

# **Analysis of the company law package from the perspective of employee board level participation**

## **ETUI Briefing paper series on the Company Law Package**

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### **1. What does the company law package include?**

One of the two parts of the EU company law package, the proposal for a Directive amending the consolidated company law Directive ((EU) 2017/1132) as regards cross-border conversions, mergers and divisions - COM(2018) 241 final, includes several provisions dealing with board level participation in these three types of cross border restructuring situations.

### **2. What is the Problem? - stakeholder protection in the context of the Directive**

In the context of cross-border restructuring activities of companies, in many cases stakeholder interests are in danger. Specifically, existing systems worker representation on company boards may be at risk due to cross-border restructuring, either because the new company law applicable to the restructured does not foresee worker board level representation, or because employment thresholds for worker representation may not be reached. Since the Polbud<sup>1</sup> decision of the ECJ on the 25.10.2017 it is settled case law that the freedom of establishment (Art. 49, 54 TFEU) also includes the right to carry out a cross-border conversion. This increased the dangers for the affected stakeholders. Neither the consolidated company law directive nor the recent commission proposal promotes a sound, coherent and sustainable stakeholder approach in EU company law.

### **3. How does the proposal address Employee Board Level Participation?**

With regard to employee board level participation issues, the legislation that already exists on this for cross-border mergers (Art. 133 directive (EU) 2017/1132) and the new rules proposed by the commission for cross border conversions and divisions (Art. 86l and 160n Commission proposal) must be examined. In general, the law of the country in which the company is registered in defines the rules for employee board level participation. However, existing participation arrangements are endangered if restructuring results in applying company law which do not provide for or define weaker rules for worker participation. The reference on the SE Directive in the existing Art. 133 of the consolidated company law Directive and the planned Art. 86l and 160n of the commission proposal provides some protection here through a “before-after” principle which specifies triggers for negotiations over worker participation arrangements and a set of standard fallback rules which apply if negotiations fail. The former Cross-border Mergers Directive, which is now part of the consolidated company law Directive, has adopted a weaker version of the “before-after” principle which has weaker triggers and which allows management to unilaterally impose the standard (fallback) rules.

### **4. What are the major shortcomings and how could they be fixed**

In the following, the major shortcomings from the perspective of board level participation are addressed. The leading principle of this paper is to promote a sound, coherent and sustainable stakeholder approach in EU company law. The focus is only on employee board level participation; as other worker rights issues are addressed in other papers.

#### **a) General approach**

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<sup>1</sup> Heuschmid, Arbeit und Recht, 2018 p 96.

- In general EU company law does not incorporate the stakeholder approach, which is the basic principle of company law in the major European company law systems. This should be changed. Therefore a **stakeholder clause** should be introduced in a new Art. 1 in Directive (EU) 2017/1132 with the following wording: “The management or administrative organ is responsible for managing the company in the interests of the company, that is, taking account of the interests of the shareholders, its employees and other stakeholders, with the objective of sustainable creation of value.”<sup>2</sup>
- To prevent loopholes in stakeholder protection the measures allowed in the context of cross-border restructuring should be regulated through the enumeration principle in the Directive (i.e. principle that only actions are allowed which are specifically authorized). Therefore, a new Article should be introduced at the beginning of Title II of Directive (EU) 2017/1132 with the following wording: “To safeguard sustainable stakeholder protection, cross-border restructuring measures beyond Art. 86b (2), Art. 119 (2) and Art. 160b (3) are not allowed”.

#### b) Cross-border Conversion

- The key risk to employee board level participation in the case of cross-border conversions is that the new company law applying to a converted company may not require participation, even if the company previously had workers on the board. To ensure that at least the status quo of board level participation is protected by the Directive a **general protection-clause** should be introduced as a new Art. 86l (1): “It is a fundamental principle and stated aim of this Article to secure employees' participation rights. Therefore, in the company resulting from the cross border restructuring, at least the same level of all elements of employee participation rights should continue to apply”.
- If the negotiation procedure is triggered by Art. 86l (2) **supplementary provisions on standard rules** are necessary in Art. 86l (3) lit. g). Negotiations are triggered if employment in the last six months has been at least 4/5ths of the threshold for participation, however, if no participation existed previously then there may be no participation in the converted company, even if employment subsequently grows beyond the participation threshold in the origin country. The best solution would be to apply the standard rules automatically, if the thresholds laid down in the law of the departure state are exceeded in the next three years after the conversion.
- Art. 86l (4) lit. a) and b) should be deleted, since they allow weaker or no participation and are thus not in line with the approach to protect at least the same level of all elements of employee participation rights.
- The protective provision in Art. 86l (7) which freezes in participation arrangements for three years should be extended to five years. This could be combined with a provision for a re-negotiation procedure including the application of standard rules.

#### c) Cross-border Division

- A **general protection-clause** in a new Art. 160n (1) should be introduced, similar to the case of cross-border conversions (see 1st bullet point in the section on conversions).
- Introduction of a **supplementary provision on standard rules** in Art. 160n (3) lit. g) (see 2nd bullet point on conversion).
- Deletion of Art. 160n (4) lit. a) and lit. b) (see 3rd bullet point on conversion).
- Extension of the freezing provision in Art. 160n (7) to five years (see 4th bullet point on conversions).

#### d) Cross-border Merger

- Introduction of a **general protection-clause in a new Art. 133 (1)** (see 1<sup>st</sup> bullet point on conversions).

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<sup>2</sup> See also: Recital 14 Directive (EU) 2017/828.

- Introduction of the “four fifths-model” of Art. 86l (2) Alt. 1 and Art. 160n (2) Alt. 1 into Art. 133 (2) including sustainable standard rules (on the latter see the 2<sup>nd</sup> bullet point on conversion).
- To make the case of cross-border mergers consistent with cross-border conversions and divisions the following aspects have to be added:
  - Introduction of a reference to Art. 4 (4) in Art. 133 (3) lit.b).
  - Deletion of Art. 133 (3) lit. c) apart from the reference on Art. 7 (1) of SE-Directive.
  - Introduction of a reference on point (a) of part 3 of the Annex in Art. 133 (3) lit. h) and deletion of the reference on point (b) of part 3 of the Annex and introduction of supplementary provision on standard rules (see bullet point 2 on conversion).
- Since Art. 133 (4) is not in line with the approach to protect at least the same level of all elements of employee participation rights, it should be deleted.
- Extension of the freezing provision in Art. 133 (7) on five years (see bullet point 4 on conversion).