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Corporate Mobility – The Involvement of Employees

by

JOTI ROEST*

In April 2018, the European Commission presented a proposal for a Directive amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions. This article discusses the proposed provisions to protect the interests of employees in a cross-border operation. Their position would be strengthened since employee representatives are granted information and consultation rights. As to the protection of existing board level employee representation rights, the Proposal follows the EU legal framework on the involvement of employees, consisting of a negotiation process between representatives of the employees and the management. As Standard Rules apply if no agreement can be reached, negotiations take place with the law as a sentinel. Practice has shown that this complicated legal framework is effective in protecting existing employee participation rights. The Proposal shows that in 2019, this carefully vetted political compromise leaves EU legislators little room to manoeuvre by simplifying the framework or strengthening the position of employees.

Table of Contents

ECFR 2019, 74–105

1. Introduction	75
2. Involvement of Employees: the European Perspective	76
2.1. Involvement of Employees; Employee Participation	77
2.2. Historical Overview of the Involvement of Employees at a European Level	78
3. Cross-border Corporate Restructuring: the Protection of Employees	84
3.1. General Observations	84
3.2. Information and Consultation Rights	85
3.3. Protection of Participation Rights	88
4. Scrutiny by the Competent Authority	96
5. Examples	97
6. Final Remarks	103

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1. Introduction

Over the past decades the EU Court of Justice has confirmed in its ‘landmark cases’ the right of companies to carry out cross-border restructurings on the basis of the freedom of establishment. Currently the rules on cross-border conversion and cross-border division are not harmonised, thus leading to legal uncertainty. Expert reports (such as the report of the Reflection Group in 2011 and the extensive study conducted by Ernst & Young in 2018)¹, public consultations and expert meetings have shown broad support for a European instrument on cross-border conversions and divisions and also shown inefficiencies and shortcomings in the current Cross-border Merger Directive.² EU legislators are faced with the difficult task of designing a legal framework that facilitates companies entering into cross-border restructurings, by providing comprehensive and efficient procedures, while at the same time offering adequate protection to the companies’ stakeholders. In April 2018, the European Commission presented its Company Law Package, containing a proposal for a directive regarding cross-border conversions, mergers and divisions (Proposal).³ This article dis-

- 1 Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011 (<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851654> date of last access: 24 January 2019); *Ernst & Young*, Study on the cross-border transfers of registered offices and cross-border divisions, Final Report, 5 February 2018 (<https://ec.europa.eu/info/publications/ey-study-assessment-and-quantification-drivers-problems-and-impacts-related-cross-border-transfers-registered-offices-and-cross-border-divisions-companies_en> last visited: 24 January 2019). See also: *Jessica Schmidt*, Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?, Study conducted for the European Parliament’s Committee on Legal Affairs, 2016 (<[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU\(2016\)556960_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU(2016)556960_EN.pdf)> last visited: 24 January 2019); *Stephane Reynolds/Amandine Scherrer/Emmanuela Truli*, Ex-post analysis of the EU framework in the area of cross-border mergers and divisions, European Implementation Assessment, European Parliamentary Research Service, 2016 (<[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/593796/EPRS_STU\(2016\)593796_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/593796/EPRS_STU(2016)593796_EN.pdf)> last visited: 24 January 2019); *Carsten Gerner-Bewerle/Federico M. Mucciarelli/Edmund Schuster/Mathias Siems*, “Cross-border Reincorporations in the European Union: The Case for Comprehensive Harmonisation” (<<https://ssrn.com/abstract=3033920>> last visited: 17 December 2018).
- 2 Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, COM(2012)740 final, p. 12–13; Feedback Statement to the 2017 Public Consultation on “EU Company Law upgraded: digital solutions and providing efficient rules for cross-border operations of companies” (<https://ec.europa.eu/info/sites/info/files/summary_of_feedback_to_the_2017_public_consultation_on.pdf> last accessed: 24 January 2019).
- 3 Proposal for a directive of the European Parliament and of the Council amending directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, COM(2018)241 final (Proposal). Part of the Proposal is an explanatory memorandum (Expla-

discusses the legal framework contained in the Proposal on the protection of employees in a cross-border corporate restructuring. As follows from the analysis below, the position of employees would be strengthened as the Proposal grants employees information and consultation rights in a cross-border transaction. Apart from these rules, the Proposal aims to protect employee participation rights, also referred to as Board Level Employee Representation (BLER).

Over the last decades, the involvement of employees and especially employee participation has proven to be one of the most political and sensitive subjects in the context of European company law and has been a barrier to the creation of European legal forms (the European Company) and to the establishment of directives in the field of cross-border corporate transactions. In the following section, the historical ‘breakthroughs’ that have been achieved on a European level regarding the involvement of employees will be briefly highlighted (para. 2.2). As the term employee participation has a specific meaning in the context of European company law, the various forms of employee involvement included in European legislation and their definitions are discussed and a short overview is given of the different systems of employee participation that exist between the Member States (para. 2.1). Paragraphs 3 and 4 discuss the provisions contained in the Proposal to protect the position of employees in a cross-border operation, and these rules are illustrated by two examples of cross-border transactions (para. 5). The final paragraph (para. 6) contains some concluding remarks.

2. *Involvement of Employees: the European Perspective*

The EU framework legal framework on the involvement of employees consists of several directives regulating different aspects of co-determination rights of employees both on a national and a transnational level. In this article the focus is on EU regulations on the involvement of employees in relation to crossborder company restructurings.⁴ National law on the involvement of employees is

natory Memorandum) containing specific explanations to the different articles (Explanations). The Proposal is accompanied by an Impact Assessment, SWD(2018) 141 final (Impact Assessment). The Committee on Legal Affairs of the European Parliament published a Draft Report on the Proposal dated 21 August 2018 (rapporteur: *Evelyn Regner*) and the Committee on Economic and Monetary Affairs published an Opinion for the Committee on Legal Affairs on 25 October 2018 (rapporteur: *Olle Ludvigsson*). On 29 October 2018 the European Economic and Social Committee (EESC) submitted its opinion on the Proposal (ST 13687 2018 INIT). In December 2018, the Presidency published a compromise proposal (Interinstitutional File 2018/0114(COD) dated 18 December 2018) (Amended Proposal).

4 Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community will not be discussed.

not harmonised and the Member States may grant employees or their representatives various co-determination rights in a cross-border restructuring. Such rights are not affected by the provisions of the Proposal.⁵

2.1. *Involvement of Employees; Employee Participation*

In a European company law context, co-determination rights, for example employee participation, have a specific meaning. The overarching concept ‘involvement of employees’ is defined as any mechanism, including information, consultation and participation, through which employees’ representatives may exercise influence on decisions to be taken within the company (article 2(h) SE Directive⁶). The European Works Council Directive contains extensive definitions of both *information*⁷ and *consultation*⁸ rights. *Employee participation* is defined as the influence of employee representatives (for example, a works council) in the affairs of a company by way of the right to elect or appoint some of the members of the company’s supervisory board (in a two-tier structure) or administrative body (in a one-tier governance model) or the right to recommend and/or oppose the appointment of some or all of the members of these organs (article 2(k) SE Directive). Employee participation thus has a specific meaning and should be clearly distinguished from other forms of co-determination often referred to as employee participation or workers participation.

Within the EU a great variety of forms of employee participation exists.⁹ In some Member States, employee participation is limited to state-owned companies (fe Greece, Ireland, Portugal and Spain).

5 Recital 15 Amended Proposal.

6 Directive 2001/68/EC with regard to the involvement of employees (SE Directive).

7 Article 2(1)(f) defines information as: ‘the transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it. Information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organs of the group or undertaking’.

8 Consultation is defined (article 2(1)(g)) as: ‘[t]he establishment of a dialogue and exchange of views between employees’ representatives and the (central) management, at such time, in such fashion and with such content as enables employees’ representatives to express their opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken in to account within the Community-scale group (or undertaking)’.

9 The following is based on the overview of the various employee participation systems included in the table in Annex 10 to the Impact Assessment (fn. 3), 190–193; *Michael Stollt/Elwin Wolters*, Worker involvement in the European Company (SE). A hand-

Between the Member States that provide for employee participation in the private sector, there is a wide variety of systems. There are huge differences as to the thresholds, the lowest being 25 (Sweden) up to 1000 (Luxembourg). The number of employee representatives in the management board (one-tier board structure) or supervisory board (two-tier board) ranges from one single member (Croatia) to half of the members (fe Germany). In most of the Member States however, the participation rights are limited to one third of the members of the board (fe Austria, Denmark, France, Hungary, Luxembourg).

In some systems employees or their representatives have the right to appoint members to the board (fe Germany) while other Member States grant the right to recommend candidates for appointment. In some Member States no system of employee participation has been established in national law (Belgium, Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Malta and the United Kingdom).

2.2. *Historical Overview of the Involvement of Employees at a European Level*

2.2.1. *1994: the European Works Council Directive*

The first milestone on the harmonisation of involvement of employees was the adoption of the European Works Council Directive (EWC Directive) in 1994.¹⁰ This directive was agreed after a long period of negotiation: the first draft ('Vredeling proposal') dates from 1980. The negotiation process accelerated when the United Kingdom, which was opposed to the creation of a European Works Council, was no longer involved in the establishment of the Directive.¹¹ A Recast of the EWC Directive was adopted in 2009.¹²

book for practitioners, 2011, p. 69–85, see table 7 at p. 84–85 and in more detail: *Dirk Van Gerven* (ed.), *Cross-Border Mergers in Europe*, Vol. I & II, 2010, national reports.

10 Directive 94/45/EC on the establishment of a European Works Council (EWC) or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

11 In 1997 the EWC Directive was extended to the United Kingdom, Directive 97/74/EC extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

12 Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

The EWC Directive is applicable to transnational companies and groups employing at least 1,000 employees within the Member States¹³ and at least 150 employees in each of at least two Member States.¹⁴ The EWC Directive aims to improve the right of employees to information and to consultation in such transnational companies and groups. Article 1(3), included in the Recast EWC Directive in order to clarify the distinction between the competence of the European Works Council (EWC) and the national representative bodies, stipulates that competence of the EWC and the scope of information and consultation rights are limited to transnational issues. A matter is considered to be transnational where it concerns the transnational group (or undertaking) as a whole, or at least two undertakings in different Member States (article 1(4) EWC Directive). The co-determination rights of an EWC are thus complementary to procedures for information and consultation of employees embodied in national legislation, as such rules are often limited to decisions of the management regarding national issues and are not geared to management decisions taken in other Member States that, nevertheless, affect them. According to recital (37) of the Preamble, opinions expressed by the EWC should be without prejudice to the competence of the central management to carry out consultation in accordance with national legislation or practice.

The framework of the EWC Directive, a system of ‘regulated self-regulation’¹⁵ would prove to be a blueprint for following EU legislative initiatives in the area of the involvement of employees. The starting point is the conclusion of an agreement between a special negotiating body (SNB) consisting of employee representatives, and the management of a transnational company or group on the establishment of an EWC (or another suitable procedure for informing and consulting employees). The negotiating process may be initiated by the management of the transnational group or requested by at least 100 employees or their representatives (article 5(1) EWC Directive). Negotiations should take place in a spirit of cooperation (article 6(1) EWC Directive). Without prejudice to the autonomy of the parties, the EWC Directive sets out a number of regulations on the content of the written agreement that may be tailored to the

13 And/or the countries of the European Economic Area (i.e. Iceland, Liechtenstein and Norway).

14 In the terminology of the EWC Directive: Community-scale undertaking or Community-scale group of undertakings, see article 2(1)(a)-(c) EWC Directive, see the Report on the implementation by Members States of Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertaking and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), COM(2018) 292 final (May 14, 2018) (Implementation Report EWC 2018) p. 3.

15 *Stan De Spiegelaere*, Too little, too late? Evaluating the European Works Councils Recast Directive, European Trade Union Institute Report 138, 2016, p. 15.

needs and structure of the transnational company or group. The agreement should contain provisions on a number of issues included in article 6 EWC Directive, eg the composition of the EWC; the arrangements for linking information and consultation of the EWC to national employee representation bodies; the venue and frequency of meetings of the EWC; financial and material resources allocated to the EWC; and the duration of the agreement. When the structure of the transnational company or group changes significantly, article 13 EWC Directive stipulates that an existing agreement should be amended and renegotiated.

If the central management and the SNB are unable to reach an agreement within three years from the date of the initiation of the negotiations or the request thereto, or if the management refuses to initiate negotiations and establish an SNB (within 6 months after a request thereto), subsidiary requirements apply (included in an Annex to the EWC Directive), obliging the management to establish an EWC. As a result, the negotiations between the management and the SNB take place with the law as a sentinel since the subsidiary requirements are binding. The provisions included in the Annex as such form the departure point for the negotiations between the management and the SNB; the central management and the SNB may decide that the subsidiary requirements apply.

The subsidiary requirements (as implemented in the national legislation of the different Member States) regulate the composition and the competences of the EWC. The EWC will be provided with information relating to the structure, the economic and financial situation of the transnational company or group and its probable development, and production and sales. Information and consultation of the EWC will in particular relate to the employment relationships, transfers of production, mergers, cut-backs, closing of undertakings, and collective redundancies. The EWC and the management will meet once a year and the EWC will be informed and consulted on the basis of a report drawn up by the central management.

The EWC may elect a select committee consisting of five members; the select committee has the right to meet with the management where there are exceptional circumstances or decisions that affect the interests of the employees to a considerable extent, for example the closure of establishments or collective redundancies. The operating expenses of the EWC are borne by the central management of the transnational company or group.

The EWC Directive stipulates that the Member States must provide for appropriate measures (by ensuring that appropriate administrative or judicial procedures are in order) in the event the management of the transnational company or group does not comply with the provisions included in the EWC Directive. In the Netherlands, for example, the Enterprise Chamber of the Amsterdam Court of Appeal is competent (article 5 Dutch European Works Council Act).

In 2018 the Commission published a report on the implementation of the Recast Directive.¹⁶ This Implementation Report shows *inter alia* that most Member States have properly implemented the EWC Directive in their national legislation and that it has improved the clarity of the legal framework. It also shows that the provisions, nevertheless, remain difficult to interpret for practitioners in individual cases.¹⁷ The Recast EWC Directive has not been effective in increasing the number of EWCs.¹⁸ On the basis of the Implementation Report, the Commission has announced further measures to improve the establishments of EWCs, one of them being the publication of a handbook containing specific advice for both employers and workers, members of EWCs, trade union representatives, and other stakeholders.¹⁹

The European Trade Union Institute (ETUI) keeps an extensive database on EWCs that is an important and coherent source of information about EWCs. It contains actual figures and statistics on the establishment of EWCs, EWC agreements, and detailed information on legislation in the different Member States.²⁰

2.2.2. 2001: the *Societas Europaea* or European Company (SE)

From the perspective of European Company Law, 2001 was an important year. After a negotiation period of 35 years (Professor Sanders presented the first draft of a Statute for the European Company in 1966) a compromise was reached on a Regulation for the European Company (SE).²¹ The most delicate subject of the European Company legislation was, without any doubt, the involvement of workers, especially the board-level representation of employees.²² The creation of the SE and the agreement on workers participation repre-

16 Implementation Report EWC 2018. The Implementation Report is accompanied by staff working document Evaluation, SWD(2018) 187 final, (Evaluation Report EWC Directive 2018).

17 Implementation Report EWC 2018, section IV, p. 5-8.

18 Evaluation Report EWC Directive 2018, V.A.1 at p. 19–22 and *De Spiegelaere* (fn. 15), p. 20–32.

19 Implementation Report EWC 2018, p. 8-9.

20 Please be referred to the website of the EWC database (<www.ecdwb.eu>).

21 Regulation (EC) 2157/2001 on the Statute for a European Company (SE) (SE Regulation).

22 The adoption of the SE Regulation and the SE Directive has resulted in a stream of publications from both legal scholars and legal practitioners, e.g.: *Paul Storm*, *The Societas Europaea: a new opportunity?*, in: Dirk Van Gerven/Paul Storm (ed.), *The European Company*, 2006, Ch. 1, p. 16.

sented a milestone and paved the way for the European Cooperative (2003)²³ and for adoption of the Cross-border Merger Directive (2005).²⁴

While the Regulation for the European Company (SE Regulation) contains provisions on the formation and the internal structure of the SE, the accompanying SE Directive regulates the involvement of employees. If one of the companies participating in the establishment of the SE, or its subsidiaries, has employees, the provisions contained in the SE Directive apply. Following the blueprint of the EWC Directive, the management of the companies participating in the formation of the European Company will set up a negotiating body (SNB) and start negotiations in order to reach an agreement on the involvement of employees. Such an agreement should contain provisions on both information and consultation of employee representatives by setting up an SE works council (SEWC) and should contain employee participation rights if such board-level employee representation exists in one of the participating companies. The rules that aim to protect existing workers participation rights are complex and are discussed in more detail in section 3.²⁵ Research has shown that the extensive and complicated regulation of board-level employee participation may be considered a negative driver for the creation of SEs.²⁶

In conformity with the legal framework of ‘regulated self-regulation’ implemented in the EWC Directive, negotiations take place with the law as sentinel. Standard Rules set out in an Annex to the Directive apply (article 7 SE Directive) if no agreement can be reached within six months after establishment of the SNB; the negotiations may be extended up to one year (article 5 SE Directive). The information and consultation rights of the SEWC, as laid down in the Standard Rules, are to a large extent similar to the rights of an EWC established under the EWC Directive. Where employee participation rights apply in the SE, the SEWC will exercise such rights. As workers employed by the subsidiaries of the SE are represented in the SEWC, employee participation in an SE has a ‘transnational character’.

23 Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE) accompanied by Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative with regard to the involvement of employees. The SCE will not be discussed in this contribution since the provisions on the involvement of employees are more or less identical to the SE.

24 Directive 2005/56/EC on cross-border mergers of limited liability companies.

25 See also: *Philippe François/Julien Hick*, European involvement: rights and obligations, in: Dirk Van Gerven/Paul Storm (ed.), *The European Company*, 2006, Ch. 3, p. 77–97.

26 Report from the Commission to the European Parliament and the Council on the application of the SE Regulation, COM(2010) 676 final, p. 4–5 and the accompanying working staff document SEC (2010) 1391, p. 8.

To guarantee that the rules on the involvement of employees are respected, the provisions of the SE Directive and the SE Regulation are linked: an SE may not be registered (and thus be created) unless an agreement on employee participation has been concluded, the SNB has decided not to open or to terminate negotiations, or the Standard Rules apply (article 12 (2) and (3) SE Regulation).

Extensive information on the number of SEs and agreements concluded on the involvement of employees can be found in the SE database held by ETUI.²⁷

2.2.3. 2005: Cross-border Merger Directive

The Cross-border Merger Directive was adopted in October 2005, and a few months later, the EU Court of Justice ruled in *Sevic*²⁸ that a cross-border merger falls within the freedom of establishment (articles 49 and 54 TFEU). The Cross-border Merger Directive regulates the scope of a cross-border merger, the procedural framework, and the protection of creditors and minority shareholders.²⁹ Because the Directive contains no provisions on information and/or consultation of employees affected by the envisaged merger, national co-determination rights, if existing, apply. Article 16 of the Directive does provide for the protection of existing board-level participation rights. The starting point is that the national rules on board-level participation rights in the receiving Member State apply, unless such national law (in short) does not provide for the same level of employee participation rights as operative in the relevant merging companies (article 16 (2) Directive). If this is the case, a negotiating procedure based on the provisions of the SE Directive is required and may lead to an agreement on employee participation. If the parties fail to reach such an agreement, the Standard Rules apply. The protection of employee participation rights in a cross-border merger are discussed in more detail in section 3.³⁰ In 2017, Directive 2017/1132 entered into force; the provisions on cross-border mergers are included in Chapter II.³¹ Research has shown (see the extensive empirical data collected by the research project *Cross-border Corporate Mobi-*

27 See <<http://ecdb.worker-participation.eu/>>.

28 ECJ, 13 December 2005, *Sevic*, C-411/03, ECLI:EU:C:2005:762.

29 For the procedure of a cross-border merger, see *Dirk Van Gerven*, Community rules applicable to cross-border mergers, in: Dirk Van Gerven (ed.), *Cross-Border Mergers in Europe*, Vol. I, 2010, Part I, Ch. 1 and *Paul Storm*, Scope and limitations of the Cross-border Merger Directive, in: Dirk Van Gerven (ed.), *Cross-Border Mergers in Europe*, Vol. I, 2010, Part I, Ch. 4.

30 See also *Philippe François/Julien Hick*, Employee participation: rights and obligations, in: Dirk Van Gerven (ed.), *Cross-Border Mergers in Europe*, Vol. I, 2010, Part I, p. 29–43.

31 Directive (EU) 2017/1132 relating to certain aspects of company law.

lity in the EU)³² that the cross-border merger is becoming increasingly popular.

3. Cross-border Corporate Restructuring: the Protection of Employees

3.1. General Observations

The landmark cases of the EU Court of Justice on the freedom of establishment have upheld that companies have the freedom to carry out cross-border corporate restructurings and that such restructuring may take the form of either a legal merger or a conversion. Cross-border conversions involve a change in the applicable company law (the *lex societatis*) and thus create the need to protect the interests of the company's stakeholders. The current Proposal, that uses the Cross-border Merger Directive as a blueprint, aims to offer such framework. A cross-border corporate restructuring may affect employees in ways that are not within the scope of the Proposal. The restructuring may, for example, include a transfer of the economic activities of the company. Such transfer will likely have significant consequences for the labour law position of the employees as it may lead to collective redundancies. The Proposal contains, as is discussed below, information and consultation rights and rules to protect existing employee participation rights, but does not regulate the implications on individual employment agreements.

European legislators acknowledge that a cross-border conversion or division may, in certain circumstances, be used to for abusive purposes, eg the circumvention of labour standards, social security payments, and rules on employee participation. In the past it has therefore been argued that a cross-border corporate restructuring by way of a conversion should only be possible if not only the registered seat, but also the economic activities, the actual head office, were to be transferred. In its recent judgment in *Polbud*, the EU Court of Justice ruled that the transfer of only the registered office is in conformity with the freedom of establishment.³³ In its Explanatory Memorandum to the April

32 Thomas Biermeyer/Marcus Meyer, Cross-border Corporate Mobility in the EU, Empirical Findings 2018, Institute for Transnational and Euregional cross border cooperation and Mobility [ITEM] & Institute for Corporate Law, Governance and Innovation Policies [ICGI] (<www.maastrichtuniversity.nl/corporate-mobility-project> last accessed: 24 January 2019).

33 ECJ, 25 October 2017, *Polbud*, C-106/16, ECLI:EU:C:2017:804. See Walter Bayer/Jessica Schmidt, "Grenzüberschreitende Mobilität von Gesellschaften: Formwechsel durch isolierte Satzungsverlegung", *Zeitschrift für Wirtschaftsrecht* 2017, 2225; Christoph Teichmann/Ralf Knaier, "Grenzüberschreitender Formwechsel nach "Polbud"", *GmbH-Rundschau* 2017, 1314, especially section III.2 analysing the protection of em-

2018 Proposal, the Commission considered that EU legislators need to step in and provide rules in order to combat misuse of a cross-border conversion, for example by the use of the letterbox companies for fraudulent purposes.³⁴ The April 2018 Proposal contains specific rules that strengthened the supervisory role of the competent authority, as it was given the power to block a cross-border restructuring where it determined that it constituted an ‘artificial arrangement’. The Amended Proposal no longer contains specific regulations to combat the use of cross-border operations for fraudulent or abusive purposes, but stipulates that the Member States may provide that the competent authority may refuse a pre-conversion, pre-merger or pre-division certificate if the cross-border transaction is set up for abusive or fraudulent purposes. This section 3 discusses the involvement of employee representatives and the protections of employee participation rights in the event of a cross-border operation, while section 4 focuses on scrutiny of the transaction by the competent authority.

3.2. Information and Consultation Rights

To be able to assess the consequences of the envisaged cross-border restructuring, employees or their representatives require comprehensive information about the envisaged restructuring. Evaluation of the functioning of the Cross-border Merger Directive has identified a number of shortcomings.³⁵ One of them is that although the Directive sets out a framework to protect employee participation at board level, no rules have been included that oblige the participating companies to provide specific and comprehensive information on the envisaged cross-border merger to the employees.³⁶ As is mentioned above, within the European Union the rules on involvement of employees in corporate decision-making are not harmonised, and they can vary to a significant degree. Some Member States require employees to be informed of an envisaged

employee participation rights (the German ‘Mitbestimmung’); *Peter Kindler*, “Unternehmensmobilität nach “Polbud”: Der grenzüberschreitende Formwechsel in Gestaltungspraxis und Rechtspolitik”, *Neue Zeitschrift für Gesellschaftsrecht* 2018, 1178 at V(c) (cc); *Ariel Muchal/Krzysztof Oplustil*, “Redefining the Freedom of Establishment under EU Law and the Freedom to Choose the Applicable Company Law: a Discussion after the Judgement of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud”, *ECFR* 2018, 270.

34 Explanatory Memorandum (fn. 3), p. 3, 20.

35 Impact Assessment (fn. 3), section 1.5.

36 Explanatory Memorandum (fn. 3), p. 6 and section 3 (giving an overview of the different evaluations, stakeholder consultations and impact assessments), recital (15) Amended Proposal.

international restructuring; other Member States grant extensive information and consultation rights to a works council or comparable representative body. To strengthen the position of employees, the Proposal contains rules to ensure that employees will be duly informed of the cross-border operation and its implications for employees. According to the Proposal, the board of the company carrying out a cross-border restructuring (or companies in the case of a cross-border merger) must prepare a report explaining the implications of the restructuring for the employees (article 86f [cross-border conversion], article 124a [cross-border merger] and article 160b [cross-border division] (1) Proposal). A report is not required where the company and its subsidiaries have no employees (other than members of the board) (article 86f/124a/160b (5) Proposal). The report must be made available in any case electronically together with the draft terms of cross-border operation (article 86f/124a/160b (3) Proposal). The Proposal does not provide any rules on where the information is to be made available and does not specify the way in which employees or their representatives are informed of the existence of the report.

The report must address in particular the following issues: the implications of the proposed cross-border restructuring on the future business of the company; the implications on the safeguarding of employee relationships; whether there will be any material changes in the employment conditions or changes in the location of the company's places of business; and how these factors would affect any subsidiaries of the company (article 86f/124a/160b (2) Proposal). In order to guarantee the accuracy of the information contained in the report, the Proposal stated that an independent expert report is required in a cross-border conversion or division. However, the Amended Proposal no longer contains this provision.

The report must be made available to the representatives of the employees (eg a works council) or, where there are no such representatives, to the employees themselves not less than one month before the date of the general meeting in which the shareholders vote on the transnational restructuring.³⁷ From a Dutch viewpoint on the involvement of employees, a period of one month for information and consultation seems rather short. The Proposal contains no further regulations on or explanations of the question to which representative body the report should be provided if different companies (in different Member States) are engaged in the cross-border operation or when there are various employee representative bodies established. The Proposal should give some further clarification hereon.³⁸ Where an EWC has been established, it will in most cases be the

37 According to the Proposal submitted in April 2018, the report had to be submitted two months before the general meeting in the event of a cross-border conversion or division.

38 See also *Patrick Mückel/Mareike Götte*, "Unternehmensmitbestimmung und grenzüberschreitende Unternehmensmobilität. Mitbestimmungsrecht im Vorschlag für eine

competent body of employee representatives, depending on the content of the EWC agreement that may have been concluded. As the Proposal is silent on the subject of competence of the employee representatives, such competence will have to be determined by national law or by EU case law.

The management draws up a separate report for the shareholders, and this report must also be made available to the employees (article 86e, 124, 160g (3) Proposal). The obligation to prepare a report is without prejudice to the information rights and consultation procedures implemented in national law on the basis of Directives 2001/23/EC, 2002/14/EC or where an EWC is established, information and consultation rights following the EWC Directive (article 86f/124a/160h (6) Proposal). Where national law grants employee representatives more extensive information and/or consultation rights, such rights must be respected.

When the management or the administrative organ of the company receives ‘*in good time*’ an opinion from the employee representatives, or where there are no such representatives, from the employees themselves, as provided under national law, the shareholders must be informed of the opinion and the opinion is to be attached to the report (article 86f/124a/160h (4) Proposal). It should be noted that the text of this provision is not perfectly clear. Does ‘as provided under national law’ refer to the consultation of employees (the “opinion”) or whether the opinion should be requested from the employee representatives or the employees themselves?³⁹ The Proposal should clarify the wording of article 86f/124a/160h (4), especially where the Explanatory Memorandum considers that the initiative is coherent with the objective of the European Pillar of Social Rights⁴⁰, in particular the 8th Principle (Social dialogue and involvement of workers) and that it will directly ‘*contribute to the principle stipulating that employees or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings (...)*’.⁴¹ This would suggest employees or

Richtlinie in Bezug auf grenzüberschreitende Umwandlungen, Verschmelzungen und Spaltungen“, Betriebs-Berater 2018, 2036, 2037.

39 Jessica Schmidt, “EU Company Law Package 2018 – mehr Digitalisierung und Mobilität von Gesellschaften (Teil 1)”, Der Konzern 2018, 229, 242 interprets the wording as a reference to the opinion of the employees (“*Sofern das Leitungs- oder Verwaltungsorgan nach Maßgabe des nationalen Rechts rechtzeitig eine Stellungnahme der Arbeitnehmervertreter (bzw. Arbeitnehmer) erhält [...]*”) while Mückl/Götte (fn. 38), 2037 interpret this sentence as a reference to national law on the competence of employee representatives or the employees themselves (“*Wenn die Geschäftsleitung “rechtszeitig” eine Stellungnahme der Arbeitnehmervertretungen oder, gemäß dem jeweiligen nationalen Recht, der Arbeitnehmer selbst erhält, [...]*”).

40 Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights, C(2017) 2600 final.

41 Explanatory Memorandum (fn. 3), p. 11.

their representatives are granted a consultation right, regardless provision in national law.

Furthermore, it should be noted that the Proposal contains no further indication of the timeframe and it remains unclear at what moment the employee representatives have submitted their opinion ‘in good time’.⁴² As this provision is specifically included in the Proposal to safeguard the position of employees, the timeframe should be clarified.

The requirement to provide the employee representatives with a report is a significant step towards strengthening the position of the employees involved as they receive specific information on the transnational restructuring. The fact that an opinion of the employees or their representatives is attached to the report clearly confronts the company with the employees’ position on the envisaged cross-border restructuring. The competent authority may, when scrutinizing the legality of the cross-border operation, also take the employees’ position into account (article 86*m*, 127, 166*o* (2) and (5)(a) Proposal). As noted before, the wording on the consultation of the employee representatives as included in the current Proposal should be clarified. It could be argued that the provision on consultation, given the tight time-frame, only to a certain extent enables a ‘dialogue and exchange of views’ between the management of the company/companies engaged in the cross-border operation.⁴³

3.3. Protection of Participation Rights

As to the protection of participation rights, the Proposal is in line with the carefully vetted political agreement on the protection of employee participation that led to adoption of the SE Directive and the Cross-border Merger Directive. Article 16 of the former Cross-border Merger Directive sets out a detailed framework to protect existing employee participation rights. This sys-

42 See also: *Mückl/Götte* (fn. 38), 2038 and, in less detail: *Patrick Mückl / Mareike Götte*, “Aktuelle Entwicklungen im Recht der Unternehmensmitbestimmung”, *Der Betrieb* 2018, 1652-1653; *Alexandra Butterstein*, “Modernisierung des EU-Gesellschaftsrecht zur Stärkung der grenzüberschreitenden Mobilität von Gesellschaften”, *Europäische Zeitschrift für Wirtschaftsrecht* 2018, 838, section III(1)(e); *Maximilian Selent*, “Die Mitbestimmung nach dem Company Law Package aus Perspektive des deutschen Kompromissvorschlags zur europäischen Mitbestimmung”, *Neue Zeitschrift für Gesellschaftsrecht*, 1171, section II (2) (c)(aa).

43 See the definition of consultation as included in article 2(1)(g) EWC Directive (fn. 12). See also *Aline Hoffmann/Sigurt Vitols*, *The EU company law package: how it should be improved to strengthen workers’ rights and avoid abuse through cross-border mobility*, European Trade Union Institute Policy Brief 11/2018, p. 3.

tem, based on negotiation between employees and the management of the restructuring company or companies, is very complicated but has proven to be rather effective in protecting existing board-level employee participation rights. Since practice has shown that the system leaves some room to circumvent potential employee participation rights under national law, the Proposal as presented in April 2018 contained provisions to safeguard national employee participation rights. As is discussed below, the Amended Proposal leaves the protection of national board-level participation rights to national law of the Member States.

3.3.1. General Rule: Participation Rights in the Destination Member State Apply

The starting point is that the converted company (article 86l (1) Proposal), the company resulting from a cross-border merger (article 133 (1) Directive 2017/1132) or, in the event of a cross-border division (article 160n (1) Proposal), the recipient company will be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office. An important consequence of this general rule is that if the destination Member State does not provide for employee participation rights, no such rules will apply in the destination company. As the general rule may lead to the disappearance of existing employee participation rights, it is set aside in three situations (articles 86l (2) and 160n (2) Proposal, article 133 (2) Directive 2017/1132). In the event of these situations, in line with the legal framework described above and included in both the EWC Directive and SE Directive, the management is obliged to launch negotiations with representatives of the employees to determine an arrangement on employee participation in the destination company. If no agreement can be reached, the Standard Rules on employee participation apply. This fall-back scenario guarantees that employee participation rights will be respected in a cross-border restructuring.

Exception I: The Restructuring Company has Implemented an Employee Participation System and Employs more than 500 Employees

If a company that intends to carry out a cross-border restructuring is operating under a system of employee participation and has, in the six months prior to the disclosure of the draft terms of the cross-border conversion, merger of division, an average number of employees that exceeds 500, the general rule is not applicable and the management has to launch a negotiation procedure.⁴⁴

44 The number of 500 employees relates to the threshold for the number of employees under the German Drittelbeteiligungsgesetz (see § 1(1) DrittelbG).

The Proposal as presented in April 2018 contained a provision, applicable in the case of a cross-border conversion or division, aimed at preventing that such restructurings were used to circumvent national employee participation regulations. Past experiences have shown that companies, especially in Germany, transform themselves into an SE or carry out a cross-border merger before they reach the relevant threshold for the number of employees. By transforming to an SE or by moving the registered seat to another Member State, national employee participation rules or a stricter regime of board-level employee participation may be evaded; this practice is known as ‘freezing’.⁴⁵ In order to protect potential employee participation rights, the Proposal lowered the thresholds and stipulated that if the average number of employees of a company that intends to carry out a cross-border corporate restructuring exceeds *four fifths of the applicable threshold* for employee participation under national law in the six months leading up to publication of the draft terms of the cross-border conversion or division, it is obliged to enter into negotiations on employee participation. This provision was not an effective mechanism to safeguard national employee participation rights. Firstly, because it was not applicable in the event of a cross-border merger where a company, aiming to circumvent national board-level employee representation rights, may have chosen this form of cross-border restructuring. Secondly, the provision lowered the thresholds for the obligatory negotiations on employee participation rights, and yet the outcome of such negotiations remained uncertain as the fall-back scenario (the Standard Rules) stipulates that if an agreement is not reached, the rules relating to employee participation in the departure Member State apply and evidently the thresholds for such employee participation are not met. As a result, the aim of the provision, the protection of potential employee participation rights, was unlikely to be achieved. In order to counter the ineffectiveness of the proposed solution, trade unions have suggested to ensure that the Standard Rules apply even if the applicable thresholds are not yet met.⁴⁶ It is questionable whether a political agreement from the Member States could be reached on an amendment on the Standard Rules to the SE Directive, as employee participation is in 2019 still politically sensitive. Finally, the proposed provision exclusively related to the applicable threshold for the number of employees under national law. In some Member States additional requirements have to be met in order to be subject to employee participation. In

45 See *Müeckl/Götte* (fn. 38), 2040–2041; *Sascha Morgenroth/Jörg Salzmann*, “Grenzüberschreitende Umwandlungen in der EU und unternehmerische Mitbestimmung”, *Neue Zeitschrift für Arbeitsrechts* 2013, 449 section III(3); *Jessica Schmidt*, “EU Company Law Package 2018 – mehr Digitalisierung und Mobilität von Gesellschaften (Teil 2)”, *Der Konzern* 2018, 273 section III.4 (b)(ee)(3) and *Ulrich Noack/Julia Kraft*, “Grenzüberschreitende Unternehmensmobilität – der Richtlinienvorschlag im Company Law Package”, *Der Betrieb* 2018, 1577, 1581.

46 *Hoffmann/Vitols* (fn. 43), p. 3.

the Netherlands, for example, the ‘large company regime’ containing employee participation rights applies after a transition period of three years. A company is ‘large’ when its issued share capital plus reserves amount to EUR 16 million, the company and its subsidiaries jointly employ on average 100 employees and the company or one of its subsidiaries has established a works council (this obligation applies when a company employs 50 employees or more (article 2 Dutch Works Council Act)).⁴⁷ The Proposal sidestepped such more complicated requirements for the applicability of employee participation. Furthermore, when implementing this provision into national law, the Member States lacked the possibility to formulate an alternative rule tailored to the national provision on this matter.

Exception II: ‘Before-and-After’ Principle

The second exception applies where national law applicable to the company in the destination Member State does not provide for at least the same level of employee participation as operated in the company or companies in the departure Member State(s) prior to the conversion, cross-border merger or division. This principle is known as the ‘before-and-after’ principle. On this point it is worth mentioning that in the past there has been discussion whether the ‘level of employee participation’ is measured numerically or that a substantive test should be applied. From the wording of article 16(2) Cross-border Merger Directive, that the level of employee participation should be measured ‘by reference to the proportion of employee representatives amongst the members of the management or supervisory board’, it is generally concluded that a numerical test applies.⁴⁸ In the Netherlands, the Dutch large company regime grants a works council the right to give a binding recommendation to one-third of the members of the board while it also has a non-binding right of recommendation to the appoint-

47 When a company is ‘large’, it has to register this information at the Trade Register. After three years the company has to amend its articles of association in accordance with the rules of the ‘large company regime’. When this system is applicable, the right to appoint or dismiss members of the management board shifts from the general meeting of shareholders to a mandatory supervisory board. (In international groups a ‘mitigated regime’ might apply, leaving this important power with the general meeting.) The works council (or the central or group works council, if established) has a binding right of recommendation on the appointment of one-third of the members of the supervisory board (or in the case of a one-tier board, on the non-executive directors) (articles 153–158/263–268 Dutch Companies Act (DCA) (Book 2 Dutch Civil Code)), see further on the role of Dutch works councils in transnational groups: *Marcus Meyer*, “Employee Participation in Multinational Corporations: Corporate Governance and the Role of Works Councils”, *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 2017, 134–141.

48 *Femke Laagland*, *De rol van Nederlandse werknemers(vertegenwoordigers) bij een grensoverschrijdende juridische fusie*, 2013, p. 94–96.

ment of each member of the supervisory board (article 2:158/268 (5) and (6) DCA). Dutch legislators have taken the view that because of this non-binding recommendation right to the appointment of all members of the supervisory board, the Dutch system will always have the higher level of employee participation.⁴⁹ This viewpoint seems disputable as this non-binding recommendation right does not, in practice, result in a number of employee representatives higher than one-third of the members of the supervisory board.

Exception III: No Employee Participation Rights for Employees outside the Destination Member State

The third exception to the general rule concerns the situation that national law in the destination Member State does not provide for employees of establishments of the company situated in other Member States the same entitlement to exercise participation rights as enjoyed by those employees employed in the destination Member State. It should be observed that the wording of the exception refers to employees employed in establishments of the company outside the destination Member States. The exception therefore has a limited scope as it does not cover the employees of subsidiaries of the company in other Member States than the destination Member State. The third exception will frequently apply as national law on employee participation is in most cases a ‘national affair’, while the national rules limit the participation rights to the employees or their representatives employed by the company and its establishments and subsidiaries in the Member State where the company has its statutory seat.⁵⁰ In its *TUI*-Case, the EU Court of Justice ruled that article 45 TFEU does not preclude legislation (like the German *Mitbestimmungsgesetz*) that provides no employee participation rights to employees employed in a subsidiary located in the territory of another Member State.⁵¹

When one of these three exceptions to the general rule apply, the employee participation will not be regulated by national law of the destination Member State but an agreement on employee participation has to be negotiated (arti-

49 See the Parliamentary Documents 2006/07, 30 929 (no 3, explanatory memorandum) p. 24; *Joti Roest*, “Grensoverschrijdende fusie en vennootschappelijke medezeggenschap”, *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2007, 711.

50 In Denmark and Sweden employees of a ‘foreign’ subsidiary may under certain conditions have employee participation rights, *Marie Seyboth*, Worker participation as an element of the democratic principle in Europe – A critique of the co-determination relevant aspect in the Reflection Group report, in: Sigurt Vitols/Johannes Heuschmidt (ed.), *European company law and the Sustainable Company: a stakeholder approach*, Vol. II, 2013, p. 151, 166.

51 ECJ, 18 July 2017, *TUI*, C-566/15, ECLI:EU:C:2017:562. See *Mathias Habersack*, “Germany first”. Kritische Bemerkungen zum EuGH-Urteil in Sachen ‘Erzberger ./ TUI AG”, *Neue Zeitschrift für Gesellschaftsrecht* 2017, 1021.

cle 86*l*, 160*n* (3) Proposal, 133 (3) Directive 2017/1132). In the following section the negotiation process is discussed.

If a company carrying out a cross-border operation is operating under a system of board-level employee representation, it is obliged to take a legal form allowing for the exercise of such rights (articles 86*l*, 160*n* (6) Proposal, 133 (6) Directive 2017/1132).

3.3.2. *Agreement on Employee Participation; Application of the Standard Rules*

The procedure to determine the employee participation rights when one, or more, of the exceptions to the general rule applies as laid down in articles 86*l*, 160*n* (3) Proposal, and 133 (3) Directive 2017/1132. These articles contain many cross-references to the SE Directive which make the already very complex system difficult to interpret. Obviously, the SE Directive contains rules for the protection of employee participation if an SE is established. Such rules that are tailored to the creation of an SE are not automatically suitable for being adopted verbatim into the various forms of cross-border corporate restructuring. It could be argued that, instead of making references to the SE Directive, European legislators should include a continuous text of the framework on employee participation tailored to each form of cross-border corporate restructuring in the current Proposal. In the following, a brief overview is given of the various steps to be taken to determine the employee participation rights.

The first step, completely in line with the legal framework on involvement of employees at a European level, is the creation of an SNB by the management of the company or companies carrying out the cross-border restructuring, as soon as possible after publishing the draft terms of the cross-border conversion, merger or division (article 3 (1) SE Directive). In a cross-border merger, the company may decide not to enter into the negotiation process but instead decide to apply the Standard Rules included in the Annex to the SE Directive (articles 133 (4)(a) Directive 2017/1132 and 133 (8) Proposal). This rule is not applicable to a cross-border conversion or a division. The Explanatory Memorandum offers no background to this choice. It might be advisable to amend the Proposal and apply this provision equally on the cross-border conversion and division, as the negotiation process is time-consuming and costly while the position of the employees is adequately protected by the Standard Rules.⁵²

52 See also, *Schmidt* (fn. 45), section III.4 (b) (ee) (3). The Explanatory Memorandum (fn. 3), p. 19 *et seq.* contains a general observation that refers to the perceived higher risks for employees in cross-border conversions and divisions.

The composition of the SNB should, in short, reflect the number of employees employed by the company or the participating companies and the subsidiaries in each Member State. The provisions in the SE Directive on composition of the SNB are very detailed and, as a result, rather complicated (article 3 (2)(a)(i) SE Directive). And the method to be used to nominate, elect or appoint the members of the SNB is determined by national law in the different Member States (article 3 (2)(b) SE Directive).

After the creation of the SNB, the SNB and the competent organ or organs of the company/companies carrying out the cross-border operation will enter into negotiations on a written agreement on arrangements for employee participation (article 3 (3) SE Directive). The SNB may decide, by a special majority, not to open negotiations or to terminate the negotiations and rely on the employee participation rights in the destination Member State (article 86l, 160n (4) Proposal, 133 (4) Directive).

The SNB may request the assistance of experts (for example, representatives of EU-level trade unions) in the negotiation process (article 3 (5) SE Directive) and the costs of the SNB are borne by the company or the participating companies (article 3 (7) SE Directive). The Directive stipulates that the SNB and the competent organs have the duty to cooperate (article 4 (1) SE Directive). Negotiations commence as soon as the SNB is created and may continue for a period of up to six months. The parties may, by joint agreement, decide to extend the negotiations for up to one year (article 5 SE Directive). If an agreement is concluded, the agreement must contain the substance of the arrangements on employee participation, including the number of members of the management board, administrative board or supervisory board that are subject to participation rights of the employees and the procedures as to how these members should be elected, appointed or recommended (article 4 (2) SE Directive). The SE Directive contains detailed voting rules, for example to address the situation in which the negotiations would result in a reduction of participation rights (article 3 (4) SE Directive). If an agreement is reached, the arrangements on employee participation must be included in the corporate structure of the company registered in the destination Member State. The company is obliged to communicate the outcome of the negotiations to its employees or their representatives (articles 86l, 160n (8) Proposal, article 133 (8) Directive 2017/1132).

If the SNB and the competent organs fail to reach an agreement within the negotiation period of 6 months, and this period is not extended, the Standard Rules for employee participation as contained in the Annex to the SE Directive apply.⁵³ As to the content of the Standard Rules for the various forms of

53 These Standard Rules have been implemented in the national legislation of the different Member States.

cross-border restructuring, the following applies. In the case of a conversion, the company in the destination Member State has to apply the employee participation rules in place in the converting company (see Standard Rules Part 3 sub (a)). In the case of a merger or division, the company in the destination Member State has to apply an employee participation system that entitles employees to elect, appoint, recommend, or oppose the appointment of a number of members of the management or supervisory board equal to the highest proportion in force in the participating companies (see Standard Rules Part 3 sub (b)).

Member States may in their national legislation limit, where the Standard Rules apply, the proportion of employee representation in the administrative organ (one-tier board) to one-third (articles 86l (4)(b), 160n (4)(b) Proposal, 133 (4) (c) Directive 2017/1132). Member States shall ensure in their national laws that the rules on employee participation that applied prior to the cross-border conversion or division, continue to apply until the date of application of any subsequently agreed rules or the Standard Rules (articles 86l, 160n (4)(c) Proposal). This provision is not applicable in a cross-border merger, as article 133 (4) Directive 2017/1132 is not amended accordingly.

3.3.3. *Protection of Employee Participation Rights in the Destination Company*

The legal framework on employee participation contains provisions to prevent employee participation arrangements being realised in the destination company or employee participation rights being removed shortly after the cross-border corporate restructuring.

To guarantee that rules on employee participation are respected, a cross-border operation may not be registered or enter into effect unless an arrangement on employee participation has been concluded; the SNB has (with a special majority) decided not to open negotiations or to terminate such negotiations; or the Standard Rules apply (article 86l, 160n (3) referring to article 12 (2) and (4) SE Regulation).

In order to protect employee participation rights in the destination company, the Proposal determines that the company resulting from a cross-border corporate restructuring is not entitled to remove the participation rights during a period of three years by way of carrying out a subsequent cross-border or national merger, division or conversion. In the case of such transaction, the company is obliged to take measures to ensure the protection of employees' participation rights by applying *mutatis mutandis* the rules on employee participation laid down in the SE Directive (article 86l, 133, 160n (7) Proposal). The

position of employees is strengthened by this provision since this anti-abuse rule applies in both domestic and cross-border operations. Under the Cross-border Merger Directive, employee participation rights were only protected in a domestic merger. From the position of employees, however, a ‘protection period’ of three years is rather short.⁵⁴

4. *Scrutiny by the Competent Authority*

After the general meeting has decided on the envisaged cross-border corporate restructuring, this decision and all relevant information and documents must be submitted to the competent authority of the departure Member State (articles 86*m*, 127, 166*o* (1) Proposal). It is up to the Member States to designate a competent authority to scrutinize the legality of the cross-border operation. Member States may designate a court, a notary public or different authority to fulfil this responsibility. The competent authority determines whether all relevant conditions for the corporate restructuring have been met. According to recital (12) of the Amended Proposal, the competent authority should ensure that a decision on the approval of a cross-border operation is taken in a fair, objective and non-discriminatory manner on the basis of all elements required by national and EU Law. The competent authority checks whether the company has complied with its obligations towards the employees. It verifies if the employee representatives have received the report describing the implications of the restructuring for the employees and, as part of the assessment of legality of the cross-border operation, examines the report (article 86*m*, 127, 166*o* (2) and (5)(a) Proposal). The competent authority also checks if the rules on employee participation have been complied with and verifies that the draft terms of the cross-border transaction include information on the procedures by which arrangements on employee participation are determined and examines whether the company has launched a negotiation procedure on employee participation, where relevant (article 86*m*, 127, 166*o* (4) and 5(c) Proposal). If the company has complied with all the relevant conditions and procedures, the competent authority will issue a pre-conversion, pre-merger or pre-division certificate. If the relevant requirements have not been met, no such certificate will be issued. If after such scrutiny, the certificate is issued, it will be transmitted to the competent authority of the destination Member State. The competent authority in the destination Member State will then scrutinize that part of the procedure governed by the law of the destination Member State. The com-

54 By the European Trade Union Institute, a quite extensive period of 10 years is recommended, *Hoffmann/Vitols* (fn. 43), p. 3.

petent authority of the destination Member State must ensure that the arrangements for employee participation have been determined lawfully (article 86*p*, 128, 160*r*(1) Proposal).

As mentioned above, cross-border corporate restructurings may in some circumstances be used for abusive purposes. In order to prevent abuse of cross-border conversions and divisions, the Proposal as submitted in April 2018 strengthened the supervisory role of the competent authority; the competent authority had the power to block the cross-border operation where it determined that it constituted an artificial arrangement. Alternatively, if the competent authority had serious concerns that the cross-border conversion or cross-border division was unlawful, it could carry out an in-depth examination as regards the existence of abuse. These anti-abuse provisions were included in articles 86*m-n*, 160*o-p* Proposal, and thus only relevant in the event of a cross-border conversion or division. Although the premise of the Commission in its Proposal that abuse of cross-border operations should be combated was widely supported, especially the concept of the ‘artificial arrangement’ was criticised because of its lack of clarity since the Proposal contains no further definition. In addition, the question was raised if measures to counter abuse should be included in the current Proposal.⁵⁵ The Amended Proposal leaves it to the Member States to determine whether the competent authority should be entitled to refuse a pre-operation certificate where they find that the cross-border operation is set up for abusive or fraudulent purposes, leading to the evasion and/or circumvention of national or EU law, or for criminal purposes (articles 86*m*, 160*o* (7), 127 (8) Proposal).⁵⁶

5. Examples

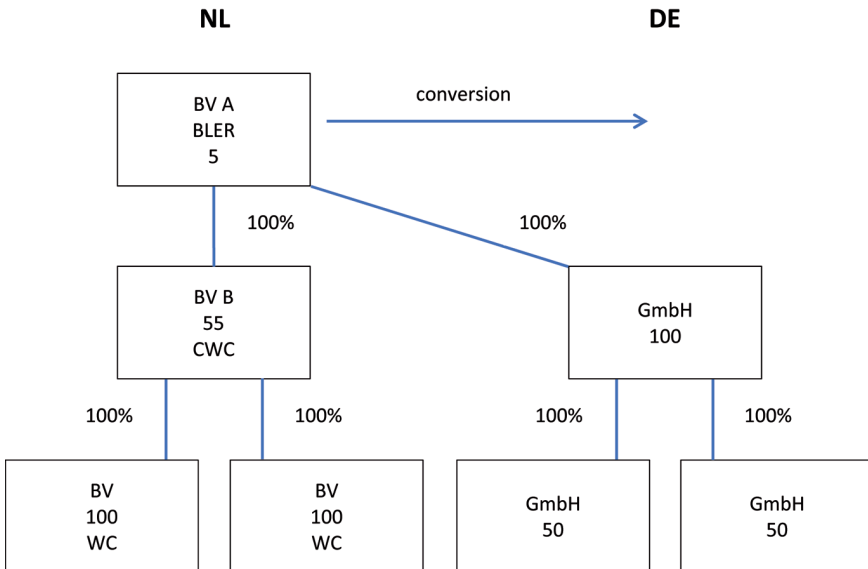
In this paragraph the legal framework on the involvement of employees in the event of a cross-border operation is illustrated by way of two hypothetical examples. In order to illustrate the application of the ‘before-and-after-principle’ (article 86*l* (2) Proposal. 133 (2) Directive 2017/1132) discussed above, the transactions are envisaged by companies that have their statutory seat in Member States with a system of employee participation in their national laws.

55 Opinion EESC (fn. 3), no. 1.14, 3.5.5-7; *Noack/Kraft* (fn. 45), 1580; *Schmidt* (fn. 45), section III (4) (b) (3).

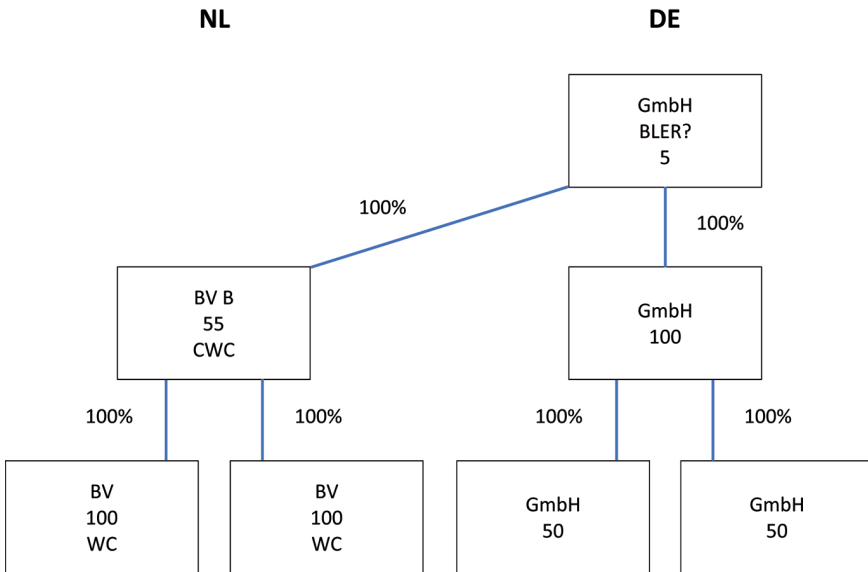
56 See also Recital 34 Amended Proposal.

Example I: Conversion of a Dutch BV into a German GmbH

The first example concerns a cross-border conversion of a Dutch private limited liability company (*besloten vennootschap*, BV), BV A, into a German *Gesellschaft mit beschränkter Haftung* (GmbH).



BV A has subsidiaries in both the Netherlands and in Germany. We presume that the BV A is subject to the Dutch large company regime containing employee participation rights. Two works councils and a central works council (CWC) have been established in the Dutch part of the group (BV B). According to the provisions of the Dutch large company regime, the CWC has a binding recommendation right with regard to the appointment of one-third of the members of the supervisory board of BV A and a non-binding recommendation right on all appointments to this board (articles 2:268 (5) and (6) DCA). After the envisaged operation, the structure of the group will be as follows:



Information and Consultation

According to article 86f (1) of the Proposal, the management of BV A shall draw up a report explaining the implications of the cross-border conversion for the employees. The management will provide the representatives of the employees with the draft terms of the cross-border conversion and the report not less than one month before the general meeting. Article 86f (3) stipulates that the report must be made available to the representatives of the employees of the company. Strictly speaking, BV A has no employee representatives, but it seems obvious that the report should be submitted to the CWC established with BV B. When the management of BV A receives ‘in good time’ an opinion of the CWC on the cross-border conversion, this opinion will be attached to the report. Since article 86f (6) stipulates that the provisions are without prejudice to the information and consultation rights instituted under national law, these rights will now be analysed.

The Dutch Works Council Act (WCA) grants the CWC extensive co-determination rights. The CWC has a right to be informed and consulted because the envisaged transaction evidently has repercussions for the position of the employees since the parent company BV A, subject to employee participation rights, will be converted into a GmbH (article 25 (1) (a) or (e) WCA). The advice of the CWC must be requested at a time when it can still significantly affect the envisaged decision of the company. According to Dutch law this

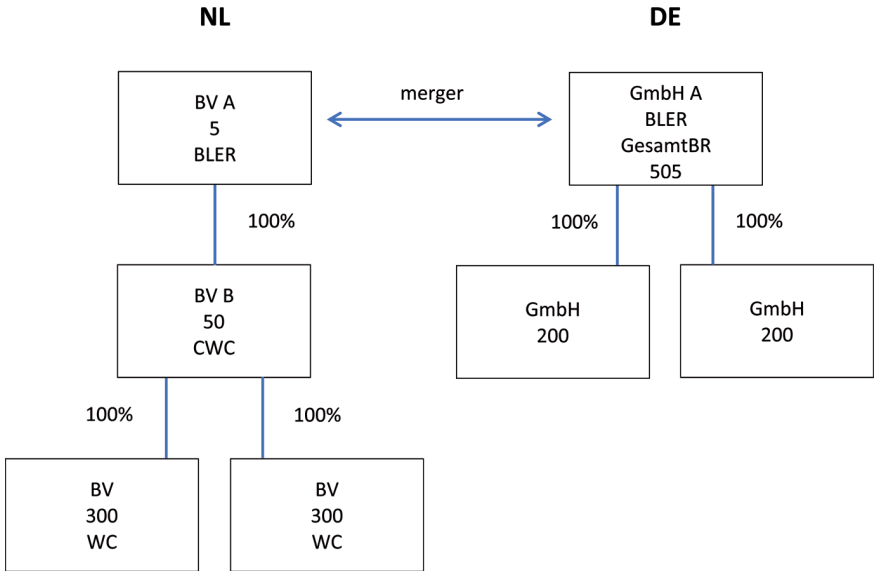
must be earlier than one month before the general meeting. For the purpose of the advice being sought, the CWC must be furnished with a summary of the grounds for the decision, its expected consequences for the employees, and the measures proposed by the management for dealing with such consequences. The CWC must render its written advice after the matter has been discussed in a consultation meeting with the management. If the decision of the company is not in accordance with the advice of the CWC, it may lodge an appeal within one month against the decision with the Enterprise Chamber of the Amsterdam Court of Appeal (article 26 (1) WCA). Appeals may be lodged only on the ground that the company could not in all fairness have arrived at that decision. If the Enterprise Chamber grants the appeal, it can order the company to rescind its decision in whole or in part (article 26 (5) WCA).

Participation Rights

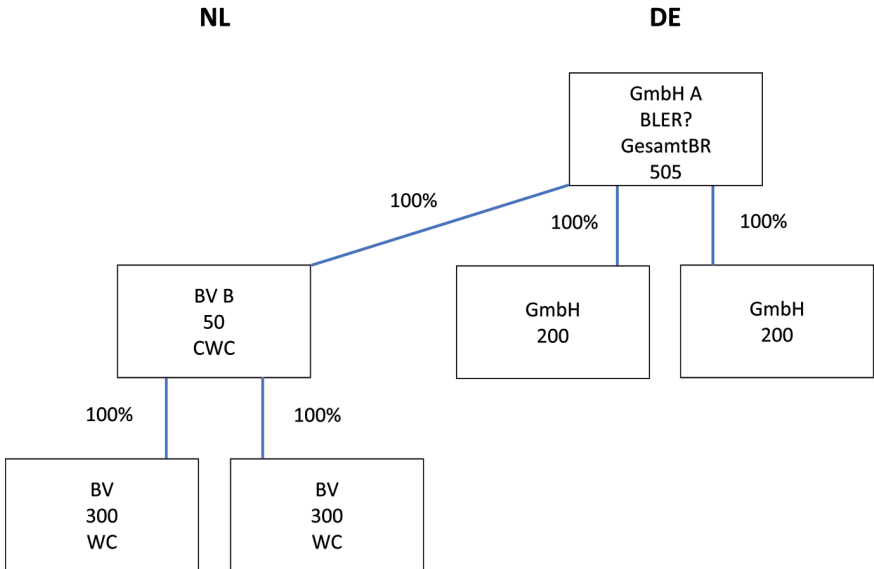
According to the ‘general rule’ laid down in article 86l (1) Proposal, the converted company GmbH will be governed by the employee participation rules in the destination Member State (Germany). Under German law, the thresholds for employee participation (500 employees) are not met after completion of the cross-border operation and the GmbH will not be subject to employee participation (§ 1 (1) (3) DrittelbG). This results in an exception to the general rule on the basis of the before-and-after principle (article 2 (2)(a) Proposal). As a consequence, negotiations will have to be launched between the management of BV A and an SNB consisting of representatives of both the Dutch and German employees. When an agreement is reached, employee participation rights on the basis of this agreement will have to be implemented in the destination company and the GmbH will be governed by this system of employee participation. A possible outcome of these negotiations could be that the Dutch CWC and representatives of the German employees together exercise the employee participation rights. If no agreement can be reached, the Standard Rules apply and this would lead to a situation where participation employee rights will have to be implemented in the GmbH, in accordance with Part 3 (a) Annex to the SE Directive: “all aspects of employee participation shall continue to apply (in the Destination Company)”.

Example II: Cross-border Merger of a Dutch BV and a German GmbH

In the second example BV A (subject to employee participation as the large company regime applies) intends to carry out a cross-border merger with an existing company, GmbH A, subject to employee participation in accordance with the German *Drittelbeteiligungsgesetz*.



After completion, BV A dissolves as a result of the cross-border merger:



Information and Consultation

According to article 124a Proposal, the management of both the BV A and GmbH A will provide employee representatives of the Dutch and the German employees, the CWC and the *Gesamtbetriebsrat* with a report that contains specific information on the implications of the cross-border merger. The employee representatives may give an opinion on the report that will be attached to it. In the Netherlands, the Works Council Act grants the CWC the right of advice on the envisaged cross-border transaction (article 25 WCA) and in Germany the national provisions on information and consultation as imbedded in the *Betriebsverfassungsgesetz* must be complied with.

Employee Participation

According to article 133 (1) Directive 2017/1132 (as implemented into national law), the company resulting from the cross-border merger will be subject to the rules in force concerning employee participation in Germany, where GmbH A has its registered office. There will be an exception to this general rule since GmbH A employs more than 500 employees (article 133 (2) Directive 2017/1132). Unless the management boards of both BV A and GmbH A decide to apply the Standard Rules in accordance with article 133 (4) Directive 2017/1132⁵⁷, a negotiation process will be launched in accordance with the rules included in article 133 (3) Directive 2017/1132 (as implemented in national law). If no agreement can be reached, the Standard Rules apply. Unless the viewpoint of Dutch legislators were to be followed that the Dutch employee participation system always takes precedence based on the works council having a non-binding right of recommendation to the appointment of all members of the supervisory board, the German system of employee participation applies.

One of the remaining problems of the protection of employee participation in cross-border operation is that if the German system of employee participation is applied, it grants no participation rights to employees in the Dutch part of the group, since the German rules on employee participation are granted to the German employee representatives, in this case example probably the *Gesamtbetriebsrat*. Employee participation is a ‘national affair’ of the different Member States. This leads to the unsatisfactory conclusion that although the legal framework included in the SE Directive, and the Proposal, protects the level of existing employee participation rights, the employee representatives in the departure Member State may lose employee participation rights (in favour of the employee representatives in the destination Member State). The SNB, when

57 Pursuant to Dutch law, such decision will be subject to an advice of the CWC (article 25 (i) WCA).

negotiating an agreement on employee participation rights, could aim for an agreement that grants employee participation rights to employee representatives of both the departure and the destination Member States.

After the cross-border merger, GmbH A will be obliged to establish an EWC since the transnational group created by way of the cross-border merger employs more than 1,000 employees and at least 150 employees in each of at least two Member States.⁵⁸

6. *Final Remarks*

One of the aims of the current Proposal⁵⁹ is to provide harmonised rules on cross-border conversions and divisions that contribute to removing restrictions on the freedom of establishment, whilst at the same time providing adequate protection for stakeholders such as employees. The first observation is that adoption of the Proposal would create a legal framework for cross-border conversions and divisions which currently does not exist. The position of employees would obviously be strengthened as EU legislation in this field creates more legal certainty.

From the viewpoint of employee protection, safeguarding existing employee participation rights at board level is the most important element of the Proposal. Experiences with both the SE and cross-border mergers have shown that the framework included in the SE Directive and adopted in the Legal Merger Directive is to a certain degree successful. The starting point is the ‘general rule’ that employee participation rights in the destination Member State apply. However, if application of this general rule would lower the level of existing employee participation rights, it is set aside. The framework offers a negotiating system leading to an agreement on employee participation and thus protects existing employee participation. When no agreement can be reached, default rules apply, so that negotiations take place against the background of the parties being aware that the law makes provisions for this situation. In these provisions the before-and-after principle is leading. As a result, the framework on employee participation is only applicable when one of the participating companies already has incorporated an employee participation system. There is, however, an important difference between the protection of such rights in the case of the creation of an SE and a cross-border operation. The SE must

58 Cost reduction may be achieved when negotiations with the SNB are launched on both an agreement on employee participation rights and an agreement on the establishment of an EWC.

59 Recital 6 Amended Proposal.

establish a representative entity of the employees (SEWC) that will exercise employee participation rights. In the case of a cross-border merger, conversion or division, the framework to protect employee participation rights may guarantee protection of the existing level of employee participation rights but these rights may very well be exercised only by the employee representatives in the destination Member State since employee participation is generally a ‘national affair’ that does not take into account employees employed by establishments or subsidiaries outside the destination Member State. This observation leads to the conclusion that although the existing *level* of employee participation rights in the company that enters into a cross-border corporate transaction is in principle safeguarded, the employees and/or their representatives in the departure Member State may lose their employee participation rights. In the negotiation process on an agreement on employee participation, the SNB could aim for safeguarding (some) participation rights of the employees in the departure Member State.

Experiences have shown that companies, particularly in Germany, create an SE or engage in a cross-border merger before the national thresholds for the number of employees are met, to avoid being obliged to establish employee participation rights or being subject to a higher level of employee participation. As the rules contained in the April 2018 Proposal to counter such circumvention lacked effectiveness, the Amended Proposal no longer contains those provisions. Rules tailored to combat circumvention of board-level representation rights would therefore have to be included in the national law of the Member States.

In order to protect employee participation rights, the company resulting from a cross-border operation is not entitled to remove such rights during a period of three years by way of carrying out a subsequent cross-border or national corporate restructuring. The Proposal has extended this anti-abuse provision to cross-border operations, although a protection period of three years remains rather short.

The second important element of employee protection relates to the information and consultation of employees. On a transnational level, the EWC Directive grants information and consultation rights to an EWC, but on a national level there is no harmonisation of such rights. As the Cross-border Merger Directive contained no provisions on the information and consultation of employees, the obligation of the management board contained in the Proposal to provide employees with a report that contains specific information on the implications of the envisaged cross-border transaction substantially strengthens the employees’ position. The fact that employee representatives can give their opinion on the cross-border corporate restructuring which is attached to the report, confronts the management and the shareholders with the employees’

position on the envisaged transaction, particularly since both the report and the opinion of the employees are submitted to the competent authority. The competent authority can, when scrutinizing the legality of the envisaged transaction, take the employees' position into account. For employees in those Member States that have a long tradition of co-determination, the report and the right to be consulted might not add additional co-determination rights, but the provision does safeguard the right of employees in all Member States to be provided with such information and to be consulted on the cross-border operation. It should be noted, however, that the timeframe is rather short since the report has to be submitted one month before the shareholders decide on the transaction. As a result, further clarification of the period the employee representatives have to issue their opinion is desirable. This equally applies to the ambiguous wording of article 86f/124a/160h (4) of the Proposal.

On the basis of the above, it can be concluded that the provisions included in the Proposal to safeguard the protection of employees are in line with existing EU legislation on the involvement of employees. There seems to be no room for EU legislators to depart from the political compromises reached between the Member States in the past. On the most politically sensitive subject, the protection of employee participation rights, the provisions only slightly deviate from the compromise negotiated in the past, as employee participation rights in the destination company are protected in both a domestic and a cross-border restructuring within three years of the cross-border operation. The information and consultation rights of employees have been strengthened since employee representatives must receive a report on the cross-border transaction and may give their opinion on the transaction.

One of the hopes and wishes for the future evolution of the involvement of employees may perhaps be that national systems of board-level participation rights provide more room for the involvement of employees employed by foreign subsidiaries or establishments, resulting in more transnational employee participation rights after cross-border operations.