Conclusions
Towards a revision of the regulation of cross-border mergers

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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 Given that the Cross-border Mergers Directive ('the Directive'), as codified and repealed by EU Directive 2017/1132/EC, is, as Blanaid Clarke put it in Chapter 1, 'dauntingly complex', we will not be touching upon all its aspects.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.[1]

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

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 an 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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