

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

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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')¹ carried out by the ETUI's GOODCORP network.² 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 Directive 2005/56/EC as amended by several Directives was repealed.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.

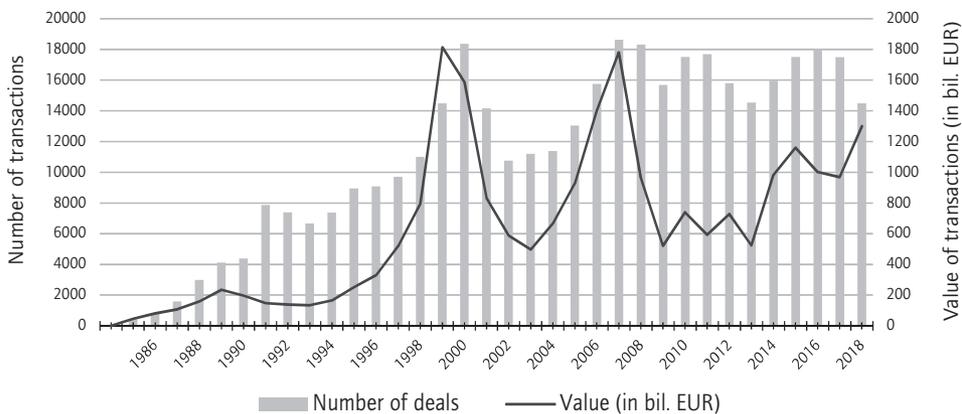
2. Mergers and cross-border mergers in the EU

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).³ 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

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 2005.⁴ 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

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.⁵

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.

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.

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