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Austria - Transposition of the Directive on Cross-Border Mergers

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As already reported there have been several meetings since autumn 2006 in the Ministry of Justice regarding the transposition of the company law of the Directive on cross-border mergers and in the Ministry of Economy and Labour regarding the employee participation (Article 16). The social partners, especially the Chamber of Commerce, the Federation of Austrian Industrialists, the ÖGB and the Chamber of Labour have been involved. The formal appraisal procedure regarding the employee participation was before summer and now the bill is in the parliament. Probably it will be adopted soon and will enter into force on 15 December 2007 as intended in the Directive.

Company Law

In terms of the transposition of the Directive into Austrian company law there was no controversial discussion. Austrian stock corporations (AGs) and limited liability companies (GmbHs) will have the opportunity to merge with all corporations founded under the law of another member state and have their statutory seat, central administration or principal place of business in the community. The direction of the cross border Merger can be inside (Hineinverschmelzung) and also outside (Hinausverschmelzung) provided the laws of the affected states also permit both directions of the merger.

The cross border merger follows the same principles and procedures which provides for domestic mergers. This means, among other things, that the general meeting of an Austrian AG or GmbH, has to decide a cross-border merger until a majority of three quarters.

The management also has to inform the work council of the cross-border merger in time and give the shop stewards the opportunity for a writing statement that has to be published by the management.

In terms of company law the main question was how to secure the creditors claims of an Austrian company in case of an outside cross-border merger. The law has a provision that all creditors have

to be informed in case of an outside cross-border merger individually and can demand securities or payment of their claims.

Employee Participation

Regarding the employee participation there have been some controversial positions between the ÖGB and the Chamber of Labour on the one side and the employers representatives on the other side.

In the following you can read the main points of the controversial positions and the results of the negotiations (I don't expect that the results will be amended in the further processing in parliament):

1. The transposition of Art 16 par 4 c (*Member States may determine to limit the proportion of employee representatives in the administrative organ in particular circumstances*).

Result: This provision will not be transposed.

2. The question, if the period of three years in Art 16 par 7 (*...participation rights are protected in the event of subsequent domestic mergers...*) is a minimum period or a fixed period.

We (the representatives of the Chamber of Labour and the ÖGB) argued that the period of three years is a minimum period and not a fixed period, because the European legislator is not authorized to regulate the national company law and therefore it is within the competence of the national legislator to go beyond the three years.

Result: In the Austrian transposition the period will be five years.

3. The question, if the representatives of the employees in the (supervisory) board shall be entitled to time off for training without loss of wages.

Result: The representatives will have one week additional training without loss of wages if the company has establishments in at least two member states.

4. The question, who will appoint the Austrian member of the SNB if none of the concerned companies in Austria has a works council.

This is a question that has already been discussed in the course of the transposition of the SE Directive without any result. That means this point is still not regulated and therefore – from our point of view - not transposed properly. So we tried again to find a solution.

Result: Unfortunately there is still no solution for this problem.

5. Probably the most important regulation in the transposition is the paragraph regarding the loophole of Art 16 par 4 a (*application of the legislative provisions on the standard rules for employee participation without negotiation*).

This paragraph contains provisions

- that employees or their representatives shall be informed immediately if the management has decided not to hold negotiations and in particular the management shall give detail information of the companies and workplaces involved, the number of employees and details of existing worker representative bodies in these companies and workplaces
- about the setting up of a "special delegating body" (SDB) and the convening of the meeting of this body (the power to convene the meeting lies with the worker representatives)
- about the delegation of representatives to the SDB from Austria;
- about the tasks of the SDB: the decision on the distribution of seats and the delegation of employees' representatives to the supervisory or management board. The latter is restricted to the delegation of representatives from Austria. Delegation of representatives from other member states is a matter for each individual country's transposition legislation. Only in cases where such provisions are lacking does the SDB become responsible for the nomination of delegates.
- that in the case where, after members have already been delegated to the supervisory or administrative board, a change takes place such as to influence the composition of the delegation, the SDB has to take a new decision on the distribution of seats on the supervisory or administrative board and, if necessary, on the delegation of employees' representatives.
- that some provisions of the SE-transposition will apply: the constitution of the SNB, holding of meetings, taking of decisions, bearing of costs, duty of confidentiality, rights of employees' representatives.

In addition to that there was a discussion, if in cases where participation was present in at least one involved company and covered less than 33% of the total workforce of all involved companies, the SDB shall be up to decide whether the provisions on participation should apply. The result of the discussion was, that there is no need for a special provision, because if the management has decided not to hold negotiations there will be employee participation regardless the 33% threshold (Art 16 par 4 a refers to par 3 h and this provision refers only to part 3 of the Annex, point b of the SE Directive). To make it clear this is adhered in the explanations.