

Chapter 6

Austria

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1. Introduction

The national implementation of the Directive on the cross-border mergers of limited liability companies (2005/56/EC, hereafter the Cross-border Mergers Directive) was carried out in Austria without major controversy. The Directive was transposed in two separate legal acts. The provisions concerning the employee participation system (Art. 16 Cross-border Mergers Directive) have been incorporated into the Employment Constitution Act (*Arbeitsverfassungsgesetz*). The Directive was generally interpreted favourably for employee participation. In particular, a special negotiating body (SNB) has to be established, which consists of the employee representatives of the participating companies and is supposed to decide on the distribution of seats and the delegation of employee representatives to the supervisory or management board. Employees' participation rights are protected in the event of subsequent domestic mergers for a period of five years after the cross-border merger has taken effect.

Holding, investment and financing companies, which usually have only a few employees, are the primary targets of cross-border mergers. Frequently, smaller subsidiaries in a group are also merged, especially in the banking and insurance sectors. In contrast, larger operating companies with a substantial number of employees are affected only in a few cases. In the period 2008–2012, Austria had a negative cross-border merger balance (93 outbound versus 70 inbound mergers). Since 2015 the total number of mergers has recovered and reached pre-crisis levels.

2. National background

In Austria the transposition of the Cross-border Mergers Directive was split up into two parts. The basic elements of the Directive have been transposed into national law in the EU Merger Act (*EU-Verschmelzungsgesetz*, or EU-VerschG), which came into effect in December 2007. Furthermore, Article 16 of the Cross-border Mergers Directive, which regulates the determination of the employee participation system, has been included in the Employment Constitution Act (*Arbeitsverfassungsgesetz*) through the introduction of a special section (Part III). The Ministry of Justice was responsible for transposition of the parts regarding company law and the Ministry of Economy and the Ministry of Labour for those on employee participation. The ministries organised working groups

in which the social partners (the Chamber of Commerce, the Federation of Austrian Industrialists, the Austrian Trade Union Federation and the Chamber of Labour) were involved. From an Austrian perspective implementation of the Cross-border Mergers Directive was carried out without major controversy. Although there was a difference of opinion between the social partners in terms of the implementation of Article 16 (employee participation), ultimately the Chamber of Labour and the Trade Union Federation, ÖGB, were able to convince the Ministry of Labour to adopt the trade union's position (see below).

In principle, two types of cross-border merger can be distinguished: inbound and outbound. In the case of an inbound merger the company resulting from the merger is subject to Austrian law; in the case of an outbound merger the resulting company is subject to a foreign Member State's law. In Austria, private limited companies (GmbHs), public limited companies (AGs) and companies with the *Societas Europea* (SE) legal form may be involved in cross-border mergers. The law does not restrict cross-border mergers to companies that share the same legal form. However, the authorities must check whether the desired merger combination is allowed under the national law covering the merging partner. Cooperatives, private foundations, savings banks and partnerships are not within the scope of the new law.

Company lawyers claim that the demand for cross-border mergers is increasing constantly. Combined with the effect of universal succession (transfer of all assets and liabilities to the acquiring company, including all contractual relationships, such as employment agreements) and the principle of tax neutrality, the cross-border merger offers some benefits for the businesses, such as simplifying legal and administrative structures, minimisation of risk, freeing up of cash and cost reduction. They argue that cross-border mergers are attractive for multinational companies with several corporate entities spread across Europe that want to restructure the group, and also for companies interested in transferring their registered seat to another EU country (Fabian 2014). In the latter case a company establishes a new subsidiary registered in another EU country and afterwards merges with that subsidiary. Since the EU has not passed a directive on the cross-border transfer of registered office, the cross-border merger is often used as a substitute.

From a trade union perspective there does not seem to have been a substantial increase in the number of cross-border mergers and worker participation seems to be a non-issue in most cases. Only a few shop stewards have contacted the Chamber of Labour or the trade unions asking for advice on this issue. In the cases involving large cross-border mergers (for example, bwin/Party Gaming and Intercell/Vivalis) worker participation was not an issue due to the absence of works councils in the companies concerned. This means that trade unions in Austria have little practical experience regarding cross-border mergers. The trade unions are convinced that such mergers are largely used as a restructuring tool within multinational corporations (that is, for internal reorganisation) and as a tool to transfer the registered seat to another EU country.

3. National implementation

3.1 Procedure for a cross-border merger

Procedurally, a cross-border merger involving an Austrian company corresponds in many ways to a domestic merger. However, the protection of creditors and the rights of shareholders opposing the merger are stronger for outbound cross-border mergers than for domestic ones. And the protection of employees in cross-border mergers differs from that in domestic mergers. Regarding company law, the Cross-border Mergers Directive has been transposed into national law as follows:

- Merger partners have to draw up a merger plan, the specifics of which are regulated by law (for example, details of the exchange of securities or shares; consequences for employment and employee participation, description of procedure governing employee participation at the merged company and so on). Management is responsible for drawing up these documents. Normally the managements of the involved companies cooperate when preparing the common draft terms. The draft terms of merger have to be filed with the Commercial Register and must be submitted to the shareholders one month prior to the shareholders' meeting.
- A management report for the merging companies must explain the legal and economic aspects of the merger (for example, share exchange ratio and valuation of the merging companies) and the implications for creditors, employees and employee representatives; this report must be sent to employee representatives or to the employees themselves at least one month prior to the general meeting which decides on the cross-border merger. This may be a joint report by the managers of the companies involved. The report, which must include the annual financial statements for the past three years of all companies involved, also has to be made available at the business premises during the month prior to the shareholders' meeting.
- An independent expert (auditor) appointed by the court must review and report on the share exchange ratio in particular. This report must be available for viewing at the business premises one month prior to the shareholders' meeting. The expert report is not required when all shareholders of all companies involved in the cross-border merger waive this right at the shareholders' meeting. Furthermore, the expert report is not required when the transferring company is a wholly owned subsidiary.
- At the shareholders' general meeting at least 75 per cent of the capital present must approve the cross-border merger. A notary must be present and is responsible for writing up the protocol. There are some exemptions for the approval of the merger by the general meeting, for example when the acquiring company holds all of the shares in the transferring company.
- The agreement on employee participation, or alternatively a declaration of non-negotiation, has to be included with the application to the Commercial Register.
- The merger must then be entered in the Commercial Register. In case of an outbound merger the Companies Register Court examines the merger according to national legal provisions and issues a certificate of legality. This certificate and other documents have to be presented to the commercial registry responsible for the acquiring company. After an examination of all the documents and entry in

the commercial register of the acquiring company the merger legally takes effect. In case of an inbound merger the cross-border merger becomes legally effective upon its registration in the Austrian Companies Register.

The consequences of the merger are that all assets and liabilities of the company being dissolved, including all contractual relationships, such as employment agreements, are transferred to the company resulting from the merger by way of universal transfer; the transferring companies cease to exist without liquidation and are de-registered in the Austrian Companies Register; shareholders in the dissolved companies become shareholders in the company resulting from the merger.

3.2 Special protection for minority shareholders and creditors

For outbound mergers, shareholders opposing the merger have an exit right to reasonable cash compensation. Within a period of one month, the shareholders have to accept the offer. Minority shareholders objecting to the merger in the shareholders' meeting have the right to initiate court proceedings to scrutinise the appropriateness of the compensation offered. Furthermore, for outbound mergers, creditors of an Austrian transferring company have the right to demand security or payment for already existing claims. This ex-ante protection of creditors' claims does not apply to domestic mergers.

Austrian law does not allow cross-border mergers that include cash payments of more than 10 per cent of the nominal value (even though Art. 3.1 of the Directive allows cash payments to exceed 10 per cent). This means that in case of an inbound merger an additional cash payment of more than 10 per cent of the nominal capital equal to the shares granted by the company is not permitted.

3.3 Employee participation

The Austrian system of employee participation allows the works council to appoint one-third of the company's supervisory board members. There have been some controversial differences of opinion between the social partners regarding employee participation. It is a success for the trade unions that the Cross-border Mergers Directive was generally implemented in a manner favourable for employee participation.

The general principle applied by the Cross-border Mergers Directive is that employees' rights of participation are governed by the national laws of the transferee company (in this case, Austria), unless:

- one of the merging companies has employed more than 500 employees, on average, in the six months before publication of the draft terms and such a company has a security stem of employee participation in place; or
- Austrian law does not provide for the transferee company to offer at least the same level of employment participation as existed at the merging companies prior to the merger; or

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- employees working in business operations of such a company in another Member State are not provided with the same employee participation rights as employees in Austria.

Austria has transposed all exemptions into a new special section of the Austrian Employment Constitution Act (Part III). In such situations the procedure for employee participation (Art. 16 par 3e) relies on the SE Regulation and SE Directive. Austria has transposed Art. 16 par 3e in line with the Cross-border Mergers Directive and the minimum percentage of employees required has been raised to one-third (SE Directive: 25 per cent).

The implementation of Art. 16 par 4a ('Member States shall confer on the relevant organs of the merging companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation') into national law was of particular importance; §261 which regulates Art. 16 par 4a contains the following provisions:

- Employees or their representatives shall be informed immediately if management decides not to hold negotiations; in particular, management shall provide detailed information on the companies and workplaces involved, the number of employees and details of existing worker representative bodies in these companies and workplaces.
- A special negotiating body (SNB) has to be established; the Austrian members of the SNB shall be appointed through a resolution by the works council. The invitation to the constituent meeting of the SNB can be made by each of its members.
- The SNB is responsible for deciding on the distribution of seats and on the appointment of employee representatives to the supervisory or management board. The appointment of Austrian employee representatives is made by the works council. The delegation of representatives from other Member States is a matter for each individual country and depends on their legislation. The SNB is responsible for the nomination of delegates only in cases where a Member State does not have legal provisions with regard to the delegation of employee representatives to the supervisory or management board.
- In case of a structural change in the company that affects the composition of the delegation the SNB has to take a new decision on the distribution of seats in the supervisory or management board and, if necessary, on the appointment of employee representatives.
- For the SNB some provisions of the SE transposition apply, including the constitution of the SNB, the holding of meetings, the taking of decisions, the bearing of costs, the duty of confidentiality and the rights of employee representatives.

Other important provisions in the national implementation include:

- Art. 16 par 4c allows Member States to limit the proportion of employee representatives in the administrative organ in particular circumstances. This provision was not transposed.

- Art. 16 par 7 states that, when the company resulting from the cross-border merger is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of subsequent domestic mergers for a period of three years after the cross-border merger has taken effect. The representatives of the Chamber of Labour and the Austrian Trade Union Federation argued that the period of three years is a minimum period and not a fixed period, because the European legislator is not authorised to regulate national company law and therefore it is within the competence of the national legislator to go beyond the three years. Art. 16 Par 7 has been transposed in §262 (*Arbeitsverfassungsgesetz*). According to §262 employees' participation rights are protected in the event of subsequent domestic mergers for a period of five years.
- §260 Par 5 states that employee representatives on the board can have one week of additional training without loss of wages if the company has establishments in at least two Member States.

The Austrian legislator did not find a solution to the question of who should appoint Austrian members of the SNB if none of the Austrian companies involved has a works council. This problem was already discussed in the context of the transposition of the SE Directive without any result.

4. Statistical data

Figures going up to 2015 show that the total number of mergers, both national and cross-border, dipped in the wake of the financial crisis in 2009/2010 but has since recovered to pre-crisis levels.

Statistical data on cross-border mergers differ considerably by source. According to a study by Bech-Bruun and Lexidale (2013) 128 Austrian companies (both merging and acquiring companies) were involved in cross-border mergers in the period 2008–2012. In comparison with other Member States, Austrian cross-border merger activity appears to be above the EU average. When splitting up the companies into merging versus acquiring companies, the data show that more merging companies (70) than acquiring companies (58) have been involved in cross-border mergers in Austria, giving it a negative cross-border merger balance.

Another data source (cross-border mergers taking place between 2008 and 2012 listed in the company register) provided by the Ministry of Justice and evaluated by the author shows a somewhat different result: 188 Austrian companies (both merging and acquiring companies) were involved in a cross-border merger in the period 2008–2012. According to this source, inbound and outbound mergers balance each other exactly; in the observation period, 94 outbound mergers and 94 inbound mergers took place in Austria. However, 24 inbound mergers and one outbound merger are due to a single property management company, Octopus Liegenschaftsverwaltungsgesellschaft m.b.H. This company initially acquired 24 companies, most of which were registered in Gibraltar and England (Lancaster), and was then merged back into a company registered

in England (Lancaster). This example shows very clearly that cross-border mergers are carried out mainly for tax reasons. Holding, investment and financing companies, which usually only have a few employees, are therefore the primary targets. Often, smaller group units are merged, especially in the banking and insurance sector. In contrast, operating companies with a larger number of employees are affected only in a few cases. Excluding the property management company Octopus, there is a negative cross-border merger balance in Austria (93 outbound mergers versus 70 inbound mergers).

The following cross-border mergers are worth mentioning. Among the outbound mergers:

- Coface Austria Holding AG was merged with Coface SA (France);
- ARAG Österreich Allgemeine Rechtsschutzversicherungs-Aktiengesellschaft was merged with ARAG SE (Germany);
- bwin Interactive Entertainment AG was merged with PartyGaming Plc (Gibraltar);
- Procter & Gamble Austria GmbH was merged with Procter & Gamble GmbH (Germany);
- EISMANN Tiefkühl-Service GmbH was merged with Eismann Tiefkühl-Heimservice GmbH (Germany).

Among the inbound mergers:

- Austrian BMW distribution GmbH (retail) was merged with BMW Polska and BMW Hungary;
- Borealis AG was merged with Borealis A/S (Copenhagen);
- Egger Holzwerkstoffe GmbH was merged with Egger Industrieentwicklungs GmbH (Germany);
- BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft was merged with BAWAG banka (Slovenia);
- Grazer Wechselseitige Versicherung Aktiengesellschaft was merged with Grawe (Bulgaria).

Almost 65 per cent of the outbound mergers were with acquiring companies registered in Germany; in contrast, for inbound mergers, only 29 per cent of the inbound mergers were with merging companies registered in Germany.

5. Conclusion

From an Austrian perspective the implementation of the Cross-border Mergers Directive was carried out without major controversy, since the procedures involved in cross-border mergers correspond in many ways to those for domestic mergers. Austria has chosen a separate law for the transposition of the company law parts of the Cross-border Mergers Directive (*EU-Verschmelzungsgesetz*). The law came into effect in December 2007. The provisions concerning the employee participation system (Art. 16 Cross-border Mergers Directive) have been transposed into the Austrian Employment Constitution Act (*Arbeitsverfassungsgesetz*).

It is a success of the trade unions that the Cross-border Mergers Directive was interpreted in favour of employee participation. Employees' participation rights are protected in the event of subsequent domestic mergers for a period of five years after the cross-border merger has taken effect. If the management has decided not to hold negotiations (if the standard rules for participation are used), a special negotiating body (SNB) has to be established. The delegation of the Austrian employee representatives is carried out by the works council. The delegation of representatives from other Member States depends on their national legislation. The SNB is responsible for deciding on the distribution of seats and on the delegation of employee representatives to the supervisory or management board.

Statistical data (2008–2012) show very clearly that cross-border mergers are carried out mainly for tax reasons. Holding, investment and financing companies, which usually have only a few employees, are primarily affected by cross-border mergers. Furthermore, smaller group units are merged, especially in the banking and insurance sector. In contrast, operating companies with a larger number of employees are affected only in a few cases. Therefore, worker participation seems to be a non-issue in most cases. According to the statistical data, in the time period 2008–2012 Austria had a negative cross-border merger balance (93 outbound mergers versus 70 inbound mergers).

References

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