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-Brunn 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; 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.

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

ETUC (2017) Statement submitted in response to European Commission online consultation, Brussels, European Trade Union Confederation.