

Chapter 2

Employee participation issues in cross-border mergers: key empirical findings

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1. Introduction

This chapter summarises the results of research done for the European Trade Union Institute on the extent to which worker participation has been an issue under company mergers regulated by the EU Cross-Border Mergers Directive (CBMD). Worker participation in companies merging across borders has been controversial, among other things because of the concern that registration of the merged entity in a Member State with no worker participation requirements could lead to a weakening or circumvention of existing worker rights. This chapter provides important information regarding the way in which worker participation provisions are working in practice in the merger cases covered by the Cross-border Mergers Directive. The research was carried out for the period 2008 to 2012.

Even though mergers at the national level have been possible since the 1970s, for a long time companies in many EU and EEA Member States could not merge with companies based in other countries. From the first Commission proposal for a Directive on cross-border mergers was published in 1984 (Commission to the Council 1985), it took more than 20 years until a solution was found. In 2005, the Cross-border Mergers Directive of Limited Liability Companies was adopted at the EU level (European Parliament 2005). One of the main obstacles to the adoption of this instrument was the issue of employee participation rights, which exist in about two-thirds of EU Member States.

The Cross-border Mergers Directive was supposed to be transposed by all Member States before 15 December 2007. As part of the European Union's quality assurance mechanisms and regulatory oversight, Article 18 of the EU Cross-border Mergers Directive called for a review five years after the final date of transposition 'in light of the experience acquired in applying it'. This review was carried out by Lexidale, an international consultancy firm that operates a research network of expert lawyers, law firms, economists, and scholars in all 31 EU/EEA Member States and Bech-Bruun, a Scandinavian law firm with extensive experience in mergers and acquisitions. Published in September 2013, the study focused on the transposition of the Cross-border Mergers Directive in all EU and EEA Member States (apart from Croatia, which was not part of the EU when the study commenced). In more detail, the study also examined the benefits, difficulties and trends under the Cross-border Mergers Directive and analysed quantitative findings, such as the overall number of cross-border mergers that took place between 2008 and 2012 (Bech-Bruun and Lexidale 2013).

The matter of employee participation was one of the aspects addressed in the study. However, the discussion on that matter relied on qualitative information provided by stakeholders during interviews and on information gathered in the course of the legal research conducted on the transposition of Article 16 Cross-border Mergers Directive into national legislation. Due to the various issues the study had to address, employee participation (along with other matters) was not dealt with in greater depth.

An additional source of information on cross-border mergers and employee participation is a 2013 study conducted by Professor Walter Bayer for the Hans Böckler Foundation. The study analysed cross-border mergers in Germany, identifying German cross-border mergers where employee participation had been determined in accordance with the Article 16 CBMD procedure (Bayer 2013). However, this study focused only on Germany and did not provide further-reaching information on cross-border mergers. As a consequence, despite the information provided in the studies by Lexidale and Bech-Bruun and Professor Bayer, the issue of employee participation in cross-border mergers remains under-researched.

The goal of the present chapter is to provide a comprehensive overview by identifying cross-border mergers in which employee participation has been an issue for a broader range of countries. The basis of the analysis is the merger plans of the merging and the acquiring companies whose registered office are located in Member States with employee participation systems. The countries examined include: Austria, the Czech Republic, Denmark, Estonia, Finland, France, Hungary, Luxembourg, Norway, Poland, Slovenia, Slovakia and Sweden. This research covers the period from 2008 to 2012. In addition, and in reference to Professor Bayer's study, documents for cross-border mergers of merging and acquiring companies whose registered offices are located in Germany were also collected and analysed for this period.

Based on the findings of this research, it is possible to distinguish certain characteristics of companies involved in cross-border mergers in which employee participation has been an issue (see Section 5 below). Section 2 provides a general analysis of the issue of employee participation in cross-border mergers. Section 3 elaborates on the applied methodology and Section 4 examines the findings from the merger plans. Section 5 concludes.

2. Employee participation and the Cross-border Mergers Directive

An important issue in the context of the Cross-border Mergers Directive is the determination of the employee participation rights applicable in a company resulting from a cross-border merger.¹ Article 2(k) of Directive 2001/86/EC on Employee Participation in European Companies defines employee participation as follows:

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

1. See also Chapter 1 in this volume on this issue.

- 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.’

Figure 1 A majority of Member States have an employee participation system



Note: countries with employee participation (light grey), no employee participation (dark grey).
Source: Lexidale.

One reason for the importance of employee participation in cross-border mergers is that this issue is regulated differently among the EU and EEA Member States. Employee participation rights exist in 19 out of 30 Member States.² However, employee

2. Please note that this and the following observations are based on data from Conchon (2011), which has been updated for the purpose of this study by Lexidale country researchers.

participation is not regulated in the same manner in the different countries. For example, in some Member States there is no minimum threshold for the application of employee participation rules, as in the case of Austrian public limited liability companies. In other countries, a minimum number of employees applies, varying from 25 to more than 500 employees (Conchon 2011: 14). Another important difference exists with regard to the number of employee representatives on the company board. This can vary between one representative and half of the company board (parity).

Due to the existing differences between the employee participation systems applicable in the Member States, the concern was raised that cross-border mergers might allow companies to limit the employee participation rights applicable to them. This could, for example, be the case if a German company merged with a company from the United Kingdom. If UK law applied to the successor company, there would be no employee representatives sitting on the supervisory board, even though it was previously required for the German company.

This was also a major obstacle to enacting a directive on cross-border mergers at the EU level, for which a solution was found with the European Company (SE) Regulation in 2001 (Council of the European Union 2001a). The legislative framework for the SE provided a system in which management and employees would negotiate on the content of the employee participation rights applicable after the creation of an SE, or certain standard rules would apply. Those rules were taken over for the Cross-border Mergers Directive, with certain adaptations.

As a general rule, Article 16(1) CBMD provides that the rules on employee participation that shall apply are those of the country in which the company resulting from the cross-border merger has its registered office. However, Article 16(2) CBMD provides for three exceptions:

- (i) One of the merging companies has more than 500 employees and has had an employee participation system for the past six months.
- (ii) If national law after a cross-border merger does not provide for the same level of employee participation as operated in the merging companies.
- (iii) If the applicable employee participation rights discriminate against employees of foreign establishments.

If any of these exceptions apply, either a special negotiating body (SNB) will be formed or the standard rules will apply in accordance with the annex of the SE Directive. Article 16(3) CBMD regulates this procedure with reference to the SE Directive (Council of the European Union 2001b). The main difference between the regime under the SE Directive and the Cross-border Mergers Directive with regard to employee participation is that, for the application of the standard rules, the percentage of employees required to have been previously covered by an employee participation system has been raised from 25 per cent to 33.3 per cent.

3. Methodology

The objective of the study summarised here was to identify cross-border mergers where employee participation was an issue during the period 2008–2012, in the following countries: Austria, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Luxembourg, Norway, Poland, Slovenia, Slovakia and Sweden. These countries were selected together with the European Trade Union Institute and share the existence of employee participation rights as a key characteristic.

In order to be able to identify the relevant cross-border mergers, the merger plans of the merging and the acquiring companies in the above-mentioned countries were collected. The content of a merger plan is regulated by Article 5 CBMD: Article 5(j) CBMD stipulates that the merger plan has to address ‘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 16’. Therefore, the relevant cross-border mergers could be identified on this basis. It should be noted that a small number of merger plans for the period 2013–2014 have also been acquired for Austria. These have been included in the analysis.

The merger plans were analysed in order to identify, first, whether a SNB has been set up or the standard rules were applied and, secondly, whether there has been any impact on employment. In addition, general data were collected on both the merging and the acquiring company as well. These findings are discussed in the next section.

4. Findings

In addition to identifying cross-border mergers in which employee participation has been an issue, this section also analyses the characteristics of relevant cross-border mergers, including: the dates of the merger plans, the location of the registered office of the merging companies, the number of employees, the field of activity, the company forms, the board structures, the mentioned reasons for carrying out the cross-border merger and the impact on employment.

4.1 Overall list of cross-border mergers found in which employee participation was an issue

Overall, 75 cases were identified in which employee participation was an issue in cross-border mergers based on the above-mentioned methodology. In two cases, however, no merger plan could be obtained and in five cases, the national BLER threshold value for the application of the regime was not reached. A total of 68 cases, therefore, should fall under the framework of Article 16 of the Cross-border Mergers Directive and one of three outcomes would have been possible: 1) the standard rules could have been applied unilaterally by management; 2) a SNB could have been created and an agreement concluded; or c) a decision could have been taken by the SNB not to open negotiations and

apply the standard rules instead. It should be stressed that this case selection concerns not only clear cases in which an agreement was concluded between the management and the employees on the content of the employee participation rights after the cross-border merger takes effect (17 cases), as well as 22 cases in which the standard rules were applied unilaterally by management; it also includes fully 25 cases in which the merger plans were not clear as to which of these possibilities was used, or in which the merger plans merely mentioned an expected impact on employee participation arrangements. Moreover, the selection includes cases that can be interesting for a different reason, for example, if it appears from the merger plan that the company carried out a different corporate operation in order to avoid having to undergo the procedure to determine the employee participation rights applicable after the cross-border merger has taken effect. In four cases, BLER would have been applicable, but the works council(s) decided not to open negotiations in the first place.

Table 1 Cross-border mergers in which employee participation was an issue

Acquiring company	Merging company
Aareal Bank AG	Aareal Bank France S.A.
Aktsiaselts Baltem	BCM Baltijas Celtniecibas Masina
Aktsiaselts Baltem	Baltijos Statybinės Masinos
Allianz Global Corporate & Speciality AG	Stanislas H. Haine NV
Allianz Global Investors Europe GmbH	Allianz Global Investors Italia SGR SpA
apetito Aktiengesellschaft	apetito Netherlands Holding B.V.
ARAG SE	Assicurazioni Rischi Automobilistici e Generali S.p.A.
ARAG SE	ARAG SE/ ARAG Compania Internacional de Seguros y Reaseguros SA
ARAG SE	ARAG zavarovanje pravne zascite d.d.
ARAG SE	ARAG SA
ARAG SE	ARAG Nederland, Algemene Rechtsbijstand Verzekeringmaatschappij NV
ARAG SE	ARAG Österreich Allgemeine Rechtsschutzversicherungs-Aktiengesellschaft
Arsonsisi Tallinn OÜ	Oy Arsonsisi Finland Ltd
AS Ramirent	SIA Ramirent
AS Ramirent	AB Ramirent
Asko Appliances Holding AB	AM Kodinkoneet Oy
BAWAG P.S.K.	BAWAG banka d.d.
Benteler Deutschland GmbH	Benteler Finance B.V.
Bertrandt Aktiengesellschaft	Bertrandt Spain S.A.

Acquiring company	Merging company
BMW Bank GmbH	BMW Financial Services Iberica establecimiento financiero de credito SA
Boromont Aktiengesellschaft	Hilti Deutschland GmbH
Citibank Europe plc	Citibank zrt
Citibank Europe plc	CEP Czech Republic
Citibank Europe plc	CEP Poland
Citibank Europe plc	Citibank Slovakia
Citibank Europe plc	Citibank Romania S.A.
COFACE S.A.	Coface Deutschland Aktiengesellschaft
COFACE S.A.	Coface Kreditversicherung AG
Coface SA	Austria Holding AG
Compagnie Francaise d'Assurance pour le Commerce Exterieur (Coface)	Coface Assicurazioni SPA
Danske Bank A/S	Aktsiaselts Sampo Pank
Danske Bank A/S	AB Sampo Bankas
Diesel Denmark ApS	Diesel Finland Oy
Diners Club Sweden AB	Diners Club Finland Oy
Diners Club Sweden AB	Diners Club Norge AS
Eismann Tiefkühl-Heimservice GmbH	EISMANN-Tiefkühl GmbH
Eurocard AB	Europay Norge AS
Evli Securities AS (in dissolution proc.)	Evli Securities IBS AS
Evli Securities AS (in dissolution proc.)	FMI AB Evli Securities
Fresenius SE & Co. KGaA	Calea Nederland NV
Gambro Lundia AB	Gambro
Gjensidige Forsikring ASA	Tennant Försäkringsaktiebolag
Grazer Wechselseitige Versicherung Aktiengesellschaft	Grawe Bulgaria Obshto Zastrahovane EAD
Heidelberg Baltic Finland OU	SIA Heidelberg Latvija
Heidelberg Baltic Finland OU	Heidelberg Lietuva
Heidelberg Baltic Finland OÜ	Heidelberg Finland Oy
ING-DiBa AG	Conifer BV
Kennametal GmbH	Kennametal Österreich GmbH
Kennametal GmbH	Kennametal Czech s.r.o.
MAN Diesel SE	MAN DIESEL A/S

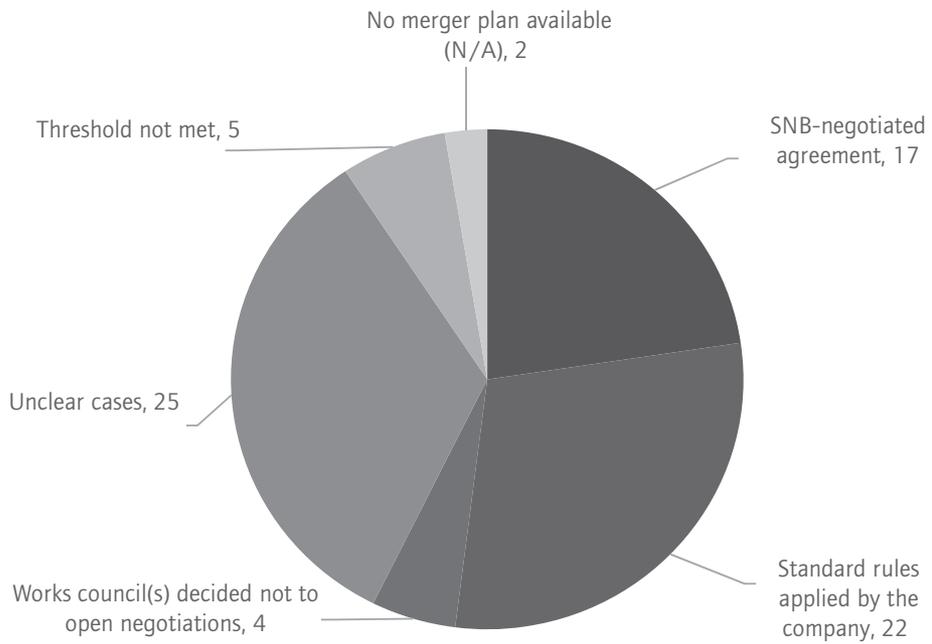
Acquiring company	Merging company
Münchener Rückversicherungs-Ges. AG	Münchener Rück Italia S.p.A
Nokia Sales International Oy	Nokia Svenska AB
Nordisk Handverk AS	Nordic Personnel Solutions ApS
Oxea GmbH	Oxea Hungary kft
Panasonic Marketing Europe GmbH	Panasonic Nordic AB
Procter & Gamble GmbH	Procter & Gamble Austria GmbH
PSI Group ASA	CashGuard AB
QSC AG	Collutio Holding GmbH
RCI Banque SA	RCI Bank GmbH
Rosemount Tank Radar AB	SF Control Oy
Schroder Investment Management (Luxembourg) S.A.	Schroder Investment Management Benelux N.V.
Schroder Investment Management (Luxembourg) S.A.	Schroder Investment Management A/S
SIA "RN Trade"	Baltic Steel Trade OÜ
Siemens Osakeyhtio	AS Siemens
Siemens Osakeyhtio	UAB Siemens
Siemens Osakeyhtio	Siemens SIA
Skandinaviska Enskilda Banken AB	Skandinaviska Enskilda Banken A/S
Skandinaviska Enskilda Banken AB (publ)	SEB Privatbanken ASA
Skandinaviska Enskilda Banken AB (publ)	SEB Gyllenberg Private Bank Ab
StarFox Agents OU	CV Keskus AS
StarFox Agents OU	CV Rinka
StarFox Agents OU	CV Türgus
Teller A/S	Teller AS
UniCredit Bank AG	UniCredit CAIB AG
WestLB AG	WestLB (Italia) Finanziaria S.p.A.

Source: T. Biermeyer, M. Meyer and Lexidale

4.2 Date of merger plans of relevant cross-border mergers

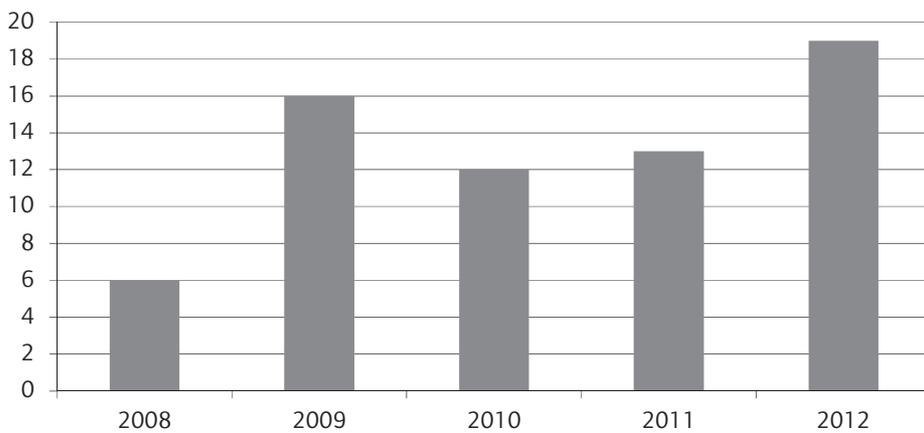
No clear trend is visible concerning the years in which the merger plans of cross-border mergers involving employee participation were registered. It can be noted only that the lowest number (six cross-border mergers) occurred in 2008 and the highest number in 2012 (19).

Figure 2 Realisation of board-level participation rights in the CBMs examined



Source: T. Biermeyer, M. Meyer and Lexidale.

Figure 3 Cross-border mergers in which employee participation was an issue, by year of the merger plan (2008–2012)



Note: information available for 66 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

4.3 Location of registered office of the companies involved in relevant cross-border mergers

The second issue examined was the location of the registered office of the acquiring company and the merging company involved in the relevant mergers. With regard to the acquiring companies (see Table 2), there is a clear trend that most located their registered office in Germany (26 companies in total) and therefore that employee participation was most often an issue when a foreign company merged into a German company. The countries with the most acquiring companies after Germany were Estonia (13), Sweden (9) and France (5), followed by Ireland (4), Finland (4) and Denmark (4). Norway has three acquiring companies and Austria and Luxembourg each had two acquiring companies with their registered office in their country. Liechtenstein and Latvia had one acquiring company each with its registered office in their territory.

Table 2 Location of registered office of the acquiring company of relevant cross-border mergers

Germany	26
France	5
Finland	4
Estonia	13
Denmark	4
Austria	2
Sweden	9
Norway	3
Luxembourg	2
Liechtenstein	1
Latvia	1
Ireland	5
Total	75

Note: information available for all 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

The situation is different if one looks at the location of the merging companies' registered office (see Table 3). The country in which most merging companies were located is Austria (8); followed by Finland, the Netherlands and Lithuania with 7 companies; and Latvia with 6 companies; Italy with 5 companies; Denmark, Estonia, Norway and Sweden with 4 companies; and Germany, Slovenia and Spain with 3 companies; Belgium, Czech Republic and Hungary with 2 companies; and France, Poland, Bulgaria and Romania with one company each.

Table 3 Location of registered office of merging companies of relevant cross-border mergers

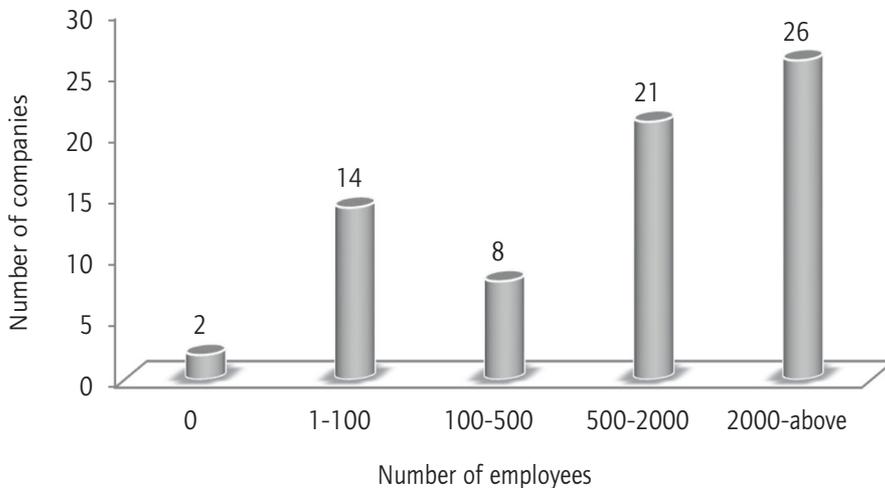
Austria	8	Italy	5	Slovenia	3	Hungary	2
Finland	7	Denmark	4	Spain	3	Poland	1
Lithuania	7	Norway	4	Germany	3	France	1
Netherlands	7	Estonia	4	Czech Republic	2	Bulgaria	1
Latvia	6	Sweden	4	Belgium	2	Romania	1

Note: information available for all 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

4.4 Number of employees involved

A further issue examined was the number of employees in the merging companies. It should be stressed that not all companies provided this information. Again, the data can be split up between acquiring companies and merging companies. Information was acquired for 70 of the acquiring companies and for 51 of the merging companies. As can be seen from Figure 3, most acquiring companies had more than 2,000 employees (26). This was followed by companies with 500 to 2,000 employees (21). 14 companies had between 1 and 100 employees and 8 companies, finally, had between 100 and 500 employees. Noteworthy is the fact that there were also 2 companies involved in relevant cross-border mergers with no employees.

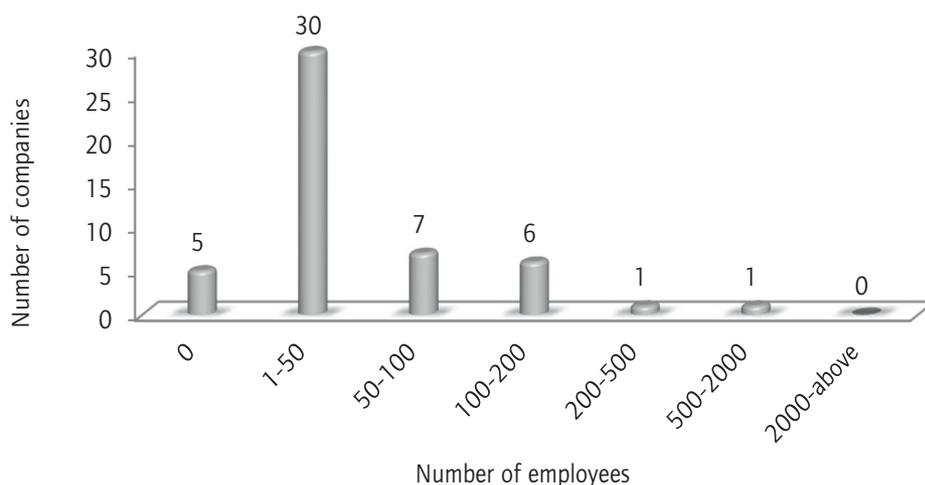
Figure 4 Number of employees of acquiring companies in relevant cross-border mergers

Note: information available for 70 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

The situation is different when comparing the acquiring companies with the merging companies (Figure 4). The trend is that the merging companies have fewer employees than the acquiring companies. For example, there was no merging company with more than 2,000 employees and only one company with more than 500 employees. Most companies had between 1 and 50 employees (30). Moreover, seven of the merging companies had between 50 and 100 employees, six between 100 and 200 employees and one had 200–500 employees and another 500–2,000 employees. Also noteworthy is the fact that, according to the information in the merger plans, five of the merging companies did not have any employees.

Figure 5 Number of employees of merging companies in relevant cross-border mergers



Note: information available for 50 out of 75 mergers.
 Source: T. Biermeyer, M. Meyer and Lexidale.

4.5 Field of activity of companies involved

Further information examined was the field of activity of the companies involved. These data not only stem from the merger plan but were complemented where necessary and if available by public information. Moreover, it should be stressed that the information only includes the activity of the companies involved and not the group of companies of which the company is a part. To provide an example: a company could be in a company group whose overall activity is manufacturing, but the company in question may have as its activity the management of companies. In this case, the activity is the management of companies and not the manufacturing of goods.

As a result, slightly more than half of the relevant cross-border mergers were carried out in financial and insurance activities (55 per cent). Other prominent areas are wholesale and retail trade (16 per cent) and manufacturing (14 per cent). Further relevant fields were the management of companies, telecommunications, professional, scientific and technical services and other service activities.

Table 4 Main sector of companies involved

Financial and insurance activities	55%	Telecommunications	3%
Wholesale & retail trade	16%	Management of companies and enterprises	3%
Manufacturing	14%	Other service activities	3%
Professional, scientific and technical services & other service activities	4%	Manufacturing and other service activities	1%

Note: information available for 73 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

4.6 Company legal forms involved

When analysing the company law forms of the companies in the relevant cross-border mergers, the clear trend was that most were public limited liability companies. The situation is the same for merging and acquiring companies; 50 (or 67 per cent) of the acquiring companies and 39 (or 55 per cent) of the merging companies were public limited liability companies; 24 of the acquiring and 30 of the merging companies were private limited liability companies. One of the acquiring and two of the merging companies were of a different company law form.

4.7 Company relationships

Another characteristic examined with regard to the relevant cross-border mergers was the relationship between the acquiring and the merging company. Two aspects have been analysed: first, the relationship between the two companies and, secondly, whether both companies belonged to the same company group.

As to the relationship between both companies, it can be noted that in the vast majority of cases the acquiring company held all shares of the merging company (68 per cent of cases). In 6 per cent of the cases, both companies were subsidiaries of the same company and in 24 per cent of cases they were subsidiaries in the same company group, but not of the same company. In one case, it can be inferred from the information in the merger plan that the companies did not have a formal link; they neither held shares in one another nor belonged to the same company group.

A second aspect considered was whether the companies belonged to the same group. The reason for also examining this aspect was that companies that hold each other's shares do not necessarily have to be part of a company group. It should be noted that the data gathered do not constitute a formal definition of a company group but are based on information from the merger plan. This means that a cross-border merger was counted as having taken place within the same group of companies if the merger plan explicitly provided this information. The finding is that, in all but one case, the companies involved belonged to the same company group.

Table 5 Company relationship between merging firms in relevant cross-border mergers

Acquiring company holds all shares of merging company	68%	Subsidiaries in the same company	6%
Subsidiaries in the same group	24%	Not linked	2%

Note: information available for 50 out of 75 mergers.

Source: T. Biermeyer, M. Meyer and Lexidale.

4.8 Multiple cross-border mergers

One key finding of this study is the fact that the Cross-border Mergers Directive is used frequently by corporate groups for corporate restructurings through multiple cross-border mergers. This is interesting insofar as several legal entities in different jurisdictions and hence different employee participation regimes are affected. Such restructurings by means of the Cross-border Mergers Directive can potentially have an impact on a large number of employees.

Fifteen mergers were identified in which several companies were merged simultaneously. These were the mergers within the ARAG SE group, Coface SA and Kennametal GmbH, which merged with its Austrian and Czech subsidiaries, and Citibank Europe. Another multiple merger was carried out by Heidelberg Baltic Finland with its subsidiaries in Lithuania, Latvia and Finland. It is worth noting here that among the multiple mergers identified, a substantial number were conducted by companies in the financial sector (four out of fifteen).

4.9 Impact of cross-border mergers involving employee participation on employment

Article 5(d) of the Cross-border Mergers Directive requires companies to provide information on the repercussions for employment. As a general trend, in 57 out of 59 cases in which this information was provided, the companies stated that there would not be any negative effect on employment. In the merger of Procter & Gamble GmbH and Procter & Gamble Austria GmbH, it was stated that the cross-border merger would not have an impact on employment directly, although, due to a general cost cutting programme, the number of employees might be reduced. In the merger between Rosemount Tank Radar AB and SF Control Oy, it was noted that '[t]he end assembly of the LevelDatic product was transferred from Finland to Rosemount Tankradar AB's production unit in Gothenburg before the merger and does not otherwise affect the production process.' PSI Group ASA and CashGuard AB provided a positive outlook by stating that the company's ambition for growth will create new opportunities for highly qualified employees.

Table 6 Cross-border mergers involving multiple merging companies

Acquiring company	Merging companies
ARAG SE (Germany)	<ul style="list-style-type: none"> – Assicurazioni Rischio Automobilistici e Generali S.p.A. (Italy) – ARAG Compania Internacional de Seguros y Reaseguros SA (Spain) – ARAG zavarovanje pravne zascite d.d. (Slovenia) – ARAG SA (Belgium) – ARAG Nederland, Algemene Rechtsbijstand Verzekeringmaatschappij NV (Netherlands)
Coface SA (France)	<ul style="list-style-type: none"> – Coface Kreditversicherung AG (Germany), – Coface Assicurazioni SPA (Italy) – Austria Holding AG (Austria)
Heidelberg Baltic Finland OÜ (Estonia)	<ul style="list-style-type: none"> – SIA Heidelberg Latvija (Latvia) – Heidelberg Lietuva (Lithuania) – Heidelberg Finland Oy
Kennametal GmbH	<ul style="list-style-type: none"> – Kennametal Österreich GmbH – Kennametal Czech s.r.o
Citibank Europe (Ireland)	<ul style="list-style-type: none"> – Citibank zrt (Hungary) – CEP Czech Republic – CEP Poland – Citibank Slovakia – Citibank Romania S.A.
Aktsiaselts Baltem (Estonia)	<ul style="list-style-type: none"> – Baltijas Celtniecības Masina (Latvia) – Baltijos Statybinės Masinos (Lithuania)
AS Ramirent (Estonia)	<ul style="list-style-type: none"> – SIA Ramirent (Latvia) – AB Ramirent (Lithuania)
Danske Bank A/S (Denmark)	<ul style="list-style-type: none"> – Aktsiaselts Sampo Pank (Estonia) – AB Sampo Bankas (Lithuania)
Diners Club Sweden AB (Sweden)	<ul style="list-style-type: none"> – Diners Club Finland Oy (Finland) – Diners Club Norge AS (Norway)
Evli Securities AS (Estonia)	<ul style="list-style-type: none"> – Evli Securities IBS AS (Latvia) – FMI AB Evli Securities (Lithuania)
Schroder Investment Management (Luxembourg) S.A. (Luxembourg)	<ul style="list-style-type: none"> – Schroder Investment Management Benelux N.V. (Netherlands) – Schroder Investment Management A/S (Denmark)
Siemens Osakeyhtio (Finland)	<ul style="list-style-type: none"> – AS Siemens (Estonia) – UAB Siemens (Lithuania) – Siemens SIA (Latvia)
Skandinaviska Enskilda Banken AB (Sweden)	<ul style="list-style-type: none"> – Skandinaviska Enskilda Banken A/S (Denmark) – SEB Privatbanken ASA (Norway)
StarFox Agents OU (Estonia)	<ul style="list-style-type: none"> – CV Keskus AS (Estonia) – CV Rinka (Lithuania) – CV Turgus (Latvia)

Source: T. Biermeyer, M. Meyer and Lexidale.

In two cases, it was stated that the merger would negatively affect employment. In the merger between BAWAG P.S.K. and BAWAG Banka d.d., it was stated that '[t]he acquiring company has ca. 4,150 employees. The merging company has 19 employees at the moment. However, a major part of those employment relations will end based on an agreement with the employees on 21.12.2012.' The merger plan for UniCredit Bank AG and UniCredit CAIB AG stated that, as part of the merger, a restructuring would be carried out, which would lead to job losses.

4.10 Companies that applied the procedure under Article 16 of the Cross-border Mergers Directive

We shall now look more closely at the cases in which employee participation was an issue. They can be divided into two kinds of case: those in which the procedure under Article 16 CBMD was applied and those in which it was not, but which are relevant for a different reason. The first category comprises agreements concluded on employee participation as provided for in Article 4 of the SE Directive and standard rules provided for under Article 16 CBMD and the Annex to the SE Directive. The second category comprises cases that are interesting for a variety of reasons: for example, in a number of cases, the merger plan stated that the Article 16 CBMD procedure would be applied. However, it was not stated whether a special negotiating body would be established that would negotiate on the content of employee participation rights after the cross-border merger takes effect, or whether the standard rules would be applied. Other cases reflect that companies carried out other corporate transactions to circumvent the application of the Article 16 CBMD procedure, and so on.

As a general conclusion, it can be stated that in 40 of the 75 cross-border mergers, either the employees negotiated on employee participation rights or the standard rules were applied. Thirty five cases were relevant for another reason. In 22 cases out of the 40 cases in which one of the two possibilities under Article 16 CBMD was used, the standard rules were applied. In 18 cases, the merger plans provided that the employees would negotiate on employee participation rights after the cross-border mergers. Considering this result, it appears that management uses its option to apply the standard rules immediately, as provided for in Article 16(4)(a) CBMD, in about half of the cases.

As stated above, 35 cases were identified that were relevant, but cannot be put in the category of the Article 16 CBMD procedure. In one type of case the information provided in the merger plan was not sufficiently clear. There are a number of cases in which it was not stated whether the standard rules were applied or whether the employee participation rights would be negotiated. A second type includes cases in which no specific information was given at all. For example, in the merger of SIA 'RN Trade' and Baltic Steel Trade OÜ, it was stated in the merger plan that participation of employees of the merging company in the management of the acquiring company takes place as provided for under §41² of the Estonian Community-scale Involvement of Employees Act. §41 of this Act,² however, is so broad that the consequences remain unclear. In other mergers, such as in the case of Siemens Osakehitiö/AS Siemens, it is stated that the merger does not have an impact on employee participation. However, at the same

time it is stated that the employee representation system will be agreed upon together with the employees' representatives.

Other cases, such as the merger between BMW Bank GmbH and BMW Financial Services Iberica establecimiento financiero de credito SA are important because employee participation rights were not determined during the cross-border merger. Even though the acquiring company would have fallen under German employee participation rules, those were not used by the employees. The cross-border merger of Grazer Wechselseitige Versicherung Aktiengesellschaft and Grawe Bulgaria Obshto Zastrahovane EAD is also noteworthy. The merger plan provides that the cross-border merger falls under employee participation and that the employee representation was asked to form a special negotiating body. However, the Austrian general works council decided not to do so because the merger would not affect existing employee rights and in Bulgaria, the location of the merging company, employee participation does not exist and the works council maintains its rights.

Also interesting are the Finnish cases, such as Nokia Sales International Oy/Nokia Svenska AB. The merger plan provides: 'The merging company is bound by collective bargaining agreement entered into between Almega and certain trade unions. The merging company must summon the unions and negotiate the merger before any decision is made. However, the unions do not have any real influence over the decision.'

A similar case is Panasonic Marketing Europe GmbH and Panasonic Nordic AB. In this case, the merger plan provides that the acquiring company does not have employee participation because it has fewer than 500 employees. Also after the merger, the number of employees will be lower than 500. The merging company had a right to employee representation, but did not make use of it. Moreover, the merger is subject to the Swedish Codetermination at Work Act, which provides for a right of negotiation for the employees' unions. The unions approved the decision.

The merger between RCI Banque SA and RCI Bank AG should also be highlighted. The Austrian company was converted into a company with limited liability (*Gesellschaft mit beschränkter Haftung nach österreichischem Recht*) on 16 March 2011. The rationale for this was that for public limited liability companies, there is no threshold for the application of the employee participation rules in Austria. That means the RCI Bank fell under those rules and would have had to follow the Article 16 CBMD procedure. However, before the merger, RCI Bank AG converted into a private limited liability for which a threshold of 300 employees exists in order to fall under the Austrian employee participation regime. As the merger plan states: 'therefore the Austrian rules concerning employee participation are no longer applicable'.

Finally, the MAN Diesel SE and MAN DIESEL A/S merger is also interesting. In this case, the SE agreement of MAN Diesel SE already regulates restructurings such as cross-border mergers and therefore the companies did not apply Article 16 CBMD.

5. Conclusion

The study summarised above provides important information on the EU cross-border mergers in which employee participation has been an issue. The first set of information regards the type of companies involved in cross-border mergers. First of all, acquiring companies tend to be large companies (two-thirds of them have more than 500 employees) whereas the merging companies are almost all small or medium sized (between 1 and 200 employees). Secondly, most of the acquiring companies were established in Germany, whereas the merging companies were not concentrated in a specific country. A slight majority of merging companies were in the financial services industry (banking, insurance, investment) and the rest mainly in the manufacturing or wholesale and trade sector.

Most significantly, in a large majority of cases the merging company is already fully owned by the acquiring company and in over 90 per cent of the cases both companies belong to the same group. As a consequence, also in cases involving an employee participation issue, the cases concern inter-group restructurings. In only one case did a cross-border merger take place between independent companies. This suggests that the cross-border merger is being used almost completely for in-house restructuring, rather than for cross-company restructuring, as originally foreseen by the Directive.

A significant information right provided to workers is the right to information in the merger plan about the anticipated employment impact of the merger. This right is important because the literature on mergers and acquisitions shows that, in many cases, restructuring leads to adverse impacts on employment. However, the vast majority of cases analysed here show that the companies claimed that the cross-border merger would have no impact on employment. This suggests that either the cross-border mergers do not lead to significant restructuring, or that the impact on employment levels is indirect or long-term in this kind of merger.

With regard to employee participation, the analysis suggests that it is not dealt with as originally intended in the Cross-border Mergers Directive. In only 40 of the 75 cases analysed was the Article 16 provision on worker participation clearly applied. In the other 35 cases Article 16 was not applied, for a variety of reasons. This suggests that the procedures for ensuring that worker participation is respected should be strengthened. With regard to the procedure for determining employee participation, in somewhat over half the cases in which Article 16 was clearly applied (22 of 40 cases) the standard rules were unilaterally imposed by management. In less than half of the cases (18 of 40) was an SNB established for the negotiation of worker participation.

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