

The transposition into Norwegian law of the 10th Directive on cross-border mergers of companies with share capital

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1. Legal changes and a new regulation

The 10th Directive (2005/56/EU) was made part of the EA agreement by the EEA Committee on 22 September 2006 (No. 127/2006). The transposition process was divided into:

- Changes in the Norwegian act relating to public limited liability companies (*allmennaksjeloven*) and the Norwegian act relating to limited liability companies (*aksjeloven*).¹ The changes were adopted by Parliament on 18 December 2007. The Ministry of Justice was the responsible ministry.
- A new regulation concerning employee participation in cross-border companies with legal authority in the Norwegian act relating to public limited liability companies (*allmennaksjeloven*). Regulations are made by the relevant ministries (no hearing in Parliament), in this case the Ministry of Labour and Social Inclusion. The Regulation was adopted by the government on 9 January and came into force on 1 February 2008.

2. Background: Norwegian legislation on employee representation

Norway has a combination of a one-tier and a two tier-system. In companies with:

- 30–49 employees: a majority of the employees (or trade union(s) covering two thirds of the employees) may demand 1 board member elected by and from among the employees;
- 50–200 employees: a majority of the employees (or trade union(s) covering two thirds of the employees) may demand that one third of board members be elected by and from among the employees;
- 200+ employees: board-level representation (one third) is compulsory.

¹ A few other acts were affected, but these two are the important ones.

The same rules apply to groups (parent company and subsidiaries). The legal framework covers (with some exceptions) all companies considered a legal entity.

In addition, companies with more than 200 employees are supposed to establish a 'corporate assembly' (*bedriftsforsamling*). This arrangement is found only in Norway and must not be confused with either the general assembly or works councils (*bedriefsraat*). Two thirds of the members of the corporate assembly are elected by the general assembly and one third by (and from among) the employees. The corporate assembly elects the board, and the election process (found in a regulation with legal authority in the Norwegian act relating to limited liability companies) ensures that one third are elected by the employees. In addition, the corporate assembly may decide on issues such as large investments and the relocation or closure of plants.

The idea and composition of the corporate assembly played an important part in the board legislation. But changes in legislation in 1989 made it possible to enter into an agreement with local trade unions not to establish an assembly, in which case the employees are entitled to elect one more (for example, one third +1 representatives) employee director. Today, only approximately 20 per cent of all companies with more than 200 employees have established a corporate assembly.

3. Article 16 – contents of Norwegian regulation

The contents of the regulation are in principle very similar to the regulation concerning SEs.

The general principle is stated in §4 (1):

The participation rules of the state where the company resulting from the cross-border merger has its headquarters [shall apply], unless §4 (2)....

- a) one of the merging companies has more than 500 employees;
- b) the relevant national law governing the company emerging from the cross-border merger does not require the same amount of participation as was found in the companies involved in the merger (number/portion of employee representatives in the 'governing body');
- c) the national legislation implies that 'foreign' workers shall not be given the same participation rights as domestic workers.

If any of points a–c apply, the regulation lays down the rules and procedure of the negotiating body (see below).

Comments on exceptions to §4 (1)

- a) In Norwegian companies with more than 500 employees, employee board-level representation and a corporate assembly are compulsory.

In companies with fewer than 200 employees representation depends on a request from the employees. Only approximately 50 per cent of companies with more than 30 employees have exercised this right. In the new regulation the Ministry states that only companies in which the employees **have done so are covered** by §4 (1).

The same principle does apply to the corporate assembly: if an agreement is made, an assembly would not **[does not?]** have to be established in the new company. In the same companies, we find that 30 per cent do not adhere to the law on board-level representation. These companies have not suffered any legal sanctions, however.

The requirement of exercising the legal right (combined with the lack of sanctions) is very important as it means that (merged) companies with a Norwegian headquarters are likely to start the negotiation process at a far lower level of participation (no employee representatives) than the Norwegian law provides for.

The same low starting level, even if illegal, would also apply in the case of the corporate assembly. A number of companies have not established one, even if no agreement with the trade union(s) has been made.

Thus, in companies in which the employees have not used their rights (a) could be an important way of increasing participation in Norwegian-based companies. But if the employees do not use their rights, the negotiation process would start off with a weak Norwegian delegation.

b) This would apply only if one of the merging companies is German and thus subject to the rule that half of the directors must be employee representatives. But as in (a), the regulation is based on the principle of exercising rights, not on the rules/laws as such.

c) When employees demand representation at board level, employees from subsidiaries/workplaces located outside Norway may be taken into account. This exception is therefore apparently not relevant to Norway. In reality, however, few Norwegian parent companies have foreign employees on the board, if any – they tend to come from other Nordic countries. Decisions concerning the number of employees abroad and how to include them is taken by a government tribunal (the committee on industrial democracy). Thus, in most situations, a negotiating body has to be set up.

SNB – composition and purpose

The rules are made on the same principles as the rules concerning SEs and the standard regulation. In the case of conflicts, the committee on industrial democracy will address the issues.

4. Public interest

The directive has not given rise to any public interest *at all* in Norway; there have been no newspaper articles and no debates by the trade unions.