ meeting.** Publication of the calling of the shareholders’ meeting must take place at least one month prior to the date set for it (Art. 40.2 SAL). Approval of the cross-border merger will require a vote in favour of two-thirds of the voting capital present at the general meeting, unless the company is a joint-stock company or limited partnership by shares and at least 50 per cent of the share capital is present. In the latter case a simple majority will suffice for approval. The approval of the merger by the general shareholders’ meeting will not be required if one of the companies involved is the direct holder of all share capital in the company which is to be taken over (Art. 49.1.4. SAL).
- **Registration, publication and effectiveness of the cross-border merger.** The merged company is to submit the draft merger terms (no more than six months old) and shareholders’ approval of these merger terms to the Commercial Registry. This agency is responsible for verifying performance of the procedures and formalities according to the relevant Spanish regulation, including the fulfilment of requirements on worker participation, and will issue a certificate of legality for the cross-border merger (Arts. 64 and 65.1 SAL). The cross-border merger will be effective upon registration of the resulting company with the competent Commercial Registry (Art. 46.1 SAL). The transferring companies will proceed to cancellation (Art. 66.3 SAL). In cases where employee participation is required according to Law 31/2006 of 18 October on employee involvement in European Joint Stock Companies and Cooperatives (EIL), the merger will not be effective until an employee participation agreement (or submission to the subsidiary provisions of EIL) has been presented to the Commercial Registry.

No explicit provisions for additional employee rights, for example at a hearing for the pre-merger or merger certificate or for a national merger control authority are included. No minimum required period for validity of statements regarding employment impact is considered. No explicit penalties for false statements regarding employment impact are included (Art. 64 SAL).

### 3.2 Protection for minority shareholders and creditors

The cross-border merger will be binding on all shareholders and creditors once approved by the general assembly of shareholders. However, minority shareholders may request the acquisition or redemption of shares and participations against a reasonable cash payment if they do not agree with terms of the cross-border merger and the registered office of the resulting company is not located in Spain (Art. 62 SAL). In inbound mergers, the cash compensation to which shareholders are entitled may not exceed 10 per cent of the nominal value of the shares and participations received in exchange (Art. 25.2 SAL). In outbound mergers, the cash payment included as part of the exchange may exceed 10 per cent of the nominal value of the shares and participations, if the legislation applicable to one of the non-Spanish companies involved in the cross-border merger allows for it (Art. 57 SAL).

Creditors' interests are also protected. The merger will not take place until a month after the publication or written notice of the last announcement of the approval of the merger resolution to all shareholders and creditors. Creditors of the companies involved in the merger may object to the merger during the month following the last announcement relating to the approval of the merger resolution. Creditors whose loans are adequately guaranteed shall not be entitled to object to the merger. In cases where creditors are entitled to object to the merger, the merger will be halted and not effective until the company provides security for the amount owed the creditor (Art. 44 SAL). Debenture holders may exercise their right to object to the merger on the same terms as the regular creditors, except in cases in which the merger is approved by the general assembly of debenture holders (Pereda Espeso and Martínez Paños 2010).

## **4. Worker involvement provisions**

### **4.1 Employee participation**

No additional provisions for employee participation were incorporated into Spanish law ahead of the Cross-border Mergers Directive. The implementation of the Directive pursuant to SAL also modified Law 31/2006 of 18 October on employee involvement in European Joint Stock Companies and Cooperatives (EIL), by introducing a new Title IV (Arts. 39 to 45).

As a prevailing rule, Spanish law does not recognise board-level participation rights for employees. Workers' involvement rights are confined to information and non-binding consultation. They do not include the right to designate a number of members of the management body of the company or to attend its meetings with a voting right. Board-level participation rights for employees are acknowledged only for European companies or companies resulting from a cross-border merger within the EU (Art. 67.2. SAL). The scope and terms of board-level employee participation will be determined pursuant to EIL (Art 39.2. EIL). It is possible to negotiate board-level employee participation rights in companies resulting from a cross-border merger in which at least one of the companies involved already had worker participation and employed an average number of 500 or more employees during the six months prior to the publication of the draft terms of the cross-border merger (Art. 39.1 EIL).

As foreseen by the Cross-border Mergers Directive, there are two ways to determine the form of worker participation that will apply. The first way is through negotiation between the management bodies of the companies involved in the merger and a special negotiating body (SNB) representing the employees. The members of the SNB will be elected in accordance with the domestic legislation and practices of each Member State in which the companies involved in the cross-border merger, including those subject to dissolution, had subsidiaries and workplaces (Arts. 7.1 to 7.4 EIL). The Spanish members of the SNB will be chosen by the trade unions with a majority position in the works council or works councils of the companies involved in the cross-border merger or among employee delegates. Overall, the number of SNB members per union will be in proportion to the votes received by each trade union in the works council elections.

In the case of smaller companies, with a number of employees fewer than 50, where the duties of the works council are carried out by employee delegates, the selection will be made by the trade union with a majority of delegates. The legislation makes no provision for what happens if the companies involved in the cross-border merger have no works council or employee delegates.

The negotiation of board-level employee participation rights between the competent bodies of the companies involved in the cross-border merger and the SNB will last up to 12 months (six months after the establishment of the SNB, which may be extended by six additional months). The subsidiary provisions of EIL will be applicable where the parties do not come to an agreement within the abovementioned timeframe.

An alternative way to determine the parameters of worker participation bypasses negotiations altogether. The management bodies of the companies involved in the cross-border merger may unilaterally decide to apply the rules governing employee participation in the merged company defined in the subsidiary provisions in EIL (Art 40.1 EIL) (so-called ‘standard rules’).

## 4.2 Other relevant provisions and rules

As a general rule, several articles of the Spanish Workers’ Statute (*Real Decreto Ley 1/1995 de 24 de Marzo sobre el Estatuto de los Trabajadores*) are relevant to employee protection in case of company mergers and takeovers.

Article 40 of the Spanish Workers’ Statute establishes special protection clauses for employees affected by transfer of facilities. The employee has the right to keep or cease working unless hired with a specific mobility condition. In case the employee chooses to cease working, a severance pay equivalent to 20 days for each year of work will be received, up to a maximum of twelve months’ salary. In case the employee chooses to keep working and doing so would involve a move, compensation for the expenses of the move will be received. Information on the move will be made available to employees by the company management 30 days before the effective date of the move. Employees may also claim against the decision to move. In case the move affects the entire workforce, a 15-day period of information and consultation with the employee representatives will be agreed. The parties will negotiate in good faith. The company management will have the final decision on the move notwithstanding the right of the workforce and their representatives to take legal action against it when considered appropriate.

Article 44 of the Spanish Workers’ Statute establishes the duty of a newly established company resulting from a merger or takeover to subrogate the rights of the employees of the transferring companies, as well as the duties and arrangements in force. The obligation also affects valid collective agreements.

## 5. Statistical and other data

It is difficult to find detailed statistical data and information on cross-border mergers and acquisitions by Spanish companies. No comprehensive study for the period 2009–2015 or for a sub-period within it is available. According to the corresponding UNCTAD Investment Reports, 12 mergers and acquisitions deals worth over USD 3 billion were completed in 2010–2015, which included a Spanish company as an acquired or acquiring company. Ten mergers and acquisitions deals were cross-border, while the remaining two were domestic. Four mergers and acquisitions deals worth over USD 3 billion were completed between a Spanish company and another company within the EEA/EU area. Only one was an inbound deal. In 2011, Banco Santander S.A. acquired 96 per cent of shares of the listed Poland-based bank, Bank Zachodni WBK S.A. The value of the operation was USD 5.6 billion. The other three mergers and acquisitions with Spanish components were all outbound deals. In 2011, a French group of investors acquired 100 per cent of share capital of Distribuidora Internacional de Alimentación (DIA) S.A. for USD 3.1 billion. In 2015, a UK-based investor group acquired 100 per cent of the electric services company E.ON España S.L. for USD 3.1 billion. Also in 2015, the Spanish radiotelephone and communication company Jazztel PLC was acquired by the French Orange S.A. for USD 4.3 billion.<sup>4</sup>

Over the period 2009–2015, mergers and acquisitions were driven mainly by the restructuring of the Spanish building, energy and financial sectors. Several large companies in these sectors divested, reducing their balance sheet by selling non-core assets and subsidiaries. More detailed information on cross-border transactions by strategic investors, private equity transactions and divestments by Spanish companies, although not an exhaustive list, can be found in the annual reports on Spain of the Mergers and Acquisitions Review (Hoedl and Ruíz-Camara 2011; 2012; 2013; 2014; 2015).

Another data source, although available only for listed companies, is provided by the Spanish National Securities Commission (CNMV). Raw data on registered legal acts regarding mergers, acquisitions and other transformations of listed commercial companies can be retrieved for 2009–2016. The information is ordered by date released.<sup>5</sup>

## 6. Assessment and conclusions

The transposition of the Cross-border Mergers Directive into Spanish law was completed without major political dispute. The national transposition was accomplished pursuant to the Structural Amendments Law (SAL), which implied a major revision of the Spanish legal framework relating to commercial companies. The law came into force in July 2009. Previous to this, Spanish national law did not refer explicitly to cross-border mergers. The national transposition of the Cross-border Mergers Directive also introduced a new Title to Law 31/2006 on employee involvement in European Joint Stock Companies and Cooperatives (EIL).

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4. See UNCTAD Cross-border M&A database ([www.unctad.org/fdistatistics](http://www.unctad.org/fdistatistics)) and UNCTAD World Investment Reports (<http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx>).

5. <http://www.cnmv.es/Portal/hr/busquedahr.aspx?division=3&idPerfil=2>



The transposed Directive introduces the possibility to negotiate board-level employee participation in companies resulting from a cross-border merger. Previously, the Spanish regulations did not legally enforce employee involvement rights ahead of information and consultation, except in the case of European Companies (SEs) and European Cooperatives (SCEs). The trade unions consider that the implementation of the Cross-border Mergers Directive has largely had a positive effect, as it broadens the scope for employee participation. Nevertheless, the trade unions were not successful in their attempt to include a specific clause on the socio-economic impact of cross-border mergers to the draft legislation in 2007. The employers refused to be bound by restrictive regulations or considerations of impact. The regulation only establishes a number of procedures on information and consultation to guarantee the protection of shareholders, creditors and employees required by the Cross-border Mergers Directive.

Statistical data (2009–2015) for mergers and acquisitions in Spain is scarce. Mergers and acquisitions were driven by the restructuring of the Spanish building, energy and financial sectors. Several large companies in these sectors divested due to the difficulties associated with the economic crisis. Nevertheless, the number of cross-border mergers have increased in recent years. Such mergers are often used for handling the internal restructuring of multinational companies operating within the EU. Cross-border merger regulation also provides a way of transferring a company's registered seat from one national subsidiary to another in the EU (Sánchez Álvarez 2008: 97).

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# Chapter 14

## Sweden

**Bernard Johann Mulder**

### 1. Introduction

As cross-border mergers predominantly concern company law, the Cross-border Mergers Directive (2005/56/EC) was implemented into Swedish law mainly by amendments to the 2005 Companies Act and the 1987 Cooperative Societies Act. Transposition in Sweden took a moderately wider approach than was required by the Cross-border Mergers Directive. Regarding scope of applicability, cooperatives and companies in liquidation were also included in addition to limited liability companies, but cross-border divisions and triangular mergers are not covered by the implementing legislation (Bech-Bruun and Lexidale 2013: 121). Sweden also took a moderate approach to stakeholder protection. Protections for creditors and employees are included, but not for minority shareholders. Furthermore, a national right to veto cross-border mergers in the public interest was not included (Bech-Bruun and Lexidale 2013: 136).

The Cross-border Mergers Directive's rules on employee participation (notably Article 16) were implemented into the 2008 Employee Participation in Cross-border Mergers Act. In Sweden there is a particularly low threshold for triggering worker participation rights. Workers in almost all companies with more than 25 employees may elect two representatives and two deputy representatives to the boards of their company. As a result, worker participation has been an issue in a number of cross-border mergers involving Swedish companies (see Chapter 2 in this volume).

### 2. Legal background

Prior to the implementation of the Cross-border Mergers Directive through amendments in the national legislation, there was no law on cross-border mergers, and the existing legislation did not contain rules on such mergers. Whether Swedish law or the legislation of another Member State should apply was determined by the rules on conflict of laws;<sup>1</sup> in the event that another Member State's legislation applies it would be possible for a cross-border merger to take place, according to that Member State's rules. Such a state of affairs was insufficient for EU law, however, as stated by the European Court of Justice (ECJ) in its judgement in the *SEVIC* case.<sup>2</sup> The Court stated that the Treaty of

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1. Cf. Regulation (EU) No 1215/2012 (Brussels I) and Regulation (EC) No 593/2008 (Rome I).

2. *SEVIC Systems*, C-411/03, EU:C:2005:762.

the European Union (now the Treaty on the Functioning of the European Union, TFEU) does not allow a Member State to refuse generally to register a cross-border merger in its commercial register.

The Cross-border Mergers Directive was implemented into national legislation through amendments to the 2005 Companies Act<sup>3</sup> and the 1987 Cooperative Societies Act.<sup>4</sup> To a large extent the implementation rules state that the provisions applicable to domestic mergers also apply to cross-border mergers (Chapter 23, section 36 of the 2005 Companies Act). In addition, the 2008 Employee Participation in Cross-border Mergers Act implements Article 16 of the Cross-border Mergers Directive rules on employee participation into Swedish law.

The implementation of the Directive did not involve any changes to the 1976 Codetermination Act, which contains a significant set of employee participation rules and is the core act regulating collective labour law. For instance, this act regulates the right to organise, the right to negotiate, the employer's obligation to continuously inform the trade union with which the employer has a collective agreement, the law on collective agreements, veto rights in some situations, the law on collective actions and the law on mediation. The Act is, however, a framework regulation. Due to the traditionally high degree of organisation among employers and employees, the trade unions and employer organisations agree upon industrial relations issues, or more precisely: the parties establish the rules on both the substance and the regulation of work and its conditions.

The existing 1987 Board Representation Act, which had its origins in the mid-1970s, did not meet the Directive's requirement on employee involvement in a cross-border merger situation. Therefore, the legislator had to take legislative measures for implementing the Cross-border Mergers Directive. To a large extent the 2008 Employee Participation in Cross-border Mergers Act follows the structure and wording in the 2004 Employees' Involvement in European Companies Act (implementing Directive 2001/86/EC).

### **3. National implementation**

#### **3.1 Scope**

The cross-border merger rules apply to Swedish limited companies (both public and private) and any corresponding legal person with residence within the European Economic Area (EEA) which includes a cross-border element. In principle the national legislation only allows mergers between business associations of the same kind. A legal person is considered to be resident within the EEA if it was formed in accordance with the law of an EEA/EU state and has its seat, central administration or main business activity within the EEA/EU. Furthermore, the rules apply to mergers of cooperative

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3. For an English version of the Companies Act see Maxwell (2014).

4. Prop. (Government Bill) 2007/08:15.

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societies, except cooperative housing associations. The rules are also applicable to mergers of European Companies (SEs) and European Cooperative Societies.

Swedish law allows for mergers by acquisition and mergers by formation of a new company. The consequences of a cross-border merger are the same under Swedish law as under the Cross-border Mergers Directive: the merged companies cease to exist (in the case of acquisitions, however, the acquiring company continues to exist), the shareholders of the companies which cease to exist become shareholders in the new or acquiring company, and all assets are transferred to the new or acquiring company.

A cross-border merger has legal effect as from the date of registration of the merger with the Swedish Companies Registration Office and is enforceable vis-à-vis third parties as of the date of publication of the merger in the Official Swedish Gazette (*Post och Inrikes Tidningar*).

### 3.2 Procedure

According to the 2005 Companies Act, the board of directors of the Swedish company shall sign the draft plan (common draft merger terms) that was prepared by the management organs of the merging companies (in Sweden: the board of directors). The draft terms of cross-border mergers shall contain certain information; the national implementation legislation does not, however, provide for the inclusion of a right to profit sharing or any special conditions for profit sharing in the draft terms. Violating the provisions of the common draft merger terms can lead to liability for damages for the members of the management organ.

The board of directors of each merging company must draw up a report for the company's shareholders which contains the reasons for the merger, including a legal and economic explanation and justification, as well as information on the merger's consequences for shareholders, creditors and employees.

Within one month from the date the draft terms were drafted, the participating Swedish company must hand in the draft plan for registration to the Swedish Companies Registration Office. In the case of acquisition, if the acquirer is not a Swedish company, the Swedish company involved must hand in the documents. If more than one Swedish company is involved, the oldest is responsible for this. The draft terms shall be available to shareholders and employees; those shareholders who request it shall be provided with a copy of the draft terms.

The independent expert, in the Swedish legislative context, is the auditor. The auditor of each participating company shall draw up a report on both the draft terms of the cross-border merger and the board of directors' report; the auditor may request any information deemed necessary from the merging companies. The auditor's report shall clarify the consideration ratio and the determining of the share exchange ratio, the methods to be used to determine the value of the assets and debts, and the result of the methods used. The auditor's report shall also indicate the particular difficulties involved

in rating the value of property. The auditor's report shall be attached to the draft terms.

The draft terms shall be submitted to the general meeting of all the companies involved. The draft terms of the cross-border merger, the board of director's report and the auditor's report shall be available at the latest one month before this general meeting takes place to the shareholders, trade unions representing the employees and employees not represented by any union.

#### **4. Worker involvement**

The employee participation rights defined in Article 16 of the Cross-border Mergers Directive were implemented into national legislation by the 2008 Employee Participation in Cross-border Mergers Act.<sup>5</sup> Other than these Article 16 rights, the legislator has not taken any additional measures to implement the provision in Article 4.2 of the Cross-border Mergers Directive on protecting other employee rights. A company participating in a cross-border merger is obliged to meet the requirements already existing in Swedish legislation. Thus, the rules on information and negotiation in the 1976 Codetermination Act apply in principle (see the next section on this). The 1987 Board Representation Act did not meet the Directive's requirements concerning the employees' right to participation in cross-border mergers situations, thus it was necessary to define a new set of rules.

In general, employee participation rules will be applicable where the company resulting from the merger has its registered office. The exceptions mentioned in Article 16.2 of the Cross-border Mergers Directive were not transposed into Swedish law. Instead, the regulations for the SE (*Societas Europaea*) have been modified and transposed. The same rules apply to all companies, no matter what size they are.

The members of the special negotiating body (SNB) shall be appointed by the local trade union with a collective agreement with the employer. In practice, there is frequently one for each category of worker (manual workers, professionals and white-collar workers, if they are represented at the workplace). If none of the participating companies has a collective agreement with any trade union, the members of the SNB shall be appointed by the most representative local union. If none of the employees are union members, the SNB is appointed by the employees in the companies in Sweden.

The participating companies are obliged to inform employees about the progress of the merger. This obligation also implies that the participating companies should inform on changes in the corporate structure that might affect the composition of the SNB.

The 2008 Employee Participation in Cross-border Mergers Act contains standard provisions that can be applied upon agreement of the parties. Furthermore, these provisions are applicable if one-third of the employees are entitled to participation, or – if the employees entitled to participation are less than one-third of the total – if the SNB

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5. Prop. (Government Bill) 2007/08:20.

decides that the employees shall be included in participation in the merging company. Finally, the standard provisions can be applied unilaterally by management without initiating negotiations on employee participation.

## **5. Other relevant legislation on worker involvement and participation**

Although the Cross-border Mergers Directive has been implemented into Swedish legislation, the core legislation on employee involvement and participation affecting cross-border mergers is the 1976 Codetermination Act. This by international comparison fairly far-reaching act on employee involvement and participation is also applicable in cross-border merger situations and provides the central legal rules between employer and employees' organisation (Adlercreutz and Mulder 2013; Fahlbeck and Mulder 2009).

Despite its name, the Act is not really about transferring managerial powers or other decision-making rights reserved for the employer to the trade union. Instead, it is about joint participation through negotiations. The Act does not deprive employers of their prerogatives; rather the employers retain the right to decide ultimately how to manage the business. Thus, the unions do not actually have the right to take managerial decisions, but rather the possibility to influence management decisions through the employer's obligation to negotiate with them concerning any managerial decision that the employer intends to take. Under certain conditions a trade union is entitled to prevent the employer from using specific contractors; that is, in specific situations the unions have a veto right.

The Act is by far the most important channel for employees and their representatives to exert their influence through negotiations. Typically, the employee organisation participates through its right to receive information and in some cases as a result of representation in some decision-making body, most frequently in health and safety committees. The right to negotiate extends to all levels of trade union hierarchy, both local level (plant or company level) and central level (industry-wide level). Breaches of the employer's duty to negotiate are sanctioned with damages.

In the Act Swedish labour law recognises three different types of collective negotiations: (i) general collective negotiations on the relationship between employers and employees represented by a trade union, (ii) extended collective negotiations on managerial decisions and (iii) dispute negotiations. Only the last one is about legal disputes and is settled by the Labour Court. The first two involve conflicts of interest, including negotiations on managerial issues, and cannot be considered by the courts; they can only be resolved as a result of negotiations, sometimes but not necessarily after industrial action has been taken.

According to the provisions on general collective negotiations, a party, whether it be an employer, an employers' organisation or an employees' organisation (but not a single

employee), is entitled to request negotiations. There is no requirement that the parties already have a relationship through a collective agreement. The provision defines a right to negotiations on all aspects of the relationship between employer and employee. A request for general collective negotiations means an obligation for the other party to participate in the negotiations; the right and obligation to negotiate according to this provision is reciprocal.

The 1976 Codetermination Act imposes an obligation on employers to take the initiative to negotiate with the established union before making certain kinds of decisions (extended collective negotiation). An employer is then obliged to negotiate with the trade union with which the employer has a collective agreement before making a decision which would make major changes in either managerial issues or in working conditions for a single employee. Thus, the existence of a collective agreement is of great importance, which the legislation acknowledges by giving the trade unions more far-reaching rights than a trade union without a collective agreement.

This in fact means that the employer has to institutionalise negotiations in advance; in other words, the provision implies a substantive reduction in unilateral employer decision-making powers. This applies when the employer is about to decide to make major managerial changes or major changes in working conditions. A cross-border merger is always a major managerial change that calls for extended collective negotiations. If the measure does not qualify as a major change, the employer is not obliged to take the initiative to negotiate, but if the employer does not call for negotiations, the trade union with a collective agreement can do so.

The stage during the decision-making process at which negotiations must start is of major importance. The Act thus requires that the employer has to initiate negotiations at a very early stage, before any decision on the issue is made, and continue the negotiations – or more precisely, discussions – throughout the decision-making process.

Parallel with this negotiation channel, there is the channel of board representation for employees, which is governed by the 1987 Board Representation Act. According to this act, employees are entitled to representation on the company's board of directors through their trade unions. An important difference with regard to the negotiation channel, however, is that the 1987 Board Representation Act provides for direct influence on the board; that is, the company's main decision-making body. In principle, the employee board members have no special status regarding influence and liability in comparison with board members elected by the shareholders' general meeting. Thus, they are covered by company law, meaning for example that the board representatives shall be obliged to consider the company's interest in their decisions.

As mentioned above, this Act did not fulfil the requirements in the Cross-border Mergers Directive; thus a new legal item was adopted and enacted implementing the Directive on this point. However, this Act would apply to decisions on a cross-border merger.



## 6. Conclusions

The concept of employee participation corresponds to the definition in the European Company (SE) Directive (2001/86/EC) supplementing the Statute for a European Company regarding employee involvement. As employee participation takes place at the board level, participation is thus not primarily a matter of labour law regulation, but instead a matter of company law regulation.

As a consequence, in Sweden no amendments were made in the labour law legislation, besides the adoption of the 2008 Employee Participation in Cross-border Mergers Act. Thus, the general and far-reaching obligations under the 1976 Codetermination Act – namely that the employer inform and negotiate with the trade union with which the former has a collective agreement – shall prevail. This 1976 Codetermination Act is the core of the Swedish industrial relations system: employee involvement is safeguarded by information and negotiation rights and obligations rather than employee participation in company boards or by other organisational solutions. The obligation to negotiate enters into the decision-making process at a much earlier stage than the rights and obligations according to the 2008 Employee Participation in Cross-border Mergers Act.

Finally, the legislation on employee protection under the implementation provisions of the Transfers of Undertakings Directive (2001/23/EC) may be applicable in a cross-border merger situation, if certain conditions are met. Such a transfer must, however, comprise a transfer of assets or employees. Whether shares are transferred or not does not matter for the applicability of the Transfer of Undertakings Directive.

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## **Part 3**

### **Case studies of cross-border mergers and worker rights**



# Chapter 15

## Greece: case studies of a mechanism for company 'exit' from a crisis-ridden country

Christos A. Ioannou

### 1. Introduction

Since the onset of the financial crisis, there have been a number of prominent cases of companies 'exiting' Greece through an effective transfer of their registered headquarters to another country. These have been complex, multi-stage processes, particularly in the cases in which the companies were listed on the Athens stock exchange, thus engaging securities law as well as company law. This chapter analyses three of these cases, the relocation of the metals group Viohalco to Belgium, the dairy company FAGE to Luxembourg and the Coca-Cola Hellenic Bottling Company to Switzerland. The Cross-border Mergers Directive played a direct role in the first two cases, both of which involved forming a subsidiary in another Member State and then merging the parent company into that subsidiary. The third case used a similar mechanism, however, as the transfer was to a country outside of the EU (Switzerland), the Directive was not used specifically. Significantly, in all three cases the mergers were one component of 'in-house' restructurings rather than the joining together of truly independent companies.

These three cases had very different impacts on labour and labour relations. The first case analysed – the merger of the metals group Viohalco SA Group into a Belgian listed holding in 2013 – was received positively by the trade union and the workers' side. There were no direct negative implications for employment relations in the group of companies involved and affected by the Cross-border Mergers Directive. The two other cases, however, illustrate that cross-border restructurings can have very negative impacts for workers. These two case studies – the dairy company FAGE and the Coca-Cola Hellenic Bottling Company (or CCHBC for short) – highlight the use of European legislation to support restructuring at an advanced stage of the financial crisis. This is a new aspect of the Greek crisis, which indicates that there has been little room for exploring worker involvement rights in the context of long established adversarial industrial relations. Indeed, in the third case (CCHBC) 'Europeanisation' itself is considered as part of the problem, although the restructuring took place partially outside the EU legal framework as the company seat was transferred to Switzerland.

In this context, the question of worker involvement and labour rights related to and arising from EU company law is of interest to company and national trade unions. Although worker representation on the board was not an issue in any of these cases, the information rights provided in different pieces of legislation (for example, the Cross-border Mergers Directive and, where an EWC was present – Coca Cola HBC – the

European Works Councils Directive) were not fully utilised. While in the past the Greek unions were not really active in exploring their rights arising from the EU framework, in the current crisis the extent to which they are aware of and may make use of the existing machinery is an open question.

The trade union role can be characterised in terms of a chicken and egg situation. In the past, before the crisis, unions were fairly reluctant to exercise their information and consultation rights, precisely because they were minimal and considered of marginal importance. In the same period, the developments pertaining to the Cross-border Mergers Directive were unusual and unfamiliar. In the national context trade unions were able to use other means based on national legislation and national systems of industrial relations (collective bargaining, strikes and so on). Similar to the case of the EU Takeovers Directive (Ioannou 2016), the information rights were considered inadequate and thus not fully utilised.

## **2. Viohalco SA/NV: a case of exit with a 'neutral' impact on labour**

Viohalco is a group of companies active in steel, copper and aluminium production, processing and trade, as well as in real estate development. Viohalco was the largest metals group in Greece. Through its production facilities in Greece, Bulgaria, Romania, Russia, the former Yugoslav Republic of Macedonia and the United Kingdom, the Group's subsidiaries specialised in the manufacture of steel and steel pipes, copper and cables, and aluminium products, generating annual revenue of €2.9 billion in 2013 and employing approximately 8,000 workers worldwide. More than 60 per cent of its productive capacity was in Greece and it is noteworthy that the group's exports alone accounted for almost 10 per cent of the country's exports.

Up until 2013, Viohalco was organised through a holding company, Viohalco Hellenic Copper and Aluminium Industry SA (Viohalco Hellenic, for short), which had been listed on the Athens stock exchange since 1947, and held shares in approximately 90 companies. In 2013, Viohalco effectively transferred its seat from Athens to Brussels through a cross-border merger. In May it established a Belgian limited liability company, Viohalco SA/NV, as a subsidiary. In September 2013 the board of directors of Viohalco Hellenic and Viohalco SA/NV approved a cross-border merger. Through a 1-to-1 share exchange, shareholders' ownership was transferred from Viohalco Hellenic to Viohalco SA/NV. Simultaneously, a domestic merger was approved between Viohalco SA/NV and Codifin SA, a Belgian holding company which held shares in Viohalco-affiliated companies. In November 2013, Viohalco was listed on the regulated market of Euronext Brussels. According to the prospectus for admissions to Euronext trading, out of the group's 8,000 employees, only two were employed directly in the holding company Viohalco SA/NV, and it was anticipated that another two would be transferred in due course.<sup>1</sup>

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1. This information is contained in the Prospectus for 'Admission to trading and listing of all shares on Euronext Brussels in the context of the mergers by absorption of Viohalco SA/NV of Viohalco Hellenic Copper and Aluminium Industry SA and Cofidin SA', available at: <http://www.viohalco.com/Files/Documents/Document15.File1.Original.pdf> (downloaded 24 July 2017).

The merger and transfer of seat of Viohalco from Greece to Belgium attracted wide publicity and became a topic for public debate in Greece. The announcement of the move created concerns, in the early stages of the merger, about the future of production sites and employment in the group's subsidiaries in Greece.

However, through information procedures involving employees and company unions – in the few cases these were present at company level (for example, Sidenor, Fulgor) and represented in the metalworkers' federation (POEM) – these concerns were eased. Through these procedures, which are based on national provisions on informing trade union representatives and employees about restructuring, the company management explained that the main reason for the merger and the transfer of seat of the holding company was the credit crunch. Through this move the company would no longer be classified as an 'emerging market' company and would thereby have both easier access to and cheaper credit. The estimated reduction in interest payments by more than 2 per cent in the period when the merger took place amounted to more than €60 million annually. A further reason given was that only about 15 per cent of the group's sales were accounted for by Greece, the other 85 per cent coming from abroad.

The implementation of the cross-border merger procedure followed the provisions of the transposed Directive in a context in which unionisation levels in the group's many companies varied, as only a minority of production sites were unionised. The group management followed an information procedure that was directed straight to the employees, as well as to the leaders of the metalworkers' federation (POEM), since the Viohalco Group accounted for a large share of the POEM union membership. However, it appears that neither the many non-unionised employees nor the unionised segments of the Group were aware of the full provisions of the Cross-border Mergers Directive as transposed in Greece. In fact, it was the group's minority shareholders who became active, criticising it for not fully meeting its obligations under the Directive. This view was shared by the Hellenic Capital Markets Commission (the HCMC) with regard to Viohalco SA.<sup>2</sup>

### **3. Controversial 'exodus': FAGE Group and Coca Cola Hellenic Bottling**

#### **3.1 Two cases of cross-border restructuring**

FAGE Group SA and Coca Cola Hellenic Bottling Company are two other prominent cases that indicate use of the possibilities arising from the EU company law provisions as a means for initiating company restructuring. Unlike the Viohalco case, however, the

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2. In a press release of Viohalco SA/NV, issued in Brussels, 23 September 2014 (with regulated information as defined in the Belgian Royal Decree of 14 November 2007 regarding the duties of issuers of financial instruments which have been admitted for trading on a regulated market) it was stated: 'The Belgian company Viohalco SA, the controlling holding of the Viohalco group announces the decision that has been notified to it by the HCMC further to the cross-border merger through which Viohalco SA absorbed the Greek company Viohalco Hellenic Copper and Aluminium Industry SA and the Belgian company Cofidin SA. The HCMC believes that pursuant to Greek law, Viohalco SA should have launched mandatory tender offers on its seven subsidiaries that are listed on the Athens stock exchange as a result of the merger transaction. As a sanction for Viohalco SA's non-compliance with this obligation, the HCMC decided to impose a total fine of 230,000 euros on Viohalco SA.'

emigration of these two companies in 2012 has had wider implications for employment relations, becoming the subject of protracted conflicts at the company and group levels.

These companies both operated at a multinational level and had their registered seat in Greece. FAGE SA is a leading internationally-active Greek dairy company, with most of its sales (about 70 per cent) outside Greece. Coca-Cola Hellenic Bottling Company, which was the largest company listed on the Athens Stock Exchange, is the second-largest bottler of Coke in the world, with the bulk of production and 95 per cent of its sales (in a total of 27 countries) outside Greece.

In the context of the Greek financial crisis, in 2012 both companies decided to start procedures to relocate their corporate seat outside Greece. As indicated in company and press reports, the trigger for this process was the credit crunch in Greece and ratings based on 'country risk'. Both companies financed their activities in part by issuing corporate bonds, whose risk ratings and interest rates are based not only on company-specific factors but also – in part – on factors pertaining to the country in which their parent company is registered. FAGE had been considering internal restructuring designed to enhance the efficiency of its corporate structure and to better reflect the increasingly international nature of its business. A threatened ratings downgrade in 2012 due to the location of its headquarters in Greece triggered a restructuring of the corporate group, which aimed at reducing bondholders' exposure to economic developments in Greece. The anticipated benefits of the favourable tax environment of Luxembourg also played a role in selecting that country for relocation of the company seat. Coca Cola HBC had also been given a negative rating outlook because of the crisis, and in 2013 it was estimated that its interest costs had increased to about €500 million annually. With this move, CCHBC expected to increase its credit capacity and draw more funds at a lower cost. Its 'exodus' was organised through the possibilities made available for implementing a cross-border merger and a transfer of seat. The legal procedures for their emigration had to operate through Greek company law as adapted to EU company law.

Although both groups effectively relocated their seats outside Greece, they used different mechanisms to do so. The relocation was less complex in the case of FAGE, as it was not listed on the stock market and thus capital market law was not involved. The FAGE Group relocated from Greece to Luxembourg as part of a corporate restructuring programme completed on 1 October 2012. FAGE Dairy Industry SA, the former parent company of the Group, merged into its subsidiary, the Luxembourg-based FAGE International SA. The Group's operations outside Greece were, from then on, conducted through a newly formed Luxembourg subsidiary, FAGE Luxembourg S.a.r.l., which became a holding company for the Group's subsidiaries in the United States, the United Kingdom, Italy and Germany.

The Coca-Cola HBC transfer was more complex due to its status as a listed company. It shifted its seat to Zurich, Switzerland and obtained a listing on the London Stock Exchange. The vehicle for doing this was Coca-Cola HBC AG, a new holding company founded in the autumn of 2012 in Switzerland by Kar-Tess Holding, which held a 23.5 per cent stake in CCHBC. This holding became the group's parent company and to this end had to submit an optional public offer for the acquisition of the whole of



Coca-Cola Hellenic. In May 2013 the Hellenic Capital Market Commission approved the Coca-Cola HBC AG application to initiate the buy-out process pursuant to Article 27 of Greek Law 3461/2006 concerning the transfer procedures. The share exchange offer was launched by Coca-Cola HBC AG (Coca-Cola HBC) on 11 October 2012 to acquire all of the issued ordinary shares of Coca-Cola Hellenic, Coca-Cola HBC. On 29 April 2013, Coca-Cola HBC's shares were admitted to listing on the premium segment of the UK Listing Authority and to trading on the Main Market of the London Stock Exchange. Following the completion of the squeeze-out in June 2013, Coca-Cola HBC ended up holding 100 per cent of Coca-Cola Hellenic.

### 3.2 Impact on labour and labour relations

In their press statements and successive legal statements both companies initially stated that they would maintain their production plants in Greece. These claims lacked any detailed specification of production volume and employment levels, or for that matter any time frame, as these specifications are not required by current EU company law, as transposed into national legislation.

However, following the initial stages of restructuring and FAGE's transfer of seat to Luxembourg, FAGE Dairy Industry SA (which remained a corporation organised under the laws of Greece and became a subsidiary of FAGE International) continued its restructuring plans, which also affected employment relations. In Greece, it aimed at 20 per cent pay cuts, a shorter work week (80 per cent of full time) and job cuts. Not surprisingly the emigration of the parent company and the transfer of seat were not welcomed by the trade union side, as these further restructuring measures affected employment relations. Coca Cola HBC also undertook measures with a major impact on labour, closing two of its six production plants in Greece (in Patra and Thessaloniki), and some regional distribution centres in the latter stages of the restructuring process, just before announcing their planned transfer of seat in October 2012. The next round of restructuring and layoffs came in October 2013 by cutting another 33 jobs at the distribution centre in Thessaloniki, which caused a strike and a long boycott of CCHBC products.

In both groups, there was an established tradition of adversarial employment relations, which was typical for the company level in Greece. This meant that there was no tradition of information and consultation with the involvement of the plant and company-level unions. In the context of these adversarial industrial relations, the union side was also reluctant to explore the possibilities offered by the relevant provisions of EU company law as incorporated in its Greek transposition. The rationale for this reluctance was feasibility; it was unlikely to have any real impact on the development and outcome of the procedure. Therefore, in both cases restructuring evolved in the context of increasingly adversarial industrial relations.

In the case of FAGE, the conflict evolved around the pay cuts and shorter working week through successive strikes and legal disputes between the management and the unions, without any reference to the company law provisions about information rights and duties pertaining to the employees.

In the case of Coca Cola HBC, the dispute evolved through strikes and a years' long (from 1 October 2013) boycott of CCHBC products (which led to protracted legal disputes) with the demand 'reopen the Thessaloniki plant'. Several former employees of the company posted a resolution on the internet that called on the world to boycott the products of Coca-Cola and to exert pressure so that the company would rehire the workers, thus putting 'social responsibility' into practice.<sup>3</sup> The trade union's criticism was that the company had relocated production to a Bulgarian plant. In November 2013, the company sued the members of the Panhellenic Federation of Bottled Drink Workers (POEEP) and members of the trade union of the Thessaloniki plant, demanding €250,000 in damages allegedly inflicted on Coca-Cola because of protesters' complaints that the company had transferred facilities to countries with cheaper production costs. In a statement, the company denied the charges and argued that it 'will not allow anyone to deny its strong commitment to a stable and substantial presence in Thessaloniki and Northern Greece'.<sup>4</sup> Moreover, the company claimed that in case they won the legal battle, it would give the money to charity.

The trade union side accused Coca-Cola of hypocrisy as the company advertised corporate social responsibility programmes, while at the same time dismissing employees in order to maximise profits.<sup>5</sup> Coca-Cola sought to minimise or even stop the boycott in support of the dismissed employees in the courts and with a media campaign. It is noteworthy that the diverging views and attitudes that developed during this conflict had a common denominator in the CCHBC boycott campaign, within the framework of which the trade unions declared that 'these practices of multinational companies exploit the possibilities provided by European legislation, but what is legal is not always ethical'. Among other things a strand of Euroscepticism developed, although the transfer of seat and the related restructuring involved a non-EU Member State.

#### 4. Conclusion

A number of years into the Greek crisis there have been several cases of major companies using EU company law directives as a means of initiating a 'Greek exit' and indeed as part of wider company restructuring in the context of the financial crisis. The three cases analysed here all involved a complex set of transactions that resulted in the transfer of the company's registered office to another country. Two of these cases explicitly used the Cross-border Mergers Directive, while in the third case a similar mechanism was used to effect a transfer outside the EU. Significantly, in none of these three cases was the cross-border merger between independent companies, which was the type of restructuring envisaged in the original cross-border mergers legislation.

The three cases show that experiences have been very mixed set regarding employee involvement in these company restructurings. In the case of the cross-border merger of

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3. See <https://el-gr.facebook.com/Coca-cola-apergia-238774946277939>

4. See <http://gr.coca-colahellenic.com/media/3296/gegonota-kai-sxetika-stoixeia.pdf> and <http://gr.coca-colahellenic.com/gr/drastiriotita/paragogikes-monades/topiki-paragogi/>

5. See <http://www.poeep.gr/index.php/el/coca-cola> and <http://www.poeep.gr/index.php/el/coca-cola/558-----3->

the Viohalco SA Group, which became a Belgian listed holding company, employees and unions at Viohalco received information about the reasons and prospects of the move that resulted in the transfer of seat from Greece to Belgium. Worker representatives' actions and reactions were met by the management using formal 'international' (as provided for in the Cross-border Mergers Directive) and 'national' (to the metal workers federation POEM) information and informal and proactive (HR management initiated) information towards the employees. The management move was well received and fed back into consensual attitudes between management and employees representatives.

The case studies of FAGE and of the Coca-Cola Hellenic Bottling Company highlight that in the context of long established adversarial industrial relations there has been little interest in and no room for exploring the worker involvement rights arising from EU company law. On one hand, using these provisions seems to depend on other factors in the national employment relations system, and on the other, the occasional but increasing use of the EU company law machinery for transfer of seats and cross-border mergers is normally related to broader restructuring developments that present major challenges to the labour side. As stated in the Introduction, the minimal rights that existed under EU legislation were for the most part not used by the trade unions, not because they were not needed, but rather because they were considered to be too weak.

In Greece, this type of restructuring is new and may involve a large number of companies in the future. After the recent stage of the Greek crisis and the capital controls imposed since early July 2015, out of 300 Greek businesses surveyed between 13 and 17 July 2015, 23 per cent planned to transfer their headquarters abroad, and another 13 per cent had already done so (Endeavor Greece 2016). This is a major challenge to the employment relations system in Greece, and the trade unions do not seem prepared to explore the possibilities offered by EU legislation referring to various aspects of worker participation rights. This remains 'new territory' for trade unions, 'discovered' in emergency conditions. Making use of them remains exceptional, and therefore there is ample room for stakeholder alignment to basic (and new) rights emerging from the EU and national levels.

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# **Chapter 16**

## **The cross-border merger of Coface Austria Holding AG into Coface SA France**

**Helmut Gahleitner**

### **1. Introduction**

This case study examines the cross-border merger of Coface Austria Holding AG into Coface SA France, two companies in the Coface insurance group. Similar to the other insurance industry cases analysed in this book (Euler Hermes in Chapter 17 and Codan/Trygg-Hansa in Chapter 18), this cross-border merger was driven primarily by changes in the regulation of the industry, namely the implementation of the Solvency II Directive. The changed economics in the insurance industry made it more sensible to pool the group's capital 'under one roof'. In this case the Cross-border Mergers Directive was used purely for internal restructuring, specifically to transform group subsidiaries into foreign branches, rather than for mergers between independent companies. Coface Austria Holding AG was in fact only one of a number of subsidiaries that was merged into Coface SA through a multiple cross-border merger.

A second similarity to the other insurance cases in this volume is the relatively low level of stress affecting industrial relations caused by this type of restructuring. Coface management claimed that no negative impact on employment levels or conditions was expected from the transformation of subsidiaries into branches. Therefore, the cross-border merger in itself was not particularly controversial with regard to its impact on employment or working conditions.

Regarding industrial relations, the main issue was the system of worker participation that would result from the merger processes in the Coface group. Both Coface Austria Holding AG and a German company involved in the cross-border merger (Coface Kreditversicherung AG) had worker participation in their supervisory boards. As a result of the negotiations by the special negotiating body (SNB) an agreement on workers' representation at board level could be concluded. Overall, this agreement can be rated as well balanced and satisfactory, showing that the internationalisation of worker participation can be implemented smoothly.

### **2. Background information on the Coface Group**

The Coface Group is a worldwide leader in credit insurance that offers companies around the globe solutions to protect them against the risk of financial default among their clients. It is a global player located in 67 countries and offering credit insurance in over

200 countries. In 2014, some 4,400 employees worldwide generated sales of €1.4 billion. Compagnie Française d'Assurance pour le Commerce Extérieur SA (hereafter Coface SA), the parent company of the Coface Group, is a joint stock company with its seat in Paris. The shares of Coface SA are listed on the regulated market of Euronext in Paris. The controlling shareholder is Natixis, a French corporate and investment bank, and the free float amounts to approximately 60 per cent of the shares.

Coface Austria Holding AG is a joint stock company with its seat in Vienna. Prior to the cross-border merger described in this case study, Coface Austria Holding was merged with Coface Austria Kreditversicherung AG, which operated not only in Austria but also through eight foreign branches in eight central European countries (Czech Republic, Hungary, Bulgaria, Poland, Rumania, Slovakia, Lithuania and Latvia).

### **3. The 2012 restructuring project**

Coface SA, the parent company, decided to simplify the structure of its European credit insurance activities and converted its European credit insurance subsidiaries into branches. Thus, Coface SA has merged cross-border two German companies (Coface Kreditversicherung AG and Coface Deutschland AG), an Italian company (Coface Assicurazioni Spa) and an Austrian company (Austria Holding). According to the merger report, the project pursued two major objectives: (i) optimisation of the acquiring company's capital requirements and (ii) rationalisation of the rating constraints.

The streamlined structure has anticipated the new regulatory framework of the Solvency II Directive, which resulted in a complete overhaul of insurance companies' capital adequacy and regulatory requirements. The scope of supervision in Solvency II covers both the legal entities holding a credit insurance license and the consolidated level of the parent company. Since completion of cross-border mergers with its European credit insurance subsidiaries the group parent company, Coface SA, has carried out all credit insurance operations through branches and therefore no longer has to meet capital requirements in these countries. Beyond that, Coface SA is only under the control of the French regulator, Autorité de Contrôle Prudentiel, which makes it easier for management to communicate with regulatory authorities. The conversion of the subsidiaries into branches has had the positive result of concentrating all rating constraints on the surviving company.

The cross-border merger between Coface Austria Holding AG and Coface SA resulted in the transfer of all the assets and liabilities of the Austria Holding AG to the acquiring company, Coface SA. As a result of completion, the merged company has been dissolved as a matter of law. The activities and operations have been continued by the acquiring company in the form of an Austrian branch. The foreign branches finally became branches of the acquiring company. The acquiring company held 100% of the shares in the merged company. As a consequence of the cross-border merger these shares were cancelled. Therefore special rights for minority shareholders were not an issue.

According to § 13 (1) of the Austrian EU Merger Act, the creditors of the merged company may request security for their claims within two months upon publication of the merger plan, provided that they demonstrate plausibly that the settlement of their claims is endangered by the contemplated merger. Since the merger had no capital-decreasing effect, no measures regarding creditor protection had to be implemented.

#### **4. Consequences of the merger for the employees**

According to the merger report, the works council of the absorbing company (Coface SA) issued an opinion on the whole merger project. The content is as follows:

‘The merger will not impact employment in the Surviving Company and in the Merged Company, including employment in CK Austria AG and its foreign branches, which shall primarily be transferred to the Merged Company as a result of the Preliminary Merger. There is no impact on the collective and individual status of the employees of the Surviving Company. Furthermore, in accordance with the territoriality rules, the individual and collective status currently applicable to the employees of the Surviving Company would not be extended to the employees of the Merged Company. On the Completion Date, the employment contracts of the employees of the Merged Company will be transferred to the Surviving Company. Beyond that, the contemplated operations will have no impact on the employment contracts of the Merged Company’s employees or on the social status applicable to them. The terms of the employees’ employment contracts shall continue without change. There will be no restructuring in consequence of the merger. It is specified, according to Sec. 3(1) Austrian Employment Law Harmonisation Act upon the Adjustment of Labour Law (*Arbeitsvertragsrechtsanpassungsgesetz*), that a transfer of business will not affect any employment relationship. Employment contracts are transferred to the Surviving Company by operation of law.’

To safeguard employees’ participation rights, a negotiation procedure was required. The aim of the negotiation procedure is to set out rules related to the participation of the employees in the governing bodies of the surviving company (Board of Directors). In accordance with Article L.2372-1 of the French Labour Code, a special negotiating body (SNB) was created. To understand the negotiation procedure in the SNB an interview was carried out with a member of the European Works Council of Coface SA and an employee representative on the Board of Directors of Coface Europe.

As already mentioned, Coface SA has merged two German companies (Coface Kreditversicherung AG and Coface Deutschland AG), an Italian company (Coface Assicurazioni Spa) and an Austrian company (Austria Holding). Both the first German company and the Austrian company had worker participation in their respective supervisory boards. Worker representatives from the German company were elected by the workforce. For the Austrian company, one-third of the supervisory board members were appointed by the works council. Only the Italian company had no worker participation at board level.

The establishment of the SNB was the first important step. It had to be guaranteed that the workforces of all countries were represented. Taking into account the number of employees in each country, the SNB was set up as follows: five persons from France, four persons from Germany and one person from each of the other countries. Overall, the SNB consisted of 20 people from 14 countries.

According to interviews with the worker representatives, the negotiations with management were conducted in a fair and objective atmosphere. The SNB was supported by two experts: one was a representative of the German service union Ver.di and the other was an independent expert from France, who was financed by the company. Beyond that, all meetings were supported by simultaneous interpretation into French, German and English. The negotiations lasted less than a year. In this period the SNB held ten meetings.

Particularly challenging were the questions of who should be nominated to the board of directors and which countries should be represented on the board. According to the legislation, the board of directors of Coface Europe consisted of 12 members, of whom the SNB had the option to nominate four members. Various proposals were discussed; in the end, an agreement was found within the SNB whereby two persons from France, one person from Germany and one from Austria were nominated to the board of directors.

## **5. Conclusion**

This chapter has analysed the multiple cross-border merger within the insurance group Coface, focusing on the merger of Coface Austria Holding AG into Coface SA France. This merger was driven by the changed financial logic within the European insurance industry caused by the implementation of the Solvency II Directive. According to this logic, it now makes sense for insurance groups to simplify their structures and merge subsidiaries into one company. Groups have a strong incentive to pool their capital, which needs to be set aside for regulatory purposes, and to reduce the number of regulatory agencies they deal with. This was established through a multiple cross-border merger, which merged a number of national subsidiaries into the parent group, which is located in France. The operations of the subsidiaries were transformed into branches of the company Coface SA.

Given that the multiple cross-border merger was seen as purely internal restructuring, and was not anticipated to have a negative impact on employment levels or working conditions, the merger was not controversial with worker representatives in this respect. The Austrian works council took advantage of its right to append an opinion to the management report by underlining this lack of negative impact, as well as the fact that existing employment contracts would be transferred to the merged company without change.

As worker participation existed in two of the merging companies – one German and one Austrian – the conditions were triggered for establishing an SNB to negotiate the



rules for worker participation in the surviving company. These negotiations ended with an agreement that includes the right to nominate worker representatives comprising up to one-third of the board members of Coface Europe, as well as various training courses for the workers' representatives in the board. In this way, the Coface example demonstrates the ways in which the specific co-determination model of Germany and Austria was effectively exported to France via the Cross-border Mergers Directive.



# **Chapter 17**

## **Euler Hermes: introducing board-level representation into Belgium through a cross-border merger**

**Guy Van Gyes and Stan De Spiegelaere**

### **1. Introduction**

In the present case study we focus on the cross-border merger of Euler Hermes, which, in a two-phase process in 2011 and 2014, integrated its national subsidiaries in Europe into one company with its statutory seat in Belgium. Like two of the other case studies in this volume (chapter 16 on COFACE and chapter 18 on Codan/TryggHansa) this merger was driven by regulatory changes in the financial services industry, namely the introduction of the Solvency II Directive at the EU level. The passage of this Directive increased the incentives to simplify company structures in the insurance industry. Although it was not originally intended to serve this purpose, the EU's Cross-border Mergers Directive proved to be a convenient mechanism to achieve this simplification.

As in the other two case studies, this cross-border merger was driven by capital requirements, not employment considerations, and was thus considered to be 'employment-neutral'. From the point of view of its impact on jobs, therefore, this cross-border merger was uncontroversial for the trade unions involved. This was particularly the case in the first phase of the merger (in 2011), in which worker participation on the board of the merged entity was not an issue. In the second phase (in 2014), however, worker participation was a major issue, as the German subsidiary that was merged into the parent company had one-third representation on its board. The rules in the cross-border mergers Directive for initiating negotiations over worker representation on the board were thus triggered in this second phase, and the result was that four out of the twelve members of the Board of Directors of Euler Hermes SA were to be worker representatives.

For Belgium, this case is particularly significant because it was the first by means of which the local employee representation and trade union obtained a seat on the board of a native company as a result of the rules and regulations governing cross-border mergers. This case study details the negotiations on worker participation and their outcomes and the first experiences of the Belgian representative on the board. The study also shows that worker representatives can successfully learn from other industrial relations traditions in the context of international worker representation on boards created by cross-border mergers.

## 2. The Euler Hermes Group

### 2.1 Formation of the group

The Euler Hermes Group (EH) is a complex international structure headed by the Euler Hermes Group SA (formerly Euler Hermes SA), which is headquartered in Paris and currently listed on the Euronext stock exchange. The group offers a wide range of insurance-related services for the management of business-to-business trade receivables. The product range includes credit insurance, bank guarantees, debt collection services and information products. The Euler Hermes Group is the largest provider of credit insurance in the world. In 2016 the insurance multinational had more than 6,200 employees and offices in more than 50 countries. Euler Hermes's recent corporate history is one of mergers and acquisitions, which have made it, on one hand, the biggest credit insurer in the world, but on the other hand also a subsidiary of the German Allianz Group, the largest insurance holding in the world and one of the first *Societas Europea* (SE).

The roots of the company are German-French; the German Hermes Kreditversicherungs-bank was founded in 1918 and the French Société Française d'Assurance Crédit (SFAC) in 1927. In 1993 SFAC took over the Belgian Compagnie Belge d'Assurance Crédit (COBAC) and in 1996 it expanded further with the acquisition of the American Credit Indemnity and Trade Indemnity Corporation, the oldest credit insurer in the world (founded in 1883). At the same time, Assurances Générales de France (AGF) obtained a majority stake in SFAC and changed its name to Euler. The same year Allianz acquired control of Hermes and two years later of AGF, Euler's major shareholder and the largest French insurance company.

In this acquisition process, Euler and Hermes became integrated into the German-based Allianz group, but consolidated as a separate company – Euler Hermes – which is based in France. Through this major reshuffling within the European financial insurance sector, the Germans created a dominant holding by incorporating the important French AGF, but the French obtained as (minor) compensation the integration of the credit insurance activities under the French holding Euler Hermes. This consolidation was complete by 2003.

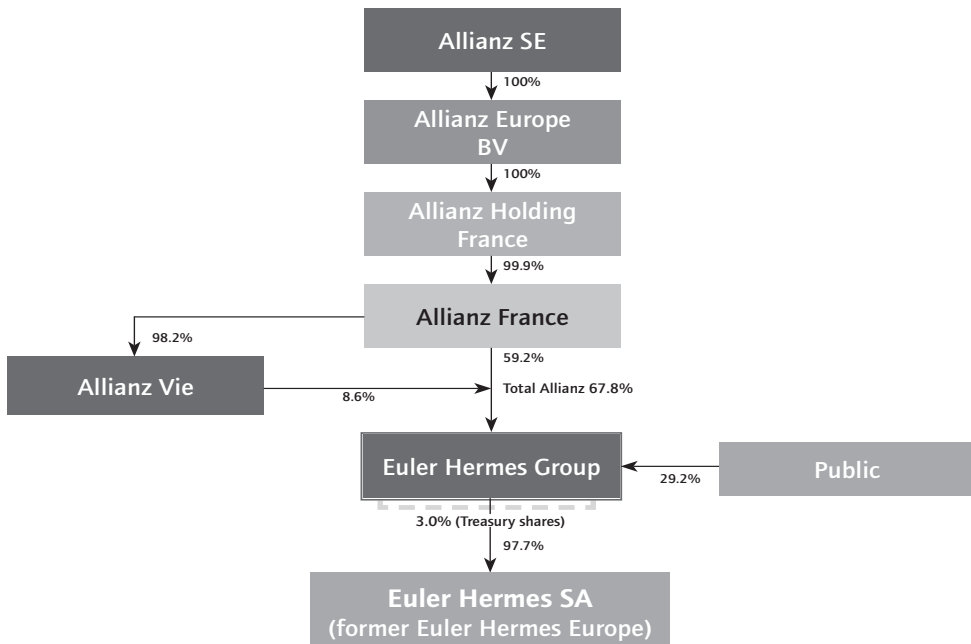
### 2.2 Rationales for the cross-border merger

Characteristic of the Euler Hermes Group (as is the case for other multinational insurance groups) was the use of many subsidiaries headquartered and active in different national markets. These subsidiaries were subject each to regulation by the respective national regulatory authorities. Almost 10 years after the first big consolidation, the Group initiated a major simplification of its legal structure by organising an 'internal' cross-border merger of its European former subsidiaries into one insurance company. This statutory merging process was preceded by an organisational integration process to increase efficiency, create economies-of-scale and expand services to international clients.

This ‘internal’ merger process – called Blue Europe – was organised in two steps. In the first step, completed on 1 January 2012, the company simplified its legal structure in Europe by merging 13 of its former subsidiaries into a single insurance company, Euler Hermes Europe, located in Brussels. In the legal restructuring project ‘Blue Europe I’, subsidiaries in the Czech Republic, Denmark, Finland, Hungary, Ireland, Italy, Netherlands, Norway, Romania, Slovakia, Sweden and the United Kingdom were merged into branches of the single Belgian-based insurance carrier Euler Hermes Europe SA. This merger process resulted in Euler Hermes Europe, which adopted the legal structure of the former Belgian COBAC.

Two years later, the legal restructuring project ‘Blue Europe II’ completed this process (in November 2014) by merging its German (Euler Hermes Deutschland) and French (Euler Hermes France) subsidiaries into the Belgian company Euler Hermes Europe SA (which in the process was renamed Euler Hermes SA). These French and German subsidiaries were the biggest entities in the group by sales and employment. Meanwhile, the Paris holding company changed its name from Euler Hermes SA to Euler Hermes Group (ELE). The Euler Hermes Group was owned approximately two-thirds by the Allianz Group and the rest by public shareholders (see Figure 1). The merger of Euler Hermes Deutschland AG and Euler Hermes France SA into Euler Hermes SA was formally decided at an extraordinary shareholders’ meeting on 4 November 2014, after approval by the controlling regulators of Belgium (NBB), France (ACPR) and Germany (BaFin).

Figure 1 Shareholder structure of Euler Hermes SA after the cross-border merger



Source: Euler Hermes 2015 Annual Report (2016: 22)

The company implemented its integration and consolidation into one company under Belgian law for a number of different reasons. However, the main reason was an optimisation decision related to Solvency II. Solvency II is an EU legislative programme implemented in all 28 Member States. It introduced a harmonised EU-wide regulatory regime for the insurance sector. Solvency II concerns not only capital requirements; it is also a comprehensive programme of regulatory requirements for insurers, covering authorisation, corporate governance, supervisory reporting, public disclosure and risk assessment and management, as well as solvency and reserving. However, one important aspect of the reserve capital that a company has to maintain is that it is to a certain degree ‘sleeping’ money, in the sense that it must be set aside and cannot be used to generate profits. Whether or not these reserves are maintained in 14 different countries or under a single umbrella makes a big difference in this regard. Belgium was chosen as the headquarters for the acquiring company because it allows four different ways to maintain such reserves. Furthermore, the country has a rather beneficial tax system for large financial multinationals. The notional interest deduction or ‘deduction for risk capital’ is a specific Belgian tax measure that, since the fiscal year 2007, allows companies to deduct a specific percentage of their ‘adjusted’ equity capital from taxable profits.

### **3. The Euler Hermes cross-border merger: implications for workers**

#### 3.1 Employee rights during the merger

The Belgian employee representation was, as required by law, informed about the merger decision beforehand, in the works council. The merger process was guided by the financial consultants Deloitte and KPMG and according to our interview partners, everything was organised in accordance with the law. Extraordinary works council meetings were organised to address the proposed merger. According to the legislation, the management body of a merging company must prepare a written Management Report for the company’s shareholders, providing a legal and economic explanation and justification of the planned merger. The works council also considered this report and its opinion was provided to the shareholders in an annex. The management report mentioned no effect on employment and working conditions.

The national provisions concerning the rights of employees in the case of a change of employer due to a transformation of the company, which is the transposition of the Transfer of Undertakings Directive (2001/23/EC), are stipulated in the Collective Bargaining Agreement (CAO-CCE 32bis). In case of a transfer of undertaking, both individual and collective working conditions must be maintained in the company resulting from the merger. The collective agreements and labour contracts between each employee and their (previous) employer are transferred automatically, without creating a new labour contract or changing any clause. In the new company resulting from the merger, the transferred employees continue to do the same work for the same wages and working conditions as before the merger. Collective agreements for an indefinite period have to be respected in the new merger until the agreement is suspended by replacement or cancellation. These national provisions were respected by the company.

### 3.2 Introduction of board-level representation

Belgian corporate law and rules on employee representation do not recognise or foresee forms of board-level participation in Belgian companies. However, as a result of the Cross-border Mergers Directive, for companies resulting from a cross-border merger that are established in Belgium, the Belgian rules will be set aside and participation will be possible if such rights existed within other participating companies (Laagland 2013). As provided for in Article 16 2(b) of the Cross-border Mergers Directive, the existence of board-level participation in the German company participating in the merger triggered the procedure on workers' participation.

In the Euler Hermes merger, the German merging company (Euler Hermes AG) had, according to German law, one-third of the seats on the supervisory board reserved for the employee side. In Germany, employees in larger limited liability companies (500 employees or more) have representation on the supervisory board, to which the day to day management of the company reports. As the workforce came to almost 2,000 employees, employee representatives on the board had a share of one-third of the seats. Therefore, in accordance with the Belgian implementation of the Cross-border Mergers Directive, German board-level representation also had to be taken into account in the merger.

The first two possibilities for implementation were relevant in this regard. The German subsidiary was the company with the largest workforce, but also the first possibility of the directive is relevant, because the German merging company counted more than 500 employees. In any case, which 'exception' triggered negotiations about board-level participation in the Euler Hermes case is not so important; management recognised from the start of the second merger process that it had to think about and act on integrating the board-level representation of employees into the corporate governance of the newly-merged Belgian company.

Under the Cross-border Mergers Directive, a special negotiating body (SNB) must be set up to negotiate arrangements on employee participation with the management bodies of the participating companies in the company resulting from the cross-border merger. The concept 'employee codetermination' has been defined in the Belgium transposition of the Cross-border Mergers Directive (CCT94/CAO94) in the same way as in the provisions on the SE Directive (CCT84/CAO84) (Laagland 2013). In the case of Euler Hermes, a large special negotiating body (SNB) was set up. It included 21 delegates from the 14 involved countries. The lead was taken by the German delegation, which thanks to its legal advisors (from the trade union ver.di) had expertise on this matter. These experts participated in the negotiations.

The election of these country representations was not always clear and transparent. In Belgium, as CCT94 prescribes, the representatives were delegated by the main trade unions represented in the works council (BTK-SETCA and CNE). From some other countries, in which no employee representation was recognised, the representation consisted of the assistant of the local CEO. In one case the selection was reportedly done at a personnel meeting where the 26 employees of the local branch were gathered, and

the director picked somebody, asking, 'would it be any trouble to go there?' However, the core union-based group consisted mainly of representatives who had already known each other for a few years due to links to the transnational activities within the Allianz group, namely the German, Belgian, French, Italian, Dutch and Nordic country representatives. Although not everybody in the SNB was convinced about the need for board-level participation, this core group was convinced of this and drove the negotiations.

On the employers' side, there was no questioning of the principle of introducing board-level representation within the new corporate governance structure of the merged company, as the law was clear on this matter. The German practice of board-level participation was to be implemented. However, the existing board structure would not be changed, which meant that, of the foreseen 12 board members, one-third (that is, four) members should come from the employee side. The board should consist of the five executive directors (including the CEO), two independent members, four employees and the president of the Allianz Group. This composition was seen as fixed and not negotiable.

On 4 December 2013 the SNB met in Brussels and reached agreement on this. Translation facilities were provided, and a pre-meeting was organised for the employee group to develop a common position towards management. In the end, the key issue was the actual composition of the employee representation. Based on employment figures, the German workforce could claim at least two mandates out of the four. However, a majority was necessary not only in terms of employment weight, but also in the employee group of the SNB, which included representatives of 14 countries. The German representatives also wanted to avoid any perception of German dominance of worker representation, and thus were willing to give up one of their seats. The Italian (trade union) representative was recruited to take the fourth mandate, mostly to counter the risk that the non-organised UK workforce would potentially be represented by a non-union and employer-friendly representative on the board. France also received a seat because of its large workforce. It was felt that Belgium, even though it did not have a large workforce, should be represented because the company's headquarters were located there.

This allocation of seats was also intended to represent the four subdivisions of the new company: Germany/Austria/Switzerland, France, Southern Europe and the Nordic division. Belgium was the odd country out; the Nordic faction experienced particular difficulties reaching agreement, as they felt underrepresented in the proposal. There were intensive discussions, weighing the possibilities of achieving representation of large and small national workforces as well as maintaining a regional balance (Molitor 2014). In the end, a compromise was reached by combining the allocation of mandates to the board with the setting up of a new transnational consultation body, in which the Nordic countries would account for half of the seats. This forum would meet twice a year and include representatives of all the subsidiaries. The forum would prepare and watch over the interests of the Euler Hermes employees within the established broader SE works council activities of the Allianz Group (which had nearly 150,000 employees).



In Belgium's monistic board structure, employee representatives are members of the board of directors, which is the company's only governance body. It is worth noting that, taking into account the size of the new company (6,000 employees), the German rules, which precipitated the introduction of board-level participation, prescribe higher employee representation (half the members of the supervisory board). However, only the existing situation in the German subsidiary was transferred to the cross-border merger and 'frozen' at a set level.

#### **4. Living with board-level participation**

The new arrangement of board-level participation created a really new constellation for the Belgian trade union representatives, as they do not currently have any systems of board-level participation in their national practice. It is also interesting to note that the board mandate was taken up by the most important representative – the head of the union delegation and works council member – of the socialist trade union BBTK-SETCA. In Belgium this trade union has in always been the most politically opposed to the introduction of any form of board-level participation. However, as this union had the majority in the employee representation of Euler Hermes, it chose to take up the board seat. The following account of the actual functioning of board-level participation is based on an interview with this Belgian board member. As the arrangement is still in its infancy, the comments and remarks are of course based only on initial experience.

Although it involved a new responsibility, he wanted to take up this position as he has always been very engaged in his trade union work. He was the most important representative in the local branch and wanted to grasp also this opportunity to develop also this interest representing work at the highest level. As he states: 'The more you are on the inside, the more you can protect and defend interests.'

In May 2014 the first board of directors of the merged company was organised with the new composition. The board meets at least four times a year. Initially, language seemed to create a problem as the Belgian representative is not very proficient in English. The management had hoped to organise the board meetings only in English. However, simultaneous translation is now provided and the board documents are also translated into French (which is also a requirement of Belgian company law and the financial controlling agency of the National Bank of Belgium, NBB).

According to Belgian law, the employee members have the same rights (and duties) as the other board members. The meetings are considered to be a positive experience by the Belgian employee board member. He has the feeling that the employee group can have its say. He refers in this regard to the CEO, who tries to seek advice, gather opinions and reach consensus. Voting has until now not been difficult. Of course, in this first year, the company has been doing very well, as one of Allianz's high-performing subsidiaries. Nevertheless, the board is not the executive committee of the company; the directors have already discussed and decided many issues beforehand, but decisions are sometimes (slightly) changed in the board of directors.

A difficulty is that board meeting documents are not always available at an early stage and only transmitted a couple of days beforehand. Therefore, the board members on the employee side reserve the night before to jointly study the points of the agenda and the accompanying documents in order to be in a position to fully play their role at the meeting. For this reason, even the Belgian representative, although he lives in Brussels, stays together with the others in the Brussels hotel.

At the time of writing two issues were not entirely resolved. It is unclear whether the employee board representation should also be involved in the audit committee and the management remuneration committee. Another key issue is confidentiality, which is a crucial factor in this new position. Information has to be kept inside the walls of the meeting. However, up until now, the representative has experienced no problems with this obligation. He has made clear arrangements with his fellow representatives. They are not allowed to ask him questions about these meetings, and everybody abides by this rule.

It seems that it is the local Belgian management which has the biggest problem with the board-level mandate of one of its employees. They see that now he sometimes has more top-level information than they do and now and then refer to this rather cynically in local discussions (for example in the works council meetings). Despite what he sees as such attempts to undermine him, the representative asserts that appreciation and respect from the rank-and-file, the local workforce, has increased.

The board attendance fees (€2,500 per meeting) are not kept by the Belgian representative, but are transferred in full to the trade union. As he was already an almost full-time representative in the company beforehand, this situation has not changed. He is now more than ever '400 per cent' involved in the union work, as he puts it.

No particular training or education was foreseen by the trade union when he took up this mandate. Luckily, he was already an experienced union representative, and could draw upon his contacts to the other employee representatives on the board, particularly his German and French colleagues. However, this training aspect remains something to be improved. Only some first instructions came from the NBB regulator.

It is in this respect also very interesting to see that the financial regulator of the country plays a role in the monitoring of these initial experiences. As part of the new regulatory supervision of the insurance sector (cf. Solvency II), the corporate governance of Euler Hermes is also closely supervised. The regulator checks the meeting reports and documents. The Belgian union representative acknowledges that this supervision by the National Bank of Belgium resulted in comments and advice that enable the employee board members to play their full role, for example by insisting on interpretation, translation, and training. This is a particular, but interesting side-effect of this case.

## 5. Conclusion

In conclusion, it can be stated that, although the Belgian rules on implementing board-level participation in relation to a cross-border merger are not always clear (see Laagland 2013), the introduction of worker participation in the Euler Hermes case ran smoothly. The management side – which was situated in the broader Allianz group, which has a tradition of such board-level participation – was familiar with the practice and did not contest the implementation. It was also not a complicated cross-border merger as it was more of an internal ‘concentration’ exercise in an existing company and not a downsizing story. As job losses were not involved, this made it easier for worker representatives to focus on worker representation in the merged company.

The Belgian union representative, who is experiencing a major innovation from a Belgian union perspective, considers the first experience with this new role as positive. His experience shows that one can learn to see issues in a different perspective, acquire more competences which can be used in other contexts, and participate in the board in open discussions. Learning from other traditions and practices of worker representation can be enabled by cross-border mergers and the inclusion of multinational worker representatives.

The major difficulties involved in this innovation concern language and playing a role in board committees. However, in this particular case of the financial sector, the regulator, who also has the authority to monitor corporate governance quality, played a supporting role in strengthening the means available to employee representation at board level. A major shortcoming from the (Belgian) union side is the lack of expertise and training provisions on this kind of board-level participation. In the negotiations, the German representatives played an important role to achieve a deal by, among other things, taking advantage of available legal expertise and experience. However, no elaborated training programme was set up to help instruct the Belgian representative in this new role.

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# Chapter 18

## Implications of EU company law directives for worker involvement – a ‘best case’ study from Denmark

Laura Horn

### 1. Introduction

This chapter provides an account of a specific cross-border merger that can in some ways be seen as a ‘best case’ of the interaction between worker rights in national and EU law.<sup>1</sup> Specifically, it looks at a merger between two insurance companies of roughly the same size – the Danish company Codan and the Swedish firm Trygg-Hansa – in 2015. It provides an outline of the merger, focusing specifically on the involvement of employee representatives in the process.<sup>2</sup>

Similar to the other two case studies of cross-border mergers in the insurance sector in this book (Chapters 16 and 17), these two companies were motivated to merge in part by the Solvency II Directive. Also similar to the other cases, both companies were members of the same group. This means that the cross-border merger can be seen as an ‘in-house’ reorganisation rather than a merger of independent companies. Finally, the fact that large-scale workforce reductions were not part of the reorganisation package removed a potentially divisive issue from the table.

What is particularly interesting about this case is, first, how well management brought worker representatives into the merger process at an early stage. This is not required by the Cross-border Mergers Directive, but rather is typical of the industrial relations traditions in both Sweden and Denmark, reinforced in part by the fact that both of the merging companies had worker representatives on their boards. Second, despite what might have been a divisive factor, given that the merger was between companies of roughly equal size, the trade unions involved cooperated well with each other in finding compromises. Although the Cross-border Mergers Directive would clearly define worker participation as an issue in the case of such a merger, and does provide a framework for negotiations, it does not specify important modalities such as numbers of representatives and their mode of selection. Another characteristic was that the parent company of the merging companies, the RSA Insurance Group, was headquartered in a country without a tradition of worker participation (the United Kingdom), something

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1. The transposition of the Cross-border Mergers Directive (2005/56/EC) into Danish law came into force on 1 July 2007. For more detail on the transposition, see Knudsen (2008).
  2. Information from the merger plan and company reports has been complemented with an in-depth interview with employee representatives and company managers, conducted shortly after completion of the merger in spring 2015.

that could have played a negative role in the merger. It can thus be seen as a 'best case', illustrating when the worker representatives involved use the tools provided for them in both national and EU legislation and management respects a tradition of social partnership.

## **2. The Codan/Trygg-Hansa merger**

### **2.1 Background information on the companies**

In 2015, a cross-border merger was completed between Codan and Trygg-Hansa, two insurance companies based in Denmark and Sweden, respectively. Both companies offer commercial and personal insurance, and hold significant shares of the insurance sector in their main markets. Both Codan and Trygg-Hansa were controlled by RSA Insurance Group, a multinational insurance group headquartered in the United Kingdom.

The Swedish company Trygg-Hansa was created in 1971 out of a merger of two companies, Trygg and Hansa, founded in 1899 and 1905, respectively. In 1997 Trygg-Hansa was acquired by the Swedish bank SEB, but the non-life insurance operations were sold off in 1999 and continued to operate as a subsidiary of the Danish company Codan, which was founded in 1916. This company had been partially taken over by a predecessor of the RSA Insurance Group in 1984, which subsequently built up its ownership stake to 100%. Thus at the time of the merger Trygg-Hansa was owned by Codan, which in turn was owned by RSA.

The merged (surviving) company is Codan Forsikring A/S, registered in Copenhagen, Denmark. At the time of the merger, Codan had around 2000 employees in its branches in Denmark, and an additional 266 employees in a branch in Norway and 115 in a branch in Estonia, while Trygg-Hansa had around 2000 employees in Sweden and a handful of employees in Norway. The size of the merger and the concomitant number of employees involved were unprecedented in Denmark.

The Codan/Trygg-Hansa merger can be understood as an intragroup restructuring, motivated by 'corporate housekeeping' objectives such as consolidation of Scandinavian operations and simplification of governance structures. Also in the background is a broader process of consolidation in the European insurance market, linked to the Solvency II Directive, which is intended to codify and harmonise EU insurance regulations. With Solvency II coming into force on 1 January 2016, the insurance sector has seen a significant increase in overall merger and acquisition activities.<sup>3</sup>

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3. See, for example, <http://www.euractiv.com/sections/euro-finance/insurance-sector-faces-consolidation-new-eu-rules-year-away-310831> (last accessed 20 October 2015).

## 2.2 Legal aspects of the merger

Within the overall framework of studies of cross-border mergers in the EU, the Codan/Trygg-Hansa merger constitutes an interesting case due to the high degree of institutionalisation of employee involvement both at the shop floor level, as well as in terms of board-level employee representation in Denmark and Sweden. In this context, we would expect to see employee information, consultation and participation rights to be safeguarded and prominent in the merger.

The merger process was completed in March 2015. The mutual involvement between the two companies began in 1996, when Codan bought Trygg-Hansa for 3.6 billion DKK, with both entities remaining separate corporate structures in the overall RSA group. Initial ideas for a merger began to be sounded out during 2012, but no concrete plans were discussed until 2013. Initially, discussions were open as to which company should be the acquiring actor, but eventually it was decided that Trygg-Hansa should be integrated into Codan.

A member of Codan management was tasked with overseeing the initiation of the merger process in summer 2013, after a first proposal had been presented to the board in April 2013. The change programme director mentioned that there was a great deal of uncertainty about procedures, and that they had worked closely with the business regulatory authority to make sure compliance with all rules regarding employee involvement could be safeguarded.

At this initial stage, before the merger plan had been fully developed and filed but when the outlines of the merger programme had become clearer, several informal consultative meetings took place between management and employees. This happened on the Swedish side in particular, with the Swedish CEO of Trygg-Hansa and trade union representatives attending. The idea was to provide the unions and employee representatives with information after each board meeting at which an update on the merger plan had been given. While this followed Swedish requirements, there were no similar requirements on the Danish side. However, unions and employee representatives from both countries were invited to these meetings, where they took on an active role in discussing issues and challenges arising from the merger.

The common draft terms, which contain the elements of the merger plan, were submitted to the Danish and Swedish business regulatory authorities in April 2014. In compliance with the Cross-border Mergers Directive provisions, the merger plan (section 5) specifies the likely consequences for employment in the merging companies. It states that, as part of the merger, the employees of the non-surviving company (namely, Trygg-Hansa) would become employees of the merged company's existing Swedish branches, with the few employees in Norway becoming part of the Norwegian branch. The plan states that 'the merger is not expected to have any other material consequences for employment in the merging companies'. Moreover, as stipulated, the merger plan outlines the procedures for employee involvement 'in determining their rights of participating in decision-making in the surviving company', in particular with regard to board-level employee representation. The plan confirms reference to the

Danish system of employee representation, equivalent to one-third of board members, and indicates the establishment of the special negotiating body (SNB).

### **3. Workers' involvement**

Following the filing of the merger plan, as required by the transposition of the Cross-border Mergers Directive, management sent a communication to the employees on the company intranet, outlining the details of the merger, in particular with regard to consequences for employment. Although they had a right to do so under the Directive, the employee representatives decided not to submit an opinion on this communication of the common draft terms. As the employee representatives put it, they saw the management communication as sufficient and did not see a need to 'rock the boat' at that stage.

Detailed discussions of the merger process were more active among the Swedish employees. The fact that the Danish company was to be the acquiring actor gave rise to more worries about employment on the Swedish side. According to the Danish representative, there were hardly any questions from the Danish employees regarding the merger. The employee representatives on both sides were in consultation with their respective local union branches (FTF, the Swedish Union of Insurance Employees, and DFL, the Danish Union of Insurance Employees/Danish FTF) to make sure that they 'didn't miss anything'.

The special negotiating body (SNB) was set up in late spring 2014, composed of 12 trade union representatives – six from Sweden, five from Denmark and one from Norway, with FTF and two other unions being involved. The first meeting was organised in Stockholm, as a gesture to the Swedish representatives. The merged company offered legal and human resource support for the SNB and covered costs for external lawyers to draft the agreement.

An agreement was reached after only three meetings, so that a planned fourth meeting was not needed. According to employee representatives who had participated in the SNB, the atmosphere during these half-day meetings was friendly, constructive and provided room for discussion. One of the main points for debate in the SNB was the difference in board-level employee representation in Denmark and Sweden. Whereas in Denmark representatives are elected through employee (committees), in Sweden the trade unions appoint board-level employee representatives. The representation model that was agreed incorporates elements from the Swedish system. Since the Swedish company was somewhat larger, in the final agreement it was decided that two of the board-level employee representatives should be from the Swedish side and one from Denmark. During the process of discussing employee involvement, the European Works Council was also consulted at a meeting in Copenhagen, without any resulting reservations about the merger. Interestingly, as Codan is fully owned by a company registered in the United Kingdom – that is, without any employee board-level representation – the process involving employees had to be explained and justified to the board members in the United Kingdom, who were not familiar with employee involvement.



The agreement reached in the SNB formed part of the overall procedure for finalising the merger process. After the merger won approval on the Swedish side in November 2014, it was then completed by 31 March 2015. There were no employment consequences of the merger other than the integration of the employees of the merged company into the respective branches of the Danish company. Despite the fact that there were redundancies on the Danish side of Codan in spring 2015, these were not a factor as they were not directly linked to the merger. This also pertains to the significant reshuffling of top-tier management after the merger, which should be seen in the overall context of consolidation of operations and governance.

#### **4. Conclusions**

There are several interesting issues in the overall process of the Codan/Trygg-Hansa cross-border merger to be discussed in the context of the overall study of the Cross-border Mergers Directive in this book. In particular, the strong culture of and commitment to employee representation is visible in terms of procedural steps, as well as more informal practices. Moreover, the provision of information and transparency in the process is rather important, both at the legislative and the company level.

Overall, the Codan/Trygg-Hansa merger can be seen as a positive example with regard to employee involvement in a cross-border merger situation. Given the institutional, legal and cultural context, it is of course unlikely that experiences from this case could indeed be used as 'best practice' recommendations for cross-border mergers in other countries. However, it is certainly worth pointing out that in this case employee involvement was not considered an obstacle to the merger process. Instead, employee involvement was included not only to comply with legislative requirements, but appears to have formed an integral part of the overall process.

The consensual nature of the discussions and negotiations in the SNB well illustrates the shared understanding of the relevance and role of board-level employee representatives between the two employee groups. The overall 'culture' of board-level employee representation in Denmark and Sweden provided a background against which the requirements for employee involvement were not only not challenged or resented by management, but rather actively supported and accommodated. The employee representatives' decision not to issue their own statement regarding the communication on the merger plan should be seen in light of this overall constructive relationship between management and employees.

As a critical side-note, and realising that whether providing a commentary of their own would have made a difference to the overall process is a moot question, it might be pointed out that that consensual relations between management and employee representatives should in general not preclude a willingness to 'rock the boat', if there are even minor employee concerns related to a merger process. At the same time, the wide consultations with trade unions and even the EWC illustrates that the employee representatives involved in the process took their role very seriously. As a 'best practice' scenario, the case of the Codan/Trygg-Hansa merger serves as a reminder that employee

involvement is indeed an integral part of cross-border mergers where there are relevant legislative and institutional frameworks.

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# Chapter 19

## Cross-border merger to form the International Consolidated Airlines Group, S.A. (IAG)

Holm-Detlev Köhler, Sergio González Begega and Miguel Martínez Lucio

### 1. Introduction

This chapter provides a case study of the formation of the International Consolidated Airlines Group (IAG) through the merger of British Airways (BA) and the Spanish airline Iberia, which was completed in 2011. Even though this formation was in many respects a cross-border merger of Iberia into the larger BA, the Directive on cross-border mergers – which had been implemented in both the United Kingdom and Spain by this time and could have been used – was not utilised. Instead, a complex set of transactions were implemented involving the transfer of the assets of BA to a Spanish holding company (BA Holdco S.A.) and then a domestic merger in Spain of BA Holdco and Iberia into IAG, at the time a shell company formed purely for the purpose of the merger. As part of the merger, BA Holdco and Iberia transferred all their assets to IAG and ceased to exist thereafter. Although IAG is registered in Spain and is thus formally a Spanish company, its headquarters are located in London, where the company's strategic decisions are made. This is allowed under Spanish company law, which follows incorporation theory and thus allows the registered seat and the 'real seat' (head office) to be located in different countries.

Although the Directive on cross-border mergers was not used to form IAG, the case study illustrates a number of points relevant for this book. The first underlines that the Cross-border Mergers Directive is used mainly for mergers between companies within the same group (inter-group transactions) rather than mergers between independent companies. The arguments made in the cross-border merger implementation study (Bech-Bruun and Lexidale 2013) that legal uncertainty affects the application of the Directive to such transactions may thus have some weight here.

The second point is that worker rights to information and consultation under European company law are not strong enough to help workers protect their interests in cross-border restructuring situations. Although the restructuring was cross-border, the main source of worker involvement for the Spanish workforce was through the Economic and Social Council, a purely domestic information and consultation body established at Iberia in 2001.

The third point is the need for substantial penalties in European legislation for the violation of commitments made to the workforce in order to obtain support for or

reduce opposition to cross-border restructuring. A number of commitments agreed with representatives of the Spanish workforce prior to the merger were – within a relatively short period of time after the merger – not carried through, in part on the grounds that British (and not Spanish) management were now calling the shots.

## 2. The British Airways/Iberia merger

In the summer of 2008, the Spanish airline Iberia and British Airways (BA), both national flag carrier airlines, announced their intention to merge, thereby creating what would then be the world's third largest airline in terms of turnover, behind only Air France and Lufthansa, and the fifth by stock market capitalisation, behind Air China, Singapore Airlines, Southwest Airlines and Lufthansa. Due to other merger operations undertaken by US companies, the resulting IAG became the third largest European carrier and the sixth in the world in terms of turnover. The final deal was secured in November 2009 in a binding agreement reached by the respective boards of directors, which created a holding company in which BA would take a 55 per cent stake, with Iberia accounting for the remaining 45 per cent. The former stockholders of each of the companies were allocated shares in proportion to their previous holdings, whereby the Spanish savings bank Caja Madrid (now Bankia) and Invesco, a UK investment company, continued to be the main shareholders, with 9 per cent.<sup>1</sup>

Table 1 Timeline of the BA–Iberia merger

1999	BA takes stake in Iberia as part of cooperation deal
2003	BA and Iberia begin operating together
2007	BA heads a consortium of investors in a takeover bid for Iberia
2007	BA withdraws its bid, arguing that the 'friendly terms' essential to the bid were no longer there
2008	BA and Iberia announce merger intention after BA had called off merger talks with Australia's Qantas
2009	November: Preliminary merger agreement
2010	April: Merger project is signed, to be formalised and approved by the EU
2011	Resulting IAG begins operating October: Launch of new low-cost brand Iberia Express
2012	April: Acquisition of British Midland International (BMI) from Lufthansa completed December: Merger of the cargo operations of British Airways, BMI and Iberia into a single business unit, IAG Cargo
2013	April: IAG assumes full control of Spanish low-cost airline Vueling
2015	August: Acquisition of the Irish airline Aer Lingus completed
2016	End of the 'Initial Period'

Source: authors' own compilation

1. Detailed information on the merger operation at: <http://www.es.iairgroup.com/phoenix.zhtml?c=240950&p=irol-mergerdocdisclaim>

The operation was undertaken following a failed attempt in 2007 by British Airways, together with a UK mutual fund, to buy Iberia, given the refusal by Caja Madrid to sell its stake to a non-domestic company. The new company began operating in early 2011, trading under the name of International Airlines Group (IAG). The British-Spanish holding is headquartered in London (United Kingdom), but with its registered office and tax domicile in Madrid (Spain) and listed on the London Stock Exchange (constituent of IBEX 35) with secondary listings on the Madrid, Barcelona, Bilbao and Valencia stock exchanges.

The merger was the culmination of an alliance process lasting ten years, during which both airlines shared routes as part of the major global airline grouping One World. At the time of the merger, Iberia held a 9.9 per cent stake in BA, with the latter holding a 13.5 per cent stake in the Spanish company. The main strategic aims of the merger were the consolidation of both companies after tough years in the airline industry, losses and debt problems in both cases; cost-cutting, synergies and competitiveness; meeting the increasing low-cost competition; and starting new alliances with American Airlines.

### **3. Rationales of the merger**

The conditions preceding the merger between BA and Iberia are to be found in 1999 when Iberia Líneas Aéreas de España S.A. (Iberia) became a partner of the ONEWORLD Alliance, along with American Airlines and BA, among other airline companies. The establishment of the ONEWORLD Alliance was part of a broader process of corporate restructuring and business concentration within the airlines sector that started in the late 1990s and led to other transnational alliances, such as STAR ALLIANCE (STAR) and SKY TEAM, led by Air France and Lufthansa, respectively.

In April 2001, Iberia was privatised. The share capital of Iberia was controlled by the Spanish State Society of Industrial Participations (SEPI, now TENEO). SEPI announced the sale of its controlling stake in Iberia after the approval of the public stock offering by decision of the Council of Ministers of 30 December 1999. The privatisation of Iberia led to BA acquiring a shareholding through its capital company BA&AA Holdings Limited. BA announced its acquisition of 10 per cent of the shares of Iberia. It also held two seats on Iberia's board of directors. BA&AA's stake in Iberia was secured by a syndicated agreement for three years, until April 2004.

In May 2001, Iberia and BA concluded a first Memorandum of Understanding for the joint operation of their respective routes to South America. This included code-share flights by the partner airline and commercial collaboration. The agreement obtained the approval of the Directorate-General for Competition of the European Commission. In July 2002, the companies reached a second cooperation agreement which expanded the existing alliance to the connections between Spain and the United Kingdom, as well as to other Asian flight routes. In December 2003, the Directorate-General for Competition of the European Commission also approved this second commercial collaboration agreement, but demanded the transfer of several slots in Barajas-Madrid and Heathrow-

London airports due to dominant market position. Once this requirement was met, Iberia and BA began to operate together.

The companies reinforced their alliance in 2004. In March 2004, Iberia notified a relevant fact to the Spanish Securities Market Commission (CMNV) 'denying a change in the commercial relations with BA'. The communication refuted the rumours on the possible withdrawal of BA&AA Holdings from the equity of Iberia, once the terms of the syndicated agreement signed in April 2001 had expired. In late 2004, Iberia and BA signed another agreement of joint use and operation of the connections between Madrid, Barcelona and London, with their associated costs and benefits, profit-sharing, joint marketing and schedule coordination.

After three years of collaboration, the tightening of the alliance between Iberia and BA accelerated in 2007. Early that year, Iberia denied the rumours about a possible merger with Lufthansa. In March 2007, Iberia announced that TGP Capital LPP (Texas Pacific Group), on behalf of other partners, required financial, fiscal and corporate information to make a takeover bid for the entire share capital of the company, offering €3.60 per share.

In response to this request, Iberia demanded in turn information from TGP on the identity of its industry partner(s) and its operating licence or air operator's certificate (AOC). TGP answered that the takeover bid was made in the name of five companies: TGP Partners V LPP, Vista Capital de Expansión S.A., Inversiones Ibersuizas S.A., Querqus Equity S.L. and British Airways PLC, which acted as industry partner of the consortium. Thus, BA admitted its interest in taking over the majority shareholding in Iberia.

The request for information by TGP caused surprise and discomfort to Iberia, given that the industry partner of the consortium behind the bid had two seats on the company's board of directors. BA had complete access to Iberia's financial information through the participation of its subsidiary BA&AA Holdings in shareholding of the company. BA was perfectly aware, for instance, of Iberia's liquid assets position, which reached €2,411 million at the end of 2006. This ample financial situation was due to the different sales and asset disinvestments completed by Iberia since its privatisation in 2001.

In July 2007, however, Iberia decided to send the requested information to the consortium led by TGP. In November 2007, another takeover bid was launched on Iberia, offering €3.90 per share. The takeover bid was made by a Spanish consortium led by Gala Capital with the Spanish airline Air Europa as industry partner.

In this context, and with two competing takeover bids, two of the institutional shareholders with an ownership stake of moderate size, BBVA and LOGISTA, decided to sell their stakes in Iberia. However, BA decided not to make use of its preferential right of purchase of these two large blocks of shares as a member of the board of directors of Iberia. By contrast, Caja Madrid did make use of the preferential right of purchase and reinforced its stake in Iberia. After this move by the Spanish Savings Bank, the consortium led by TGP withdrew its takeover bid.

After the failure of BA's first takeover bid for Iberia and with the reinforcement of the stake held by Caja Madrid, some important changes were introduced in the Spanish company's board of directors. Iberia also decided not to answer the request for information made by Gala Capital. As a result, the Spanish consortium also withdrew its takeover bid.

The final movement prior to the merger between Iberia and BA was made in early 2008, when BA&AA Holdings announced a public offering for up to 13.15 per cent of Iberia, offering €2.34 per share. The announcement was considered to be hostile by the Spanish shareholder core, led by Caja Madrid, which had acquired the stakes of BBVA and LOGISTA a few months earlier, at €3.6 per share. Iberia also took a shareholding in BA, with the purchase of a 9.99 per cent stake in the British company, distributed between market price and financial derivatives.

#### **4. The cross-border merger and its consequences for shareholders and creditors**

In 29 July 2008, Iberia and BA announced their intention to start talks on the possible merger of the companies, based on the cross shareholdings of 9.99 per cent of BA in the hands of Iberia and the 13.15 per cent of Iberia owned by BA. However, there were other options on the table. BA was also exploring a possible merger with Australian Qantas. This paralysed the negotiations with Iberia.

The talks between Iberia and BA were formally resumed after a year, in August 2009. BA was in a very harsh financial situation as a result of the huge deficit in its pension fund (estimated at around £4 billion). The company decided to issue convertible bonds to raise £350 million of fresh capital, paying interest at 5.8 per cent per cent over five years, falling due on 13 August 2014. BA's financial problems accelerated the talks with Iberia. In November 2009, the companies signed a provisional Memorandum of Understanding on the merger, establishing a share swap of 45 per cent of the merged company for Iberia and 55 per cent for BA.

In April 2010, Iberia and BA signed the merger contract, based on the terms established in the Memorandum of Understanding. Rather than being structured as a transaction under the Directive on cross-border mergers, which had been implemented in both countries by this time and thus was available for use, the merger was to take place in a series of steps. First, shell companies were to be created in Spain: BA Holdco S.A. and the future parent company International Consolidated Airlines Group S.A. (IAG). Secondly, a share exchange was to be carried out, whereby shareholders in BA were to receive shares in BA Holdco S.A., which was then to become the holding company for BA. Finally, a purely domestic merger between Spanish companies (Iberia and BA Holdco S.A. into IAG) was to take place, with the former shareholders of Iberia and BA Holdco receiving shares in IAG. Although IAG would be registered in Spain (and would thus be a Spanish company under Spanish company law), the headquarters would be located in the United Kingdom. BA would in effect be the senior partner in the merger,

as its shareholders would have the majority of shares in the new entity and management would be in London.

The merger received the approval of the Directorate-General for Competition of the European Commission in July 2010. Three months later, in September, the appointment of the merged company's board of directors was communicated to the Spanish national authorities. The new company had its registered office in Madrid (Spain). On 20 January 2011, Iberia suspended trading in its shares and proceeded to the share exchange. In legal terms and as far as the capital of Iberia and BA is concerned, the merger was concluded on 21 January 2011. However, the merger contract established the deadline of 21 January 2016 for the completion of the merger with the integration of the operative structures of Iberia and BA into IAG.

After five years (2011–2016) with much turbulence – economic recession, terrorist attacks, several air traffic controllers' strikes, labour conflicts around the Iberia restructuring and the creation of low-cost Iberia Express, not to mention the Brexit referendum – the merged group seems to be consolidated. In 2015, for the first time, the new holding IAG paid dividends to shareholders. The executive boards are composed of British and Spanish managers, the common aircraft fleet has grown from 352 (2011) to 525 (2016), passenger volume has doubled and the expected profit margins have risen. Although the big transatlantic merger project with American Airlines could not be realised, the incorporation of Irish Aer Lingus and Spanish Vueling, together with the new cargo division IAG Cargo has significantly widened and diversified the portfolio.

## **5. Consequences of the merger for the employees**

The merger project established that all collective bargaining and employment contracts continue to be organised within the two brands BA and Iberia, which continue to operate as operating airline companies until 2016.

The Unite trade union, which represents thousands of BA workers, said it supported the deal, but 'not at any cost'. Steve Turner, Unite national officer for civil aviation, said: 'mergers mean synergies, and synergies usually mean job losses and the levelling down of terms and conditions' and that workers must be consulted on any 'key decisions' about their future (BBC News, 8 April 2010; <http://news.bbc.co.uk/2/hi/8608667.stm>)

As regards Iberia, the representatives of the workforce were informed of the merger from the very beginning of the first formal talks between Iberia and BA in July 2008. Nevertheless, the information and consultation of the employees was not conducted in fulfilment of the provisions of the Takeover Bids Directive, but rather via a company-level instrument for the representation of workers' interests, which had been established by Iberia in 2001 after privatisation in compensation for the loss of board-level representation. The name of this body is the Economic and Social Council of Iberia. It gathers together representatives of the management (including the CEO), as well as the two most representative trade unions among the ground staff, CCOO and UGT, and



the pilots' trade union, SEPLA. The other representative trade unions in Iberia are not recognised members of this body.

'The merger started in 29 July 2008, with the notification of the relevant fact to the Spanish Securities Market Commission (CMNV) by Iberia. And if not that same day, the day after, we were called by the president of the company to a meeting at the Economic and Social Council of Iberia. We were informed of the intention of the company to proceed with the merger there (...) at the very moment that the talks were about to start.' (ref. IAG\_SIND-01)

The Economic and Social Council of Iberia was established in 2001, after the privatisation of the company. The representatives of CCOO, UGT and SEPLA, the most representative trade unions, which had a seat on the board of directors of the public company, were compensated for the loss of board-level participation with this new body for information and consultation of employees. It covered only the Spanish workforce.

The Economic and Social Council of Iberia was convened on 29 July 2008, after the extraordinary meeting of the board of directors at which the decision to start the talks with BA was made. The representatives of CCOO, UGT and SEPLA were informed of Iberia's intention to proceed with the merger. At previous meetings of the body, these three trade unions had also been informed and consulted on the takeover bids made by TGP and Gala Capital. They were also aware of the different merger options that Iberia was considering at the time.

On 17 September 2008, CCOO and UGT addressed an open letter to the CEO of Iberia in which they demanded some guarantees for the workforce and for the operation of Iberia if the merger was completed. The pilots' trade union SEPLA joined the declaration afterwards. The trade unions asked for: (i) the preservation of Iberia as an independent company based in Spain with its own operating licence and air operator's certificate (AOC); (ii) the preservation of the traffic rights of Iberia for two years from the day of the merger, at least; (iii) the preservation and development of the hub of Madrid-Barajas; (iv) the preservation of the long-haul routes of Iberia and interests in other airports; (v) the preservation of the handling and mechanical maintenance of Iberia for a minimum of eight years, that is until 2016; (vi) no forced dismissals for a minimum of five years and the utilisation of statutory lay-off proceeding 72/01, negotiated in 2001, in the event of any changes in the workforce; and (vii) the preservation of the agreements and industrial relations dynamics of each company and country. Transnational agreements or other measures aimed at removing statutory, cultural and corporate differences and making equivalent the working conditions of the employees of Iberia and BA would not be accepted by the Spanish workforce.

'This is a letter we sent to the president of Iberia at that precise moment (...). And what we are saying here is that employee participation will be a key factor in the merger. We are asking him to listen to us. The operation should be favourable for the customers and the shareholders, but also for the workforce.' (ref. IAG\_SIND-02)

In particular, the trade union organisations represented in the Economic and Social Council of Iberia were afraid that BA's delicate financial situation would have negative consequences on Iberia and that Iberia's liquid assets would be used to make good the British company's pension fund deficit.

The Iberia management informed and consulted the employees' representatives through the Economic and Social Council. CCOO, UGT and SEPLA transmitted the non-confidential information to other minority trade unions represented in the company. The privileged access to information of these three organisations caused some tension between majority and minority trade unions.

'We were given the information on the merger, yes (...). We had access to this information. As to the economic and financial situation of Iberia, well, we have a meeting with the management on a quarterly basis to monitor this. And we are in the firm. We have the same information available to the board of directors only 24 hours after they get it. In general terms, we got the information we asked for. There were no problems with this, no problems at all.' (ref. IAG\_SIND-01)

The merger contract between Iberia and BA, signed in April 2010, included some of the compromises reached between Iberia management and the Spanish trade unions. Transitional provision 39 of the merger contract (BOE n. 149, 19 June 2010, section III, p. 53263) states that the working conditions of Iberia employees will not be modified as a result of the merger. It also established that in case employment downsizing was imposed by the management, the statutory lay-off proceeding 72/01 would apply. These guarantees would last two and a half years, until 31 December 2012.

Nevertheless, social peace in Iberia began to break down after the signing of the merger agreement in April 2010. Relations between management and workforce representatives deteriorated and conflict arose in late 2012, when the management announced a lay-off of 20 per cent of the workforce, roughly 4,000 dismissals with low severance pay: 20 days' wages per year of service with a maximum of 12 months' wages, according to the labour market reform approved by the government earlier that year.

'Once the merger contract is signed, the situation changes. The same day I have lunch with the new CEO of Iberia and he tells me that, well, that the situation has changed, that he is now in charge and that it is going to be a different thing (...). The agreements started to be broken (...). The management started to ignore the compromises on the merger they had made with the workforce.' (ref. IAG\_SIND-03-R3)

Industrial disputes peaked during Christmas 2012 and early 2013, when a strike was called affecting ground staff and flight crews. Operations were paralysed and many routes disrupted and the Spanish government was forced to intervene. In March 2013, the situation was eased after mediation by an external expert. The company accepted another transitional period covering two years (2013–2015), in which the statutory lay-off procedure would again be applied. In this procedure, workforce downsizing would be implemented through early retirement schemes and voluntary termination of contracts. A total number of 3,141 employees had been included in the lay-off plan which had to be

concluded by 31 December 2014: 2,256 of those affected are ground staff, 258 are pilots and 627 are cabin crew.

The impressions and satisfaction of the workforce representatives with regard to the quality of the information and consultation available to employees during the negotiation and consolidation of the merger differ considerably between the three most representative trade unions. The major trade unions among the ground staff, CCOO and UGT, share a very positive assessment of their participation in the merger and consider that relations with the management were mainly good and mutually beneficial during 2008–2014. The only exception was the intense period of industrial disputes in late 2012 and early 2013.

However, information and consultation were conducted through the Economic and Social Council, in which minority trade unions are not represented. The national transposition of the Cross-border Mergers Directive (Directive 2005/25/EC) was not applied to secure or enhance employees' participation rights in the merger.

CCOO and UGT did not make use of the possibility to be informed and consulted by the management under any other legal requirements, because they already had access to proper information and consultation through the Economic and Social Council:

‘Insofar as we have been part of the Economic and Social Council of Iberia since 2001, insofar as it held meetings on a quarterly basis ... we were perfectly aware of the situation. We knew that Iberia had to find a partner, we could see that BA was a clear option. Throughout the process, we have known exactly where we were.’ (ref. IAG-SIND-02)

However, the Spanish pilots' trade union SEPLA has a totally different perspective on the quality of the participation process. It is highly dissatisfied with the information and consultation conducted by the management and considers that the interests of the workforce have not been properly represented in the merger.

‘The Economic and Social Council of Iberia only provides information. It is supposed to be sensitive information that can affect the interest of the firm if it is made public. So a confidentiality clause is applied. However, we didn't meet the management regularly when the merger started. The Economic and Social Council was not convened. We asked the management to call meetings but it didn't (...). The body has served no purpose. We haven't had access to truly sensitive information.’ (ref. IAG\_SIND-03-R3)

According to the legal advice received by the SEPLA trade union, the merger between Iberia and BA was carried out by means of specifically tailored legal engineering to avoid the more inclusive requirements of European and Spanish Law (especially Law 27/2009 of 30 December 2011). The two merged companies that were dissolved in April 2010 to establish IAG were two shell capital companies already registered in Spain. In legal terms, the merger between Iberia and BA was not transnational, as the nationality

of both merged capital companies was Spanish. However, the operational effects of the merger are obviously transnational.

‘The merged companies are fully Spanish and the outcome of the merger, once the merged companies are dissolved, is also Spanish. It is registered in Madrid (...). But operations are governed from the United Kingdom. All the decisions are taken there. IAG is formally here, but decisions are taken there.’ (ref. IAG\_SIND-03-R1)

At the time of the merger many trade union and workforce groups and also Spanish politicians feared an effective takeover of Iberia by BA (‘the big fish eats the smaller one’, *El País*, 19.11.2015). Abandoning routes, cutting aircraft capacity and severe cost and employment cuts fuelled the impression of emptying the Spanish brand, reducing it to a low-cost division, and focussing all the high-profit strategies on BA. ‘The mood among workers at Iberia, the Spanish flag carrier, is a mixture of anger and foreboding’ (*Financial Times*, 06.12.2012). Only recently, after new investments and the recovery of closed routes, has this fear seemed to diminish.

Several interviewees stated that the workforce of Iberia has not been provided with appropriate information and consultation, given the lack of negotiation at corporate level at which actual decision-making occurred. Spanish workers’ representatives had only been informed by Iberia managers who, in their view, have merely played the role of transmission belts with no authority since the merger of Iberia and BA in April 2010. In this sense, the negotiation of the IAG European Works Council, which started in November 2014, is expected to provide an opportunity to reach the management of IAG and to achieve actual information and consultation rights. Currently, the special negotiating body is negotiating the agreement on behalf of the future IAG EWC.

‘To be honest, we don’t expect too much of this European Works Council. But it can help us to solve one of the biggest problems we have had since the beginning of the merger. Our inability to access those who are actually taking the decisions in IAG and talk to them face to face. To be informed by them directly and to make them hear us.’ (ref. IAG\_SIND-04)

The main Spanish trade unions represented in the company, SEPLA, UGT and CCOO, feared that once the merger of the operational structures of Iberia and BA was completed, on 21 January 2016, the management of IAG would transfer the seat of the company from Spain to the United Kingdom.

## 6. Conclusions

The case study of the formation of IAG is informative for the study of cross-border mergers specifically and cross-border restructuring more generally. Although IAG is in effect the child of a cross-border merger – the merger of a Spanish company (Iberia) with a British airline (BA) – the Directive on cross-border mergers was not the midwife in this birth. Rather, a series of transactions (formation of shell companies, share exchange between BA and a Spanish holding company, domestic merger between

Spanish companies) were used as an alternative mechanism to achieve this end. As the data in Chapter 2 and the case studies in Section 3 of this book show, most transactions covered by the Cross-border Mergers Directive are carried out ‘intra-group’, rather than between independent companies. This case study provides one example of the alternative means available for merger between such independent companies.

This case study also highlights the difficulties of protecting workers’ interests in complex cross-border restructurings and the need for stronger rights in European legislation. As such transactions affect workforces in two or more countries, these workforces will generally have different (and in many countries weak or no) rights to information, consultation and participation. Had the Directive on cross-border mergers been utilised, these rights would have been weak anyway, as these are limited to a months’ notice ahead of the shareholder meeting deciding on the merger, receipt of the draft merger terms and management report, and the right to attach an opinion; the provisions on worker participation would not have applied in this case. As it turned out, the Spanish workforce had most of its information and consultation through the Iberian Economic and Social Council, a company-specific body.<sup>2</sup>

Finally, the case study illustrates the need for substantial and effective penalties in case management violates its commitments to the workforce. The Iberia Economic and Social Council was able to negotiate what looked like a good deal for its workforce as a result of the merger. However, commitments made were soon reneged on, partly with the argument that strategic decision-making had now shifted to the British management in London (although IAG formally is a Spanish company, as it is registered in Spain). In the case of cross-border restructuring, decision-making power often shifts location within the company, and the sanctioning of agreements needs to reflect this reality.

## Reference

Bech-Bruun and Lexidale (2013) Study on the application of the Cross-border Mergers Directive for the Directorate General for the Internal Market and Services, European Union.  
<http://dx.doi.org/10.2780/96404>

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2. The Economic and Social Council was created by an agreement between the trade unions and the company in the course of the privatisation of Iberia in 2000. In compensation for their seats on the company board, Iberia established this specific representative board for trade union and company representatives, with privileged access to information on strategic economic issues.



# Conclusions

## Towards a revision of the regulation of cross-border mergers

Jan Cremers, Aline Hoffmann and Sigurt Vitols

### 1. Introduction

In this chapter we present the main conclusions of the book. Given that the Cross-border Mergers Directive ('the Directive'), as codified and repealed by EU Directive 2017/1132/EC, is, as Blanaid Clarke put it in Chapter 1, 'dauntingly complex', we will not be touching upon all its aspects. For example, creditor rights have been cited as an area that needs to be addressed in a revision of the Directive. Although creditors often have overlapping interests with workers, as both of these stakeholders have an interest in the financial stability and sustainability of the post-merger company, this issue is not addressed here.

This study focused on worker rights in cross-border merger situations. However, as the Commission's proposed company law package (see the introductory chapter to this book) extends many of the basic provisions for worker rights in the Directive to cross-border conversions and divisions, the conclusions of this study inform the functioning of worker rights in different types of cross-border corporate reorganisations. In drawing these conclusions, the authors of this chapter have benefitted greatly from a set of briefing papers analysing different aspects of the company law package and a number of meetings of the ETUI's GOODCORP network in mid-2018 dedicated to discussing these papers.<sup>1</sup>

### 2. Main findings

**Finding 1: The Directive has been used mainly in ways other than originally foreseen by its drafters**

Very little regarding the economic rationale for the Directive is said in its recitals beyond stating that '[t]here is a need for cooperation and consolidation between limited liability companies from different Member States' and that the regulatory framework needed to promote this activity must be implemented at EU level (Recital 1). The explanatory memorandum accompanying the Commission's proposal (COM(2003) 703 final) indicates that it was aimed mainly at enabling and minimizing the cost of cross-border mergers for SMEs, as the SE option was presumably too costly for all but the largest

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1. The main findings of these briefing papers are summarized in an ETUI policy brief (Hoffmann and Vitols 2018). The briefing papers are available for download at <http://www.worker-participation.eu/Company-Law-and-CG/EU-Company-Law-Package>

firms. The Directive appears to have been drafted primarily with the model of mergers between independent companies in mind. The assumptions underlying the Directive can be seen, for example, in Article 8, which requires that each merging company hire an ‘independent expert’ to scrutinise the common draft terms and issue an opinion. While there is an option to waive this expert report under certain circumstances, and there is a procedure for ‘simplified formalities’ in the case of wholly-owned subsidiaries (Article 15), nevertheless it is clear that the standard procedure is based on the model of independent firms rather than parent and subsidiary companies in mergers.

As the data in Chapters 2 and 8 show, however, the vast majority of the cross-border mergers examined took place between companies in the same group, typically between parent companies and their 100%-owned subsidiaries. These two chapters focused on cross-border mergers where worker participation is relevant – in other words, the larger mergers – but there is no reason to believe that the situation is different for smaller cross-border mergers. The case studies show that one main reason for cross-border mergers within a company group is ‘internal housekeeping’, specifically in the insurance sector where regulatory changes (the Solvency II Directive) have increased the incentives for consolidating company capital in one company and regulatory relationships with an authority in one country (Chapters 16, 17 and 18). A second reason is the desire to effectively move the company to another national regulatory regime. Chapter 15 examines three cross-border mergers that allowed significant companies to effectively ‘exit’ Greece. The reason given in these cases for exit was that financing conditions were better outside of this crisis-ridden country. However, cross-border mergers may of course be motivated by other advantages of ‘regulatory arbitrage’, for example, lower tax rates or weaker labour rights and standards.

It is illustrative that one of the largest independent mergers taking place in Europe in the past decade (British Airways and Iberia), which is examined in Chapter 19, did not in fact use the Cross-border Mergers Directive, although the Directive had been implemented in both countries involved (the United Kingdom and Spain). However, the restructuring in effect was a cross-border merger, as the resulting company established a registered seat in Spain and headquarters in the United Kingdom. The cross-border merger implementation report (Bech-Bruun and Lexidale 2013) has given a number of reasons cited by practitioners for why the Directive is not typically used for mergers between independent companies.

In summary, the case studies show little evidence that the Directive was used by companies to pursue the ‘classical’ rationales for merger identified in Chapter 3, e.g. mergers with foreign firms allowing expansion into new national markets or mergers to create European-scale entities. Instead, the Directive appears to have been used in large part by companies to exploit advantages provided by different regulatory environments through intragroup cross-border reorganisations of their legal structures. This is significant because it indicates that the new types of reorganisations addressed by the company law package proposed by the Commission (cross-border conversions and divisions) may also be used by companies in ways unforeseen by the legislator. Although ‘anti-abuse’ provisions are included in the package, they appear to be too weak to discourage tax and labour standard avoidance by companies (Hoffmann and Vitols 2018).



**Finding 2: Information and consultation rights defined by the Cross-border Mergers Directive in the merger process are too weak**

When discussing information, consultation and worker participation rights in cross-border mergers, one needs to distinguish between two dimensions. The first dimension is the use of these rights prior to and during the cross-border merger process. The second dimension concerns the outcome: the information, consultation and participation structures that are created for the company or companies resulting from the merger process.

Regarding the first dimension, as discussed in the Introduction, Chapter 1 and the country analyses in Part 2, worker information and consultation rights during the merger process defined by the Directive are restricted to (i) the receipt of the management report at least one month before the shareholders' meeting deciding on the merger, which is supposed to include reasons for the cross-border merger and its implications for stakeholders, and (ii) the right to attach an opinion to this management report, if submitted 'in good time'.

One ambiguity that has been an issue in some countries (for example, see Chapter 8 on Germany) is whether workers are also entitled to receive the common draft terms, as this is not explicitly required in the Directive. Rather, it is stated that these terms should be published in accordance with national laws, which may or may not have a requirement to provide them to worker representatives. This ambiguity should be removed by including a clear requirement that workers should be provided with this information, as is the case for the management report.

Equally significant, however, is the question of the timing of worker rights. In line with the EU *acquis* and the letter and spirit of the law, workers are to be informed and consulted at an early stage, before management has made a final decision about the cross-border merger. However, as in the case of the EU Takeover Bids Directive (Cremers and Vitols 2016), in practice, these information rights come much too late in the restructuring process for workers to have much influence. By the time the management report is submitted, the decision on the merger will likely already have been effectively taken, and the shareholders' meeting is merely a symbolic or rubber stamp approval of the cross-border merger. Specific application of the wide range of rights to information and consultation laid down in the EU *acquis*, particularly in a transnational level, is conspicuously absent or at least not discernible in the reports from practice described in this book.

As we have seen from Part 2 of this book, a number of countries in this study do have mechanisms for involving workers at an earlier stage in the merger process. One of these mechanisms is board-level employee representation, which is widespread in the private sector in six countries included in our study (Austria, Germany, Finland, the Netherlands, Norway and Sweden). A second mechanism is specific rights to early involvement for worker representatives at the plant or company level (which also exist in the six countries with worker board-level participation in the study). Several countries prescribe an early start for informing and consulting workers, especially

in case of proposals that lead to major restructurings, such as the termination of operations or a significant reduction of activities. National representative bodies often have the right to advice, with a time horizon that provides the representatives with the right and opportunity to meet the management to discuss the proposed decision and to come up with their own recommendations. The outcome of these national deliberations can be crucial for all involved stakeholders, including the worker representatives from other constituencies involved. As can be seen in the case studies in Part 3 of this book, implementation of cross-border mergers can go quite smoothly where workers are involved at an early stage.

In short, the Directive's provisions do not adequately provide that employees and their representatives at all levels of the company are adequately informed and consulted about the company's plans. They should be informed about the potential implications for employment and the strategies of the company, especially where the applicable laws governing the company are likely to change. Worker rights in cross-border mergers (as well as in cross-border divisions and conversions) could and should be significantly strengthened by embedding company law legislation more explicitly in the EU *acquis* on information and consultation rights at national and transnational levels. This *acquis* is quite extensive, including principles in fundamental documents such as the Council of Europe European Social Charter, the Community Charter of Fundamental Social Rights, the Charter of Fundamental Rights in the EU, and in the European Pillar of Social Rights. Furthermore, these principles have been implemented in specific legislation, including the EWC Directive, the SE Directive, the Framework Directive on Information and Consultation, the Collective Redundancies Directive and the Transfer of Undertakings Directive. These should be referenced explicitly in EU legislation applying to cross-border reorganisations, so that they can clearly be called upon throughout the restructuring process.

**Finding 3: Worker information, consultation and participation rights in the resulting company need to be strengthened**

A second level of worker rights contained in the Cross-border Mergers Directive refers to the information, consultation and participation structures that exist in the company resulting from the merger. From the point of view of worker rights, the Cross-border Merger Directive compares unfavourably to the SE Directive, which was passed only a few years earlier (2001 versus 2005) but contains considerably stronger rights:

- (i) Where the SE has employees, the SE Directive requires negotiations on establishing a transnational international information and consultation body ('the representative body'). The Cross-border Mergers Directive contains no such requirement.
- (ii) The threshold for triggering worker participation provisions in the Cross-border Mergers Directive is that one-third of employees in the merged entity be covered by worker participation, as opposed to only one-quarter in the SE Directive in the case of SE creation through merger.
- (iii) The Cross-border Mergers Directive allows management to impose the 'standard' (fall-back) rules unilaterally, without engaging in negotiations with workers to

develop arrangements which are tailor-made to the company's specific structures. The SE Directive does not allow management to do this; the fall-back rules are used only when negotiations reach the limit (six months, or twelve months with an extension) without success, or where the workers' special negotiating body (SNB) agrees to it.

With respect to point (i), the absence of a requirement to negotiate transnational information and consultation arrangements, the data and case studies presented here illustrate the yawning gaps that have arisen in practice. Cross-border mergers are by definition transnational transactions, yet in many cases neither during the merger nor after it were employee representatives from different countries able to engage with one another or with the (new) central management in a phase in the life of the company where it would have more important than ever as the implications of the merger on employment become clear. It should be recalled that it is the recognition of the gap between national-level and transnational-level information and consultation which informed the passage of the EWC Directive in 1994, its recast in 2009, and the adoption of the SE Directive in 2001.

The impact of the right for management to unilaterally forego negotiations and simply impose the standard rules (see point (iii), above) is even greater. As seen in the detailed examination in Chapter 2, of the 68 cases in which board-level employee representation was clearly impacted, negotiations only took place in 17 cases; in fully 22 cases, the management unilaterally imposed the standard rules. It should also be stressed that in 25 of those cases, it was not clear what – if anything – had happened to ensure board-level employee representation in line with the Directive's requirements.

This 'shortcut' application of the standard rules is exacerbated by a further shortcut: the Cross-border Merger Directive simply refers to the SE Directive at critical junctures of its own application. As noted in Chapter 2, the use of cross referencing in Article 16 is cumbersome, making it more difficult to identify the rules that apply to cross-border mergers, which adds unnecessarily to the complexity of the instrument. This makes it all the more difficult for workers to assert their rights. Two examples will suffice to illustrate the resulting absurdities. For example, the Cross-border Merger Directive simply refers to the SE Directive's fallback provision which, in the absence of agreed rules, empower the Representative Body to allocate the seats on the supervisory or administrative board; where there is no Representative Body foreseen in the fallback for the cross-border merger, how is the allocation of seats to be regulated? Similarly, since it is SNB which is empowered by the law to nominate the first members of the board, who is to nominate the members if there is no SNB in the first place? And who is to nominate the members for future mandates? Would a new Special Negotiation Body need to be convened for that sole purpose? Indeed, it is these particular questions which are only now beginning to arise in practice: as the first mandates of board-members who were (somehow) nominated for the initial term of office come to an end, it is entirely unclear how to nominate new members, or confirm existing members for a second term. Companies and their workforces are obliged to improvise highly subjective 'solutions' or workarounds – which is surely not the intention of the legislation.

In the light of these myriad problems of design and implementation, trade unions have thus demanded, at a minimum, the strengthening of requirements for information, consultation and participation structures after cross-border mergers to match standards set by the SE (ETUC 2017).

However, given a number of weaknesses in the SE Directive and the Cross-border Mergers Directive, the ETUC has a more far-reaching demand for the implementation of a European framework for worker information, consultation and participation (see Chapter 4). This would be a ‘horizontal’ set of rules that would apply across all European company law types and companies formed through EU Directives for cross-national restructuring (cross-border mergers and divisions, cross-border conversions). One major problem that would be addressed is the ‘freezing-in’ problem; that is, a company changes its legal form to an SE or engages in a cross-border merger below a key threshold triggering worker participation for example, for German companies below the 500 employee threshold for triggering one-third participation. The company then grows beyond the threshold, without triggering the obligation to introduce worker participation, which would have happened had the firm remained a German company.

EU legislation regulating cross-border reorganisations should reflect the European nature of the entities that are created by providing for European-scale worker rights. As is the case for SEs, this legislation should provide for transnational information and consultation as a rule. Secondly, to ensure that genuine negotiations over worker rights in the resulting entity take place, management should not have the unilateral right to impose ‘standard’ rules for worker participation. Thirdly, a dynamic element must be included so that worker participation rules can be renegotiated when important structural changes in the company take place. Fourthly, to discourage the use of cross-border reorganisations to create letterbox companies for tax or labour standard avoidance, legislation should require that genuine economic activity and management structures exist in the ‘destination’ country of registration of the resulting company. Finally, worker information, consultation and participation rights in the resulting company should be protected for a period of at least ten years, irrespective of any subsequent restructuring which could otherwise call the whole arrangement into question.

**Finding 4: ‘Other’ worker rights in the Cross-border Mergers Directive need to be strengthened**

In addition to information rights with regard to the management report (Article 7) and worker participation rights (Article 16), a number of other worker rights relevant to cross-border mergers should be more clearly defined and strengthened, such as employment rights and conditions and the preservation of worker representation arrangements at plant and company level. Although some of these rights are referred to in Recital 12 to the Cross-border Mergers Directive (collective redundancies, transfer of undertakings and so on) they are not explicitly referred to in any Article in the Directive.

This has led to ambiguity in some countries concerning the applicability of these rights (Bech-Bruun and Lexidale 2013). In order to ensure that they are implemented,

these rights should be specifically mentioned in the body of the Directive. As in the case of information, consultation and participation rights mentioned above, this could be done by explicitly linking the provisions of any legislation regulating cross-border reorganisations in the EU *acquis* on labour law and workers' rights.

#### **Finding 5: Enforcement and penalties need to be increased**

Findings 2–4 have focused on protecting and strengthening legal rights for workers. An additional important issue is whether rights on paper are realised in practice. A number of chapters have revealed that these rights are often not respected. For example, Chapter 2 shows that basic information on cross-border mergers that should be available is often not in fact available, not about negotiations and agreements concluded about worker involvement, but also with respect to simple facts such as the number of employees employed in each company. This lack of transparency makes it difficult for employees to ascertain what rights, if any, they might have prior to, during, or after the merger. This issue extends beyond cross-border mergers, as research by the European Workers Participation Competence Centre and the SEEurope network (now named the Worker Participation in Europe network) has for some time now showed that SEs are often registered without any checks on whether negotiations on worker information, consultation and participation have been carried out. This demonstrates that the designated 'competent authorities' are not fully checking whether all the requirements for cross-border mergers have been met.

Indeed, as the implementation report conducted on behalf of the Commission mentions, because non-compliance does not necessarily affect the merger's validity, deadlines might be ignored (Bech-Bruun and Lexidale 2013). The closer look in Chapter 2 at 75 cases in which the merger was highly likely to have impacted board-level representation yielded that in 25 cases it was not even clear in the officially submitted merger plan itself what would happen with existing board-level representation. This does not suggest that workers' rights are being taken very seriously. If the Commission already sees it as requiring a particular level of skill and resources for one Member State to check the documents from another Member State in order to establish compliance, then how are workforces and their representatives to ensure compliance with their rights?

A related issue is the lack of substantial penalties if companies provide incomplete or false information, or if the required procedures are simply not carried out. The GOODCORP study on worker rights under the EU Takeover Bids Directive (Cremers and Vitols 2016) indicates that there is a stark contrast between the serious penalties for violation of capital market laws (insider information, ad hoc notification of shareholders on important company developments) and the complete or almost complete lack of penalties for violation of worker rights. This includes violations such as failure to adhere to statements about anticipated employment impacts of company restructuring and the failure to inform workers fully and in a timely manner. This imbalance between capital market and labour law implementation needs to be addressed by strengthening enforcement and penalties for violations of worker rights. The recently agreed European Labour Authority (Cremers 2018) could play a role here in monitoring and enforcing compliance with worker rights requirements.

### 3. Conclusion

The time is ripe for strengthening worker rights in cross-border reorganisations such as cross-border mergers. The European Commission has opened this discussion through the publication of a proposed company law package, which as of the time of completion of this manuscript (November 2018) is rushing through the legislative process in the European Parliament and Council.

This study has presented considerable evidence that the promise of a ‘social dimension’ and the realisation of worker rights to information, consultation and participation contained in Article 153 of the Treaty on the Functioning of the European Union and in other parts of the EU *acquis* on worker rights have been only partially achieved. As in the case of other EU legislation (e.g. Takeover Bids Directive, European Works Council Directive), workers too often are informed and consulted ‘too little, too late’ (Cremers and Vitols 2016; De Spiegelaere 2016) about the cross-border merger, and are involved ‘too little’ in the company resulting from the merger.

We do find cases where workers are involved at an early stage of restructuring, where management plans can be changed by workers in a way that the interests of workers and the company as a whole are advanced and where worker involvement is preserved or even strengthened post-merger. The definition of strong legal rights for workers in EU law is a crucial step in the long-term goal that these positive examples become the norm instead of the exception. This book has been written with the intent of assisting the attainment of this goal.

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## **Exercising voice across borders: workers' rights under the EU Cross-border Mergers Directive**

### **ETUI series – Workers' rights in company law**

Edited by  
Jan Cremers and Sigurt Vitols

Since the passage of the 2005 EU Directive on cross-border mergers of limited liability companies, mergers between firms based in different countries have become an increasingly important form of corporate reorganization in Europe. Cross-border mergers have great significance for workers' rights to information, consultation and participation, since firstly, they should be comprehensively informed and consulted about the merger, and secondly, since the company law regime applicable to workers after the merger may have weaker regulations than they enjoyed pre-merger.

This book contains the results of a study of workers' rights to information, consultation and participation in EU and national law covering cross-border mergers, which was undertaken by the ETUI's GOODCORP network of academic and trade union experts on company law and corporate governance. Based on an analysis of available statistics, nine national legal regimes and seven case studies, this book argues that the provisions for workers' rights under the Directive are inadequate, both during the merger procedure and in the new post-merger entity. It remains to be seen whether the deficits identified in this study can be successfully addressed by the implementation of the EU Company Law Package, a new legislative initiative regulating different types of cross-border reorganizations.

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