The company law package from the perspective of the workers' voice
Briefing paper series on the Company Law Package
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The author invokes in this paper the workers' voice in the 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, drawing on experiences with other cross-border restructurings.

What problems is the Company Law Package proposal addressing?

- The Commission's main aim is that new company law rules make it easier for companies to merge, divide or move within the Single Market.
- Currently, relevant stakeholders (employees, creditors, minority shareholders and other third parties) are faced with uncertainty as to their rights and protections in cross-border situations. The divergent national conflict-of-law rules contribute to this situation.
- The claim is that the new rules will ensure that employees' rights are well protected with strong safeguards; this should be guaranteed in a balanced framework where the use of the freedom of establishment enshrined in the EU Treaty goes hand in hand with protecting national social and labour law prerogatives, in line with the European Pillar of social rights.
- The proposal aims a better tackling of artificial arrangements that lead to tax and social contribution abuses.

What is in the proposals (related to the workers' voice)?

- For cross-border operations, the recitals suggest that with these proposals for employee information, consultation and participation a) targeted amendments are introduced to existing cross-border mergers rules that b) also apply to cross-border divisions and conversions, and that c) provide for specific measures for cross-border divisions and conversions as a result of the perceived higher risks for employees inherent in such operations.
- For cross-border conversions and divisions, the proposals introduce rules and procedures requiring Member States to assess on a case-by-case basis whether the cross-border conversion in question constitutes an artificial arrangement designed to obtain undue tax advantages or unduly prejudice the rights of employees.
- The Directive provides that the rules on employee participation shall follow the laws of the MS where the registered office of the successor company is situated.
- To avoid forum shopping, the Directive includes three exceptions to the general rule in order to guarantee the status quo in terms of employee participation. If any of these exceptions apply (basically there must be some form of employee participation before the merger), the management **can either negotiate with workers a tailored solution on the participation or apply standard rules** (on the composition of the representative body, the competence and powers and the functioning of the participation) provided by SE Directive 2001/86/EC59. The percentage of employees required to have been previously covered by an employee participation system is **one third** (compared to one quarter in the SE directive rules).
- The proposal neither changes the current rules which provide for information and consultation of workers under EU law nor does it prescribe how such consultation and information should be effected.
- Related to genuine suspicion of fraud 'on reasonable grounds', a physical presence before a competent authority can be required at different stages of a merger, conversion or division process. Serious concerns that cross-border conversions or divisions end up in an artificial arrangement can lead to in-depth assessments (as prescribed in Article 86n, 160p and 160o).

What needs to be assessed?

In earlier research, we found that information, consultation and participation rights defined by EU-legislation in and during cross-border company restructuring processes are restricted.[i]

- **It is important to verify which information has to be provided.** For instance, in the CBM-study (forthcoming, 2018), the receipt of a management report with reasons for the CBM and its implications for stakeholders has to be provided at least one month before the shareholders' meeting deciding on the merger. We found ambiguity in some countries whether workers are entitled to receive the common draft merger terms. Workers representatives have the right to attach an opinion to this management report, if submitted 'in good time'.
- The question is **at what stage can workers derive rights from the EU-frame that is proposed?** In order to have decent information, consultation and participation procedures, and even more important to recognise workers as key stakeholders, workers should be informed and consulted at an early stage, before management has made a final decision about the cross-border restructuring. However, as in the case of the EU Takeover Bids Directive (Cremers and Vitols 2016), these information rights come much too late in the restructuring process for workers to have much influence. By the time the management report is submitted the decision will likely already have been effectively taken, and the shareholders' meeting being a symbolic or rubber stamp approval.
- The **information, consultation and participation rights in the resulting company** or companies have to be assessed. First, the obligation to establish an information and consultation body (works council). Secondly, the threshold for triggering worker participation. Thirdly, the obligation to negotiate. Fourthly, the fall-back (in case negotiations fail or unilaterally decided).
- In the assessment of **the application of the 'before and after' principle**, we found (unintended) negative consequences. For instance, in case a company changes its legal form below a key threshold triggering worker participation, e.g. for German companies below the 500-employee threshold for triggering one-third participation. Growth beyond the threshold, without triggering the obligation to introduce worker participation, leads to a loss of workers' rights.
- **Sanctioning of the non-respect of workers' rights and the tackling of fraudulent use** of the created regulatory frame. In general terms, there is hardly any compliance control. Moreover, social fraud is still not seen as a major offense in the Union. The internal market rules that regulate the economic freedoms so far do neither provide a EU-wide fining policy nor operational cessation procedures that can lead to the suspension of activities. There is a stark contrast between the serious penalties for violation of capital market laws (insider information, ad hoc notification of shareholders on important company developments) and the complete or almost complete lack of penalties for violation of worker rights. This includes violations like failure to adhere to statements about anticipated employment impacts of company restructuring and failure to inform workers on a timely basis.

What can be done?

The ETUC proposals to establish a 'horizontal' set of rules which would apply across all European company law types and companies formed through EU directives for cross-national restructuring (cross-border mergers and divisions, cross-border conversions) can serve as the frame of reference for a final assessment.

1. First, in order to keep up the consistency of the proposals with the SE-Directive, the option for the management to take a unilateral decision not to negotiate, but to apply the standards rules has to be taken out. Therefore, the existing Article 133.4a of Directive (EU) 2017/1132 as regards cross-border

conversions, mergers and division, which confers the relevant organs of the companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation, has to be deleted.

2. Secondly, the proposals related to the circumstances that can block the entitlement to carry out a cross border conversion or division (respectively Article 86c.2 and Article 160d.2, both under a: where 'proceedings have been instituted for the winding-up, liquidation, or insolvency of that company') have to be completed with 'genuine suspicion of social fraud or infringements of workers' rights'. In amendments of the cross-border merger Directive, this notion should also be added to the proposed Article 120.4a.

3. Thirdly, an additional circumstance could be added in these non-entitlement articles that states where '(f) disciplinary or administrative actions or criminal sanctions and decisions have been taken involving fraudulent practices which are directly relevant to the company's competence or reliability'. Reference can be made here to Chapter VI of the Services Directive.

4. The proposal states in recitals that it aims to complement the legislation of the European Works Council (Directive 2009/38/EC). However, apart from a very general formulation (submission of reports is without prejudice to the applicable information and consultation rights and proceedings instituted at national level following the implementation of Directives 2001/23/EC, 2002/14/EC or 2009/38/EC), there is no explicit reference to these EU-bodies. This could be overcome by a clear reference in the Articles 86e, 86f, 124, 124a, 160g and 160h: the reports shall be made available 'to the European Works Council, the representatives of the employees, or where there are no such representatives, to the employees themselves'.

5. National information and consultation rights in several countries prescribe an early start of the information and consultation, especially in case of proposals that lead to major restructurings, such as the termination of operations or a significant reduction of activities. National representative bodies often provide workers with advice or even consent rights, with a time horizon that provides the representatives with the right and opportunity to meet the management to discuss the proposed decision and to come up with an own advice. In the Renault-Vilvoorde case, the court clearly stated that both the national and the European information and consultation rights have to be respected. Moreover, the outcome of the national deliberations can be crucial for the further procedure and should be shared with all involved stakeholders, including the workers representatives of all involved constituencies. It is quite clear that a proper consultation at national and at EU-level cannot be finalised in two months. This has consequences for the text of the proposed Directive, with the aim to align the respective rights:

- Before a decision is taken, any preceding applicable national information and consultation rights have to be granted in such a way and in such manner that an advice can be formulated.

- The result of any preceding applicable information and consultation rights and proceedings instituted at national level has to be integrated in the reports mentioned in the Articles 86e, 86f, 124, 124a, 160g and 160h.

[i] Cremers, J. and S. Vitols (2018, forthcoming) Exercising voice across borders: workers' rights under the EU Cross-border Mergers Directive.
Cremers, J. and S. Vitols (2016) Takeovers with or without worker voice: workers' rights under the EU Takeover Bids Directive. ETUI: Brussels.
Cremers, J. Stollt, M. and S. Vitols (2013) A decade of experience with the European Company. ETUI: Brussels.