

Chapter 1

Worker rights under the Cross-border Mergers Directive 2005/56/EC: an introduction

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1. Introduction

This chapter provides an introduction to key aspects of the Cross-border Mergers Directive 2005/56/EC, focusing in particular on worker rights. Directive 2005/56/EC and a number of related Directives were subsequently codified and repealed by EU Directive 2017/1132/EC.¹ The main objective of the Cross-border Mergers Directive (European Parliament 2005) is to facilitate the reduction of obstacles to mergers of companies across national borders that might be due to differences in national laws. A Report produced in 2013 for the EU Commission by Bech-Bruun and Lexidale on the implementation of Cross-border Mergers Directive (Bech-Bruun and Lexidale 2013; hereafter: ('the Report')) concluded that:

'[T]he [Cross-border Mergers Directive] has brought about a new age of cross-border mergers activity. Stakeholders across the continent have consistently reported their satisfaction with the CBMD and its transposition, and consider it to be a vital step in creating a more vibrant and robust market environment within the EU and EEA.' (Bech-Bruun and Lexidale 2013: 2)

A primary concern at the time the Cross-border Mergers Directive was being negotiated was that cross-border mergers would be used as a mechanism to enable companies to avoid the employee participation system applicable in the Member State in which they have their real seat. This was a valid consideration in that, as the Report noted, only 19 Member States have participation systems. Even within these 19, differences exist with regard to their application. For example, some systems apply only to state-owned companies or to companies with a minimum number of employees. Variations also exist in the applicable rules, including: the number of board-level representatives who may be appointed; employees' entitlement in a dualist board system to a seat on the management board or the supervisory board; board members' responsibilities; eligibility for appointment; and the process of appointment (Bech-Bruun and Lexidale 2013: 71–72). By inserting a new company in a jurisdiction without an equivalent participation system, a subsequent merger between the first company and this new company would allow it to choose a new legal system and reduce participation rights.² It was thus made

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1. As noted in the Introduction, this chapter was completed as part of a study of worker rights under the EU Cross-border Mergers Directive 2005/56/EC and the law as stated as of December 2016.
 2. For a good summary of the historical origins see Siems (2008).

clear from the outset that mergers should not be facilitated in ways that diminished participation rights. It was agreed that the fundamental principle of the Cross-border Mergers Directive in this respect would be to grant employees of merging companies at least the same standard of participation as they enjoy under their respective national laws. This was referred to as the ‘before and after principle’.

2. Background

In December 1984, the Commission published a proposed tenth Directive on cross-border mergers of public limited companies (‘the Proposal’) (European Communities Commission 1985). This was modelled on the Mergers Directive 78/855/EEC (The Council of European Communities 1978) which regulated mergers within Member States. One difficulty with this from an employee protection perspective was that the latter does not involve disputes on conflicts of laws and so the issue of disparities of treatment of employee rights amongst Member States did not arise. The Proposal provided that a Member State did not have to apply the provisions of the Directive to a cross-border merger where ‘an undertaking would as a result no longer meet the conditions required for employee representation in that undertaking’s organs’ (Art. 1(3) of the Proposal). This exemption was expressly stated to be ‘pending subsequent coordination’ and the Recitals explained that the exemption appeared ‘necessary at any rate until the Council has decided on the Commission’s amended proposal for a Fifth Directive’. In the end, neither the Proposal nor the proposal for a Fifth Directive received Parliamentary approval because agreement could not be reached on employee participation in corporate boards. Both were withdrawn in 2001, leading to the High Level Group of Company Law Experts recommending the following year that the Commission urgently bring forward revised proposals (2002:111).

The Cross-border Mergers Directive arose from a further proposal for a Directive on Cross-Border Mergers published in 2003 (European Parliament 2003). The introduction of Regulation (EC) No. 2157/2001 established a Statute for a European Company (SE), creating a uniform legal framework within which companies from different Member States could plan and reorganise their businesses on a Community scale. It enabled cross-border mergers through the formation of an SE. In terms of employee participation, the Cross-border Mergers Directive relies on Directive 2001/86/EC supplementing Regulation (EC) No. 2157/2001 with regard to employee involvement. It was considered that referral to Directive 2001/86/EC would facilitate the adoption of the Cross-border Mergers Directive as it would avoid the need to reopen the contentious debates within Community institutions in circumstances in which ‘a broad consensus has been reached among all the interested parties’ (European Economic and Social Committee 2004: para. 3.3.2). Directive 2001/86/EC provides that if two companies merge to form an SE, and the law of only one of the companies provides for employee participation, participation rights should be preserved through the application of a set of standard rules unless the parties decide otherwise. This incentivises companies and their employee representatives to negotiate mutually agreed arrangements.

A number of points need to be made at the outset about the use of Directive 2001/86/EC in this way. First, the context in which Regulation (EC) No. 2157/2001 and Directive 2001/86/EC apply is different. Because of the Community nature of the SE, it is not subject to any existing national rules on mandatory employee participation in the Member State in which it locates its registered office. By contrast, merging companies to which the Cross-border Mergers Directive applies will be governed by the national law of Member States (Laagland and Zaal 2011: 291). Secondly, the Cross-border Mergers Directive, unlike Directive 2001/86/EC, does not deal with the operation of the representative body and the procedure for employee information and consultation.³ These issues thus will continue to be governed by national law. For example, the European Works Council Directive (European Parliament 2009) does not apply to the SE but does apply to cross-border mergers. The Report notes that different rules may thus apply in respect of works councils and employee participation issues and a lack of coordination may give rise to ‘parallel procedures in order to make sure that everything is in compliance with the rules’ (Bech-Bruun and Lexidale 2013: 74). Thirdly, the use of cross referencing in Article 16 is cumbersome, making it more difficult to identify the rules that apply to cross-border mergers. While the reference to Directive 2001/86/EC is understandable from a tactical perspective, it does add to the complexity of the instrument, making it difficult to assimilate.

3. Cross-border mergers

The Cross-border Mergers Directive applies not just to mergers of PLCs but to mergers of all limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community (Art. 1). To constitute a ‘cross-border merger’, at least two of the merging companies must be governed by the laws of different Member States. Vermeylen has opined that the Cross-border Mergers Directive should also apply where all the existing merging companies are governed by the same *lex societatis* but their assets and liabilities are transferred to a newly incorporated company governed by another *lex societatis* (Vermeylen 2005).

Three distinct types of merger are envisaged:

- (i) a merger whereby one existing company absorbs the other participating companies, which are dissolved;
- (ii) a merger whereby all the participating companies are dissolved and a new company is formed; and
- (iii) a merger of a subsidiary into its parent (Art. 2).

In the first two mergers, the companies being dissolved are dissolved without going into liquidation, and on the date of dissolution their assets and liabilities are transferred to the successor company in return for the issuance to their shareholders of securities or shares representing the capital of the successor company plus a cash payment. This cash

3. Article 9 of 2001/86/EC. See Francois and Hick (2010: 11).

payment must not exceed 10 per cent of the nominal value, or in the absence thereof, the accounting par value of these securities or shares.⁴ In the case of the merger of a subsidiary, the latter too is dissolved without going into liquidation and all its assets and liabilities are transferred to its parent.

A distinction may be made at the outset between a merger under the Cross-border Mergers Directive and a ‘takeover’ under the Takeover Bids Directive 2004/25/EC. The latter is defined as ‘a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law’ (Art. 2(1)(a)). In addition, Directive 2004/25/EC applies only to companies whose securities are admitted to trading in a regulated market in a Member State.

The cross-border merger takes effect on the date determined in accordance with the law of the Member State to whose jurisdiction the successor company is subject (Art. 12). On this date, all the merging companies’ assets and liabilities will be transferred, the members of those companies will become members of the successor company, and the other merging companies will cease to exist (Art. 14.1 and 2). If national law requires the completion of certain formalities before the transfer of any of the assets, then rights and obligations by the merging companies become effective against third parties, and the successor company must carry them out (Art. 14(3)). Any rights and obligations of merging companies arising from contracts of employment or from employment relationships existing at the date on which the merger takes effect will be transferred to the successor company on the date the merger takes effect (Art. 14(4)).

Article 4(1)(b) is a core provision of the Cross-border Mergers Directive, providing that unless it provides otherwise, merging companies must comply with the provisions and formalities of the national law ‘to which they are subject’. As has been observed, the use of this phrase obviated the need to make a definitive statement on whether a company is governed by the law where it has its registered office or principal place of business or which rules should apply when, according to the conflict-of-law rules applying in the Member States concerned, a successor company is subject to more than one *lex societatis* (Van Gerven 2010: 12). These national provisions are expressly stated to include, inter alia, those related to the decision-making process concerning the merger, shareholder protection and the protection of employees as regards rights not governed by Article 16.

4. Procedure

The management or administrative organ (referred to in this chapter as ‘the board’) of each of the merging companies is required to draw up and publish (Art. 6), within one month of the general meeting referred to below, a single common draft terms of the merger. This should include at least the terms set out in Article 5. These must

4. See Article 3(1) for an exception to this 10 per cent rule.

include ‘the likely repercussions of the cross-border merger on employment’ (Art. 5(d)) and ‘where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 6’.

One complaint identified in the Report is the lack of a requirement to carry out a social impact assessment (Bech-Bruun and Lexidale 2013: 74). It is argued that such an assessment would provide the parties involved with better information, allowing them to make better decisions. Agreeing common terms may not always be straightforward, given that the rules for agreeing these common draft terms and their contents may differ in each of the Member States governing each of the merging companies.

In addition, the board of each of the merging companies must draw up a management report for their shareholders, explaining and justifying the merger’s legal and economic aspects and explaining ‘the implications of the merger’ for employees, as well as shareholders and creditors.⁵ This report has to be made available not only to shareholders but also to the employee representatives or, if there are none, the employees themselves. The timeline for this is not less than one month before the date of the general meeting called to approve the common draft terms. The report must also have attached to it a separate opinion from the employee representatives if it is made available ‘in good time’, as provided for by national law.

These provisions might usefully be compared with the more detailed information requirements mandated in the Takeover Bids Directive for inclusion in the offer document and offeree response circular. It requires that the board of the offeror express a view on:

‘the offeror’s intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror’s strategic plans for the two companies and the likely repercussions on employment and the locations of the companies’ places of business.’ (Art. 6(3)(i) Directive 2004/25/EC)

Article 9 of the Cross-border Mergers Directive provides for the second stage in the process, the approval of the common draft terms by the general meetings of each of the merging companies. In this regard, it provides that the meetings may reserve the right to make implementation of the merger conditional on express ratification by it of the arrangements decided on with respect to employee participation in the new company (Art. 9(2)).

Article 10 requires Member States to designate the court, notary or authority competent to scrutinise the legality of the merger as regards that part of the procedure that concerns

5. Article 7. In addition to the common draft merger terms, provision is made under the Cross-border Mergers Directive for the preparation of an independent expert report, and in certain circumstances, an interim accounting statement.

each merging company subject to its national law. The aforementioned authority in each Member State concerned issues a certificate attesting to the proper completion of the pre-merger acts and formalities. Under Article 11, the legality of completion of the merger will also be scrutinised by the court, notary or authority designated by the Member State whose law governs the company resulting from the merger. This scrutiny also includes the formation of any new company formed. The authority must ensure in particular that the merging companies have approved the common draft terms in the same terms and also, where appropriate, that arrangements for employee participation have been determined in accordance with Article 16. However, the Report identified that there is uncertainty concerning the standard of review involved. It suggests that it includes only a check as to whether an agreement has been concluded or a decision not to negotiate has been taken rather than a review concerning the conclusion of the agreement or its content. A legal adviser is cited as saying that, because non-compliance did not necessarily affect the merger's validity, deadlines might be ignored. The Commission's Consultation posed the question whether Member States should check documents from other Member States when they are checking compliance with their national legal requirements. This would require a particular level of resources and skills, however.

5. Employee participation

Article 16 deals with employee participation. The term 'participation' is defined by reference to Article 2(k) of Directive 2001/86/EC as:

'the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:

- the right to elect or appoint some of the members of the company's supervisory or administrative organ, or
- the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.'

The Report confirms the view of some stakeholders that the employee participation system in the Cross-border Mergers Directive is 'overly complex' and that this complexity has resulted in unnecessary costs, delays and problems (Bech-Bruun and Lexidale 2013: 73).

5.1 General rule and exceptions

Article 16(1) provides that the successor company will be subject to the 'rules in force concerning employee participation' in the Member State where it has its registered office. If there are no such rules, the new company will have no obligations in this respect.

However, there are a number of exceptions under Article 16(2), in which the rules of the Member State where the successor company has its registered office will not apply. In these cases, the participation system will be established through an agreement

negotiated by a special negotiating body or through the application of Standard Rules as set out in Article 16(3).⁶ These exceptions are as follows:

- if at least one of the merging companies has more than 500 employees,⁷ on average, in the six months prior to publication of the draft terms of cross-border merger and is operating under an employee participation system (Art. 16(2) first paragraph);
- if the national law relating to the successor company does not provide for at least the same level of employee participation as operated in the merging companies, the level being measured by reference to the proportion of employee representatives in the board(s), board committees or the management group covering the company's profit units (Art. 16(2)(a)); and
- if the national law relating to the successor company does not provide for employees of the new company's establishments situated in other Member States the same participation rights as those enjoyed by the employees in the Member State where the new company has its registered office (Art. 16(2)(b)).⁸

Although the Report notes that Member States have transposed the general concept of special negotiating bodies and Standard Rules 'a considerable number of them have decided to modify the procedure under Article 16' (Bech-Bruun and Lexidale 2013: 114). A number of Member States follow a 'somewhat different version' of the three exceptions by not implementing parts of Article 16(2) or by transposing them differently. For example, the Netherlands did not transpose Art. 16(2)(b). As a result, there are different levels of protection of employee rights in different Member States and there is a concern that this might lead to forum-shopping. The Report suggests a dialogue between Member States to discuss the transposition of Article 16 more comprehensively and to determine whether the differences are based on specific national needs (Bech-Bruun and Lexidale 2013: 116). That said, it notes that stakeholders have not identified this issue as a major problem.

An issue has arisen as to whether the exceptions set out in Article 16(2) are cumulative and whether only two exceptions exist (Bech-Bruun and Lexidale 2013: 73).⁹ This might arise if one considers that the circumstances set out in the first paragraph of Article 16(2) – 500 employees and an existing participation system – must apply in addition to either Article 16(2)(a) or Article 16(2)(b). Tepass attributes the confusion in part to Recital 13 of the Cross-border Mergers Directive (Tepass 2012: 126), which states:

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6. When at least one of the merging companies is operating under an employee participation system that, under the Cross-Border Mergers Directive, is to govern the surviving company due to an agreement or the Standard Rules, the surviving company will be obliged to take a legal form that allows participation rights to be exercised (Art.16(6)).
 7. The Report queries whether a Member State's reducing this number to 250 would constitute improper transposition or gold-plating, which might also be frowned upon in some Member States (p. 92).
 8. Art. 16(5) provides that the extension of participation rights to employees of the surviving company employed in other Member States referred to in this paragraph will not entail any obligation for Member States that choose to do so to take those employees into account when calculating the workforce thresholds that give rise to participation rights under national law. For example, German national rules include only employees of establishments in Germany and there is no requirement to change the law to include foreign-based employees.
 9. See also the discussion in Tepass (2012).

‘If employees have participation rights in one of the merging companies under the circumstances set out in this Directive **and** [bold added by author] if the national law of the Member State in which the company resulting from the cross-border merger has its registered office does not provide for the same level of participation as operated in the relevant merging companies, including in committees of the supervisory board that have decision-making powers, or does not provide for the same entitlement to exercise rights for employees of establishments resulting from the cross-border merger...’

Another explanation he proposes for considering the first paragraph of Article 16(2) not to be a standalone exception is the fact that preserving pre-existing participation rights would not seem to require a separate participation system just because the number of employees is more than 500 (Tepass 2012: 127). However, the more persuasive argument is that a literal interpretation of Article 16(2) suggests that there are indeed three exceptions. This relies on the fact that the word ‘or’ appears twice in the text of Article 16(2) itself, after the options. In addition, Tepass opines that it would not be consistent with the objective of preserving the status of participation rights in all companies to limit it to those with over 500 employees (Tepass 2012: 126). It is also worth noting that the European Court of Justice itself in Case C635/11 referred to three exceptions.

A further issue that has given rise to debate pertains to the reference in Article 16(2) (b) to foreign and non-foreign employees of the successor company having the ‘same entitlement’ to participation rights. A question arises as to whether this requires a specific review in respect of the entitlements of the actual employees in the company itself or an abstract review of the participation system in general. It has been argued that the former would be more consistent with both the language and the purpose of Article 16 (Tepass 2012: 126). A second ambiguity in relation to Article 16(2)(b) is whether this exception applies only if the employees are subject to a participation regime at the time the merger becomes effective. The Report notes that this has created some ambiguity in the German transposition (Bech-Bruun and Lexidale 2013: 73). In that context, it also states that there is a lack of clarity as to whether, in such cases, the merging companies could choose to apply the Standard Rules without prior negotiations, as provided for in the Cross-border Mergers Directive (Art. 16(4)(a)) and discussed below.

In the three exceptions referred to above, Article 16(3) provides that employees’ participation in the successor company and their ‘involvement in the definition of such rights’ are regulated by the Member States *mutatis mutandis* in accordance with specified principles and procedures set out already in Regulation (EC) No. 2157/2001 (Art. 12(2), (3) and (4)) and Directive 2001/86/EC¹⁰ and described below. Until the employee participation arrangements are determined, the merger will not be registered or take effect.

10. The following provisions of Directive 2001/86/EC: Article 3(1), (2) and (3), (4) first subparagraph, first indent, and second subparagraph, (5) and (7); Article 4(1), (2), points (a), (g) and (h), and (3); Article 5; Article 6; Article 7(1), (2) first subparagraph, point (b), and second subparagraph, and (3). However, for the purposes of this Directive, the percentages required by Article 7(2), first subparagraph, point (b) of Directive 2001/86/EC for the application of the standard rules contained in part 3 of the Annex to that Directive are raised from 25 to 33 1/3 per cent; Articles 8, 10 and 12; Article 13(4); and part 3 of the Annex, point (b).

5.2 Negotiating an agreement

If one of the three exceptions to the general rule set out in Article 16(2) apply, as soon as possible after publishing the draft terms of the cross-border merger or agreeing a plan for the merger, the boards of the participating companies must take the necessary steps to start negotiations with the representatives of the companies' employees on arrangements for employee participation in the successor company. One of these steps is the provision of information about the identity of the merging companies, concerned subsidiaries or establishments and the number of their employees (Art. 16.3(a) (A.3.1 Directive 2001/86/EC). There is no reference as to whom this information – often referred to as the 'initiation notice' – should be provided, but given that the requirement to provide information refers to this as a step in the commencement of negotiations with employee representatives, one can assume it should be to them. In practice, this notice is often issued at an earlier stage in an effort to expedite the process and to allow the cross-border merger to be registered.

For the purposes of the negotiations, a special negotiating body ('SNB') must be established that is representative of the employees of the merging companies and 'concerned subsidiaries or establishments'.¹¹ The composition of this body and the procedure for the appointment or election of its members are strictly regulated. Its members should, for example, be elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries and establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State that equals 10 per cent, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together (Art. 3.2(a)(i) of Directive 2001/86/EC). Further additional members from each Member State must be added to ensure that the SNB includes at least one member representing each participating company that is registered and has employees in that Member State and that will cease to exist following the merger.¹² If the number representing such companies is higher than the number of additional seats available pursuant to the above rules, these additional seats will be allocated to companies in different Member States by decreasing order of the number of employees they employ (Art. 3(2)(a)(ii) Directive 2001/86/EC).

It is up to Member States to determine the method to be used for the election or appointment of SNB members who are to be elected or appointed in their own territories. They should ensure, however, that as far as possible at least one member representing each participating company that has employees in the Member State are included (Art. 3(2)(b) Directive 2001/86/EC). Member States may provide that SNB members may include trade union representatives, whether employees or not. If there are no employee representatives in undertakings or establishments through no fault of

11. Art. 2(d) Directive 2001/86/EC defines this as 'a subsidiary or establishment of a participating company which is proposed to become a subsidiary or establishment of the SE upon its formation'.

12. Art. 3(2)(a)(ii) of Directive 2001/86/EC. This is subject to the number of additional members not exceeding 20 per cent of the number designated by virtue of (i), and the composition of the SNB not entailing double representation of the employees concerned.

their own, Member States must provide that the employees have the right to elect or appoint members of the SNB (Art 3(2)(b) Directive 2001/86/EC). The SNB may also invite experts to assist and advise it and they might decide to include, for example, representatives of EU-level trade union organisations (Art. 3(5) Directive 2001/86/EC). Any expenses related to the functioning of the SNB or the negotiations must be borne by the merging companies (Art 3(7) Directive 2001/86/EC).

The SNB takes decisions on the basis of an absolute majority of its members, which must also represent an absolute majority of its employees. Each member has one vote. However, if the result of the negotiations leads to a reduction of participation rights, the majority must be two-thirds of the members of the SNB, representing at least two-thirds of the employees, including the votes of members representing employees employed in at least two Member States (Art 3(4) Directive 2001/86/EC and Article 16(3)(a)).

The SNB and its competent organs are required to negotiate ‘in a spirit of cooperation’ with a view to reaching an agreement on arrangements for employee participation (Art. 4(1) Directive 2001/86/EC. Art 16(3)(b)). That said, the SNB may decide by a two-thirds majority of its members, representing at least two-thirds of the employees, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations and to rely instead on the participation system in force in the Member State where the registered office of the successor company will be situated (Art. 16(4)(b)).

The legislation applicable to the negotiation procedure will be that of the Member State in which the successor company’s registered office is to be situated (Art 6 Directive 2001/86/EC and Art. 16(3)(d)). Negotiations may take up to six months from the establishment of the SNB.¹³ It has been pointed out that this timetable is not always consistent with national legislation and the Report cites the example of Austria, where the law requires that the merger be filed with the registry within nine months of the merger’s effective date (Bech-Bruun and Lexidale 2013: 73).

Ultimately, the employee participation agreement reached after the negotiations should take the form of a written agreement (Art. 3(3) Directive 2001/86/EC). In order to facilitate this agreement, the merging companies must inform the SNB of the plan and the actual process of establishing the new company ‘up to its registration’ (ibid.). The agreement must include: the scope of the agreement; the substance of the participation arrangements, including (if applicable) the number of board members the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights; and the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation (Art. 4(2)(a)(g) and (h) Directive 2001/86/EC and Art. 16(3)(b)). The Standard Rules described below will not apply to this agreement unless they so provide therein (Art. 4(3) Directive 2001/86/EC and Art. 16(3)(b)).

13. Art 5(1) Directive 2001/86/EC and Art 16(3)(c). By joint agreement this period may be extended a further six months.

5.3 Standard rules

All Member States are required to set down Standard Rules on employee participation (Art. 7(1) Directive 2001/86/EC and Article 16(3)(e)). These Standard Rules are different from the national rules on employee participation. They must satisfy the provisions set out in the Annex, Part 3 of which contains provisions on employee participation.

Employees are entitled to elect, appoint, recommend or oppose the appointment of a number of board members that is equal to the highest proportion in force in the participating companies before the merger (Part 3 of the Annex point (b) Directive 2001/86/EC and Art. 16(3)(h)). It is clearly stated, however, that if none of the participating companies was governed by participation rules before the merger, the successor company will not be required to establish provisions for employee participation (*ibid.*).

Directive 2001/86/EC sets out the role of the employee representative body in employee participation. In a cross-border merger, the SNB will be responsible for the allocation of board seats as the successor company will not have a representative body (Tepass 2012: 137–138). It will thus perform the role of deciding on the allocation of board seats among the members representing employees from the various Member States. It will also decide on how employees may recommend or oppose the appointment of those board members according to the proportion of employees in each Member State. If employees of one or more Member State are not covered by this proportional criterion, it must appoint a member from one of those Member States, in particular the Member State in which the successor company's registered office is located, 'where that is appropriate' (Directive 2001/86/EC, Annex, Part 3, point (b) and Art. 16(h)). Unlike Directive 2001/86/EC, where it is expressly referenced, under the Cross-border Mergers Directive the Member States are free to determine the allocation of the seats it is given in the administrative or supervisory board. If the Standard Rules are applied following prior negotiations, notwithstanding these Rules, Member States may determine to limit the number of employee representatives on the administrative organ of the successor company.¹⁴ This would allow a Member State to ensure, for example, that the German participation system (50 per cent employee representatives in the supervisory body of companies with more than 2,000 employees) is not exported to the other Member States.

All the members of the board elected, appointed or recommended by the representative body or the employees will be full members, with the same rights (including voting rights) and obligations as those members representing the shareholders (Directive 2001/86/EC, Annex, Part 3, point (b) and Art. 16(h)).

The Standard Rules of the Member State in which the registered office of the successor company is to be situated will apply in three circumstances. First, Member States may confer on the merging companies the right to choose to apply the Standard Rules

14. Art. 16(4)(c). However, if employee representatives in one of the merging companies constituted at least one-third of the board, the limit should never result in a lower proportion than that.

without any prior negotiation (Art. 16(4)(a)). While the Report describes this option as one that offers 'less stringent protection of employees' (Bech-Bruun and Lexidale 2013: 75), its intention is to allow merging companies to complete the merger quickly and without long-drawn-out negotiations. Such a decision does not need to be confirmed by an SNB but, as Tepass has noted, it does not remove the requirement to create a SNB even if by the time this is done the merger has already been registered (Tepass 2012: 136). Even in this scenario, there are tasks that an SNB will be required to undertake, including, as already stated, the allocation of board seats among the Member States in proportion to the number of employees in each Member State. Where the Standard Rules are applied without negotiation, certain issues that are normally addressed in the agreement remain unresolved. Tepass cites the example of the periodic appointment of employee representatives on boards. As each election will necessitate a new allocation of seats among Member States based on the proportional criteria explained above, the SNB will have to be re-established periodically to fulfil this task. This problem can be avoided in a negotiated agreement by making specific provision for the means of filling these posts.

Secondly, the Standard Rules may be chosen where the SNB and the merging companies agree (Art. 16(3)(e) and Art. 7(1)(a) Directive 2001/86/EC). Unless the parties so agree, it is stated thus that the negotiated agreement will not be subject to the Standard Rules (Art. 4(3) of the Directive 2001/86/EC and Art. 16(3)(b)).

Thirdly, the Standard Rules will also apply if no agreement is reached within the prescribed negotiating period and each of the merging companies agrees to continue with the merger using the Standard Rules, and the SNB has not taken the decision to terminate negotiations (Art. 7(1) Directive 2001/86/EC and Art. 16(3)(e)). The idea here was that negotiating parties would always know that there was an alternative to any proposals put forward and that a failure to agree terms would not lead to a failure of protection. However, this is not necessarily the case and the Cross-border Mergers Directive provides that the Standard Rules will apply only:

- if, before registration of the successor company, one or more forms of participation applied in one or more of the merging companies covering at least 33 1/3 per cent of the total number of employees in all the merging companies; or
- if, before registration of the successor company, one or more forms of participation applied in one or more of the merging companies covering less than 33 1/3 per cent of the total number of employees in all the emerging companies and if the SNB so decides (Art. 16(3)(e) and Art. 7(2)(b) 2001/86/EC).

It is noteworthy that the triggering percentage is higher than the 25 per cent laid down in Directive 2001/86/EC, reducing the protection of employees. In any case, if there was more than one form of participation within the various merging companies, the SNB must decide which of those forms must be established in the successor company. Member States may fix the rules applicable in the absence of any decision on the matter for a successor company registered in their territory (Art. 16(3)(e) Art. 7(2)(b) Directive 2001/86/EC).

It is also important to note that the Cross-border Mergers Directive allows Member States to provide that the Standard Rules will not apply (Art. 16(3)(e) and Art. 7(3) Directive 2001/86/EC). This allows a Member State to remove this fall-back position, potentially distorting the choice available to the negotiators. In such a case, the merger could be registered only if the merging companies and the SNB reached an agreement or if none of the merging companies was subject to a participation system. As Francois and Hick point out,

‘in such a scenario, it is reasonable to assume that the participation rules, if any, in force in the Member State where the registered office of the company resulting from the cross-border merger will be located shall apply. This could result in a reduction in or disappearance of existing participation rights and does not seem to accord with the before-and-after principle.’ (Francois and Hick 2010: 31)

6. Miscellaneous provisions

Member States must provide that SNB members or the representative body are subject to confidentiality rules (Art. 8 Directive 2001/86/EC and Art. 16(3)(f)). They are, however, afforded protection in the exercise of their function in the same way as employee representatives would be protected under national law (Art. 10 Directive 2001/86/EC E, Art. 16(3)(f)).

Member States must ensure that the management of establishments of the successor company and the boards of subsidiaries and participating companies situated within their territories and the employee representatives or employees themselves abide by the obligations of the Cross-border Mergers Directive, regardless of whether or not the successor company has its registered office within its territory (Art. 12(1) Directive 2001/86/EC and Art. 16(3)(f)). Member States must have appropriate measures in place in the event of their failure to do so and in particular to ensure the enforcement of obligations arising from the Cross-border Mergers Directive by way of ‘administrative or legal procedures’ (Art. 12 Directive 2001/86/EC and Art. 16(3)(f)).

In order to preserve the existing employee participation rights under national law and/or practice, Member States may take the necessary measures to guarantee that the structures of employee representation in merging companies that will cease to exist as separate legal entities are maintained after the merger (Art. 13(4) Directive 2001/86/EC and Art. 16(3)(g)).

When the successor company is operating under an employee participation system, it must take measures to ensure that employee participation rights are protected in the event of subsequent domestic mergers for the following three years (Art. 16(7)).

7. Conclusion

This chapter has discussed key characteristics of the Cross-border Mergers Directive, focusing on worker participation. Similar to other pieces of EU legislation involving worker participation issues, the Directive had a long and controversial history prior to its passage in 2005. The focus of the Commission was on encouraging cross-border mergers and removing barriers to their use on the basis that such transactions are, in general, beneficial for the European economy. Worker representatives feared that this might be achieved at a cost to workers by enabling companies to weaken worker participation or avoid it altogether. This could be done by registering the merged entity in a Member State with weak or no requirements for worker participation.

An important development allowing the passage of the Cross-border Mergers Directive was the application of the approach to worker participation adopted in the European Company (SE) legislation, which aims to protect existing worker participation arrangements through a 'before and after' principle, while also defining a procedure for the negotiation of new worker participation arrangements. As noted above, this allowed the Cross-border Mergers Directive to proceed without having to reopen a 'Pandora's Box' and renegotiate the worker participation rules. The attraction of such an approach was obvious; namely, incorporating a level of worker protection that had already been deemed acceptable.

It is clear that the Cross-border Mergers Directive could be improved and that some of the ambiguities in the text could be clarified. The Directive is dauntingly complex and any efforts to render it more accessible and more comprehensible should be welcomed. It would appear that, while there may be a consensus on the need to do this, the timing of any such reform is not so clear-cut. A recent study for the European Parliament observed that the rules are 'overly complex, burdensome, protracted and costly' and contained many points that are 'unclear and/or controversial' (Schmidt 2016: 21). This led the author of the study to conclude that 'it would seem desirable to subject these rules to a thorough review and, subsequently, reform' (ibid.). Despite this finding, the author recommended that such a review be undertaken in the medium to long term rather than the short term as part of the proposed reform of the Cross-border Mergers Directive. This recommendation stemmed from a concern that 'undoing this carefully balanced legislative compromise package could open [Pandora's box] and ... potentially block any reform for years to come' and also that the close connection between the rules in the Cross-border Mergers Directive, Directive 2001/86/EC and Directive 2003/72/EC would mean that reform of the CBMD would have implications for the other two (ibid.). Whether these concerns are real, the deferring of debate and reform will not be feasible indefinitely and at some stage all stakeholders will have to return to the negotiating table.

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