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The Transposition in Denmark of the 10th Directive on cross-border Mergers

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Process and form

The Danish legislation transposing the Merger Directive entered into force on 1 July 2007. It took the form of a law which contains amendments to already existing company legislation, notably the law on public limited liability companies (aktieselskaber), but also three other company laws (private limited liability companies, business foundations and "certain business companies"). The law is titled, "*Lov om ændring af lov om aktieselskaber, lov om anpartsselskaber, lov om visse erhvervsdrivende virksomheder og lov om erhvervsdrivende fonde*". (It can be downloaded from www.folketinget.dk – however only in Danish).

During the formulation of the Act a committee with representatives from trade unions and employer organisations discussed and reached consensus on the provisions concerning participation. Therefore, in the hearing round taking place before the Act was presented to Parliament on 7 February 2007, there were no criticisms from trade unions and employer organisations. However, several employer organisations – among them the two most important ones, *Dansk Arbejdsgiverforening* and *Dansk Industri* – complained that the provisions on participation are difficult to understand because of the way in which they are presented in the Act (mainly in the form of references to other legislation such as the law on worker influence in SEs and the Danish provisions on employee board level representation). To this the Minister replied that in order to help solve this problem a guide explaining the provisions on participation would be written jointly by the Ministry of Business and the Ministry of Employment. The guide appeared in the autumn of 2007. It is called "*Vejledning om medarbejderes medbestemmelse i forbindelse med*

græseoverskridende fusioner og spaltninger” and is available (only in Danish) at www.eogs.dk.

There was no public debate about the legislation. In Parliament all political parties, except for a small radical left wing party, voted in favour of the law.

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The Danish transposition law not only aims at transposing the 10th Directive, but also at following up on the ECJ decision in the Sevic case (13.12.2005). As the legislators have judged the Sevic verdict to deal with mergers as well as the splitting up of companies the law also covers both these phenomena. In general, it grants workers the same rights regarding splitting up processes as the 10th Directive gives them in relation to merger processes.

The Danish law departs from the principle that Danish participation law applies to cross-border-merged companies headquartered in Denmark. Exceptions are the same as those mentioned in the Directive’s article 16, 2. For these exceptions the law on worker influence in SEs apply. As there are no provisions in Danish legislation giving workers abroad access to participation to Danish headquartered companies the SE procedures will typically have to be activated, either through negotiations or through management deciding to use the fall back provisions of the law on worker influence in SEs (i.e. unless the foreign companies taking part in the merger are without employees).

The transposition law does not open up for workers abroad to be counted when it estimated whether a Danish based company is above the threshold for participation (35 employees within the last three years), cf. this option in art. 16.5 of the Directive.

There are no detailed provisions as to which information must be given to employees prior to the merger – only that the merger plan must contain an account of the likely consequences for employment in the participating companies (art. 137a), and that information from the board must include information on “consequences...for shareholders, creditors and employees” (art. 137b).

Regarding the SNB there are no provisions that deviate from those of the SE worker influence law, except for those that are included in the Merger Directive itself. The cross-border merger law thus does not mention trade unions nor experts – here as everywhere it just refers to the SE worker influence law.

Article 139b, 3 effectively states that, unless management has decided to use the standard rules without negotiation with an SNB, the share of employee board representatives cannot be higher than determined in Danish legislation, i.e. one third. This is argued in the following way in the text accompanying the Act:

“The continuing company in a cross-border merger headquartered in Denmark will have the same managerial structure as other companies in relation to Danish legislation. In Denmark this means that a public limited company resulting from a cross-border merger – irrespective of which management structures that existed in the participating companies before the merger – will have a board and a direction. In some cases up to half of the members in a participating foreign company’s supervisory body may be elected by the employees. In contrast to a Danish board such a supervisory board in a two-tier system will exactly have as its task to supervise and not to have general managerial powers. In Danish law a board has decisive general managerial powers, and the board therefore must have a composition that reflects its obligations in relation to the company’s business activities and the interests of shareholders and employees. To meet these differences in managerial structures in the different European countries the Directive contains the possibility of

the proposed limitation of the share of employee representatives....If a limitation were not possible, it would for instance mean that employees would be entitled to for instance half of the seats on the board of a Danish company” (my translation/HK – and my comment: this is again an indication that the Danish two-tier system is rather a one-and-a-half-tier system! But of course also a decision not to allow ‘German conditions’ to get in through the back door, so to speak).

Regarding rules on subsequent structural changes the law just briefly states (art. 139f) that the provisions regarding employee participation apply “if the continuing company in a cross-border merger within the first three years after the merger takes part in a national merger or split up” (my translation/HK).

Regarding the Directive’s art 16, 4, lit a – the case of the company deciding not to negotiate, but to apply the standard rules – the Danish law says that an SNB must be set up. It is then not set up to negotiate with management, but to coordinate and take decisions on the employee side. In the Guide it is stated that the SNB in this situation must have in view that the distribution of seats take into account the share of employees employed in each Member State. It should at the same time make sure that employees in all countries affected by the merger may take part in the participation (p. 32).

Regarding registration art, 139e states that, if the national participation rules cannot be applied, registration cannot take place unless a) an agreement has been negotiated with

the SNB, or b) management has decided to use the standard rules from the SE legislation, or c) negotiations have terminated without an agreement. In the Guide a form (*“Erklæring om medarbejderdeltagelse”*/ Statement on employee participation) is printed which can be used when companies apply for registration. Here, the company can tick one of five options of having dealt with employee participation (1. national rules are applicable and will be applied, 2. rules based on agreement with SNB, 3. management decision to use national rules, 4. SNB decision to use national rules, 5. negotiations have failed and therefore standard rules apply).