

Chapter 14

Sweden

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1. Introduction

As cross-border mergers predominantly concern company law, the Cross-border Mergers Directive (2005/56/EC) was implemented into Swedish law mainly by amendments to the 2005 Companies Act and the 1987 Cooperative Societies Act. Transposition in Sweden took a moderately wider approach than was required by the Cross-border Mergers Directive. Regarding scope of applicability, cooperatives and companies in liquidation were also included in addition to limited liability companies, but cross-border divisions and triangular mergers are not covered by the implementing legislation (Bech-Bruun and Lexidale 2013: 121). Sweden also took a moderate approach to stakeholder protection. Protections for creditors and employees are included, but not for minority shareholders. Furthermore, a national right to veto cross-border mergers in the public interest was not included (Bech-Bruun and Lexidale 2013: 136).

The Cross-border Mergers Directive's rules on employee participation (notably Article 16) were implemented into the 2008 Employee Participation in Cross-border Mergers Act. In Sweden there is a particularly low threshold for triggering worker participation rights. Workers in almost all companies with more than 25 employees may elect two representatives and two deputy representatives to the boards of their company. As a result, worker participation has been an issue in a number of cross-border mergers involving Swedish companies (see Chapter 2 in this volume).

2. Legal background

Prior to the implementation of the Cross-border Mergers Directive through amendments in the national legislation, there was no law on cross-border mergers, and the existing legislation did not contain rules on such mergers. Whether Swedish law or the legislation of another Member State should apply was determined by the rules on conflict of laws;¹ in the event that another Member State's legislation applies it would be possible for a cross-border merger to take place, according to that Member State's rules. Such a state of affairs was insufficient for EU law, however, as stated by the European Court of Justice (ECJ) in its judgement in the *SEVIC* case.² The Court stated that the Treaty of

1. Cf. Regulation (EU) No 1215/2012 (Brussels I) and Regulation (EC) No 593/2008 (Rome I).

2. *SEVIC Systems*, C-411/03, EU:C:2005:762.

the European Union (now the Treaty on the Functioning of the European Union, TFEU) does not allow a Member State to refuse generally to register a cross-border merger in its commercial register.

The Cross-border Mergers Directive was implemented into national legislation through amendments to the 2005 Companies Act³ and the 1987 Cooperative Societies Act.⁴ To a large extent the implementation rules state that the provisions applicable to domestic mergers also apply to cross-border mergers (Chapter 23, section 36 of the 2005 Companies Act). In addition, the 2008 Employee Participation in Cross-border Mergers Act implements Article 16 of the Cross-border Mergers Directive rules on employee participation into Swedish law.

The implementation of the Directive did not involve any changes to the 1976 Codetermination Act, which contains a significant set of employee participation rules and is the core act regulating collective labour law. For instance, this act regulates the right to organise, the right to negotiate, the employer's obligation to continuously inform the trade union with which the employer has a collective agreement, the law on collective agreements, veto rights in some situations, the law on collective actions and the law on mediation. The Act is, however, a framework regulation. Due to the traditionally high degree of organisation among employers and employees, the trade unions and employer organisations agree upon industrial relations issues, or more precisely: the parties establish the rules on both the substance and the regulation of work and its conditions.

The existing 1987 Board Representation Act, which had its origins in the mid-1970s, did not meet the Directive's requirement on employee involvement in a cross-border merger situation. Therefore, the legislator had to take legislative measures for implementing the Cross-border Mergers Directive. To a large extent the 2008 Employee Participation in Cross-border Mergers Act follows the structure and wording in the 2004 Employees' Involvement in European Companies Act (implementing Directive 2001/86/EC).

3. National implementation

3.1 Scope

The cross-border merger rules apply to Swedish limited companies (both public and private) and any corresponding legal person with residence within the European Economic Area (EEA) which includes a cross-border element. In principle the national legislation only allows mergers between business associations of the same kind. A legal person is considered to be resident within the EEA if it was formed in accordance with the law of an EEA/EU state and has its seat, central administration or main business activity within the EEA/EU. Furthermore, the rules apply to mergers of cooperative

3. For an English version of the Companies Act see Maxwell (2014).

4. Prop. (Government Bill) 2007/08:15.

societies, except cooperative housing associations. The rules are also applicable to mergers of European Companies (SEs) and European Cooperative Societies.

Swedish law allows for mergers by acquisition and mergers by formation of a new company. The consequences of a cross-border merger are the same under Swedish law as under the Cross-border Mergers Directive: the merged companies cease to exist (in the case of acquisitions, however, the acquiring company continues to exist), the shareholders of the companies which cease to exist become shareholders in the new or acquiring company, and all assets are transferred to the new or acquiring company.

A cross-border merger has legal effect as from the date of registration of the merger with the Swedish Companies Registration Office and is enforceable vis-à-vis third parties as of the date of publication of the merger in the Official Swedish Gazette (Post och Inrikes Tidningar).

3.2 Procedure

According to the 2005 Companies Act, the board of directors of the Swedish company shall sign the draft plan (common draft merger terms) that was prepared by the management organs of the merging companies (in Sweden: the board of directors). The draft terms of cross-border mergers shall contain certain information; the national implementation legislation does not, however, provide for the inclusion of a right to profit sharing or any special conditions for profit sharing in the draft terms. Violating the provisions of the common draft merger terms can lead to liability for damages for the members of the management organ.

The board of directors of each merging company must draw up a report for the company's shareholders which contains the reasons for the merger, including a legal and economic explanation and justification, as well as information on the merger's consequences for shareholders, creditors and employees.

Within one month from the date the draft terms were drafted, the participating Swedish company must hand in the draft plan for registration to the Swedish Companies Registration Office. In the case of acquisition, if the acquirer is not a Swedish company, the Swedish company involved must hand in the documents. If more than one Swedish company is involved, the oldest is responsible for this. The draft terms shall be available to shareholders and employees; those shareholders who request it shall be provided with a copy of the draft terms.

The independent expert, in the Swedish legislative context, is the auditor. The auditor of each participating company shall draw up a report on both the draft terms of the cross-border merger and the board of directors' report; the auditor may request any information deemed necessary from the merging companies. The auditor's report shall clarify the consideration ratio and the determining of the share exchange ratio, the methods to be used to determine the value of the assets and debts, and the result of the methods used. The auditor's report shall also indicate the particular difficulties involved

in rating the value of property. The auditor's report shall be attached to the draft terms.

The draft terms shall be submitted to the general meeting of all the companies involved. The draft terms of the cross-border merger, the board of director's report and the auditor's report shall be available at the latest one month before this general meeting takes place to the shareholders, trade unions representing the employees and employees not represented by any union.

4. Worker involvement

The employee participation rights defined in Article 16 of the Cross-border Mergers Directive were implemented into national legislation by the 2008 Employee Participation in Cross-border Mergers Act.⁵ Other than these Article 16 rights, the legislator has not taken any additional measures to implement the provision in Article 4.2 of the Cross-border Mergers Directive on protecting other employee rights. A company participating in a cross-border merger is obliged to meet the requirements already existing in Swedish legislation. Thus, the rules on information and negotiation in the 1976 Codetermination Act apply in principle (see the next section on this). The 1987 Board Representation Act did not meet the Directive's requirements concerning the employees' right to participation in cross-border mergers situations, thus it was necessary to define a new set of rules.

In general, employee participation rules will be applicable where the company resulting from the merger has its registered office. The exceptions mentioned in Article 16.2 of the Cross-border Mergers Directive were not transposed into Swedish law. Instead, the regulations for the SE (*Societas Europaea*) have been modified and transposed. The same rules apply to all companies, no matter what size they are.

The members of the special negotiating body (SNB) shall be appointed by the local trade union with a collective agreement with the employer. In practice, there is frequently one for each category of worker (manual workers, professionals and white-collar workers, if they are represented at the workplace). If none of the participating companies has a collective agreement with any trade union, the members of the SNB shall be appointed by the most representative local union. If none of the employees are union members, the SNB is appointed by the employees in the companies in Sweden.

The participating companies are obliged to inform employees about the progress of the merger. This obligation also implies that the participating companies should inform on changes in the corporate structure that might affect the composition of the SNB.

The 2008 Employee Participation in Cross-border Mergers Act contains standard provisions that can be applied upon agreement of the parties. Furthermore, these provisions are applicable if one-third of the employees are entitled to participation, or – if the employees entitled to participation are less than one-third of the total – if the SNB

5. Prop. (Government Bill) 2007/08:20.

decides that the employees shall be included in participation in the merging company. Finally, the standard provisions can be applied unilaterally by management without initiating negotiations on employee participation.

5. Other relevant legislation on worker involvement and participation

Although the Cross-border Mergers Directive has been implemented into Swedish legislation, the core legislation on employee involvement and participation affecting cross-border mergers is the 1976 Codetermination Act. This by international comparison fairly far-reaching act on employee involvement and participation is also applicable in cross-border merger situations and provides the central legal rules between employer and employees' organisation (Adlercreutz and Mulder 2013; Fahlbeck and Mulder 2009).

Despite its name, the Act is not really about transferring managerial powers or other decision-making rights reserved for the employer to the trade union. Instead, it is about joint participation through negotiations. The Act does not deprive employers of their prerogatives; rather the employers retain the right to decide ultimately how to manage the business. Thus, the unions do not actually have the right to take managerial decisions, but rather the possibility to influence management decisions through the employer's obligation to negotiate with them concerning any managerial decision that the employer intends to take. Under certain conditions a trade union is entitled to prevent the employer from using specific contractors; that is, in specific situations the unions have a veto right.

The Act is by far the most important channel for employees and their representatives to exert their influence through negotiations. Typically, the employee organisation participates through its right to receive information and in some cases as a result of representation in some decision-making body, most frequently in health and safety committees. The right to negotiate extends to all levels of trade union hierarchy, both local level (plant or company level) and central level (industry-wide level). Breaches of the employer's duty to negotiate are sanctioned with damages.

In the Act Swedish labour law recognises three different types of collective negotiations: (i) general collective negotiations on the relationship between employers and employees represented by a trade union, (ii) extended collective negotiations on managerial decisions and (iii) dispute negotiations. Only the last one is about legal disputes and is settled by the Labour Court. The first two involve conflicts of interest, including negotiations on managerial issues, and cannot be considered by the courts; they can only be resolved as a result of negotiations, sometimes but not necessarily after industrial action has been taken.

According to the provisions on general collective negotiations, a party, whether it be an employer, an employers' organisation or an employees' organisation (but not a single

employee), is entitled to request negotiations. There is no requirement that the parties already have a relationship through a collective agreement. The provision defines a right to negotiations on all aspects of the relationship between employer and employee. A request for general collective negotiations means an obligation for the other party to participate in the negotiations; the right and obligation to negotiate according to this provision is reciprocal.

The 1976 Codetermination Act imposes an obligation on employers to take the initiative to negotiate with the established union before making certain kinds of decisions (extended collective negotiation). An employer is then obliged to negotiate with the trade union with which the employer has a collective agreement before making a decision which would make major changes in either managerial issues or in working conditions for a single employee. Thus, the existence of a collective agreement is of great importance, which the legislation acknowledges by giving the trade unions more far-reaching rights than a trade union without a collective agreement.

This in fact means that the employer has to institutionalise negotiations in advance; in other words, the provision implies a substantive reduction in unilateral employer decision-making powers. This applies when the employer is about to decide to make major managerial changes or major changes in working conditions. A cross-border merger is always a major managerial change that calls for extended collective negotiations. If the measure does not qualify as a major change, the employer is not obliged to take the initiative to negotiate, but if the employer does not call for negotiations, the trade union with a collective agreement can do so.

The stage during the decision-making process at which negotiations must start is of major importance. The Act thus requires that the employer has to initiate negotiations at a very early stage, before any decision on the issue is made, and continue the negotiations – or more precisely, discussions – throughout the decision-making process.

Parallel with this negotiation channel, there is the channel of board representation for employees, which is governed by the 1987 Board Representation Act. According to this act, employees are entitled to representation on the company's board of directors through their trade unions. An important difference with regard to the negotiation channel, however, is that the 1987 Board Representation Act provides for direct influence on the board; that is, the company's main decision-making body. In principle, the employee board members have no special status regarding influence and liability in comparison with board members elected by the shareholders' general meeting. Thus, they are covered by company law, meaning for example that the board representatives shall be obliged to consider the company's interest in their decisions.

As mentioned above, this Act did not fulfil the requirements in the Cross-border Mergers Directive; thus a new legal item was adopted and enacted implementing the Directive on this point. However, this Act would apply to decisions on a cross-border merger.

6. Conclusions

The concept of employee participation corresponds to the definition in the European Company (SE) Directive (2001/86/EC) supplementing the Statute for a European Company regarding employee involvement. As employee participation takes place at the board level, participation is thus not primarily a matter of labour law regulation, but instead a matter of company law regulation.

As a consequence, in Sweden no amendments were made in the labour law legislation, besides the adoption of the 2008 Employee Participation in Cross-border Mergers Act. Thus, the general and far-reaching obligations under the 1976 Codetermination Act – namely that the employer inform and negotiate with the trade union with which the former has a collective agreement – shall prevail. This 1976 Codetermination Act is the core of the Swedish industrial relations system: employee involvement is safeguarded by information and negotiation rights and obligations rather than employee participation in company boards or by other organisational solutions. The obligation to negotiate enters into the decision-making process at a much earlier stage than the rights and obligations according to the 2008 Employee Participation in Cross-border Mergers Act.

Finally, the legislation on employee protection under the implementation provisions of the Transfers of Undertakings Directive (2001/23/EC) may be applicable in a cross-border merger situation, if certain conditions are met. Such a transfer must, however, comprise a transfer of assets or employees. Whether shares are transferred or not does not matter for the applicability of the Transfer of Undertakings Directive.

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