Chapter 8
Germany

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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.[1]

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

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 Umwandlungsgesetztes* 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[2]) 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).

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
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> (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
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> (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.[3] 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.[4]

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.

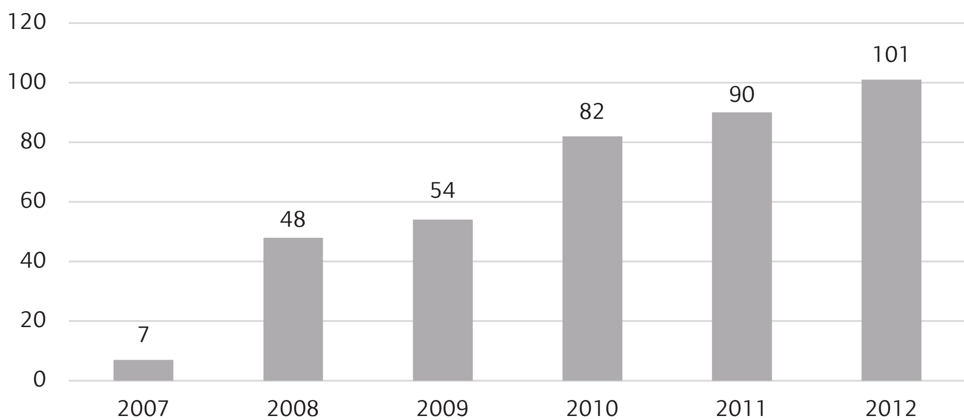
4. See the typology with regard to the latter two cases.

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).[5] 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[6]

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 INGDiba 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 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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