EMPLOYEE PARTICIPATION RIGHTS NEGOTIATION IN COMPANIES RESULTING FROM A CROSS-BORDER MERGER

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Abstract

The cross-border merger may have major consequences on the employee rights of the companies undergoing this process. The employees find themselves before two great uncertainties. The first one regards the continuity of the labor contract under the rights acquired before the merger, with respect to which the European legislator adopted Directive 2001/23/CE on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. The second one refers to maintaining the employee participation right to the administration and supervision of companies, where they exist, in the company resulting from the cross-border fusion process, right protected at European level through article no. 16 of the Directive 2005/56/EC on cross-border mergers of limited liability companies, completed with Regulation(EC) 2157/2001 in the Statute for a European company and with Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employee. The employee participation rights in resulting companies from a cross-border merger and the way they are negotiated are aspects of great importance in influencing the make-decision process regarding to operate or not such reorganization. The paper aims to achieve to an analyses of the legal framework provided by the European norms on the negotiation of participation rights of employees in the event of a cross-border merger, emphasizes the aspects with regard to which the regulation in the domain requires to be modified and proposes the lege ferenda amendments.

Keywords: *employee participation rights, negotiations, special negotiating body, agreements on employees, involvement, standard rules.*

1. Introducere.

The cross-border merger of companies, as a way to exercise the freedom of establishment, is inseparably linked to employee protection within the participating companies. The continuity of the employment relationship and the preservation of the employee rights acquired prior to the merger, as well as the preservation of participation rights to administration and management of the company resulting from the cross-border merger within the supervisory and management bodies represent the two aspects regarding to which the European legislation regulated protection mechanisms. Unlike the issue of the continuity of the employment contract within the work conditions grandfathered prior to the cross-border merger, which became the subject of numerous research in juridical literature[1], the right of participation in the administration of the company resulting from the merger and negotiating these rights have been less addressed[2].

The difference is understandable, if we take into account the fact that all Member States of the European Union have regulations regarding the preservation of rights acquired through the labor contracts , but not all of them have a legal framework which allows the employees to participate in the governance of the companies which employed them.

Therefore, on one hand there are Germany and the Netherlands, States in which employee participation rights are considered as being very important, while on the other hand there are States such as Italy or Romania that do not have such a system. In between these two extremes, there are States such as Austria or France, which have a system of employee participation, but are more reserved regarding the degree of participation of the employee in comparison to Germany. Even in those States that do not have a national participation system, there exists the obligation of respecting the employee participation rights by applying the "before and after" principle.

With the purpose of protecting the participation rights of the employees belonging to the companies partaking the process of cross-border merger in case in which the resulting company establishes its social headquarters in a State in which exists the risk of violation of these rights, the European legislator

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[1] Regarding the employee protection in the case of company transfer through merger, see R. Routier, *Les fusions de sociétés commerciales. Prolégomènes pour un nouveau droit des rapprochements,* Librairie Générale de Droit et de Jurisprudence, Paris , 2004, pp.342 and s.o.; I.T. Stefanescu, *Theoretical and practical treaty,* Bucharest, Universul Juridic Publishing House, 2012, p 466-474; A.Uluitu, *The employee rights in case of transfers of undertakings, businesses or parts of undertakings,* Romanian Journal for Labor Law number 1/2006, pp 28-35 F.Bejan, *Legal aspects of the transposition of the Directive 2001/23/EC regarding the safeguarding of employees rights in the event of transfer in the Romanian Law,* Lex Scientia Lesij, Number XX, volume 1/2013, pp 16-23.

[2] Regarding the employee participation rights, see U. Veersma, S. Swinkels - Transfer: *In European Reviiew of Labour and Research* Participation in European Companies: views from social partners in three Member States Volume11, 2005 pp. 189-205; F.Bejan, *"European Union Rules on employee participation right within the framework of cross-bordee merger ."*, Advances in fiscal, poiitical and law sciences, Proceedings of the 2nd International Conference on Economics, Political and Law Science (EPLS '13), pp 43-49.

adopted a adequate legal frame, contained in article no. 16 Directive 2005/56/EC on cross-border mergers of limited liability companies[3], completed with Regulation(EC) 2157/2001 in the Statute for a European company[4] and with Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employee[5].

Our research is focused on the legal aspects of negotiation of participation rights in resulting companies as they are regulated by the European legislation. Due to the fact that, in practice, negotiations take place at a slow pace and represent an impediment towards finalizing cross-border mergers, we aim to identify the aspects regarding which the present regulation needs to be improved, so that its provisions would be a consistent support for the employees and for companies.

2. Negotiation of participation rights.

The procedure for determining the participation rights in the company resulting from the cross-border merger is based on the model of the European Company. At Community level, Article 16 paragraph (3) extends the legal regime established by Council Regulation no. 2157/2001 and by Directive 2001/86/EC with regard to the involvement. Employees in case of establishing European Companies (EC), which become applicable to cross-border operations. At national level, Member States which established participation mechanisms, have adopted participation rules in relation to the peculiarities of their own social policies, harmonized in accordance with Community rules in the field.

Basically, if the parties do not decide otherwise, participation rights are established following negotiations between employees and employers, carefully and thoroughly regulated. Under certain circumstances, each party may choose to apply standard rules, as alternative to conducting negotiations and concluding an agreement.

According to the relevant provisions of Directive 2001/86/EC, the negotiation of participation rights by the employees and employers is subject to a legally regulated procedure, procedure which begins with the creation by the employees of a special negotiating body (SNB), continues with the ongoing negotiations between the SNB and the management bodies of the merging companies and can be finalized by an agreement between the parties with regard to the employee participation rights.

2.1. Establishing a special negotiating body (SNB)

The interests of the employees during the procedure for establishing participation rights are represented by a special negotiating body - SNB, the members of which are elected or appointed in proportion to the number of employees of the merging companies.

According to the Community rules, SNB are created after the publishing of the draft terms of the cross-border merger. As soon as possible after publishing, the management bodies of the participating companies must provide information about the identity of the companies, subsidiaries, establishments, and the number of their employees, to have all data available to create the special negotiating body and to open negotiations.

Thus, the creation of SNB is conditional upon the execution by the merging companies of a prior obligation to inform, which must be fulfilled as soon as possible after publishing the draft terms of cross-border merger.

In our opinion, the term to set up a special negotiating body is not enough regulated. *De lege ferenda* it requires a period expressed in time units to replace the current vague wording of the legislation, so as to limit any delays caused by a possible lack of the parties' intention to engage in serious negotiations.

The members of the SNB are established in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries and establishments. The number of members is determined by allocating in respect of a Member State one seat in the SNB corresponding to each 10% or a fraction thereof of the total number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States.

The practical ways for appointing or electing representatives are established by the national law of each Member State. The measures taken by the Member States in this regard must ensure, to the extent possible, that each SNB includes at least one representative for each participating company which has employees in the respective Member State.

If there is a large number of companies involved in the merger and the mechanism to appoint SNB members may result in employees of a company that are not represented, the number of members for each Member State can be supplemented. The additional members from each Member State must be established so as to ensure the including in the SNB of at least one representative for each participating company which is registered and has employees in that Member State, and which will cease to exist as a separate legal entity following the merger. The increase of the number of seats in the SNB must be made so that the number of the additional members to not exceed the number of members previously designated and to not result in a double representation of the employees concerned, and if the number of such companies is higher than the

[3] Published in the Official Journal, nº L 310/2005.
[4] Published in the Official Journal, nº L 294/2001.
[5] Published in the Official Journal, nº L 294/2001.

number of the available additional seats, these seats shall be allocated to companies in different Member States by decreasing order of the number of employees.

Both in the legal literature[6] and practice in the field, critics were brought to the SNB structure, particularly with regard to the calculation of the number of employees based on which the SNB structure is established. *De lege ferenda*, a simplified algorithm is required to determine the SNB structure, so as to remove current uncertainties.

With regard to the main role of the SNB, it has the responsibility to negotiate with the representatives of their employers the substance of the employee participation rights in the company resulting from the cross-border merger. Meantime, SNB may decide not to open negotiations or to terminate negotiations already opened.

As a rule, the SNB shall take decisions by double majority, respectively by an absolute majority of the votes of the SNB members provided that such a majority also represents an absolute majority of the represented employees. Each member of the SNB shall have one vote.

Exception to the rule on decisions made by SNB are the situations where the result of negotiations leads to a reduction of participation rights, if participation covers at least 25% of the overall number of employees of the participating companies. In order to meet the requirements of the law in these particular situations, decisions must be taken with a majority of two thirds of the members of the SNB representing at least two thirds of the employees from at least two Member States. Also, given the consequences, the decision not to open negotiations or to terminate negotiations already opened shall be taken with the same special majority.

SNB and the competent bodies of the merging companies are required to conduct negotiations with a view to reaching an agreement on employee participation in the internal structure of the company resulting from the merger. The purpose of negotiation is that the employees preserve their influence on the participating companies, influence which could be affected by the fundamental structural changes in which their employer gets involved.

In order for the negotiations to be opened, the European legislator imposed on employers the obligation to inform employees with regard to the draft terms of the cross-border merger and its actual implementation. The reason to regulate the obligation to inform is to allow the employees' representatives to assess the size of the merger and its impact on their rights, so they can prepare on real and complete grounds the negotiation of the legal system of participation within the internal organization of the company resulting from the cross-border merger.

During negotiations, the SNB may be assisted by experts upon request. Given that the participating companies are financing the functioning of the SNB, it is up to the Member States to limit costs, so that the budget allocated to negotiations to cover the services of one expert.

Regarding the duration of negotiations, the Directive establishes a maximum term of six months commencing as soon as the SNB is established to finalize negotiations. The parties may decide, by joint agreement, to extend negotiations for other maximum six months, so that the duration of negotiations does not exceed one year from the establishment of the Sunbathe participants in the negotiations, the representatives of the employees as well as the companies' representatives, shall, in the exercise of their functions, enjoy the same protection and guarantees provided for the nationals of the state of the beneficiary company's registered office in similar qualities and activities.

All participants in the negotiations, including experts, are obliged not to reveal any information available to them during negotiations and which has been given to them in confidence. The obligation of confidentiality shall apply to the participants in the negotiations even after the expiry of their terms of office.

Except as otherwise provided in Directive 2001/86/EC, the legislation applicable to the negotiation procedure shall be the legislation of the Member State in which the registered office of the company resulting from the cross-border merger has its registered office.

2.2. Negotiating an Agreement

Negotiations between the employees' representatives and the SNB of the merging companies may be terminated by concluding an agreement on arrangements for the involvement of employees.

In principle, the parties are free to determine the applicable rules on participation, according to their interests and as negotiated. The only legal demands of which they are bound are the written form of the agreement and a minimum content including the terms expressly provided by law.

Hence, according to Article 4 paragraph (2) of Directive 2001/86/EC, the agreement shall be concluded in written form and shall specify the following terms of understanding between the parties:

- the scope of the agreement;
- the substance of the arrangements established by the parties with regard to the arrangements for the involvement of employees;
- the date of entry into force of the agreement and its duration; and
- the cases where the agreement should be renegotiated and the procedure for its renegotiation.

Among the measures taken following the negotiations, the document confirming the will of the parties must contain the following aspects related to employee participation:

- the number of members in the supervisory or

[6] B. Keller, *The European Company statute-employee involvement-and beyond*, in Industrial Relations Journal, Vol. 33, no. 5, 2002, pp. 424–445

administrative bodies which the employees are entitled to elect, appoint, recommend or oppose;

- the procedures as to how these members may be elected, appointed, recommended or opposed by the employees; and
- the rights of the members elected, appointed, recommended or opposed by the employees.

3. Standard rules.

The conclusion of an agreement is only one of the solutions that can be given to the employee participation issue. It should be considered that the negotiation process does not necessarily end by concluding an agreement on arrangements for the involvement of employees, since there is a possibility that the parties cannot reach an agreement in this regard.

Also, the employees, through their representatives, may opt for the conclusion of a bargaining agreement or may find as inefficient the delay of the cross-border reorganization due to the performance of a negotiation process, against the fact that, without a bargaining agreement, their participation rights are, in subsidiary, protected by law.

In our opinion, from the perspective of the participating companies, the conducting of negotiations has some key disadvantages.

One of these concerns the fact that the negotiation procedure may last up to one year. By default, the efficiency of the cross-border merger is affected.

Direct and implied costs of such procedure are equally a disadvantage of the negotiation process. All expenses made during negotiation with regard to the functioning and protection of SNB, respectively of the competent bodies attending negotiations, is financed by the participating companies.

In addition, if we consider that during negotiations, changes can take place in the economic and legal status of the companies involved, the necessary updates are, in turn, time and resource consuming so that the losses encountered by the attendees in this context might question the cross-border decision itself.

Finally, there is a possibility that the parties do not conclude an agreement, either because they so decide or because negotiations were blocked.

Given these aspects, applying the standard rules may be the best solution for establishing the arrangements for the involvement of employees.

3.1. The scope of standard rules

In Article 16 paragraph (4) of the Directive on cross-border mergers, the European legislator gives alternative legal solutions to establishing participation rights based on a negotiation process. According to the cited provisions, under certain circumstances, the social aim may be achieved also by applying the standard rules regarding participation.

The settlement of the scope of standard rules reflects the concern to provide merging companies and employees a variety of options to cover different situations in which they might be. The initiative to apply standard rules can belong to both employees and the competent bodies of the participating companies. In some cases, the decision to implement such alternative solution may be a unilateral act of will and in others may be the results of the agreement between the parties.

Standard rules apply in the following cases:

a) SNB and the competent bodies of the merging companies so agree;
b) SNB has decided not to initiate negotiations or to close negotiations already opened and rely on the standard rules established by the national law of the Member State where the company resulting from the cross-border merger has its registered office;
c) the legal deadline for completing negotiations expired without the parties reaching an agreement on the involvement and the competent bodies of the participating companies decide to apply the standard rules and continue the merger process, while SNB does not decide to open negotiations or terminate negotiations already opened; and
d) The competent bodies of the merging companies decide to directly abide the standard rules of the Member State where the registered office of the company resulting from the merger is to be situated, without prior negotiation.

It has been argued that there is a risk that the implementation of standard rules to be decided by the employers exclusively for their benefit and not for a proper settlement of employee participation. In order to limit this eventual risk, the legal framework in the field was supplemented with several measures.

Thus, the standard rules can be applied only if:

a) before the registration of the cross-border . merger, one or more participating companies applied forms of participations covering at least 33% of the total number of employees in all participating companies or
b) before the registration of the cross-border merger, one or more participating companies applied forms of participations covering at least 33% of the total number of employees in all participating companies and if SNB so decides.(Article 16 paragraph (3) point (e) of Directive 2005/56/EC and Article 7 paragraph (2) point (b) of Directive 2001/86/EC).

Hence, the competent bodies of the merging companies may decide to make use of standard rules only if the participation covers at least one third of the total number of employees in all merging companies. It is estimated that the one third limit rule corroborated with the participation rules established by the standard rules are likely to provide sufficient protection of employee rights.

Exceptionally, where the one third thresholds are not reached, the standard rules may be applied only of

SNB so decides. Without the consent of SNB, the standard rules do not apply.

In this second scenario, practically the decision to apply or not standard rules to the participation system is made by the ones directly interested, the ones that can best appreciate the appropriateness and effects of their decisions, so even more the suspicion of violating employee rights is removed.

Besides the actual protective measures referred to above, the directive on cross-border mergers is supporting by provisions of Article 16 paragraph (6) the strengthening of the protection mechanisms of participation systems.

The provisions of the said rule specifically devotes the obligation of the company resulting from the cross-border merger to take a legal form for which the national law establishes a participation system, where at least one of the merging companies knows such a system. For example, if the applicable national law allows the exercise of participations rights only in joint stock companies, the absorbing company or the company newly created by the cross-border merger shall be set up in this form or change its legal form, as the case may be. Certainly, a change of the legal form triggers a series of other changes in the organization and functioning proper to the respective type of company, which, in turn, have to be made. Supported by these measures, the legal system of participation established by applying the standard rules ensures the observance of the "before and after" principle.

3.2. Standard rules and applicable law.

According to the standard rules, the number of members in the administrative and supervisory bodies of the company resulting from the cross-border merger shall be equal to the highest percentage that applies to participating companies.

The allocation of seats in the supervisory or administrative body among members representing employees from different Member States, namely how they can recommend or oppose the appointment of members in these bodies is made by the SNB or by the employees' representatives, as the case may be, depending on the number of employees from each Member State.

In setting the participation mechanisms, the competent body must ensure, where possible, that from each Member State at least one employee is appointed, giving priority, if necessary, to the Member State where the registered office of the company resulting from the cross-border merger is to be established.

Since the members elected, appointed, recommended in the administrative or supervisory body are full members of these structures, they have the same rights and obligations as the shareholders' representatives.

Where the standard rules are implemented, the applicable law is the law of the registered office of the company resulting from the cross-border merger. The applicable standard rules are set in the internal rules of Member States, as these transpose Directive 2001/86/EC with regard to the involvement of employees in its part referring to standard rules, including part three of the annex to the directive.

It should be noted however, that surprisingly, the Community rules give Members States the option to decide to preclude, by the national legislation transposing the directive, with no distinction, the applicability of standard rules. However, none of the Member State made use so far of the right to bring such a regulation.

Obviously, the passing of rules to preclude the alternative to apply standard rules significantly limits the options of the parties and may have serious consequences on the cross-border merger.

In this hypothesis, the only legal means by which the forms of employee participation may be established is negotiation, followed by the execution of an agreement. A failure of negotiations would result in a failure of the entire draft terms of the cross-border merger, given that the operation cannot be registered without establishing a participation mechanism.

From this perspective, the possibility given to Member States to preclude the application of standard rules by internal rules may be considered a breach of the free movement of companies, which *de lege ferenda* must be removed from the Community regulatory framework with regard to employee participation.

4. Conclusions and *de lege ferenda* proposals

The negotiation procedure is considered as being a complicated one. We find it useful to configure, in our findings, the essential aspects of employee participation negotiation in the company's management:

a) The establishment of participation rights is not mandatory for all cross-border mergers;
b) The company resulting from the cross-border is mainly subject to any rules relating to employee participation of the Member State where its registered office is to be established by the modifying or constitutive act, and in subsidiary to rules of exception;
c) Negotiations may start only if the management bodies do not decide to apply the standard provisions;
d) Where the negotiations are opened, employee participation often becomes a barrier to the completion of the cross-border merger. In practice, many mergers fail due to the difficulty to find a solution to the social issue;
e) The content of participation rights is established considering the „before and after" principle and is regulated so that the employee participation level in the company resulting from the cross-border merger to maintain, basically, the highest level of participation known before the operation in at least one of the participating companies;
f) The actual influence of the employees on the company's strategic decisions varies from one national law system to another. One of the

consequences is that the extent to which the employees influence the activity of the company may start from proposing a candidate in one of its internal structures to deciding equally with shareholders, as it happens in the German system.

In the meantime, after the analysis conducted, we consider that the European regulation of employee participation rights would be subject to *de lege ferenda* amendments under the following aspects:

a) It is necessary that the future regulation sets a doubtless minimum duration for informing employees, a limited period to form SNB and a shorter term for conducting negotiations, all these to increase the efficiency of the operation. The fact that negotiations may last one year does not meet the required celerity for a cross-border merger. In practice, the duration of negotiations exceeds this term. In practice, the average duration required to form a special negotiating body is of three months after initiating proceedings for this purpose. If we add that employees should be informed "immediately" on the merger, which means another period of time, it obviously results that the duration of negotiations does not help to reach the economic purpose for which the operation was started;
b) The calculation method of the total number of employees according to which the SNB structure is set raises several issues in practice, especially where the participating companies have a large number of subsidiaries and establishments. A different mechanism for forming a SNB, a clear and easy to do one, should be regulated;
c) Given that currently the forms of involvement in different Member States are too diverse, in the view of the Community legislator, a better harmonization of the forms of participation in different Member States;
d) Considering that not all Member States have established in the national law participation mechanisms and consequently, employee protection can be ensured only by applying standard rules, paragraph 3 of Article 7 of Directive 2001/56/EEC, according to which "Member States may provide that the reference provisions in part 3 of the Annex shall not apply in the case provided for in point (b) of paragraph 2 of Article 7" shall be repealed.

The conclusion is that the European legislator has to clarify and modify the legal framework in domain, in order for the participation right to be safeguarded, . Such an improvement of the juridical norms will encourage the cross-border mergers of companies and will guarantee their freedom of establishment.

References

- I.T., Stefanescu*Theoretical and practical treaty*, Bucharest: Universul Juridic Publishing House, 2012
- B. Keller, The European Company statute-employee involvement-and beyond, "Industrial Relations Journal", Vol. 33
- F.Bejan,*"European Union Rules on employee participation right within the framework of cross-border merger ."*, Advances in fiscal, political and law sciences, Proceedings of the 2nd International Conference on Economics, Political and Law Science (EPLS '13, 2013
- U. Veersma, S. Swinkels - Transfer: *In European Review of Labor and Research* Participation in European Companies: views from social partners in three Member States Volume11, 2005
- Lencou D. , Menjucq M., *Les fusions transfrontalieres de sociétés de capitaux: enfin une réalité mais des difficultés persistantes!*, Editura Dalloz , Paris, 2009
- Craig, P. and de Burca, G., *Dreptul Uniunii Europene*, Bucharest: Hamangiu, 2009
- Menjucq, M., *Droit international et européen des sociétés*, Domat droit privé, Montchrestien, 2008
- R. Routier, Les fusions de sociétés commerciales. Prolégomènes pour un nouveau droit des rapprochements, Librairie Générale de Droit et de Jurisprudence, Paris, 2004
- Council Regulation no. 2157/2001 on the Statute for a European Company published in the OJ 294/1 of November 10, 2001
- Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees published in the OJ L 294/22 of November 10, 2001
- Directive 2005/56/EC on cross-border mergers of limited liability companies published in the OJ L 310/1 of November 25, 2005
- Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies published in the OJ L 295/36 of October 20, 1978