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Transposition of the Cross-Border Mergers Directive. Notes from Sweden

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Implementation of Directive 2005/56/EC on cross-border mergers of limited liability companies was examined in a ministry memorandum on cross-border mergers (Ds 2006:22) and a parliamentary memorandum (SOU 2006:97) that dealt with the issues of employee participation in conjunction with cross-border mergers. Thereafter, on the basis of the abovementioned memoranda, the Swedish government put forward legislation on cross-border mergers (Government bill 2007/08:15; see also the Committee on Civil Affairs's report 2007/08:CU4) and on employee participation in conjunction with cross-border mergers (Government bill 2007/08:20; see also the Committee on the Labour Market's report 2007/08:AU3). The proposals contain a new act on employee participation in conjunction

with cross-border mergers and some amendments to existing provisions. The newly proposed act and the proposed amendments will enter into force on 15 February 2008.

The transposition into Swedish law of the *company law* provisions in the abovementioned directive implies adjustments to the existing provisions on mergers. The government proposes provisions on cross-border mergers concerning limited liability companies and cooperative societies. The amended acts will state that most of the current provisions on mergers between companies in Sweden are also to be applied in the case of cross-border mergers. In addition, the government proposes a number of provisions specific to cross-border mergers, rather than other provisions on (national) mergers.

Regarding implementation of the *provisions on employee participation* in conjunction with cross-border mergers, the government proposes that implementation will occur partly through a new act, namely the act on employees' participation in conjunction with cross-border mergers, partly through amendments to existing provisions (the 1987 Board Representation Act (lagen [1987:1245] om styrelserepresentation för de privatanställda), the Cooperative Societies' Act (lagen [1987:667] om ekonomiska föreningar), the Act on Involvement of Employees in European Companies (lagen [2004:559] om arbetstagarinflytande i europabolag) and the Act on Involvement of Employees in European Cooperative Societies (lagen [2006:477] om arbetstagarinflytande i europakooperativ). The directive does not regulate employee involvement in the case of information and consultation, but only participation.

The government proposes that Article 7 of the directive shall be implemented by provisions in company law acts. No reference in the Codetermination Act (lagen [1976:580] om medbestämmande i arbetslivet) to provisions on employers' obligation to inform is desired.

However, the government proposes that Article 16 is to be implemented by a new act, the act on employees' participation in conjunction with cross-border mergers (lagen om arbetstagares medverkan vid gränsöverskridande fusioner). The existing Board Representation Act (lagen [1987:1245] om styrelserepresentation för de privatanställda) does not meet the directive's requirements concerning how the employees' right to involvement should be formulated in companies that have participated in or have been established by a cross-border merger

when there already was a right to involvement in one or more of the merged companies.

No threshold, as laid down in Article 16(2), is proposed. The same rules should apply to all companies, no matter what size they are (government bill 2007/08:20 pp. 39). It is suggested that the new act should apply to cross-border mergers if any of the merging companies are subject to the application of provisions on employment participation.

The government proposal contains a definition of the concept of employee participation corresponding to the definition in Directive 2001/86/EC supplementing the Statute for a European Company with regard to employee involvement (Government bill 2007/08:20 pp. 49). The government proposes that it should be clear that employee participation is to take place at board level because that is where it will take place when the merging company has its registered office in Sweden.

The members of the special negotiating body are appointed by the local union(s) bound by collective agreement with the participating companies, involved subsidiary companies or involved affiliates in Sweden. If none of these companies is bound by collective agreement with any trade union, the members shall be appointed by the most representative local union. The local unions can agree upon another order. If none of the workers are union members, the special negotiating body is appointed by the workers in the companies in Sweden (Government bill 2007/08:20 p. 61.).

The Swedish government does not intend to make use of the opt-out (Government bill 2007/08:15 p. 66).

The act on employee participation in conjunction with cross-border mergers applies to subsequent domestic mergers within three years of the registration of the cross-border merger.

The act on employee participation in conjunction with cross-border mergers does not apply when the cross-border merger results in the formation of an SE or an SCE (Government bill 2007/08:20 pp. 42).

According to the act on employee participation in conjunction with cross-border mergers, managers have a duty to supply information on the progress of the merger. Furthermore, this duty also implies (according to the *travaux préparatoires*, Government bill 2007/08:20 p. 111) that management is obliged to present information

on changes within the corporate structure that might affect the composition of the special negotiating body.

The reference provisions in the act are to be applied upon agreement of the parties. These provisions are also to be applied if a third of the workforce has a right to participation, or if the participating companies have decided to refrain from negotiations on an agreement on worker participation. The special negotiating body has the issue of the introduction of participation in the merging company at its disposal if less than one third of the workers in the participating companies are included in participation.; the proportion of workers is to be calculated by establishing the amount of workers included in participation by agreement or by legislation. The Directive does not state at what point the special negotiating body must decide on the application of the reference provisions on worker participation, should the SNB wish to make such a decision. The issue of worker participation must be resolved before registration of the merger. If the special negotiating body, in this case, refrains from deciding on the application of the reference provisions the act will not be applied in the merging company (Government bill 2007/08:20 p. 93, pp. 114.). The reference provisions are also applicable when the participating companies have decided to refrain from negotiating an agreement on worker participation.