

Negotiations on employee participation in cross-border mergers following a decision against negotiations by the relevant bodies of the merging companies pursuant to section 23(1) sentence 1 number 3 MgVG

Returning to the negotiation table as a means of compensating for disincentives in inbound mergers

Abstract

In the case of cross-border mergers of limited liability companies from different Member States of the European Union, negotiations on employee participation in the target company often have to be conducted. In this respect, there are far-reaching parallels to the negotiation procedure on employee participation in the *Societas Europaea* (SE). The underlying European Union law provisions regarding employee participation could only be adopted based on a political compromise. At the heart of the compromise is the primacy of the negotiated solution: Employee participation in the target company shall be defined primarily by means of an agreement between the management of the participating companies on the one hand and a special negotiating body of the employees on the other hand. Only if no agreement can be reached within the stipulated negotiation period, subsidiary standard rules for participation apply. Pursuant to section 24(1) sentence 2 of the Law on the Employee Participation in the Event of a Cross-Border Merger (MgVG), the highest proportion of employee representatives that was in force in the merging companies before registration of the merger is perpetuated in the supervisory or administrative body of the target company (the »before and after« principle).

According to both section 16(1) sentence 1 SEBG and section 18 sentence 1 MgVG, the special negotiating body may decide not to open negotiations or to terminate them. Unlike in the case of the SE, in the case of cross-border mergers pursuant to section 18 sentence 3 MgVG such a decision results in the dynamic application of the German legal provisions on employee participation to the target company.

The unique feature of negotiations in the context of cross-border mergers is the so-called management's decision pursuant to section 23(1) sentence 1 number 3 MgVG. It allows the management of the merging companies to decide not to open negotiations. In doing so, the merging companies opt for direct application of the standard rules as of the registration of the merger.

The management's decision gives grounds to assess the negotiation situation in the context of an inbound cross-border merger from a German perspective.

To this end, the legal framework of the negotiations is first defined in more detail, with special consideration of the negotiating partners' options to decide against negotiations. The thesis clarifies the legislative ideal of the negotiated employee participation agreement and concretises the extent of employee participation pursuant to the standard rules. In the process, a compromise is advocated regarding the dispute over the assessment of employee participation in force as the basis of the »before and after« principle. According to this approach, the actual participation in the companies is decisive, unless status proceedings (Statusverfahren) pursuant to section 97 et seq. AktG are initiated in time. Furthermore, recent amendments by Directive (EU) 2019/2121 are criticised, namely the extension of the scope of application of the negotiation procedure in the context of cross-border mergers according to Article 133(2) variation 1 of Directive (EU) 2017/1132 and the corresponding restriction of the secondary law basis of the management's decision in Article 133(4) litera a of Directive (EU) 2017/1132. Moreover, the thesis shows that the management may pre-empt the decision of the special negotiating body not to open or continue negotiations because the management's decision can be taken earlier. Nevertheless, the formation of a special negotiating body cannot be omitted even after the management's decision.

On this basis, the thesis examines the individual options of the parties and their influence on the negotiation situation in the context of an inbound cross-border merger. The thesis shows that, from the point of view of the companies participating in an inbound cross-border merger, the application of the standard rules is often the

lesser of two evils compared to the dynamic application of German employee participation law. At the same time, following findings on »negotiations in the shadow of the law« from game theory, the management cannot expect significant deviations from the standard rules through negotiation. In this situation, the management is induced to decide against negotiations at an early stage pursuant to section 23(1) sentence 1 number 3 MgVG in order to pre-empt a decision by the special negotiating body not to open negotiations according to section 18 sentence 1 MgVG. This effect contradicts the legislative ideal of the primacy of the negotiated solution.

For this reason, the thesis then focuses on examining whether negotiations and the conclusion of an employee participation agreement are permissible even after an early tactically opportune decision against negotiations by the management. Ultimately, the application of the standard rules as a result of the management's decision can only be averted by a revocation of the management's decision before the expiry of the negotiation period stipulated by section 21 MgVG and before the registration of the merger. On this basis, the thesis outlines the procedure for the necessary revocation of the management's decision and the combination of such a revocation with the employee participation agreement. In addition, the thesis focuses on the legal capacity of the special negotiating body and the examination of an abuse of rights.

In conclusion, negotiations on employee participation in the target company can also be conducted after the management's decision, and an employee participation agreement can be concluded with the special negotiating body. However, as is the case with the revocation of the management's decision, negotiations and an employee participation agreement are only successful in averting the application of the standard rules if they are concluded before the expiry of the negotiation period stipulated by section 21 MgVG and the registration of the merger. The thesis thus shows a way to return to the negotiating table in order to compensate for the identified disincentives within the framework for negotiations on employee participation in the case of inbound cross-border mergers.