

Chapter 12

Norway

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1. Introduction

The Norwegian cross-border merger legislation has wide scope, covering not only private and public limited liability companies but also European Companies (SEs). However, in comparison with other countries, Norway has taken a fairly moderate approach to implementing other aspects of the Cross-border Mergers Directive. Only companies in liquidation and companies undergoing cross-border divisions have been added to the list of companies covered by transposition. Norway has also taken a minimalistic approach to stakeholder protections. According to the Cross-border Mergers Directive implementation report, only creditors enjoy special protections; minority shareholders and employees do not receive such special protections, and Norway also chose not to include a national veto right over cross-border mergers for public interest reasons (Bech-Bruun and Lexidale 2013: 121 and 136).

In principle, Norwegian workers enjoy strong rights of information and consultation prior to a cross-border merger. According to the requirements of the leading Basic Agreement (Hovedavtalen)¹ between the Norwegian Confederation of Trade Unions (LO) and the Confederation of Norwegian Enterprise (NHO) the employer has to discuss any important decision with the representative of the trade union bound by the collective agreement with the employer before any action is taken by the management. Companies without a collective agreement are instead covered by the Act of 17 June 2005, No. 62 relating to working environment, working hours, employment protection and so on, the so-called Working Environment Act (see in particular Chapter 8).²

Regarding worker participation, after a cross-border merger, if the resulting (merged) company is Norwegian, the employees are entitled to board representation according to the Public Limited Liability Companies Act and the Private Limited Liability Companies Act. In cases in which the Norwegian company is the transferor (merging) company, according to the cross-border merger legislation, the rules of the EEA/EU state to whose jurisdiction the acquiring company will be subject will be set aside under certain conditions. This means that the fairly extensive employee participation rights under Norwegian legislation will apply when the transferor company is a Norwegian one.

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1. See for an English version: <https://www.nho.no/siteassets/nhos-filer-og-bilder/filer-og-dokumenter/lonn-og-tariff/hovedavtalen-2014-2017eng.pdf>
 2. See for an English translation <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>.

2. National legal background

Norway is not a member of the EU, but rather a party to the EEA Agreement, in which framework the Cross-border Mergers Directive was implemented in 2006.³ The national implementation was approved by the parliament in 2007. Pursuant to the dualistic approach to international treaties, Norway had to implement the directive into national legislation and thus incorporated it by amendments to the 1997 Public Limited Liability Companies Act (Chapter 13.VII and Chapter 14.III), and to the 1997 Private Limited Liability Companies Act (Chapter 13.VII and Chapter 14.III). Furthermore, the legislator adopted the 2008 Regulation regarding Employee Representation Rights.

The Cross-border Mergers Directive establishes a framework in which each merging company is governed by the provisions of its national law applicable to domestic mergers and the national authorities are competent to scrutinise the legality of and register mergers. Prior to transposition, Norwegian legislation, including the implementing of the Directive concerning domestic mergers of public limited liability companies (78/855/EEC), did not include provisions on cross-border mergers, as it only governed domestic mergers.

The national registry, the Brønnøysund Register Centre (brreg.no), is supposed to confirm that a merger has been registered as completed, and issues a merger certificate for the Norwegian company. The Brønnøysund Register Centre's electronic bulletin for public announcements is the official state gazette for the publication of company information (Section 1-1 of the 1985 Business Register Act).

This legislation on cross-border mergers also, in principle, sets aside the uniform rules in the EU concerning the law applicable to contractual obligations.

3. Key elements of the Norwegian cross-border merger legislation

3.1 Scope

The cross-border merger rules apply to both public and private limited liability companies, as well as European Companies (but not to cooperatives). Section 2 para. 1 of the 2005 Act on European companies states that the provisions of the 1997 Public Limited Liability Companies Act (hereafter Public LLC Act) shall apply to SEs (see also Berge and Bondeson 2010).

The limited company laws also include provisions enabling, under certain conditions, Norwegian companies to participate in cross-border divisions. This covers the right to transfer the assets of a company governed by the laws of one Member State to another Member State by way of a cross-border division.⁴ Member States are not prevented from taking measures in the interests of creditors, minority shareholders and employees, even if such measures imply restrictions on freedom of establishment, in accordance

3. See OJ L 333, 30 November 2006 p. 59.

4. Cf. *Sevic Systems*, C-411/03, EU:C:2005:762 para. 18 and 30.

with Article 49 TFEU (cf. Article 31 EEA Agreement).⁵ Section 14-12 in both the Public LLC Act and the 1997 Private Limited Liability Companies Act (hereafter Private LLC Act) state, in compliance therewith, that the companies can benefit from the cross-border division if the laws governing the recipient company prescribe that employee representation rights should be at least as good as those laid down in Article 16 of the Cross-border Mergers Directive. Furthermore, the cross-border division must be permitted under the laws governing the other companies participating in the division.

With regard to remuneration, the shareholders of the transferor company are entitled to receive shares in the acquiring company, but also cash payments (Section 13-1 in both the Public LLC Act and the Private LLC Act).

The legal consequences of a cross-border merger are the same as the legal consequences of a domestic merger (cf. Article 14 of the Cross-border Mergers Directive). Regarding employee rights, the Norwegian implementation goes further than the Cross-border Mergers Directive and the Transfer of Undertakings Directive. Section 13-33 of the Public LLC Act and Section 13-25 of the Private LLC Act state that the merging company's rights and obligations resulting from employment contracts and employment relationships shall be transferred to the acquiring company.

The cross-border merger is effective when the acquiring company performs an act of perfection by registration in different registers, including the Norwegian Register of Business Enterprises.

3.2 Procedure

The board of directors of the Norwegian company participating in the cross-border merger and the competent management organs of the involved foreign companies shall together prepare common draft terms for the cross-border merger (Section 13-26 Public LLC Act and Section 13-25 Private LLC Act). At the latest one month before the date fixed for the general meeting, or the board meeting, which is to decide on the merger, the draft terms must be filed with the Norwegian Register of Business Enterprises (Section 13-33 Public LLC Act and Section 13-25 Private LLC Act). The Register of Business Enterprises shall publish a notice of the cross-border merger in the Brønnøysund Register Centre's electronic bulletin (Section 13-13 Public LLC Act and Section 13-25 Private LLC Act).

The board of directors of the Norwegian merging company must prepare a report on the cross-border merger (Section 13-9 Public LLC Act and Section 13-9 Private LLC Act). The report shall provide a legal and economic explanation and justification for the reasons for the merger and the consideration to the shareholders in the transferor company. Additionally, the report must describe any difficulties encountered in determining the consideration and the implications of the merger for shareholders, creditors and employees. This report shall be made available to the shareholders and the employee representatives at least one month before the general meeting that is to decide on the

5. Cf. *Sevic Systems*, C-411/03, EU:C:2005:762 para. 28.

draft terms of merger (Section 13-27 Public LLC Act and Section 13-25 Private LLC Act). Any written comments on the cross-border merger received from the employees or the employee representatives shall be appended to the report.

The boards of the companies participating in the cross-border merger shall ensure that an independent expert's report on the merger is prepared (Section 13-28 Public LLC Act and Section 13-25 Private LLC Act). Pursuant to the same provisions, no report is required if so agreed by all shareholders of the merging companies.⁶ The experts qualified for preparing such a report are state-authorised public and registered auditors (Section 13-28 Public LLC Act and Section 13-25 Private LLC Act, cf. Article 8 of the Cross-border Mergers Directive and Article 10 of the Directive concerning domestic mergers of public limited liability companies). They are subject to authorisation by the Norwegian Financial Supervisory Authority.

The resolution on a cross-border merger shall be adopted by the general meeting of the shareholders of the companies approving the draft terms by a majority of two-thirds of both the votes cast and the share capital represented at the general meeting (Section 13-3 and 13-25 Public LLC Act and Section 13-3 and 13-25 Private LLC Act). The board of directors can approve the draft terms in the transferor company when the cross-border merger is an absorption of a wholly owned subsidiary (Section 13-36 Public LLC Act and Section 13-25 Private LLC Act).

Any failure or misconduct in preparing and implementing the merger, including the preparation of the management report and the independent expert's report, can be subject to civil and criminal liability (Chapter 17 and 19 in both the Public LLC Act and the Private LLC Act).

The cross-border merger, where the acquiring company is subject to Norwegian law, enters into force when the Register of Business Enterprises registers the merger (Section 13-33 Public LLC Act and Section 13-25 Private LLC Act). A cross-border merger in which the acquiring company is subject to another EEA/EU state's legislation shall be entered in the Register of Business Enterprise when it receives notice from the competent authority in the other EEA state that the merger has come into effect (Section 13-32 Public LLC Act and Section 13-25 Private LLC Act). A cross-border merger which has entered into force cannot be declared null and void (Section 13-35 Public LLC Act and Section 13-25 Private LLC Act, cf. Article 17 of the Cross-border Mergers Directive).

4. Worker representatives' rights after transposition of the Cross-border Mergers Directive

4.1 Employee involvement after a cross-border merger

The 2008 Regulation regarding employee representation rights implements the rules in Article 16 of the Cross-border Mergers Directive and applies to an acquiring company

6. Cf. Ot.prp. (Government Bill) no 78 (2006–2007) p. 43.

that is to have its registered office in Norway (Section 2 of the 2008 Regulation regarding Employee Representation Rights, cf. Section 4 of that Regulation).

If the employees so demand, they are entitled to board representation if the number of employees in the company exceeds thirty. Thus, employees in companies with more than thirty employees are under Norwegian law entitled to representation on the board of directors or on the corporate assembly of the company (Section 6-4 Public LLC Act and Private LLC Act). They are entitled to elect one member and one observer (with deputies) to the board of directors. When a company has fifty or more employees, they are entitled to elect one-third and a minimum of two members of the board of directors (with deputy members).

If the company has more than two hundred employees, it is supposed to set up a corporate assembly in which the employees shall be represented by one-third of the members, regardless of whether a demand for representation has been made by the employees (Section 6-35 Public LLC Act and Private LLC Act). If a corporate assembly is set up, it shall elect the board of directors. However, the company and a majority of the employees, or trade unions representing two-thirds of the employees, may agree that the company shall not have a corporate assembly. In that case, the employees are entitled to elect one member (with deputy) or two observers to the board of directors, in addition to the employee representation that follows when the company has more than fifty employees (Section 6-4 Public LLC Act and Private LLC Act). Special rules apply if the company is a part of a corporate group: after application from the group, trade unions representing two-thirds of the group's employees, or from a majority of the employees in the group, the employees of the group may also be entitled to elect members of the board of directors in the parent company (Section 6-5 Public LLC Act and Private LLC Act).

Concerning employee participation, the company resulting from the cross-border merger shall be subject to the rules in force in the EEA/EU state where the merged company has its registered office (Section 4 of the 2008 Regulation regarding employee representation rights, cf. Article 16 of the Cross-border Mergers Directive). However, pursuant to the same provision, this is not true if (i) one of the merging companies has more than five hundred employees, (ii) the national law applicable to the acquiring company does not provide for at least the same employee involvement level as operated in the merging companies, or (iii) the national law applicable to the merged company does not provide for the same entitlement to exercise employee involvement in the establishment of the acquiring company as is enjoyed in the other EEA/EU state. Due to the fairly extensive employee involvement rights provided for by Norwegian law, exceeding the level of most EEA/EU states' employee involvement legislation, the national rules governing the acquiring company will probably be set aside. In these cases, when the national legislation comprising the acquiring company is set aside, a special negotiating body (SNB) shall be established (Section 4 of the 2008 Regulation regarding employee representation rights). The procedures for this employee involvement are then quite similar to the procedures provided for in the SE Directive (2001/86/EC).

If a subsequent domestic merger takes place within three years of the date the cross-border merger takes effect, the employees' involvement rights still are protected pursuant to Section 2 of the 2008 Regulation regarding employee representation rights.

The members of the SNB and the members of the representative body enjoy the same protection and guarantees provided for employees' representatives by Norwegian legislation (Article 16 of the Cross-border Mergers Directive). Although this is not expressly stated in the Norwegian legislation, any alleged breach by the companies of the employee involvement rights may be brought before the courts.

4.2 Special Negotiating Body

If the rules of the EEA state in which the acquiring company has its registered office are set aside, an SNB shall be established. By Sections 5–15 of the 2008 Regulation regarding employee representation rights the Norwegian legislator implements Article 16 of the Cross-border Mergers Directive.

Each EEA/EU state shall be represented in the SNB (Section 5 of the 2008 Regulation regarding employee representation rights). The merged companies from each Member State are entitled to appoint one member for each 10 per cent or fraction thereof out of the total number of employees in the merging companies.

The seats in the SNB are allocated to the merging Norwegian companies based on the number of the employees in each company in descending order (Section 6 of the 2008 Regulation regarding employee representation rights). Who is to be appointed is governed by Section 7 of the 2008 Regulation regarding employee representation rights. Thus, trade unions representing two-thirds of the employees are entitled to appoint members of the SNB. If the numerical requirements are not met, or if the trade unions disagree on who shall be appointed, the members of the SNB can be elected directly by and among the employees, in accordance with the 1998 Regulation on representation in private and public limited liability companies (see Section 7 of the 2008 Regulation regarding employee representation rights).

For the purpose of reaching an employee participation agreement with the merging companies, the companies shall provide information to the SNB on the draft terms and process of the merger (Section 8 of the 2008 Regulation regarding employee representation rights). The negotiations shall be initiated immediately after the establishment of the SNB and may proceed for six months, unless the parties agree upon extending the period for a maximum of twelve months (Section 10 of the 2008 Regulation regarding employee representation rights). Pursuant to Section 8 of the 2008 Regulation regarding employee representation rights, decisions of the SNB are taken by a majority vote. Reducing employee involvement rights, however, requires a two-thirds majority, according to the same provision.

The employment involvement agreement shall be in writing (Section 9 of the 2008 Regulation regarding employee representation rights). The agreement shall specify its

scope, the substance of the arrangements agreed upon for involvement, the duration of the agreement, under what circumstances the agreement shall be renegotiated and the procedures for such renegotiation. The Regulation does not, however, contain sanctions when these requirements are not met. This implies that the requirements are not formally binding, but mere instructions.

In the annex to the 2008 Regulation regarding employee representation rights, standard rules for employee involvement are laid down. They apply if no employee involvement agreement is successfully negotiated, or if the negotiating parties agree upon using these standard rules. They also apply directly without negotiations taking place with the SNB if the merging companies so decide (Section 11 of the 2008 Regulation regarding employee representation rights). The standard rules concern the right to representation (1), allocation of the seats in the administrative or controlling body (2) and the employee representatives standing in these bodies (3).

4.3 Other provisions regarding employee rights

The legal consequences of a cross-border merger are the same as those of a domestic merger (Article 14 of the Cross-border Mergers Directive). Regarding employee rights, the implementation legislation does not go further than the Cross-border Mergers Directive and the Transfer of Undertakings Directive. When a cross-border merger implies transfers not only of shares, but also of assets and liabilities, such a merger may imply the application of the Transfer of Undertakings Directive (2001/23/EC) if the conditions for a legal transfer or a merger according to the Directive are met.⁷ Section 13-33 of the 1997 Public LLC Act and Section 13-25 of the 1997 Private LLC Act state that the transferring company's rights and obligations resulting from employment contracts and employment relationships shall be transferred to the acquiring company. However, the Norwegian cross-border merger provisions stipulate the transfer of employee contracts or employee regulations in such a merger. The Transfer of Undertakings Directive is applicable when certain conditions are met: when there is a change in the employer's person after a transfer of an economic entity which after the transfer retains its identity (cf. Article 1 of the Transfer of undertakings directive, and Chapter 16 of the 2005 Working Environment Act). The legislation does not require that the conditions in the Transfer of Undertakings Directive or in Chapter 16 of the 2005 Working Environment Act are met, but the mere fact that there is a cross-border merger according to the Cross-border Mergers Directive has the consequence that the acquiring company has to succeed in the employment contracts or the employment relationships. As for the employment terms and conditions or the collective agreement that the transferring company might be obligated to respect, neither the Cross-border Mergers Directive nor the Norwegian implementation legislation takes these issues into account.

7. Cf. eg. *Amatori and others*, C-458/12, EU:C:2014:124, *CLECE*, C-463/09, EU:C:2011:24, and Rt. 2015 s. 718 *Kirkens Bymisjon*.

As mentioned above, the 2008 Regulation regarding employee representation rights implements the rules in Article 16 of the Cross-border Mergers Directive and applies to an acquiring company which shall have its registered office in Norway (Section 2 of the 2008 Regulation regarding employee representation rights, cf. Section 4 of that Regulation). Thereby, the uniform rules concerning the law applicable to contractual obligations, such as employment contracts and collective agreements, in the EU laid down in the 1980 Convention on the law applicable to contractual obligations (Rome Convention) and in the Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) are set aside.

5. Conclusion

In Norway the national implementation closely followed the basic requirements of the Cross-border Mergers Directive. Coverage was extended to companies in liquidation and also rules for cross-border divisions were introduced. However, a broader range of company forms – such as cooperatives – was not included.

Regarding worker participation, in the case of a cross-border merger, this is not primarily a matter of labour law regulation because the involvement is to take place at board level, in the intersection between company law and labour law. As a consequence, in the implementation of the Cross-border Mergers Directive, no amendments were introduced in the labour law legislation besides the adoption of the 2008 Regulation regarding employee representation rights; the amendments have been made, as shown above, in the company law legislation. The basic general obligations on the employer to inform and consult with the trade unions and, to some extent, the employees, derived mainly from domestic rather than EU legislation – specifically, pursuant to the 2005 Working Environment Act and the Basic Agreements – shall prevail.

Due to the fairly extensive employee involvement rights provided for by Norwegian legislation, which exceed the level of those in most EEA/EU states, the national rules governing the acquiring company will be set aside if certain conditions are met. This of course can be disputed when the company claims that the other Member State's legislation is similar to or has even more extensive employee involvement rights than the Norwegian legislation. In these cases, when the national legislation governing the acquiring company is set aside, an SNB shall be established. The procedures for this employee involvement are then fairly similar to the procedures provided for in the SE Directive (2001/86/EC).

References

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