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Directive 2019/2121 on cross-border conversions, mergers and divisions (I)

Degree of employee participation in cross-border conversions of companies

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The conversion of company structures at the European level entails consequences of diverse nature, including employment-related consequences. The new European regulation provides for employee participation, essentially with regard to their rights to information and consultation in draft terms of conversion, and the necessary safeguards to ensure that such cross-border operations do not involve abuse or fraud with a view to avoiding less favourable involvement of employees or their representatives in the destination Member State.

1. Introduction of new rules on cross-border conversions and divisions and completion of the regulation of cross-border mergers

1.1 The new Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (L 321/1, 12.12.2019) - hereinafter Directive 2019/2121 – is not the first to address the complexity of cross-border mergers and divisions, as it amends previous regulation of the subject, but it does extend such regulation. It does so by introducing, among other things, a separate body of rules for cross-border conversions of 'limited liability companies' (i.e., companies limited by shares) - also for cross-border divisions -, with its structure appropriate to the changes necessary for such adaptation. Thus, the new Title II introduces, with a new chapter, everything related to these conversions and with an additional chapter, everything arising from cross-border divisions. But, for the purposes of

this commentary, one of the main novelties is undoubtedly the role played by workers and their representatives in this type of operation.

It should be noted that Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (L 169/46, 30.6.2017) - hereinafter Directive 2017/1132 - did not fail to recognise the protection of employees' rights. It did so when:

(i) addressing mergers (Arts. 98 and 121 respectively), notwithstanding the referral to Council Directive 2001/23/EC of 12 March 2001 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 (L 082, 22.03.2001);

(ii) referring to the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger (Art.122);

(iii) providing for the drawing up of a report explaining the implications of the cross-border merger for employees, to be made available to their representatives one month before the general meeting (Art. 124);

(iv) requiring that the opinion of the representatives be appended to the relevant report (Art. 124);

(v) providing that the general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger (Art. 126); and

(vi) requiring that the company resulting from the cross-border merger be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office (Art. 133).

1.2 All this regulation remains essentially in force, but for some specific amendments contained in the new directive, in particular the insertion in Title II of a new Chapter I on cross-border conversions and Chapter IV on cross-border divisions. Similarly, Arts. 123 –Disclosure - and 124 - Reporting of the administrative or management body for members and employees - have been rewritten. In the same vein, the new directive introduces an Art. 126c on employee information and consultation and amends the above-mentioned Art. 133 on employee participation. Finally, as indicated and not without effects on employees, Title II adds a fourth chapter on cross-border divisions of limited liability companies, highlighting in Art. 160k the rules provided for employee information and consultation and in Art. 160l

employee participation in this type of operation. Directive 2019/2121 has already entered into force (it did so 20 days after publication) but Member States have until 31 January 2023 to formalise its transposition.

2. Employee information, consultation, participation: synonyms or separate obligations for the company?

The new directive refers without distinction to employees' rights to information, consultation and participation. Obviously, they are not synonymous but respond to different obligations on the part of the company. Each Member State has developed a different model for employee involvement in the company (Spain, through representation; Germany, through co-management, for example).

However, the most comprehensive regulation to this effect is contained in Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (L 294/22, 10.11.2001), which distinguishes between involvement, information, consultation and participation (Art. 2). The involvement of employees means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company; information means the informing of the employees' representatives by the company in a manner and with a content which allows the former to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations; consultation means the establishment of dialogue and exchange of views between the employees' representatives and the company, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the company; and, finally, participation means the influence of the employees' representatives in the affairs of the company.

2.1. *On employees' rights to information and consultation*

(a) In the most novel regulation of the new Directive 2019/2121 - that of cross-border conversion - there is an obligation on the part of the administrative or management body of the company being converted - the "converted company", i.e. the one established in the destination Member State, would be created after - to draw up a report for 'members' (i.e., shareholders) and employees (Art. 86e). In relation to the latter, the implications of the cross-border conversion for employment relationships, as well as, where applicable, any measures for safeguarding those relationships, shall be set out in a section other than that for members and exclusively addressed to employees; any substantial changes to the applicable conditions of employment or to the location of the company's places of business shall also be included; and finally, how these factors may affect the company's subsidiaries shall be specified. In addition, and as stated in Recital 13 of Directive 2019/2121, the report should include information, inter

alia, on the staff and “the likely changes to the organisation of work, wages and salaries, the location of specific posts and the expected consequences for the employees occupying those posts, as well as on the company-level social dialogue, including, where applicable, board level employee representation”. On such matters "the employees themselves or their representatives should be able to provide their opinion".

The report shall be made available in any case electronically, together with the draft terms of the cross-border conversion, if available, to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than six weeks before the date of the general meeting. If the representatives of the employees or, where there are no such representatives, the employees themselves give an opinion on this matter, it shall be appended to the report of the administrative or management body. The section of the report for employees shall not be required where a company and its subsidiaries, if any, have no employees other than those who form part of the administrative or management body. Note, however, that even if this possibility is not introduced, Art. 86g provides that Member States shall ensure that, at least one month before the date of the general meeting, the company discloses and makes publicly available in the register of the departure Member State the draft terms of the cross-border conversion and a notice informing the members, creditors and representatives of the employees of the company, or, where there are no such representatives, the employees themselves, that they may submit to the company, at the latest five working days before the date of the general meeting, comments concerning the draft terms of the cross-border conversion.

However, this regulation gives priority to all those rights derived at a national level from the transposition of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (L 80/29, 23.3.2002) and Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (L 122/28, 16.5.2009) - transposed in our country by Act 10/1997 of 24 April. This means that, in addition to what is set out in this new Directive 2019/2121, all the provisions of EU law must be complied with in this respect.

(b) But perhaps the most curious aspect of the regulation of this chapter is the differentiation between the "protection" of members (Art. 86i) and the "protection" of creditors (Art. 86j) as opposed to "employee information and consultation" (Art. 86k) and "employee participation" (Art. 86l). It is clear that the EU legislator does not provide for the "protection" of employees in line with the shareholders or creditors, perhaps because it considers that they are already adequately protected in other European legislation with an eminently employment-related content or, perhaps,

because it considers that employee information, consultation and participation constitute the best safeguard of their employment rights. In any event, the choice is made to allow members who do not approve the draft terms of the cross-border conversion to dispose of their shares or to allow creditors whose claims antedate the disclosure of the said draft terms to enjoy a system of protection of their interests. But nothing new is added to the rights of intervention - involvement, participation, information - already existing for employees in other EU legislation. And so, for example, the new directive adds nothing in terms of employee information and consultation other than a referral to the legal framework provided for in Directive 2002/14 and, where applicable in the case of Community-scale undertakings and groups of undertakings, to the provisions of Directive 2009/38.

Only a reality would allow this statement to be qualified. And it is the protection that an employee creditor of the company may have. As stated in Recital 24 of this new Directive 2019/2121, Member States should ensure that creditors entered into a relationship with the company before the company had made public its intention to carry out a cross-border operation have adequate protection. After the draft terms of the cross-border operation have been disclosed, creditors should be able to take into account the potential impact of the change of jurisdiction and applicable law as a result of the cross-border operation. And, in this regard, and since creditors to be protected can comprise current and former employees, with acquired or in the process of acquiring rights – though the directive only refers to pension rights, it must be interpreted as extending to any right, regardless of its nature and in accordance with other European rules on the matter - this "adequate" protection will also apply to them as one more creditor. The possibility for these creditors to have the right to file a claim in the departure Member State for a period of two years after the cross-border conversion has taken effect is noted here. However, it is also stated that this two-year period of protection "should be without prejudice to national law determining the limitation periods for claims".

(c) The only - minor - "protection" contained in Art. 86k is that employees' rights to information and consultation must be ensured before the draft terms of the cross-border conversion or the report are decided upon in such a way that a reasoned response is given to the employees before the general meeting.

Nothing else would make sense since the information must provide sufficient facts to form a judgment on the draft terms and the consultation must involve the power to endorse or reject the draft terms submitted, even if such is not considered in the directive as having a binding outcome for the company. However, it should be stressed that Art. 86k(3) allows for the possibility of "provisions or practices in force more favourable to employees" - which could condition all the above, strengthening employment rights - and states that Member States shall determine "the practical

arrangements for exercising the right to information and consultation". In this line, the new Directive 2019/2121 expressly refers to Art. 4 of Directive 2002/14 which stresses how the information should cover: information on the recent and probable development of the undertaking's or the establishment's activities and economic situation; information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment; and, finally, information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations.

This legislation requires "information" to be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation, as well as that the "consultation" take place: ensuring that the timing, method and content thereof are appropriate; at the relevant level of management and representation, depending on the subject under discussion; on the basis of information supplied by the employer and of the opinion which the employees' representatives are entitled to formulate; in such a way as to enable employees' representatives to meet the employer and obtain a reasoned response to any such opinion; and with a view to reaching an agreement on decisions within the scope of the employer's powers. Moreover, this Directive 2002/14, to which the new Directive 2019/2121 refers, provides, in Art. 7, for the obligation of Member States to ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them. Thus, in order to conduct an analysis of the report for employees, a company carrying out a cross-border operation should provide employee representatives with the resources necessary to enable them to exercise the rights arising from this Directive in an appropriate manner.

However, despite this very ambitious aim, the new Directive 2019/2121 does not seem to extend the role of employees' representatives. Especially since, under the provisions of Art. 86h, after taking note of the reports as well as the employees' submitted opinions and comments, the general meeting of the company shall decide, by means of a resolution, whether to approve the draft terms of the cross-border conversion.

2.2. *On employee participation rights in the company being converted and in the converted company*

(a) The above information must include "information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the converted company are determined" (Art. 86d(k)). The EU legislator confesses, through Recital 32 of this new Directive 2019/2020, its intention to preserve and strengthen the participation rights of employees by pointing out that the

involvement of all stakeholders, in particular employees, contributes to a long-term and sustainable approach being taken by companies across the internal market. In this regard, it considers that safeguarding and promoting the participation rights of employees within the board of a company plays an important role, in particular when a company moves or restructures across borders.

To this end, and in order to ensure that employee participation is not unduly prejudiced as a result of the cross-border operation, where the company carrying out the cross-border operation has implemented an employee participation system, "the company or companies resulting from the cross-border operation should be obliged to take a legal form allowing for the exercise of such participation rights, including through the presence of representatives of the employees in the appropriate management or supervisory body of the company or companies" (Recital 30). Moreover, in such a case, where a bona fide negotiation between the company and its employees takes place, it should be carried out in line with the procedure provided for in Directive 2001/86/EC - which includes a negotiation procedure (Section 2) and everything related to employee representation, information, consultation and participation (Annex to the Directive) - with a view to finding an amicable solution that reconciles the right of the company to carry out a cross-border operation with the employees' rights of participation. In this way, and in order to protect the agreed solution or the application of those standard rules, the company should not be able to remove the participation rights through carrying out a subsequent conversion, merger or division, be it cross-border or domestic, within four years.

(b) With a regulation very similar to that contained in Art. 133 of Directive 2017/1132 in relation to mergers, the new Art. 86l covers the employee participation system when there is a cross-border conversion. The main consequence is that the converted company shall be subject to the rules in force concerning employee participation, if any, in the destination Member State.

These rules shall not apply, however, where the company has, in the six months prior to the disclosure of the draft terms of the cross-border conversion, an average number of employees equivalent to "four fifths of the applicable threshold", as laid down in the law of the departure Member State, for triggering the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC. A provision which, as indicated, defines the meaning of employee participation in the European Company and gives concrete expression to this in the capacity of influence of the employee representation body or the employees' representatives in a company in two ways; one, through the right to elect or appoint certain members of the company's administrative or supervisory body; and, the other, through the right to recommend or oppose the appointment of some or all of the members of the company's administrative or supervisory body.

Nor shall they be deemed to apply where the law of the destination Member State does not provide for at least the same level of employee participation as operated in the company prior to the cross-border conversion, measured by reference to the proportion of employee representatives among the members of the administrative or supervisory body or their committees or of the management group which covers the profit units of the company, subject to employee representation. Nor shall it apply where there is no provision for employees of establishments of the converted company that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the destination Member State.

(c) In any event, it is expressly required that the participation of employees in the converted company and their involvement in the definition of such rights be regulated by the Member States in accordance with the principles and procedures laid down in Art. 12 (2) and (4) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (L 294/1, 10.11.2001) and many of the provisions (expressly indicated in Art. 86l) of Directive 2001/86/EC, already cited and also in connection with the European company.

As is known, the aforementioned Art. 12 of Regulation 2157/2001 prevents any European company from being registered unless an agreement has been concluded on arrangements for employee involvement pursuant to Art. 4 of Directive 2001/86/EC (which regulates the content of the agreement on arrangements for the involvement of the employees within the company), a decision has been taken in accordance with Art. 3(6). of that Directive (the power of the special negotiating body to decide, by majority vote, not to open negotiations or to terminate negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the SE has employees), or the period for negotiations pursuant to Art. 5 thereof has expired without an agreement having been concluded (negotiations may continue for a maximum of six months and, by common accord, for a maximum of one year). In fact, the statutes of European companies may not in any case conflict with the provisions on the involvement of employees that have been laid down. Moreover, where, pursuant to Directive 2001/86, new provisions on involvement are determined that are contrary to the existing statutes, the latter must be amended as necessary. In that case, Member States may provide that the management or administrative body of the company shall have the power to amend the statutes without a new resolution of the general meeting of shareholders.

(d) However, apart from these clarifications, Art. 86l(4) allows Member States to confer on the special negotiating body the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the destination Member State. Similarly, they may, in the case where,

following prior negotiations, standard rules for participation apply and notwithstanding such rules, decide to limit the proportion of employee representatives in the administrative body of the converted company. However, if, in the company, employee representatives constituted at least one third of the administrative or supervisory body, the limitation may never result in a lower proportion of employee representatives in the administrative body than one third. With a closing rule, Member States shall ensure that the rules on employee participation that applied prior to the cross-border conversion continue to apply until the date of application of any subsequently agreed rules or, in the absence of agreed rules, until the application of standard rules in accordance with the Annex to Directive 2001/86/EC.

In any event, where the converted company is to be governed by an employee participation system, it shall be obliged to take a legal form allowing for the exercise of participation rights and to take measures to ensure that employees' participation rights are protected in the event of any subsequent conversion, merger or division, be it cross—border or domestic, for a period of four years after the cross-border conversion has taken effect. And, also in general, the company shall communicate to its employees or their representatives the outcome of the negotiations concerning employee participation without undue delay.

3. Other final general considerations

3.1. The other main amendments - that of Art. 133 of Directive 2017/1132 - or the new legislative additions - that of a new Art. 126c on employee information and consultation or the introduction in Title II of a new fourth chapter on cross-border divisions of limited liability companies, with an Art. 160k regulating employee information and consultation or an Art. 160l on employee participation in these cross-border divisions - reproduce, almost faithfully, the regulation analysed.

But there are two points that can be highlighted:

— The first is the express acknowledgment by the EU legislator of the possible abuses that can result from a cross-border operation. In fact, "the right of companies to carry out a cross-border operation could be used for abusive or fraudulent purposes, such as for the circumvention of the rights of employees, social security payments or tax obligations, or for criminal purpose" (Recital 35). In this respect, the Directive does not hesitate to admit that if the competent authority has reasonable grounds for suspecting that the cross-border operation has been carried out for abusive or fraudulent purposes, it must take into account in its assessment all the relevant facts and circumstances, highlighting, inter alia, "the number of employees [...], the habitual places of work of the employees and of specific groups of employees, the place where social contributions are due, the number of employees posted in the year prior to the

cross-border operation [...], the number of employees working simultaneously in more than one Member State" (Recital 36). They should also analyse “relevant facts and circumstances related to employee participation rights, in particular as regards negotiations on such rights where those negotiations were triggered by reaching four fifths of the applicable national threshold” (Recital 36). Elements that must be considered only as indicative factors of abuse or fraud in the overall assessment of the cross-border operation and therefore should not be regarded in isolation.

However, in the interests of legal certainty, a cross-border operation that has taken effect cannot be declared null and void (Recital 50). This restriction is without prejudice to Member States’ powers, inter alia in the field of social law, if they establish that the cross-border operation has been carried out for abusive, fraudulent or criminal purposes. In this context, the competent authorities could also assess whether the applicable national threshold for employee participation of the Member State of the company carrying out the cross-border operation was met or exceeded in the years following the cross-border operation.

— Secondly, it should be stressed that all workers' rights are guaranteed, including those that do not correspond to the nature of information, consultation and participation. Recital 52, for example, refers to those arising from Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (L 225/16, 12.8.1998) or Directive 2001/23, already cited, for transfers of undertakings, businesses or parts of undertakings or businesses and expressly states that national law should also apply to tax and "social security".

3.2 The interplay of referrals, both to the rules of the destination Member State and to those of the departure Member State or any Member State with employees of the new company, together with the integration into this new directive of those others with their own content on employee participation in the company, relativises the scope of this new Directive 2019/2121 at the level of employment. This is not because the regulation in this area should be downgraded - incidentally, not very different from that already contained, especially for cross-border mergers in Directive 2017/1132 - but because the new European piece of legislation constantly calls for the integration of other much more complete - and demanding - legislation in this area. However, it should be noted that, while the scope of information and consultation does not predetermine the decision to convert - or divide - a company, it may be conditioned by the outcome of employee participation in the converted company.