Chapter 11
The Netherlands

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1. Introduction

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

2. National background

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

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

3. Implementation of the Cross-border Mergers Directive

3.1 General

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

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

3.2 The rules on board-level representation

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

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

1. See http://wetten.overheid.nl/BWBR0003045/Boek2/Titel7/Afdeling3A/Artikel333k/geldigheidsdatum_02-11-2015
2. See http://wetten.overheid.nl/BWBR0018115/geldigheidsdatum_02-11-2015

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

3.3 ECJ: Dutch implementation incorrect

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

4. The Dutch system of worker involvement

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

4.1 Employee board-level representation

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

3. ECJ 20 June 2013, nr. C-635/11.
4. See for the so-called structure law http://wetten.overheid.nl/BWBR0003045/Boek2/Titel4/Afdeling6/geldigheidsdatum_02-11-2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.4 Right of speech as a form of participation?

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

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

8. See in particular Laagland (2013).

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

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

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

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

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

5. Statistical data

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

5.1 The database

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

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

5.2 Number of announcements and validity

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

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

9. See https://zoek.officielebekendmakingen.nl/
10. Possibly including some (but very few) double counts due to repeated (amended) announcements.

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

5.3 Outbound or inbound

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

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

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

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

5.4 Country directions

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

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

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

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

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

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

5.5 Developments over time

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

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

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

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

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

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

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

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

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

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

5.7 Involvement of SEs

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

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

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

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

5.8 Conversions and transfers of seat

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

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

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

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

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

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

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

13. The main cases are ECJ 27 September 1986, case 81/87 (Daily Mail), ECJ 9 March 1999, C-212-97 (Centros), ECJ 5 November 2002, C-208-00 (Überseering), ECJ 30 September 2003, NJ 2004/394 (Inspire Art), ECJ 13 December 2005, C-411/03 (Sevic), ECJ 16 December 2008, C-2010/06 (Cartesio) and ECJ 12 July 2012, C-378/10 (Vale).
14. See https://www.internetconsultatie.nl/grensoverschrijdende_omzetting. The preliminary draft bill does contain an arrangement to safeguard existing participation rights.
15. S.G. van Solinge (1992), Grensoverschrijdende fusie, Deventer: Kluwer.

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

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

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

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

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

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

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16. Biermeyer and Meyer (2015).

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