Ex-post analysis of the EU framework in the area of cross-border mergers and divisions

European Implementation Assessment

STUDY

EPRS | European Parliamentary Research Service

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Ex-Post Impact Assessment Unit

PE 593.796 - December 2016

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Study

On 4 February 2016, the Committee on Legal Affairs (JURI) requested authorisation to draw up an own-initiative implementation report on cross-border mergers and divisions. This triggered the automatic production of a European Implementation Assessment by the European Parliamentary Research Service (EPRS). Implementation reports by EP committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate-General for Parliamentary Research Services.

Abstract

This study presents an evaluation of the implementation and effects of the provisions of EU law on cross-border mergers and divisions.

In this context, it focuses, in particular, on the EU Directives on the division of public limited liability companies (82/891/EEC) and on cross-border mergers of limited-liability companies (2005/56/EC), analysing their relevance, and in particular, the gaps and challenges in the application of these directives, in view of the potential for a further legislative initiative in this field.

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The expert research paper contained in this in-depth analysis has been written, at the request of the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) of the European Parliament, by:

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LANGUAGE VERSIONS
Original: EN
This document is available on the internet at: www.europarl.europa.eu/thinktank

Manuscripts completed in December 2016. Brussels © European Union, 2016.

PE 593.796
ISBN 978-92-846-0423-4
doi:10.2861/246369
QA-06-16-352-EN-N

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List of abbreviations and acronyms

AG	Die Aktiengesellschaft [journal]
CBMD	Cross-Border Mergers Directive
CJEU	Court of Justice of the European Union
DG	Directorate General
EBLR	European Business Law Review
EBOR	European Business Organisation Law Review
EC	European Communities
ECFR	European Company and Financial Law Review
ed.	editor/edition
eds.	editors
e.g.	exempli gratia (for example)
EEA	European Economic Area
EEC	European Economic Community
E. L. Rev.	European Law Review
EU	European Union
i.e.	id est (that is)
IPO	Initial Public Offering
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts [journal]
n.	note
No.	Number
NZG	Neue Zeitschrift für Gesellschaftsrecht [journal]
OJ	Official Journal
para.	paragraph
paras.	paragraphs
PLC	Practical Law Restructuring and Insolvency [journal]

RIW	Recht der Internationalen Wirtschaft [journal]
RWZ	Zeitschrift für Recht & Rechnungswesen [journal]
SE	*Societas Europaea* (European Company)
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCITS	Undertakings for Collective Investment in Transferable Securities
UK	United Kingdom
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [journal]
ZIP	Zeitschrift für Wirtschaftsrecht [journal]

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General Introduction

Background and overall context

In a global business environment, which is moving ever more rapidly and constantly changing, the flexibility of enterprises to quickly evolve, adapt and reorganise is generally regarded as central to maximising comparative advantage, financial health and profits, and to fostering innovation and therefore growth. However, the reorganisation of enterprises is often damaging in terms of employment security and sustainable jobs. Nevertheless, in recognition of the fact that 'corporate mobility' is essential to promoting a business-friendly environment at EU level, the Union developed, inter alia, legislation to enable EU enterprises to divide or merge more easily, and at the same time, to introduce a degree of oversight.

Firstly, in this context, in 2001, Council Regulation 2157/2001[1] on the *Societas Europaea* (SE) brought important changes to EU company law. This regulation established a European company statute. It also provided, for the first time, rules for mergers between public limited liability companies from different Member States through incorporation as an SE. This regulation was then supplemented by Council Directive 2001/86/EC,[2] which contained specific rules on the involvement of employees.

These major steps in the enactment of EU corporate mobility law were the result of 30 years of protracted negotiations, where a compromise between the Member States had been extremely difficult to achieve. Accordingly, despite the introduction of these landmark company-law instruments, the EU framework for cross-border mergers and divisions remained somewhat limited, in particular, in the case of mergers, by the requirement to create an SE and by restrictions on the types of companies that could be merged. In the case of divisions, the rules remained limited to a purely domestic framework laid down in Directive 82/891/EEC concerning the division of public limited liability companies. This system reflects the Member States' very diverse national regulations on company law, especially as regards the protection of shareholders and creditors, and their highly divergent traditions regarding employee participation in company ownership and decision making.[3]

Nevertheless, the negotiations on the SE Regulation opened up the debate and paved the way for Directive 2005/56/EC on cross-border mergers of limited-liability companies, which expanded possibilities for cross-border mergers to other types of companies and

[1] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
[2] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees
[3] Geens, K., Hopt, K., The European Company Law Action Plan revisited: reassessment of the 2003 priorities of the European Commission, Leuven University Press, 2010, p.300

did not require the prior establishment of an SE. Concerning cross-border divisions, the EU framework is still governed by Directive 82/891/EEC,[4] which covers national divisions and thus does not lay down any rules on how to carry out cross-border divisions.

The current EU legal framework in the area of cross-border mergers and divisions

In a context in which the cross-border dimension of business has grown tremendously from both a company and a consumer perspective, the European Commission launched a public consultation in 2012 on the future of European company law;[5] it showed that the majority of stakeholders would be interested in further harmonisation in the field of cross-border mergers and divisions.

The European Commission subsequently adopted an action plan, aimed at initiating a new framework for the future of European company law, namely by facilitating the 'freedom of establishment of companies while enhancing transparency, legal certainty and control of their operations.'[6] The European Commission also ordered a study on the implementation of the Cross-border Mergers Directive (CBMD) in all EU and EEA Member States.[7] This study, published in 2013, presented 'unequivocal evidence that the CBMD has brought about a new age of cross-border mergers activity' and underlined that, between 2008 and 2012, merger activity had increased by 173 percent, from 132 cross-border mergers in 2008 to 361 in 2012.

In response to the European Commission's action, the European Parliament also expressed its view on the way forward for European company law in a resolution adopted on 14 June 2012.[8] While welcoming the Commission's intention to shape future initiatives designed to simplify the business environment for companies, the Parliament reiterated 'its request to the Commission that it submit a legislative proposal laying down measures designed to facilitate cross-border mobility for companies within the EU' and stressed the importance of ensuring appropriate protection of the interests of creditors, shareholders, members and employees.

[4] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ L 378, 31.12.1982, pp. 47-54)
[5] Consultation on the future of European Company Law, From 20.02.2012 to 14.05.2012: http://ec.europa.eu/internal_market/consultations/2012/company_law_en.htm
[6] Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions, Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740 final
[7] Bech-Bruun and Lexidale, Study on the application of the cross-border mergers directive, Study for the Directorate General for the Internal Market and services, European Commission, 2013
[8] European Parliament resolution of 14 June 2012 on the future of European company law (2012/2669(RSP))

In 2014, the European Commission launched another public consultation on cross-border mergers and divisions that focused on two main issues: the improvement of the existing framework for cross-border mergers and a possible framework for cross-border divisions. In October 2015, the Commission subsequently issued a feedback statement summarising the responses to the consultation,[9] emphasising that many respondents expressed their support for a similar legal framework for all cross-border conversions: mergers, divisions, transfer of registered office and potentially other types of conversion (e.g. cross-border spin-offs), whereas a few replies considered a proposal for an EU instrument on cross-border transfers to be more important than a proposal on cross-border divisions.

Methodology and scope of this study

In view of the Commission's consultation and 2015 feedback report, which covers both Directive 82/891/EEC and Directive 2005/56/EC, the Committee on Legal Affairs (JURI) decided to prepare an own-initiative implementation report on cross-border mergers and divisions (Rapporteur: Enrico Gasbarra).

The study annexed to this introduction was outsourced to an external expert, and aims to support the JURI Committee's work on this report. This study presents an evaluation of the implementation and effects of the current EU legal framework in the area of cross-border mergers and divisions. In doing so, it examines the ways in which Directive 2005/56/EC was implemented, as well as the limitations of Directive 82/891/EEC as regards possibilities for carrying out cross-border divisions.

Building on the findings of the above-mentioned 2013 Commission study on the application of the Cross-border Mergers Directive, this analysis identifies and clarifies some obstacles to these mergers, in particular: i) the scope of the framework, especially the fact that it only covers limited liability companies, and only companies able to merge under national law, ii) the incompatibility and great divergence in the national protection regimes of stakeholders (creditors, minority shareholders and employees), and iii) the procedural and practical obstacles.

As regards cross-border divisions, the lack of an EU legal framework on the subject has created considerable obstacles for the mobility of companies within the EU. In the absence of EU provisions in this field, some Member States gold-plated the Directive on Cross-border Mergers, namely when transposing it into national law, they expanded its scope, to also include other restructuring possibilities, such as cross-border divisions. Other Member States have allowed for cross-border divisions, which are distinct from the framework of transposing the Directive. Finally, in yet other Member States, there are no

[9] Feedback statement, Summary of responses to the public consultation on cross-border mergers and divisions, October 2015

provisions regulating this issue, and cross-border divisions may, or may not, be permitted. These divergences create practical difficulties and sustain the lack of a stable framework in the field. As part of this general assessment, the analysis also considers the jurisprudence established by Court of Justice of the EU (CJEU) cases bearing an impact on how the freedom of establishment has been interpreted and applied.

While acknowledging the major steps taken at EU level to promote the mobility of companies across the EU, the analysis thus examines the remaining difficulties and obstacles. Furthermore, it takes due consideration of what such mobility implies for creditors, minority shareholders and employees, and considers safeguards and options that could address concerns in these areas. The study aims to maintain a balance between the arguments put forward for increasing opportunities for EU businesses and companies on the one hand, and the requirement to safeguard employee, minority shareholders' and creditors' rights on the other.

Analysis of the EU legal framework in the area of cross-border mergers and divisions

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LINGUISTIC VERSIONS
Original: EN

Manuscript completed in December 2016

Executive summary

Directive 82/891/EEC of 17 December 1982 (Domestic Divisions Directive, or Sixth Council Directive) deals with the division of public limited liability companies in a single EU country. It covers the protection of shareholders, creditors and employees. The Domestic Divisions Directive addresses the different ways companies can be divided up, but concerns only national (and not cross-border) divisions.

Directive 2005/56/EC entered into force on 15 December 2005 and provides a specific legal framework for cross-border mergers of limited liability companies (Cross-Border Mergers Directive - CBMD, or Tenth Council Directive). The CBMD is generally regarded in a very positive manner. It harmonised the cross-border mergers of limited liability companies in all EU and EEA Member States and provided a common framework facilitating cross-border mergers. More specifically, it required all EU and EEA Member States to permit cross-border mergers of limited liability companies and established a more predictable and structured framework for cross-border mergers, increasing legal security, which is essential for complex transactions. Also, it led to a significant reduction of the transaction costs for cross-border mergers. As a result, since the implementation of the CBMD, an increasing number of companies have carried out cross-border mergers.

However, some obstacles to cross-border mergers relating to problems with the CBMD have been highlighted by both practitioners and scholars, in particular: i) the scope of the CBMD framework, especially the fact that it only covers limited liability companies and only companies that are able to merge under national law, ii) the incompatibility and great divergence in the national protection regimes of stakeholders (creditors, minority shareholders and employees) and iii) procedural and practical obstacles.

These difficulties could be overcome by a revision of the CBMD addressing one or more of the following issues: extending the scope of the CBMD to include all legal entities within the meaning of Article 54 TFEU; further harmonising the rules on creditor protection (possibly with the introduction of an ex-post protection system which would not delay the merger); further harmonising minority shareholder protection (possibly with the award of an exit right against adequate compensation and a right to receive additional compensation in case of an inadequate exchange ratio); by introducing exemptions from the requirement of a merger report; harmonising the rules on the accounting date and on valuation; streamlining documentation and communication between competent national authorities. A further approximation of the rules on employee protection could also be useful if politically feasible.

This study concludes that, with regard to cross-border divisions, the main difficulty relates to the fact that, since Directive 82/891/EEC applies only to national divisions, there is currently no EU legal framework on the subject. Some Member States have carried out an expanded transposition of the CBMD, or established their own national provisions supplemented by case-law. However, most Member States do not provide for cross-border divisions and, as a result, these take place through other sophisticated and

overly complex procedures. In view of the importance of cross-border divisions as a re-organisational tool for companies and group companies, and in view of the jurisprudence of the European Court of Justice in the cases *Sevic* and *Vale* on the freedom of establishment, this situation does not seem satisfactory. Accordingly, legislative action in the form of a new Directive on cross-border divisions and a possible fine adjustment to the CBMD rules may be appropriate. In this respect, it is noted that the shortcomings of the existing EU legal framework on cross border mergers and divisions are not to be addressed by the Commission's Proposal for a Directive of 3.12.2015 (COM(2015) 616 final), which constitutes a separate codification exercise.

Chapter 1

Introduction

EU law provides a specific legal framework for cross-border mergers of limited liability companies in the Cross-Border Mergers Directive (CBMD) of 2005[10] although it does not cover certain types of limited liability companies such as undertakings for collective investment in transferable securities (UCITS) - which fall within the scope of another Directive[11] - or mutual funds. This Directive on cross-border mergers was intended for limited liability companies only and does not concern other legal entities within the meaning of Article 54 TFEU (e.g. partnerships, limited partnerships, cooperatives, foundations).[12] Also, the 1982 Domestic Divisions Directive[13] covers only *national* divisions of public limited liability companies. Accordingly, there is no specific legal framework for *cross-border* divisions. Furthermore, the 1982 Directive does not oblige Member States to allow divisions, but it applies where company divisions take place in the Member States.[14] In addition, there is currently no specific EU legal framework for cross-border transfers of seat (cross-border conversions) for legal entities established in one Member State to transfer their seat to another.

The question of a reform of the CBMD and new legislation with respect to cross-border divisions has been on the EU agenda for some time. Notably, in its 2012 Action Plan,[15] the European Commission – building on the 2011 recommendations of the Reflection Group[16] - announced that it was contemplating a reform of the CBMD as well as an initiative to

[10] Tenth Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p. 1. Cross-border mergers of UCITS – which are excluded from the scope of the CBMD (*cf.* Article 3(3) CBMD) - have been regulated in Chapter VI (Articles 37-48) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p. 32. The UCITS Directive has been implemented in all Member States, see http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32009L0065

[11] See the UNCITS Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p. 32.

[12] Specifically, EU law provides for the formation of a Societas Europaea (SE) and a Societas Cooperativa Europaea (SCE) by means of a cross-border merger, *cf.* Articles 2(1), 17-31 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1. (formation of an SE by means of a cross-border merger of public limited liability companies) and Art. 2(1), 19-34 of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1 (formation of an SCE by means of a cross-border merger of cooperatives)

[13] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Art. 54 (3) (g) TEC, concerning the division of public limited liability companies, OJ L 378, 31.12.1982, p. 47

[14] See Article 1(1) of Directive 82/891/EEC

[15] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740, 4.2., 4.3

[16] Report of the Reflection Group on the Future of EU Company Law, 5.4.2011, available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

establish a special framework for cross-border divisions. The European Commission then instructed a study on the application of the CBMD,[17] which was published in September 2013. In 2014, the Commission launched a public consultation on cross-border mergers and divisions, following which a Feedback Statement was published in October 2015.[18] Finally, in a separate exercise, on 3.12.2015, the Commission published a proposal for a Directive of the European Parliament and of the Council relating to certain aspects of company law,[19] which codifies a number of directives, including Directive 82/891/EEC and Directive 2005/56/EC.

1. I. Subject matter

This study constitutes an analysis of the relevance and lessons to be learnt from Directive 82/891/EEC concerning the division of public limited liability companies (Domestic Divisions Directive) and an ex-post evaluation of the implementation of Directive 2005/56/EC aiming to facilitate cross-border mergers of limited liability companies (CBMD).

Accordingly, the analysis includes: a) an assessment of the implementation and effects of the two above-mentioned Directives across EU and EEA Member States especially with regard to cross-border mergers and divisions, b) an assessment of specific aspects of the relevant Directives, such as the rights and/or protection of various stakeholders (creditors, minority shareholders, employees) and the practical arrangements laid down in the Directives, and, c) an assessment of the findings of the Commission's 2015 Feedback Statement.[20]

1. II. Purpose and structure

This study aims to present a state of play on the difficulties in relation to the implementation and effects of Directive 82/891/EEC (Domestic Divisions Directive) and on the lessons to be learnt which might read across to cross border Divisions, and of the difficulties as regards the implementation and effects of Directive 2005/56/EC (CBMD), in order to highlight any significant deficiencies, which need to be addressed in relation to cross-border mergers and divisions and ahead of any forthcoming legislative proposals. The analysis therefore provides information on the application, impact and effectiveness of these EU laws. The analysis then identifies possible options for improvement.

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[17] See Bech-Bruun and Lexidale, Study on the application of the cross-border mergers directive, Study for the Directorate General for the Internal Market and services, European Commission, 2013

[18] Consultation document, contributions and feedback statement available at http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm

[19] Proposal for a Directive of the European Parliament and of the Council relating to certain aspects of company law (codification) of 3.12.2015, COM(2015) 616 final available at https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-616-EN-F1-1.PDF

[20] See Feedback Statement, Summary of Responses to the Public Consultation on Cross-border Mergers and Divisions of the European Commission (October 2015), available at http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf

The analysis is accordingly divided into four chapters. Chapter 1 - the remainder of this introduction - explains the methodology and defines the main concepts addressed in the analysis. Chapter 2 explains the implementation of the Domestic Divisions and CBMD Directives in the Member States with regard to the extent of their relevance (in the case of the Domestic Divisions Directive) and impacts on cross-border mergers, while Chapter 3 describes the difficulties experienced with regard to these two instruments' application and effectiveness. Finally, Chapter 4 explains the Commission's codification proposal of 3.12.2015 and analyses the Commission's 2015 Feedback Statement[21] in light of the relevant observations made on the functioning of the Domestic Divisions Directive and of the difficulties identified in the implementation and effects of the CBMD.

1. III. Methodology

1. III. 1.Information sources

The analysis of this study is based on the information gathered from a broad range of sources, i.e. existing information and data. The analysis specifically takes into account existing published review work carried out by or for – but not limited to – the European Commission, inputs from other EU and international institutions, especially the CJEU, academia and business stakeholders, as well as legal analysis inputs. Effort has been made to avoid duplication of research work.

1. III. 2. Scope

As an outcome of the research, this in-depth analysis answers, as appropriate, three fundamental research questions, namely:

1. What benefits did the Directives concerned bring to the EU framework in the area of company law with regard to cross-border mergers and divisions?

2. What are the practical obstacles and/or discrepancies, the aspects lacking clarity in the EU legal framework relating to cross-border mergers and divisions and what are possible options for improved provisions?

3. To what extent does the current Commission proposal for a Directive of the European Parliament and of the Council relating to certain aspects of company law[22] address issues and matters of concern underlined during the public consultations?

[21] Ibid

[22] Proposal for a Directive of the European Parliament and of the Council relating to certain aspects of company law (codification) of 3.12.2015, COM(2015) 616 final

1. IV. Key concepts

1	Company conversion	A company transformation into a different company law type.[23]
2	Company seat transfer	A transfer of the real seat or the registered office of the company.[24]
3	Cross-border merger	Merger of several companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, provided at least two of them are governed by the laws of different Member States[25].
4	Cross-border division	The split up of a company in two or more separate legal entities, whereby the resulting entities will be incorporated in at least two different Member States[26].
5	Employee participation	The influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of: - the right to elect or appoint some of the members of the company's supervisory or administrative organ, or - the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ[27].
6	European Company (SE or Societas Europea)	The company law form regulated by Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)[28].
7	"Ex-ante" group	The group of Member States where the date for creditor protection commences before the general meeting deciding on the merger proposal[29].
8	"Ex-post"' group	The group of Member States where the date for creditor protection commences after the general meeting deciding on the merger proposal[30].

[23] See Bech Bruun/Lexidale (op.cit.), p. 17
[24] Ibid
[25] See Tenth Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, Article 1
[26] See Bech Bruun/Lexidale (op.cit.), p. 17
[27] Ibid, p. 18
[28] Ibid
[29] Ibid, p. 19
[30] Ibid

9	"Gold-plating"	In the EU context, 'gold-plating' refers to transposition of EU legislation, which goes beyond what is required by that legislation, while staying within legality[31].
10	Hive-down division	An operation where a company hives down a part (or several parts) of its assets by transferring this part/s to one or several companies in return for shares in this company or these companies being allocated to the company transferring assets[32]
11	Limited liability company	(a) A company as referred to in Article 1 of Directive 68/151/EEC (2), or (b) A company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject to conditions, (under the national law governing it) concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others[33].
12	Merger	An operation whereby: (a) one or more companies, upon being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company i.e. the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or (b) two or more companies, upon being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a

[31] See European Commission, Better Regulation, Glossary, available at: https://web.archive.org/web/20071222140415/http://ec.europa.eu/governance/better_regulation/glossary_en.htm

[32] See Schmidt, J., Study of the European Parliament Policy Department C for the Committee on Legal Affairs: Cross-border mergers and divisions, transfers of seat: Is there need to legislate?, 2016, p. 28

[33] See Tenth Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, Article 2 (1)

		cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or (c) a company, upon being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.[34]
13	Spin-off division	An operation whereby a company spins off a part (or several parts from its assets by transferring this/these part/s, to one or several companies in return for shares in this company or where these companies are designated as owners of the shares in the company transferring assets[35].
14	Split-up division	An operation whereby, after being wound-up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation of shares of the receiving companies to the shareholders of the company being divided[36].
15	Transposition	The process by which the European Union's Member States give force to a directive (or a provision thereof) by passing appropriate national implementation measures, typically either primary or secondary legislation.[37]

[34] Ibid, Article 2 (2)
[35] See Schmidt, J. (op.cit.), p. 28
[36] Ibid
[37] See European Commission, Better Regulation, Glossary, available at: https://web.archive.org/web/20071222140415/http://ec.europa.eu/governance/better_regulation/glossary_en.htm

Chapter 2

Implementation of the Directives

This chapter examines the implementation of the two above-mentioned Directives across Member States, as well as their effects on cross-border merger activity and the division framework. The corresponding analysis also answers the following question: What benefits did the concerned Directives bring to the EU framework?

2. I. Implementation and effects of Directive 2005/56/EC aiming to facilitate cross-border mergers of limited liability companies (CBMD)

Key findings

The CBMD harmonised the cross-border mergers of limited liability companies in all EU and EEA Member States and its overall impact is widely considered to have been very positive, mainly because of the steep increase observed in cross-border merger activity since the introduction of the CBMD (over 170%).

With regard to its content: a) it required all EU and EEA Member States to permit cross-border mergers of limited liability companies and b) it established a clear, predictable and structured framework, increasing legal certainty, which is essential for complex transactions.

As a consequence it led to a significant reduction of the transaction costs for cross-border mergers.[38]

2. I. 1. Introduction

The transposition of Directive 2005/56/EC was slow.[39] It was completed only after the transposition deadline of December 15, 2007[40] had expired and pursuant to the Commission's initiation of infringement proceedings against some Member States.[41]

[38] See Bech Bruun/Lexidale (*op.cit.*), p. 7 et seq
[39] Ibid
[40] See Article 19 of the CBMD
[41] See Cases Case C-575/08 *Commission v. Belgium* [2009] ECR I-00163 (available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-575/08); Case C-555/08 *Commission v. Sweden* [2009] ECR I-00099 (available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-555/08); Case C-493/08 *Commission v. Greece* [2009] ECR I-00064 (available at: https://publications.europa.eu/en/publication-detail/-/publication/192c8113-a69e-4a9a-a13b-7ea5f7248a35/language-en; Case E-7/09 *EFTA v. Liechtenstein* [2009] EFTA Ct. Rep [2009-2010] p. 38 (available at http://www.eftacourt.int/uploads/tx_nvcases/7_09_Judgment_EN.pdf)

The delays in transposition were attributable to various reasons, including some Member States' confusion as to the expected manner of transposition.[42] Despite these initial difficulties, the CBMD was implemented by all EU Member States[43] and Member States to the EEA[44]. Furthermore, a number of Member States also transposed optional provisions[45] into national law and, at times, expanded the scope of the Directive in terms of the types of company subject to the rules, as well as the types of merger, the forms of restructuring forms and the cash payments allowed.[46]

2. I. 2. The status quo before the introduction of the CBMD

Prior to the entry into force of the CBMD, there were essentially three procedures for undertaking cross-border mergers: a) European company (SE) formation, b) seat transfer, and c) a non-harmonised merger.[47] Cross-border mergers through the formation of SE make use of the European company form.[48] This option requires that the resulting company is an SE, which is often viewed as cumbersome[49] as it involves only public limited companies and is subject to the SE formation conditions.[50] Under the second option - a seat transfer - one first transfers the seat and then merges under domestic merger laws.[51]

[42] See Bech Bruun/Lexidale (op.cit.), p. 90: 'In Slovakia, for example, the transposition involved the amendment of the existing Commercial Code rather than adopting new legislation to uniformly transpose the Directive. Having chosen this approach, the transposition was not done in a systematic manner and included many cross-references to provisions applicable to domestic mergers. In Hungary, the Directive was only literally transposed into Hungarian law without a clear adaptation of its content to national legislation. As a consequence, the terminology used for the transposing legislation was different than the local one, and created legal uncertainty as to whether parts of the general Hungarian law were still applicable to CBMs (for example, with respect to the requirement for the feasibility study). The working assumption by many Hungarian stakeholders is that it is not applicable, but certain general provisions are nevertheless applied in order to ensure that the cross-border merger can be carried out.'

[43] See in detail Bech Bruun/Lexidale (op.cit.), p. 92 et seq

[44] The CBMD was extended to the EEA by decision of the EEA Joint Committee No 127/2006 of 22 September 2006 amending Annex XXII (Company law) to the EEA Agreement, OJ L 333, 30.11.20016, p. 59

[45] Ibid, p. 93: 'The most dominant areas of such elective expansion are creditor and minority shareholder protection, the exception to the shareholder approval under Article 9(3) CBMD, the simplified procedure under Article 15(2) CBMD, and Article 10(3) on minority shareholder protection and the issuance of the merger certificate.'

[46] Ibid

[47] See Bech Bruun/Lexidale (op.cit.), p. 35

[48] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), [2001] OJ L 294/1. The same is also possible for cooperatives by setting up a European cooperative society

[49] See Bech Bruun/Lexidale (op.cit.), p. 35

[50] E.g., the SE Regulation requires that the head office and the registered office are always located within the Member State, see Article 7 of Council Regulation (EC) No 2157/2001 of 8 October on the Statute for a European company (SE)

[51] Ibid

Apart from being complex, this procedure could arguably only be used between certain Member States (e.g. Greece, Cyprus, Malta, Italy, and France)[52] because it was only available when national legislation allows cross-border seat transfers. Therefore, for mergers taking place between other Member States, which did not provide for cross-border seat transfers, namely Austria, Belgium, Bulgaria, Estonia, Finland, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Sweden, or the UK,[53] this procedure was not available. According to the third option, it is possible to carry out a 'non-harmonised' cross-border merger based on the case law of the CJEU in the *Sevic* case.[54] Nevertheless, this option became available only in 2005 and there is a great deal of uncertainty over this case: legal advisors have used this mechanism for holding companies or shell companies, but have refrained from using it for more complex transactions, considering that such a seat transfer could be challenged and notaries might be liable for advancing it.[55]

The complexity of these methods had therefore rendered cross-border mergers costly and potentially impossible in practice.[56] Before the introduction of the Directive, only Austria, France, Italy, Lithuania, Luxembourg, Portugal, and Spain allowed cross-border mergers without using methods such as setting up an SE.[57] However, even where cross-border mergers were possible under national law, it was not necessarily practical to do so. In Austria, for example, cross-border mergers had been achievable to some extent on the basis of the *Umwandlungsgesetz*[58] and by referring to the freedom of establishment in Article 49 TFEU. However, such a procedure was considered impractical.[59] Luxembourg presents an additional example where cross-border mergers also took place despite the absence of an explicit procedure laid down in law. The procedures nevertheless encountered several practical difficulties and were characterized by uncertainty. Indicatively, before Luxembourg transposed the CBMD, it was necessary to obtain the unanimous consent of the shareholders of the absorbed company to approve a cross-border merger.[60] The practice was thus considerably hindered.[61]

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[52] Since the CJEU Case C-378/10 *Vale,* 12 July 2012, ECLI: EU:C:2012:440 (available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=116722&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1465410), it is possible to argue that all Member States must allow cross-border seat transfers under certain circumstances. Yet seat transfers on the basis of EU case-law involve a lot of uncertainty, a risk which legal advisors will not take for larger companies, see Bech Bruun/Lexidale, Study on the Application of the Cross-border Mergers Directive, 2013, p. 35, fn. 2

[53] See Bech Bruun/Lexidale (op.cit.), p. 44

[54] Case C-411/03 *Sevic* [2005] ECR I-10825 (available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=57066&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1465540)

[55] See Bech Bruun/Lexidale (op.cit.), p. 35 et seq, 45

[56] Ibid, p. 36

[57] Ibid, p. 36

[58] Transformation Act 1996 (*Umwandlungsgesetz*)

[59] C. Mader, 'Die grenzüberschreitende Verschmelzung am Beispiel Deutschland – Österreich', RWZ 4/2001 available at: www.rwz.lexisnexis

[60] See Moulin, J.-M., 'Fusion, scission et apport partiel d'actif', Dalloz, 6, Répertoire de droit des sociétés

[61] See Bech Bruun/Lexidale (op.cit.), p. 39

Finally, even in the Member States which allowed for cross-border mergers before the enactment of the CBMD, the existence of domestic rules itself raised issues of applicable law, which were at times difficult to resolve: for example, complicated questions of conflict of laws could emerge, requiring costly resolution; or post-merger challenges took place, leading to sub-optimal results and uncertainty concerning the effects of the mergers.[62]

2. I. 3. Effects of the transposition of the CBMD

With the introduction of the CBMD and its transposition throughout the EU (and EEA) Member States, a new legal channel has opened, which harmonised to a certain extent the cross-border merger legal provisions and increased legal certainty for the related transactions.[63] The effects of the CBMD can be summarized as follows:

2. I. 3.1. Ensuring cross-border mergers are possible (and more effective) in all Member States

First and foremost, the transposition of CBMD Directive allowed cross-border mergers in all Member States. In addition, it introduced improvements to pre-existing procedures in Member State jurisdictions which allowed cross-border mergers before its implementation, but which were not very effective and practical.[64] For example, in Luxembourg, following the transposition of the Directive, the procedures for cross-border mergers were considerably enabled and effectiveness increased significantly since the Directive's consent requirement was now limited to a two-thirds majority of shareholder votes[65] instead of the previously applied rule of a unanimous consent by the shareholders of the absorbed company.[66]

With regard to the enhancement of the effectiveness of the cross-border mergers procedure, credit can also be attributed to the simplified procedure introduced with the CBMD, when certain requirements are met.[67]

2. I. 3.2. Increase in number of cross-border mergers

It is therefore not surprising that, following the implementation of the Directive, an increase in cross-border mergers took place within the EU and the EEA, with cross-

[62] Ibid, p. 38 et seq
[63] See also Schmidt, J. (op.cit.)
[64] See Bech Bruun/Lexidale (op.cit.), p. 38
[65] Article 263 of the Luxembourg Company Act; however, unanimous consent is still necessary if the partners of the acquiring company or company being acquired bear unlimited liability for the debts of the partnership
[66] See Moulin, J-M. (*op.cit*)
[67] See Article 15 (1) CBMD. To use the simplified procedure, the resulting company must hold all shares and other securities entitled to vote at the general meeting of the merging companies. If the simplified procedure applies, a number of provisions concerning the protection of minority shareholders will not be invoked, due to the reason that all shares and other voting securities are already held by the acquiring company, and no shares will be issued in exchange for the transfer of the subsidiary's assets and liabilities. See Bech Bruun/Lexidale (op.cit.), p. 40

border merger numbers standing at 132 in 2008 and reaching 361 in 2012.[68] This implies an increase of 173 percent within this timeframe, with an average annual increase of 35 percent, strongly suggesting that the Directive has been extremely effective in supporting economic activity across Member States, as was also confirmed by legal advisors who reported a steep increase in cross-border merger activity since the transposition of the CBMD in the legislation of the Member States.[69] Notably, this increase in cross-border merger activity is even more dramatic as compared to the trend for general domestic mergers in the EU, which has significantly decreased between 2008 and 2012.[70]

2. I. 3.3. Harmonisation of conflicting laws

In addition, the CBMD resolved some of the difficulties stemming from conflicts between laws pursuant to the merger of companies under different domestic rules.[71] By way of example, the Directive stipulated the consequences of cross-border mergers in Article 14 of the CBMD,[72] thus settling the uncertainty about the effects of a merger, an issue of particular importance for post-merger challenges. Also, the CBMD introduced conflict of law rules[73], which provides that a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject (the principle of subsidiary applicability of national law).[74]

2. I. 3.4. Enhancing protection for creditors and minority shareholders

The CBMD introduced or enhanced the protection of creditors and minority shareholders *inter alia* from the risk of financial instability of the resulting company, if the other company has debts of its own. More specifically, the CBMD awarded minority shareholders the right to receive substantial information regarding the proposed merger and introduced an option for withdrawal rights or other similar rights[75] in order to further expand stakeholder protection, which a number of Member States used.[76] Other protective provisions established minimum criteria in terms of the content of the draft terms and require that these terms are approved at the general meeting of the companies involved.[77] The requirement to publish these draft terms, along with the completion of the merger, the creditor's rights and the location where further information can be found, also aimed at enhancing the protection of the above-mentioned stakeholders.[78]

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[68] Ibid, p. 5, 37
[69] Ibid, p. 37
[70] Ibid, p. 37 et seq. with a box revealing that general transactions in Europe decreased from 2008 to 2012, while the number of cross-border merger transactions increased (Figure 3)
[71] Ibid, p. 38
[72] According to Article 14 CBMD, all assets and liabilities of the merging company are transferred to the resulting company; the shareholders of the merging company become shareholders of the company resulting from the merger; and the remaining company is dissolved without liquidation
[73] Such as in its Article 4 (1) (b) first sentence
[74] See also Bayer, W., Schmidt, J., 'Gläubigerschutz bei (grenzüberschreitenden) Verschmelzungen. Das EuGH-Urteil in der Rs KA Finanz,' *ZIP*, 2016
[75] See Article 4 (2) of the CBMD
[76] See Bech Bruun/Lexidale (op.cit.), p. 93 et seq, with an extensive table regarding the transposition and "gold-plating" of the CBMD
[77] See Articles 5 and 9 CBMD
[78] See Article 6 CBMD

2. I. 3.5. Achieving a compromise with regard to the protection of employees

Employee participation is seen as one of the thorniest issues of the entire legislative process[79] due to the great divergence in the respective traditions of the different Member States. Indeed, a major difference between corporate law systems in the EU/EEA is that some require employee participation and others do not regulate the matter: more specifically, 19 out of 30 EU and EEA States require that employees are represented in the management or supervisory board of companies of the public and at times also of the private sector,[80] whereas in 11 EU and EEA States, no such rights exist.[81] Also, even those EU and EEA States with an established system of employee participation have greatly divergent rules[82] with regard to e.g. the minimum size of the company for which employee participation is required, the type of representation the employees receive, the number of board-level employee representatives, the process of their appointment and their responsibilities.[83] In view of these differences, prior to the enactment of the Directive, stakeholders feared that cross-border mergers could allow companies to decrease the levels of employee participation applicable to them, as illustrated in the example of a German company merging into a company from the UK: to the extent the law of the latter would apply to the successor company, there would be no employee representatives sitting on the supervisory board, contrary to what was required hitherto, for the German company.[84] This was, therefore, regarded as one of the main obstacles for creating a directive on cross-border mergers.[85]

Article 16 of the CBMD introduced a much sought after compromise solution. This provides that under certain circumstances the management can negotiate with the employees the form of employee participation in the successor company; otherwise certain standard rules apply determining applicable employee participation. This solution is modelled after the SE Directive[86] but includes a few modifications: under the CBMD, the threshold for the application of the standard rules was increased from 25 to 33.3 percent and the relevant company organs can also choose to make the standard rules immediately applicable.[87] Companies and practitioners have worked with these rules of the CBMD,[88] and they are considered more flexible than those applicable to the SE.[89]

[79] See Schmidt, J. (op.cit.) and Bech Bruun and Lexidale (op.cit.), p. 72
[80] See ibid, with further reference to A. Conchon, Board-level employee representation rights in Europe: Facts and Trends, ETUI Report 121, 2011
[81] See Bech Bruun/Lexidale (op.cit.), p. 71
[82] Ibid, p. 70
[83] Ibid, p. 71 et seq
[84] Ibid, p. 72
[85] Indicatively, see ibid
[86] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22
[87] See Articles 16(3)(e) and 16(4)(a) CBMD
[88] See Bech Bruun/Lexidale (op.cit.), p. 51
[89] See Scmidt, J. (op.cit.), p. 21

2. I. 3.6 . Efficiency gains in cases of group re-organisation

Existing evidence from stakeholders indicates that the CMBD has facilitated group reorganisations, namely the restructuring of the internal division of companies within one large group of companies.[90] Before the enactment of the Directive, subsidiaries of the same group in different Member States could not merge with each other (or only with difficulty), nor could they merge with the holding company, thus leading to corporate inefficiencies.[91] As regards facilitating cross-border mergers, the CBMD saved organisational, regulatory, capital maintenance and other costs, and provided companies with the opportunity to reorganise their business e.g. through operating a branch instead of an independent company.[92]

2. I. 3.7. Facilitation of cross-border company seat transfers

In some countries such as the UK and Germany, national legislation does not allow the transfer of the registered office. Furthermore, even in countries which allow company seat transfers, there are no common standards for cross-border transfers of the registered office among the countries permitting them, making the process very cumbersome.[93] Another option to carry out a cross-border seat transfer is to covert the company into an SE and to transfer the registered office subsequently. However, in view of the fact that the SE Regulation is applicable only on public limited companies, this option is, in practice, not available to smaller companies.[94] A further disadvantage of this option is the fact that the SE Regulation requires that the head office and the registered office are always located within the same Member State.[95] In this regard, the CBMD has introduced the option to achieve the seat transfer by way of creating a company in the desired Member State and then merge across borders into that legal entity.[96]

Nevertheless, it should be noted that a cross-border seat transfer via the CBMD is similar to a 'direct' or 'pure' cross-border seat transfer, but it is not exactly the same: since a seat transfer on the basis of the CBMD requires the existence of a company in a different Member State, the ownership of the assets and liabilities of the initial company will change; contrary to the above, in the case of a cross-border seat transfer, there is legal continuity, which is of great significance for many reasons, including tax considerations.[97] A further limitation of the use of the CBMD for seat transfer purposes relates to the requirements of Article 1 thereof: companies must have been formed in accordance to the

[90] See Bech Bruun/Lexidale (op.cit.), p. 40
[91] Ibid
[92] Ibid p. 40 et seq, with further reference to Peksys, A., Madisson, K., Agur, R., Efficiency and cost-saving through cross-border mergers, 2009, http://www.sorainen.com/en/Publications/legal-blogs/198/efficiency-and-cost-saving-through-cross-border-mergers. For the effects of the CBMD with regard to special advantages for the group reorganisation of the Banking Sector, See Bech Bruun/Lexidale (op.cit.), p. 42 et seq
[93] See Bech Bruun/Lexidale (op.cit.), p. 44
[94] See also ibid, p. 45
[95] Article 7 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
[96] See Bech Bruun/Lexidale (op.cit.), p. 45
[97] Ibid, p. 81 et seq

law of a Member State and must have their registered office, central administration or principal place of business within the EU/EEA. As a consequence, companies that carry out a cross-border seat transfer from a non-EU/EEA country into the EU/EEA and which, by that operation, convert into an EU/EEA company law form, are excluded from carrying out cross-border mergers under the CBMD framework.[98]

2. I. 3.8. Increasing regulatory competition between Member States

In view of the fact that it facilitated cross-border mergers, the CBMD can arguably be considered to increase competition between Member States, with regard either to the bureaucratic or the tax burden. Since bureaucracy is more onerous in some Member States than in others, companies of such States may use the option to merge with companies of a less bureaucratic Member State. One example is Estonia, which was considered by legal counsels to be less bureaucratic than other Baltic countries and accordingly attracted more cross-border merger activity than its neighbours.[99] An increase in the tax planning options of Member State companies should be considered as having a positive effect on the European economy overall, in the sense that it advances the cost structure and competitiveness of EU companies taking part in a globalized world economy.[100]

2. I. 3.9. Cost savings achieved by the CBMD

With regard to the costs of a cross-border merger, it has been stated that these are about twice as high as the costs of a domestic merger, because of the involvement of multiple jurisdictions, which necessitates the involvement of lawyers and authorities in at least two Member States.[101] Although each cross-border merger is different, and costs in different Member States vary significantly,[102] the CBMD has seemingly delivered a variety of procedural benefits, likely resulting in substantial savings for various market players, which in turn, contribute towards a more robust internal market, decreased prices and increased overall market efficiency.[103] The cost savings may be direct, such as a reduction in the need for legal advice / documents to be translated and lower filing costs, or indirect, such as gains generated by the increased cross-border activity.[104] Furthermore, it is stated that significant cost savings can be realized due to the fact that the transfer company is automatically dissolved once the merger is effected and complete liquidation has been avoided; the same is true with regard to the assets and liabilities of the transferor undertaking which are transferred automatically by operation of the law, thus eliminating the need for additional documentation.[105]

[98] Ibid, p. 85 et seq
[99] Ibid, p. 45 et seq
[100] Ibid
[101] Ibid, p. 189
[102] See references on costs in the different jurisdictions, ibid. p. 185 et seq
[103] Ibid, p. 46
[104] See extensive presentation of the cost savings achieved by the CBMD (cutting on agency, regulatory reporting and organisational costs, ibid, p. 46 et seq
[105] Ibid, p. 199

2. II. Directive 82/891/EEC (Sixth Council Directive) concerning the division of public limited liability companies

Key findings

The Domestic Divisions Directive covers the divisions of public limited liability companies at national level (and not cross-border divisions). As such, it is likely to be of limited value in informing this analysis. Furthermore, it does not oblige Member States to permit divisions, but applies where Member States chose to allow them.

However, despite the lack of a specific EU legal framework, among the Member States which allow for domestic divisions, some also allow cross-border divisions, either by enhancing the scope of the CBMD (gold-plating) or independently.

Unfortunately, there are no evaluations of this Directive, which predates the time when the practice was introduced of including review clauses calling for Reports on the application of EU laws based on ex-post evaluation.

2. II. 1. Introduction

Based on Article 54 (3) (g) of the Treaty, the EU has harmonised company divisions for public limited liability companies in the Sixth Council Directive 82/891/EEC of 17 December 1982 concerning the division of public limited liability companies[106] (Domestic Divisions Directive). The Directive covers only divisions of public limited liability companies – and only for domestically registered companies. Hence, EU law does not provide a specific legal framework for cross-border divisions. Moreover, the Domestic Divisions Directive does not oblige Member States to permit divisions, but it does apply where Member States choose to allow such divisions.[107]

The transposition of Directive 82/891/EEC in the then Member States of the EEC took place mostly in 1986,[108] with acceding Member States transposing it upon accession.[109] In addition, the Domestic Divisions Directive now also applies in the EEA.[110]

[106] [1982] OJ L 378, 31.12.1982, p. 47. The Directive has been amended numerous times, see the consolidated version at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1473864750716&uri=CELEX:01982L0891-20140702 .

[107] See Article 1 (1) of Directive 82/891/EEC.

[108] However, the Commission initiated proceedings against a Member State for failure to comply with the obligations and time limits laid down by the Directive, see Case 46/88, of 11 May 1989, *Commission v. Kingdom of Belgium,* ECLI:EU:C:1989:188 (available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95888&doclang=EN)

[109] For the dates of and the national laws enacted for the transposition of the Directive, see: http://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:31982L0891

[110] The Sixth Directive was extended to the EEA by 21994A0103(01), see: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31982L0891&qid=1473864750716

Notably, the Directive does not seem to have given rise to many requests for a preliminary ruling to clarify its provisions.[111]

2. II. 2. Overview of relevant 'Gold-plating' practices and other channels for allowing cross border divisions

Despite the lack of a clear, harmonised stipulation on cross-border divisions, some Member States have created mechanisms that allow for cross-border divisions.[112] Sometimes, this has been achieved by way of expanding the scope of the CBMD (gold-plating) to other restructuring possibilities, such as cross-border divisions.[113] In this first category of EU/EEA Member States fall Belgium,[114] the Czech Republic,[115] Finland,[116] France,[117] Luxemburg,[118] Spain,[119] Iceland,[120] and Norway.[121] In another category of countries, the legislation allowing for cross-border divisions exists independently of the transposition of the CBMD.[122]

Nevertheless, even within the first category of Member States (where legislation allows cross-border divisions on the basis of an expanded transposition of the CBMD, as in the Czech Republic, Finland, Luxembourg, Spain, and Iceland[123]) there are considerable differences between them:[124] in the Czech Republic, for example, the original transposition of the CBMD did not address cross-border divisions; however, many legal scholars agreed that, based on relevant case-law, cross-border divisions were possible, and since the January 2012 amendment of the law transposing the CBMD, this has also

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111 The first preliminary ruling regarding Directive 82/891/EEC (and involving also questions on the CBMD) seems to have been decided on April 7, 2016, in the Case C-483/14, *KA Finanz AG v. Sparkassen Versicherung AG Vienna Insurance Group,* ECLI:EU:C:2016:205, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=175662&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1467296 (request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 31 October 2014)

112 See Bech Bruun/Lexidale (op.cit.), p. 14

113 Ibid, 27 et seq., 102 et seq

114 See Van Gerven, D., 'Belgium,' Cross-Border Mergers in Europe: Volume I, p. 117

115 See Dvorak, T., 'Promeny a cezhranicny promeny obchodnich spolecnosti a druzstev', Wolters Kluwer, 2013

116 See Ministry of Justice of Finland, 'Facilitations in Cross-Border Restructuring Operations,' available at: http://www.om.fi/en/Etusivu/Ajankohtaista/Uutiset/Uutisarkisto/Uutiset2007/1198084587280

117 See CA Versailles, ch. 12, 3 oct. 1996, Sté Pier Import of Huston c/Sté Esders, RJDA 1997, no 60, Bull. Joly Sociétés 1997, p. 116, note Tilquin, JCP E 1997, I, no 676, obs. Viandier et Caussain (France)

118 See Section XV of the Luxembourg Company Act

119 See Article 73.2 of Ley 3/2009, de 3 de abril, sobre modificaciones estructurales de las sociedades mercantiles *(Boletín Oficial del Estado*, no.82, 4 April 2009. Sec. I, pag. 31948, available at: http://www.boe.es/boe/dias/2009/04/04/pdfs/BOE-A-2009-5614.pdf)

120 See Chapter XIV of Act No. 2/1995 on Public Limited Companies and Act on Private Limited Companies / Art. 160 (1) Act on Public Limited Companies (Iceland)

121 See Berge, S., Bondeson, H., 'Norway,' in D. van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 307

122 See Bech Bruun/Lexidale (op.cit.), p. 103

123 Ibid

124 For those countries, providing for the possibility of cross-border divisions can be characterized as gold-plating, as already indicated above, see ibid, p. 104

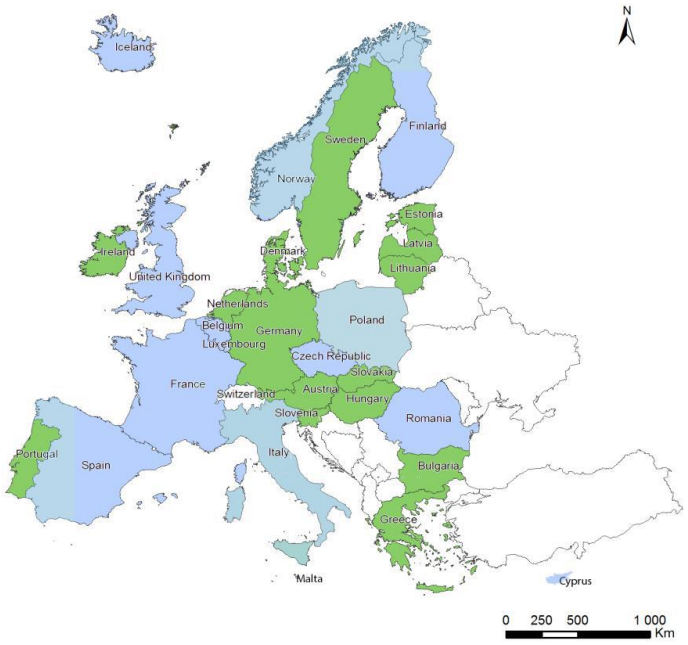
formally been acknowledged in legislation.[125] In Luxembourg, the legislation based on the CBMD was introduced into the Luxembourg Company Act by the law of 23 March 2007, which expanded its scope, although cross-border divisions of public limited liability companies had been in practice since the mid-1990s.[126] Finally, in Iceland it was reported that the provisions are not directly based on the CBMD, but mainly refer to those provisions.[127]

In contrast, there are countries that do not provide specific rules regarding cross-border divisions but do allow them, such as France[128], where there has been a case in which the court held that corporate restructuring between a French and a Dutch company is possible if the law of the other country involved recognizes the validity of this operation, and if the restructuring complies with the legislation applicable to each company.[129] Moreover, for Cyprus,[130] Italy,[131] Poland,[132] and the United Kingdom,[133] the situation has been reported as similar to France in the sense that there are no provisions regulating this issue but cross-border divisions are in principle possible.[134]

Interestingly, for certain Member States, it has been reported that national legislation was enacted as a reaction to the case-law of the CJEU, such as in the Czech Republic and Norway.[135] Legislators in these Member States seem to have adopted the opinion supported in the academic literature[136] that following the jurisprudence on the cases of *Sevic*[137] and *Vale*[138], cross-border divisions are also protected by the freedom of establishment. Here, it should again be recalled that, in the *Sevic* case, the CJEU did not limit the scope of freedom of establishment to cross-border mergers, but explicitly extended it to 'other company transformation operations'.[139] Specifically referring to this very passage in the *Sevic* judgment, the CJEU then held, in the *Vale* case, that cross-border conversions are also protected by the freedom of establishment.[140] In light of this, cross-border divisions – as a further type of 'company transformation operation'– must also be considered as protected by the freedom of establishment.[141] Notwithstanding the above,

[125] See Dvorak, T., 'Promeny a cezhranicny promeny obchodnich spolecnosti a druzstev', Wolters Kluwer, 2013, p. 227
[126] See Bech Bruun/Lexidale (op.cit.), pp. 104, 668.
[127] Ibid, p. 10
[128] Ibid, pp. 103, 427
[129] See CA Versailles, 12e ch., 3 oct. 1996, Sté Pier Import of Huston c/Sté Esders, RJDA 1997, no 60, Bull. Joly Sociétés 1997, p. 116, note Tilquin, JCP E 1997, I, no 676, obs. Viandier et Caussain (France)
[130] See Bech Bruun/Lexidale (op.cit.), p. 316
[131] Ibid, p. 561
[132] Ibid, p. 767
[133] Ibid, p. 940 et seq
[134] Ibid, p. 103
[135] Ibid, pp. 104, 345, 750
[136] See e.g. Bayer, W., Schmidt, J. (op.cit.)
[137] CJEU, *Sevic*, ECLI:EU:C:2005:762
[138] CJEU, *Vale*, ECLI:EU:C:2012:440
[139] CJEU, *Sevic*, ECLI:EU:C:2005:762, para. 19
[140] CJEU, *Vale*, ECLI:EU:C:2012:440, paras 38 et seq
[141] See Schmidt, J. (op.cit.), p. 12

there are still a number of EU/EEA Member States which do not provide for the possibility of cross-border divisions, as visually highlighted in the following figure:[142]



Member States where cross-border divisions are possible (blue), are not possible (green). Data: Lexidale.

Finally, it is interesting to note that, at times, Member States have even gone further in providing a variety of restructuring possibilities: for example, Czech legislation includes partial divisions and global transfers of assets and liabilities, and Luxembourgish national law includes cross-border transfer of assets, branch activity transfers, all assets and liability transfers, and transfers of professional assets.[143]

2. III. Conclusions

By way of an overall assessment of the Directive, firstly, one can safely conclude that the effects of the CBMD were clearly positive: it required all EU (and EEA) Member States to permit cross-border mergers of limited liability companies and established a more predictable and structured framework to that effect, enhancing legal certainty, which is essential for complex transactions.[144] Furthermore, it led to a significant reduction of the transaction costs for cross-border mergers.[145] Therefore, it enabled an increase in the number of companies which have carried out cross-border mergers.

[142] See Bech Bruun/Lexidale (op.cit.), p. 103
[143] Ibid, p. 104
[144] Ibid, p. 7 et seq
[145] Ibid

The CBMD seems, however, to have inspired some developments in relation to cross-border divisions as well, at least with regard to the few Member States which chose to include provisions corresponding specifically to cross-border divisions within the general framework of the transposition of the CBMD into national law (as part of a gold-plating process). Where this approach was not followed, few Member States tackled expressly the issues relating to cross-border divisions in their legislation or in case law. As a result, in many Member States, options related to cross-border divisions do not exist.[146] In view of its scope (national divisions only), the Domestic Divisions Directive could obviously not address the cross-border division complexities in need of regulation, which have remained unresolved.

[146] Ibid, see e.g. p. 243 (Austria), p. 292 (Bulgaria), p. 368 (Denmark), p. 384 (Estonia), p. 451 (Germany), p. 476 (Greece), p. 495 (Hungary), p. 537 (Ireland), p. 687 (Malta), p. 714 (Netherlands), p. 784 (Poland), p. 854 (Slovenia), p. 919 (Sweden)

Chapter 3

Obstacles to the full effectiveness of the Directives

This section illustrates the practical obstacles, discrepancies, and aspects lacking clarity in the EU legal framework relating to cross-border mergers and divisions. In so doing, it also points to possible options for improving certain provisions. The analysis is intended to focus on some important ex-post aspects of the Directives' performance, many of which relate to the most salient aspects of the protection provided to various stakeholders (creditors, shareholders, minority shareholders and employees), although it is not exhaustive.

3. I. Issues related to the existing CBMD legal framework for cross-border mergers

Key findings

Despite its many positive aspects, there are a number of remaining obstacles to achieving the full potential of the CBMD as regards its effectiveness.

Problems in the application of the CBMD have been referred to with regard to: i) the scope of the CBMD framework, in particular the fact that it covers only limited liability companies and only companies that can merge under national law, ii) the protection of stakeholders (creditors, minority shareholders and employees) and iii) procedural and practical obstacles.

3. I. 1. Introduction

Despite CBMD's positive aspects, it also presents weaknesses, which have been highlighted in various instances by practitioners and scholars.[147] Obstacles to the realisation of cross-border mergers are cited as originating from: i) the scope of the CBMD framework, in particular the fact that it covers only limited liability companies and only companies that can merge under national law, ii) the protection of stakeholders (creditors, minority shareholders and employees) and iii) procedural and practical obstacles.[148]

[147] The fact that obstacles and impediments hinder the CBMD's full effectiveness has also been suggested by the conclusions of the public consultation of the European Commission on the future of European company law: 331 out of a total of 496 replies support improvements to the Directive; see: http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf; see also the Commission Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final, p. 12

[148] See Schmidt, J. (op.cit.), p. 16

3. I. 2. The scope of the CBMD

As already indicated above, the CBMD covers only limited liability company cross-border mergers,[149] and is therefore in practice inapplicable to cross-border mergers of other legal entities within the meaning of Article 54 TFEU (e.g. partnerships, limited partnerships, cooperatives, foundations).[150]

According to the CJEU's decision in the *Sevic* case,[151] as this is interpreted by leading opinions in academic literature,[152] these legal entities also enjoy 'freedom to merge' as an inherent aspect of the freedom of establishment granted to them by Art. 49 and 54 TFEU.[153] In its decision, the Court explicitly held that: 'cross-border merger operations, like other company transformation operations, constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment.'[154]

Nevertheless, the lack of a clear and secure EU legal framework has been regarded as making this 'freedom to merge' illusory in practice, since the uncertainty of the applicable procedural rules, the risk of the merger ultimately failing because of some kind of (real or alleged) procedural defect and the high costs of legal advice could generally deter legal entities from even trying it.[155] An extension of the scope of the

[149] There are several provisions in the Directive that limit its scope to limited liability companies. Article 2(1) CBMD defines the term 'limited liability company' as: 'A company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others.' Additionally, Articles 3(2) and 3(3) CBMD can further limit the scope of the Directive. Article 3(2) allows Member States to exclude cooperatives, even if those fall within the definition of limited liability companies. Article 3(3) excludes certain investment companies, which are defined as: 'A company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company.'

[150] EU law provides solely for the formation of a Societas Europaea (SE) and a Societas Cooperativa Europaea (SCE) by means of a cross-border merger, *cf.* Articles 2(1), 17-31 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1. (formation of an SE by means of a cross-border merger of public limited liability companies) and Art. 2(1), 19-34 of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1. (formation of an SCE by means of a cross-border merger of cooperatives)

[151] CJEU, judgment of 13.12.2005, *Sevic*, case C-411/03, ECLI:EU:C:2005:762

[152] See Schmidt J. (op.cit.), p. 11 with further references. See also Schindler, C. P., 'Cross-Border Mergers in Europe – Company Law is catching up!', Commentary on the ECJ's Decision in Sevic Systems AG, European Company and Financial Law Review, 3, p. 109-119, 2006; Papadopoulos, T., 'EU regulatory approaches to cross-border mergers: exercising the right of establishment', E. L. Rev., p.71-97, 2011; Gesell, H., Riemer, P., "Outbound" Cross-border Mergers Protected by Freedom of Establishment Annotation to the Decision of the Amsterdam District Court (*Kantongerecht*), ECFR 2007, 4, 2, p.308-316, 2007

[153] See Schmidt J. (op.cit.), p. 11

[154] CJEU, judgment of 13.12.2005, *Sevic*, case C-411/03, ECLI: EU:C:2005:762, para. 19

[155] See Schmidt J. (op.cit.), p. 11

CBMD to include all legal entities within the meaning of Article 54 TFEU[156] would likely solve the above difficulty. This solution seems, notably, also in line with the relevant case-law in the *Sevic* or *Vale* cases.[157]

Another issue in relation to the scope of CBMD arises from its Article 4 (1). According to this provision, cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member State. The fact that Member States have the option to exclude the merging of certain types of companies with each other has reportedly created barriers to merger, e.g. in cases of mergers between private and public companies.[158] Such limitations are not necessarily insurmountable, since the acquired company can be converted into a recognized type of company and then merge. Nevertheless, this limitation creates an additional – artificial- stage to a proposed merger, increasing the cost and time required for the merger; also, it possibly raises legality issues with regard to the freedom of establishment.[159] Courts may find that even non-discriminatory obstacles on cross-border mergers between certain types of companies are in violation of Article 49 TFEU, if they unjustifiably hinder the exercise of the freedom of establishment.[160] A solution to the difficulty described above could be to amend the provision allowing Member States to exclude particular types of companies merging with each other at the cross-border level, on the basis of their respective national limitations. Notably, according to the Public Consultation carried out by the European Commission on the subject, there is strong support for allowing such cross-border mergers between different company types.[161]

Finally, according to its Article 1, the Directive applies only to mergers of limited liability companies 'formed in accordance with the law of a Member State.' Consequently, it does not apply to companies which have been formed outside the EU/EEA but have transferred their domicile to the EU/EEA. Companies, which have carried out a cross-border seat transfer from a non-EU/EEA country into the EU/EEA and which thus have converted into an EU/EEA company form, are technically excluded from carrying out cross-border mergers under the CBMD framework.[162] In order to amend this technical limitation, the scope of the CBMD could potentially be extended to also include cross-border mergers of companies that have not been formed in the EU but have converted into an EU/EEA form.[163] Notably, according to the European Commission's public

[156] Ibid, p. 17
[157] See Bech Bruun/Lexidale (op.cit.), p. 81
[158] Ibid, p. 80
[159] Ibid, p. 81, with reference to the Member States that have placed such a limitation: Czech Republic, Lithuania, the Netherlands, and Iceland
[160] Ibid. See in this regard references to Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165, para. 37 and Case C-210/06 *Cartesio* [2008] ECR I-09641, para. 113
[161] See the Commission's Feedback Statement, Summary of Responses to the Public Consultation on Cross-border Mergers and Divisions of the European Commission (October 2015), available at: http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf , 2.1. Cross-border mergers, answers to Question 2.
[162] Ibid, p. 85
[163] Ibid

consultation on cross-border mergers and divisions, there is also strong support for allowing cross-border mergers of such companies,[164] which appears to have been omitted owing to an oversight.

3. I. 3. Issues relating to the protection of stakeholders

3. I. 3.1. Protection of creditors

Article 4(2) CBMD allows Member States to apply mechanisms that ensure the protection of creditors to the extent that such mechanisms exist in the Member State's domestic merger legislation. This protection intends mainly to diminish the risk that the creditors will be in a worse financial situation than they were before the merger, for example because the liabilities of the acquiring company would exceed its assets,[165] or because the new legal system governing the merged entity could negatively impact creditors.[166] This is the case, for example, with insolvency laws, where, under the European Insolvency Regulation, the jurisdiction for insolvency proceedings is determined by the location of the registered office and the center of main interest,[167] thus the shift in location could allow shareholders to forum-shop based on insolvency laws, to the detriment of creditors.[168]

In accordance also with the domestic merger directive for internal mergers,[169] 29 out of 30 states applying the CBMD have indeed chosen to implement the optional provision of the Directive relating to creditor protection[170], albeit with considerable divergence as regards the methods and forms of such protection.[171]

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[164] See the Commission's Feedback Statement, Summary of Responses to the Public Consultation on Cross-border Mergers and Divisions of the European Commission (October 2015), available at: http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf, 2.1. Cross-border mergers, answers to Question 1

[165] Raaijmakers, T.M.J., Olthoff T. P.H., 'Creditor protection in cross-border mergers: unfinished business', Utrecht Law Review, 2008, p. 34

[166] See See Bech Bruun/Lexidale (op.cit.), p. 52

[167] See Article 3(1) together with Article 4(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160/1; for further information, see also Israel J., 'European Cross-Border Insolvency Regulation', 2005; Virgos, M., Garcimartin, F., European Insolvency Regulation: Law and Practice, 2004. On May 20, 2015 the European Parliament approved the revised European Insolvency Regulation (EIR) with a view to speedy formal adoption and entry into force mid-2017. The revisions introduced do not seem to affect the protection of creditors in the CBMD

[168] For further information, see Ringe, W.G., 'Strategic Insolvency Migration and Community Law,' in W.G. Ringe/L. Gullifer/Ph. Théry, Current Issues in European Financial and Insolvency Law. Perspectives from France and the UK, 2009, p.71; Webb, L., Butter, M., 'Insolvency proceedings: shopping for the best forum', PLC, 2009, p. 35, 39; Szydło, M., 'Prevention of Forum Shopping in the European Insolvency Law', 11 *EBOR*, p. 253-272; Eidenmüller, H., 'Abuse of law in the Context of European Insolvency Law,' *ECFR* (2009), p. 1-28

[169] See Articles 13 and 14 of Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, OJ L 110, 29.4.2011, p. 1–11

[170] Apart from Iceland, all countries have creditor protection mechanisms, See Bech Bruun/Lexidale (op.cit.), p. 117

[171] Ibid, p. 52 et seq

The differences in the national laws relate mainly to: a) the point in time when the protection commences and its duration and b) the procedure and creditor protection model followed, all in all resulting in what seems like the creation of unnecessary complexity and uncertainty.[172]

a) When does creditor protection begin, and how long does it last?

On the basis of Member States' discretion over when creditor protection commences, they can be divided into ex-ante and ex-post groups, depending on whether the creditor protection date begins prior to the general shareholders meeting, or thereafter. In the former scenario, the date corresponds to the publication of the common draft terms, while in the latter, the date may vary between the decision to merge by the general meeting of shareholders or the date on which the merger is legally concluded.[173] Problems with this system arise when a company situated in a Member State where this date starts *prior* to the general meeting works with a company in another Member State where the date starts *after* the general meeting.[174] In such instances it may be impossible to reconcile the different dates. Indicatively, this is the case when the merger certificate has already been issued in one Member State but not in the other, while at the same time the 6 months deadline to file the registration request has begun.[175]

Significant divergences between Member States also exist with regard to the duration of creditor protection, with time-frames ranging from one month (as in the cases of Denmark, France, Greece and Hungary) to six months (Czech Republic), or even with no specific date (Lithuania and the UK).[176] Despite the fact that the majority of Member States seems to limit such protection to one to two months,[177] such differences in the duration of creditor protection enhance uncertainty and may be considered as sub-optimal. This is again highlighted by the abovementioned example where the merger certificate has already been issued in one Member State but not yet in the other due to differences in applicable creditor protection rules, while the six-month clock for filing the registration is already ticking.

b) Procedural differences in creditor protection mechanisms

The predominant means of achieving creditor protection is by requiring 'creditor security.' With this approach, which is followed by 29 out the 30 states applying the CBMD,[178] creditors can request that the company provides security in the form of a

[172] Ibid, p. 53, noting the respective position also in the Commission Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final, p. 12; and Report of the Reflection Group On the Future of EU Company Law (2011), p. 28
[173] Ibid
[174] Ibid, p. 54
[175] See Article 11 (2) CBMD
[176] See Bech Bruun/Lexidale (op.cit.), p. 54
[177] Ibid, p. 55, see Figure 8 with the Length (in months) of the duration of creditor protection, supporting this conclusion
[178] The only exception is Iceland, See Bech Bruun/Lexidale (op.cit.), p. 117

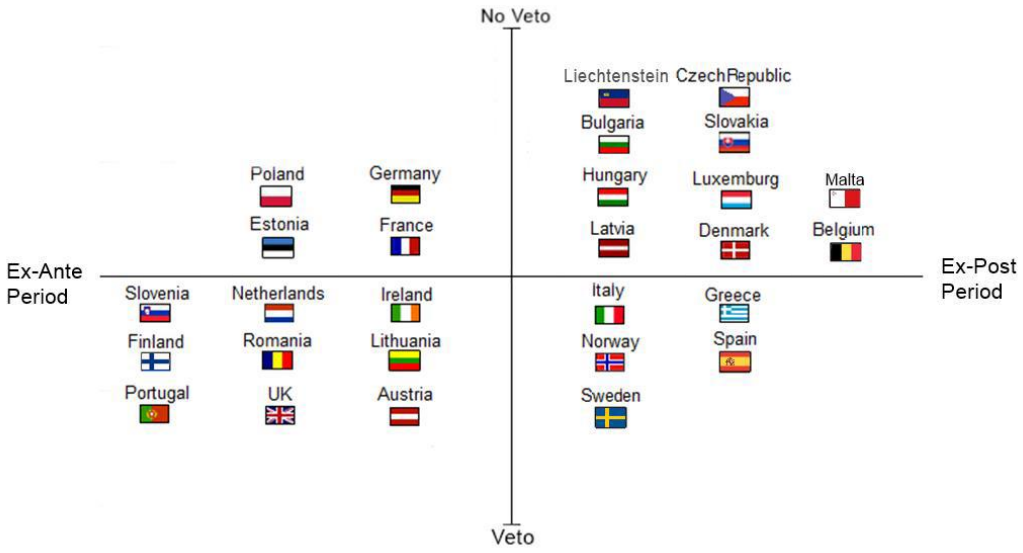
guarantee of debt payment as a precondition to a merger.[179] Despite some common characteristics of the 'creditor security' model followed by the 29 states,[180] a number of procedural differences exist.

Most significantly, there are differences between the Member States in the type of authority that decides on whether security should be provided. For one group of Member States, a legally binding decision is delivered by a court of law. For the other group, an administrative decision is handed down by the national (company) registry.[181] Examples of countries belonging to the first group are the Czech Republic,[182] France,[183] Luxembourg,[184] Poland,[185] Portugal,[186] and Slovakia[187], whereas Finland, Norway and Sweden feature in the second group.[188]

With regard to the creditor protection mechanism, some Member States have awarded creditors veto rights.[189] Typically, this option is distinctive of the 'ex-ante' approach to creditor protection, under which creditors exercise their right to block or delay mergers involving their debtors, and may delay any merger until their rights have been safeguarded. This model provides certainty for creditors up front, but the downside is that there is room for creditors to unduly abuse the procedure by blocking or delaying it.[190] On the other hand, with the 'ex-post' system, creditors are required to uphold their rights with the company resulting from the merger, which may well be based elsewhere in the Union, and they cannot block or delay the merger.[191] This model prioritizes the mobility of companies within the EU, although the interests of creditors are arguably less secured.[192]

[179] Ibid, p. 56. The different model applied in the UK is premised on the notion of a creditor meeting, where creditors convene and decide whether to approve the proposed merger, ibid.
[180] Creditors may only request security for claims that already existed before a certain date and only if the settlement of the claims is threatened by the merger and is not secure, ibid, p. 56 et seq
[181] See Bech Bruun/Lexidale (op.cit.), p. 57
[182] See Neveselý D. et al., 'Cross-Border Reorganisations in the Czech Republic', in J. Vermeylen/I. Van de Velde, 'European Cross-Border Mergers and Reorganisations,' 2012, p. 225
[183] Com. Code, Article L.236-14 (France); R.236-8 (France)
[184] See Wilkenhuysen M., Silcox L., 'Luxembourg', in D. van Gerven, *Cross-Border Mergers in Europe*, Volume II, 2011, p. 15
[185] Article 516 CPCC (Poland)
[186] Articles 101-A to 101 – C of the Portuguese Companies Code
[187] Article 69aa(5) Commercial Code (Slovakia)
[188] For Norway see Art. 13-16(1) PLLC Act.; For Finland see the Finland LLC Act, Part V, Chapter 16, Section 26(4); For Sweden see Andersson, J. B., 'Sweden', in D. van Gerven, 'Cross-Border Mergers in Europe,' Volume II, 2011, p. 186
[189] 14 Member States have granted veto rights to creditors, while 15 expressly did not, See Bech Bruun/Lexidale (op.cit.), p. 55
[190] Ibid, page 59 et seq
[191] See Schmidt J. (op.cit.), p. 18
[192] See Raaijmakers and Olthoff (op.cit.), 'Creditor protection in cross-border mergers: unfinished business', Utrecht Law Review, 2008, p. 37-38

Notably, most of the Member States in the ex-post group (10 of 15) do not grant creditors veto rights over the merger (with the exception of Italy and Spain).[193] Similarly, most of Member States in the ex-ante group (9 of 13) do provide creditors with veto rights, indicating that in practice, there are two general regulatory camps as regards the protection of creditors' rights: Late Date/No Veto and Early Date/Veto.[194] Groupings of Member States based on whether they provide for "Ex-post" or "Ex-ante" protection and whether creditors can block the CBM are indicated in the table below[195]:



Data: Lexidale

This significant divergence, compounded by the application of different procedures and deadlines for national provisions, creates considerable complexity and legal uncertainty as can further be exemplified in the theoretical example hereafter.[196]

Box 1. Case Example: Creditor Protection in relation to a Merger envisaged between a Dutch and an Italian Company

A hypothetical merger between a Dutch and an Italian company highlights the complexity and the difficulty which would be associated to radically diverging creditor protection systems: The Netherlands applies an ex-ante system in which creditors can ask for security prior to the merger if the creditors' claims are not sufficiently secured. Creditors can file an opposition to the merger at the competent district court, and request a special form of security. Creditors have one month to do so after the merger has been announced in the national gazette.

[193] See Bech Bruun/Lexidale (op.cit.), p. 58
[194] Ibid
[195] Ibid
[196] For this example see ibid

Moreover, creditors may block the merger because the notarial deed cannot be executed. Accordingly, the merger would be blocked until the opposition had been withdrawn or the court judgment dismissing the opposition had become enforceable.

In Italy, an ex-post system prevails, and a merger is suspended for 60 days after the filing of the merger deed with the registry, unless one of the following three conditions is fulfilled: the creditors consented to the merger; all non-consenting creditors have been paid in full, or; the sum necessary to pay the dissenting creditors has been deposited in a bank as a guarantee of their credit. During the 60 day timeframe, creditors can essentially block the merger.

Therefore, in the case of a cross-border merger involving entities in both the Netherlands and in Italy, advisors do not only have to deal with complex creditor protection systems, they also have to accumulate the two statutory periods because one is ex-post and the other is ex-ante. Finally, in both countries creditors can block the merger, leading to potentially long delays and uncertainty.

What is more, there are a number of specific creditor protection arrangements provided for in different Member States,[197] for example, in some countries such as Denmark, the right to protection depends on a valuation report.[198] In Norway, mergers of commercial banks or insurance companies may allow the depositor to terminate the account of the insurance agreement.[199] In Poland, if the resulting company is located in Poland, the assets and liabilities of the merging companies must be managed separately until the date on which all creditors have been satisfied or secured.[200] Finally, in Estonia, protection is only available if the resulting company is governed by the law of a different Member State.[201]

The extent of variation in creditor protection regimes among Member States is therefore significant, creating unnecessary complexities and legal insecurity. A higher degree of convergence in relation to a) the point in time when creditor protection commences (and its duration) and b) the protection mechanism and procedure, would likely resolve most of the above difficulties.

With regard to which protection mechanism is preferable in terms of maximized effectiveness, the relevant Member State legislators and implementing authorities may want to move away from awarding a veto right to the creditors of a company. Indeed, veto rights may seem excessive in view of the fact that the creditor's economic interests can be deemed as sufficiently protected by the right to obtain security for their claims, in line with the protection standard currently laid down in the Domestic Merger Directive[202]

[197] See Thorup, V., Buskov J., 'Denmark,' in D. van Gerven, 'Cross-Border Mergers in Europe,' Volume I, 2010, p. 178

[198] See Bech Bruun/Lexidale (op.cit.), p. 57

[199] See Article 31(1) and (2) of the Act of 24 May 1961 no 2 on Commercial Banks in Norway and Article 13-1(1) and (2) of the Act of 10 June 2005 no 44 on Insurance Companies and Pension Funds (Norway)

[200] See Articles 495 and 496 CPCC (Poland)

[201] See Article 433 of the CC (Estonia)

[202] Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, OJ L 110, 29.4.2011, p. 1–11

(Articles 13 and 14).[203] Arguably, the ex-post protection system can provide for a reasonable period (of e.g. 6 months) after the merger has taken effect for the creditors to lodge their request to obtain security (in the form of a debt payment guarantee), without risking delays or blockages of cross-border mergers.[204] In this respect, it should be noted that enforcing claims abroad is not necessarily too burdensome for creditors in view of the fact that the Brussels II Regulation[205] ensures that claims can be enforced throughout the EU.[206] In the alternative of opting for an ex-ante protection system, the protection period should be very short in order to minimize the risk that creditor protection would considerably delay the merger process or even thwart the entire merger.[207] Interestingly, when answering the question from the European Commission on the point in time at which creditors of the merging companies should begin to be protected, respondents of the Commission's Feedback Statement declared a preference for an ex-ante point in time (before a cross-border merger takes effect):[208] respondents nevertheless stressed that such an ex-ante protection period should not block the merger.[209]

3. I. 3.2. Protection of minority shareholders

Similarly to creditors, minority shareholders may need protection in case of a cross-border merger for various reasons, such as differences in the valuation of the entities and the exchange ratio resulting from the valuation, or objections to the envisaged amendments to the company statutes of the resulting company[210] and limitation of the shareholders' rights under a new national regime.[211] Notably, in view of the fact that a minority shareholder can own up to nearly half of the shares of a company, a protection regime can be very costly if payment of compensation to that minority shareholder is required.[212]

Article 4(2) CBMD includes an optional provision allowing Member States to create mechanisms that ensure the protection of minority shareholders. Member States tend to use this optional provision. All but six countries have included such a protection, albeit by way of introducing different systems of minority shareholder protection, which extend from 10 days to 3 months.[213] The procedure is initiated either at the general

[203] See Schmidt J. (op.cit.), p. 18. Compare the Feedback Statement, Part I, Question 5
[204] ibid, p. 19. See also the Feedback Statement, Part I, Cross-border mergers, answers to Question 6, p. 9 et seq, explaining that only 15% of the respondents were in favour of a right to block the merger
[205] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1
[206] See Schmidt J. (op.cit.), p. 18 et seq
[207] See Bech Bruun/Lexidale (op.cit.), p. 9
[208] See the Feedback Statement, Part I, Cross-border mergers, answers to Question 5, p. 8
[209] Ibid. See also answers to Question 6, p. 9 et seq
[210] See Wyckaert, M., Geens, K., 'Cross-border mergers and minority protection: an open-ended harmonisation,' Utrecht Law Review, 2008, p. 40-52
[211] See Bech Bruun/Lexidale (op.cit.), p. 68
[212] Ibid, p. 69
[213] Belgium, Hungary, Lithuania, Luxembourg, Norway and Sweden, See Bech Bruun/Lexidale (op.cit.), p. 118

meeting or on the date of the registration or publication of the registration of the merger with the national (company) registry.[214]

The regime for the protection of minority shareholders is therefore also characterized by complexity which can have a cooling effect in the cross-border mergers concerning at least some of the Member States. Recommendations for solving the above complex situation include the following alternative proposals: a) full harmonisation of minority shareholder protections systems, b) the provision of a fixed menu of options for Member States to choose from, or c) the relinquishing of such protections.[215] With the first option, minority shareholder protection should be fully harmonised at the European level, as a way of ensuring greater legal certainty and cost reductions.[216] With this scenario, minority shareholders could be given an exit right, namely a right to sell their shares against adequate compensation.[217] There is a longstanding tradition of using such exit rights in many Member States[218] and these rights are also established legal instruments of EU law.[219] Minority shareholders could also be given a right to receive additional compensation in case of an inadequate share exchange ratio or, if an additional cash payment is an issue for companies with respect to liquidity, could be awarded additional shares in the merged entity.[220]

Under the second option, which would introduce a more limited level of harmonisation but which would be in line with the principle of subsidiarity, Member States would have a fixed menu of protection measures, thereby restricting choices to certain systems of minority shareholder protection.[221] Finally, the third option, of no minority shareholder protection, is cost-saving and mobility-friendly, but on the assumption that minority shareholders find themselves in a disadvantaged position, this option may negatively impact on investments in minority interests.[222] In this regard, the Domestic Merger

[214] Ibid, p. 69
[215] Ibid. See also the Feedback Statement, Part I, Cross-border mergers, answers to Question 6, p. 9
[216] See Bech Bruun/Lexidale (op.cit.), p. 69. In favour of such proposal see Schmidt, J. (op.cit.), p. 19 et seq
[217] See Schmidt J. (op.cit.), p. 20
[218] Ibid, clarifying further that several Member States have even implemented an exit right specifically in cases of cross-border mergers, see e.g. Austria (§ 10 EU-VerschG), Denmark (Art. 285 f. Lovom aktieog anpartsselskaber (selskabsloven)), Finland (16 luku § 13 Osakeyhtiölaki), Germany (§ 122i UmwG) and, the Netherlands (Art. 2:333h Burgerlijk Wetboek)
[219] See in particular Article 28 of Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, OJ L 110, 29.4.2011, p. 1, Article 16 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4.2004, p. 12, Article 5 (2) of the Domestic Division Directive (Sixth Council Directive 82/891/EEC of 17 December 1982 concerning the division of public limited liability companies, OJ L 378, 31.12.1982, p. 47)
[220] See Schmidt J. (op.cit.), p. 20 et seq., who further explains that the mandatory cash compensation required by German law entails significant liquidity risks for companies and that accordingly, many practitioners and scholars have been calling for the possibility to grant additional shares as an alternative
[221] See Bech Bruun/Lexidale (op.cit.), p. 69. See also See Schmidt J. (op.cit.), p. 20 et seq, advocating the full harmonisation and alternatively a choice between only two protection systems
[222] See Bech Bruun/Lexidale (op.cit.), p. 70

Directive does not provide a minority shareholder protection system either.[223] Conversely, nor does it seem to forbid it. In addition, in view of the fact that a cross-border merger entails the transfer of the seat, and possibly, of the assets and operation of the merging company, it can be argued that the need for a minority protection regime is heightened with cross-border mergers.

3. I. 3.3. Employee participation

The notion of employee participation refers to the influence of employees on the corporate decision-making process within companies. More specifically, and according to Article 2(k) of Directive 2001/86/EC on Employee Participation in European Companies,[224] ''participation' means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:

- the right to elect or appoint some of the members of the company's supervisory or administrative organ, or
- the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.'

EU and EEA Member States have very different traditions with regard to employee participation. In some Member States, employee participation is mandatory by law, while in others there is no regulation on the matter. More specifically, in 19 out of 30 EU/EEA Member States, employees have a right to be represented in the management or supervisory board of companies according to national law.[225] Nevertheless, employee participation systems and requirements differ substantially and in relation to a broad range of parameters: the nature of the company as a public and private sector entity, the minimum size of the company (e.g. no minimum size or a threshold which can vary from 25 to more than 500 employees), the rights of participation that employees receive (a seat on the management board or the supervisory board of the company depending on the governance structure followed by the Member State), the number and responsibilities of the representatives and the process of their appointment.[226]

As already indicated, and with a view to reaching a compromise between these Member State differences in procedures and culture, the CBMD enacted a system based on the model of employee participation in the SE Regulation[227] but with some modifications. In particular, the general rule of Article 16 of the CBMD provides that the rules on employee participation shall follow the laws of the Member State where the registered office of the company resulting from the merger is situated. Since this could lead to a significant deterioration of employee participation rights and operate as an incentive for forum shopping to that effect, Article 16(2) of the CBMD provides for three exceptions to this rule. The first one is that the national rules do not apply if, for the preceding 6 months to

[223] Ibid
[224] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, [2001] OJ L 294/22
[225] See Bech Bruun/Lexidale (op.cit.), p. 70
[226] Ibid, p. 71 et seq
[227] See Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22

the publication of the draft terms of the cross-border merger, an average of more than 500 employees was operating under an employee participation system in one or more of the merging companies. The second exception provides that the national rules of the registered office do not apply if the company resulting from the cross-border merger does not provide for the same level of employee participation as operated in the relevant merging companies. Article 16(2)(c) provides in effect for the third exception, which applies when the national law applicable to the company resulting from the cross-border merger does not provide the same employee participation entitlement to employees situated in the Member State of the resulting company in comparison to employees of establishments situated in a different Member State.[228] If any of the exceptions applies, the management can negotiate with the employees the form of employee participation in the successor companies applying the standard rules.[229] Article 16(3) regulates this procedure by referring to the SE Directive.[230] The main difference is that for the application of the standard rules, the percentage of employees required to have been previously covered by an employee participation system has been raised from 25 percent to 33.3 percent.[231]

This framework is considered as workable, although there are concerns that it is overly complex and costly[232] and that there are issues in need of addressing, namely: concluding an employee participation agreement may take months, which is hard to reconcile with national legislation, as is evident e.g. in the case of the Austrian provision requiring the registration of the cross-border merger within nine months of the effective date of the merger;[233] furthermore, there is ambiguity as to the exceptions of Article 16 (2) CBMB[234] and as to the sanction for non-conformity with the employee participation rules.[235] Additionally, unlike the SE Regulation, the CBMD does not include provisions on information and consultation in the employee protection framework.[236]

Notably, stakeholders in Germany have indicated that the issue of employee participation is often one of the most important issues in the entire transaction and that it may lead to the cross-border merger not being pursued further; also, that the

[228] See Bech Bruun/Lexidale (op.cit.), p. 113 et seq
[229] Ibid, p. 114
[230] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22
[231] Ibid
[232] See ibid, explaining that respective complaints have been expressed by legal advisors from 14 Member States
[233] Ibid
[234] See e.g. Tepass, M., 'Employee Participation Schemes and European Employment Rules for Cross-Border Reorganisation', in J. Vermeylen, Van de Velde, European Cross-Border Mergers and Reorganisations, p. 280
[235] See Bech Bruun/Lexidale (op.cit.), p. 74. On the different issue of problematic transposition of the Article 16 provisions, and proposals for a solution (ranging from non-action, dialogue between Member States and initiation of proceedings against Member States for a failure to fulfill obligations, as has been done by the European Commission in the recent case of *Commission v. the Netherlands*, Case C-635/11), see p. 116 et seq
[236] See Bech Bruun/Lexidale (op.cit.), p. 74. See in this respect also Andenas M., Woolridge, F. European Comparative Company Law, 2009, p. 499

corresponding procedure involves significant investment in costs and time[237]. Greece has also reported that a proposed merger between a Greek listed company and a Spanish company had to be abandoned because of employee participation issues.[238] Complaints about the employee participation procedure have been expressed also by stakeholders in Italy, with reference also to a particular cross-border merger of an Italian and German company.[239]

Proposals for amendments to the abovementioned framework vary significantly. One approach proposes amendments aiming at a high degree of employee participation (e.g. in the form of decreasing the percentage of application of the standard rules from 33.3. percent to 25 percent in alignment with the SE Directive[240]). The opposite approach is the mobility-friendly approach. This proposes the introduction of a more narrow set of conditions to employee participation with a view to decreasing the procedural burden of a merger and the time it takes to bring about a merger.[241]

In view, however, of the fact that Article 16 CBMD was the result of a very fragile compromise, attention should also be paid to the third proposal that a reform of the CBMD should refrain from amending corresponding employee participation provisions.[242] Therefore, taking into account the political problem with adjusting the existing CBMD employee participation framework, certain clarification on the existing ambiguities might be possible through an interpretative communication or Commission guidelines. Notable examples of ambiguities in need of clarification relate to the requirements of Article 16(2) or the issue of sanctions for non-compliance, to the extent a consensus seems realistically achievable.[243] Such clarifications could be expected to have a beneficial effect on the application of the employee participation rules and hence on the exercise of employee participation rights.

3. I. 4. Issues in relation to procedures and practical obstacles

3. I. 4.1. Communication between authorities – documentation

The national (company) registers of different Member States need to collaborate and communicate with each other in cross-border merger procedures.[244] Legal advisors and various stakeholders report difficulties with regard to the communication between different national authorities involved. Registries contact each other with letters - often in

[237] See Bech Bruun/Lexidale (op.cit.), p. 197
[238] Ibid, p. 199
[239] Ibid, p. 207
[240] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22
[241] See Bech Bruun/Lexidale (op.cit.), p. 74
[242] See See Schmidt J. (op.cit.), p. 20 et seq
[243] See Bech Bruun/Lexidale (op.cit.), p. 76
[244] See e.g. Article 13 CBMD as currently in force: '[T]he registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.'

their own language, or faxes. Envelopes sent via mail have been reported to go astray at times, and e-mails are rarely used.[245] In general, the communication mode and language differs significantly: for example, the Finish authority sends out letters to all countries in English, except for Sweden to which letters are sent in Swedish; Slovenia sends certified translated documents.[246] In this regard, legal advisors refer to delays, legal uncertainties and additional costs associated to non-standardized communication.[247] Member States have, in particular, yet to apply a standard procedure (e.g. regarding means of communication, standardization, language and deadlines) for the communication between the national registries of different Member States. Notably, Article 13 CBMD has been amended by Article 2 of Directive 2012/17/EU[248], which allowed the Commission to set up a Business Registers Interconnection System (BRIS). The objective of this electronic system is to ensure structured communications, which should address the abovementioned difficulties in the near future.[249] The legal deadline for the deployment of the respective infrastructure is June 8, 2017[250]. Communication between registries shall henceforth be electronic instead of on paper and standardized in a way that also provides a solution to the language problem.[251] With regard to the timing of the communication, and in order to ensure a fast communication process, two complementary options are suggested.[252] One is to allow the acquiring company to notify the foreign registry early if it so wishes. The second option is to set a maximum period of time within which a registry is required to notify its foreign counterpart.[253]

On the same subject of streamlining the procedure and alleviating discrepancies, the European Commission could consider standardizing relevant documentation, since it is currently not harmonised and may hinder cross-border mergers both procedurally and in terms of cost. A prominent example is the pre-merger certificate required by Article 10 (2) CBMD, which varies in form substantially in different Member States and which could easily take the form of a standardized pre-merger certificate.[254]

[245] See Bech Bruun/Lexidale (op.cit.), p. 61
[246] Ibid, p. 62
[247] Ibid, p. 61 et seq
[248] Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, [2012] OJ L 156/1 . See also Implementing Regulation (EU) 2015/884 of 8 June 2015
[249] See Bech Bruun/Lexidale (op.cit.), p. 61
[250] See https://e-justice.europa.eu/content_business_registers_at_european_level-105-en.do
[251] See Bech Bruun/Lexidale (op.cit.), p. 63
[252] Ibid, p. 64
[253] Ibid, with a further proposal to impose a duty on the national registry of the resulting company to publish the cross-border merger in the Official Journal of the European Union with a view to providing easy identification of cross-border mergers, albeit without further arguments as to the necessity and usefulness of such a procedure
[254] E.g. in the UK and in Ireland it has the form of a formal court order, while in Germany, the notification of registration also constitutes the pre-merger certificate, see Schmidt J. (op.cit.), p. 25 with further references

3. I. 4.2. Fast track procedures / exemptions

Article 7 CBMD does not provide for exceptions to the requirement of a merger report, which intends to inform the shareholders, but is both time-consuming and costly. An express provision could allow for a waiver of the required report by the shareholders of both companies.[255] Even if one takes into account the opinion that a merger report intends to also inform the employees, a waiver could at least be possible in cases where the company does not have any employees[256] or where the employee side consents to the waiver.[257] A fast-track route to implement a cross-border merger, for example in cases of group reorganisations in which the transferee and transferor are wholly owned subsidiaries and have no creditors, seems particularly useful.[258]

In addition, it is not clear whether Article 15 exempts upstream mergers of a 100%-subsidiary from the merger report, whereby a clarification as to such an exemption would facilitate procedures in relation to intra-group mergers.[259]

3. I. 4.3. Obstacles due to divergent accounting rules in relation to the decisive date

Member States have diverging accounting rules, which have been reported to create practical impediments to cross-border mergers. In particular, two important dates exist for cross-border mergers: the effective legal date (registration date) and the accounting date (decisive date) of the merger.[260] The registration date is governed by the law of the Member State of the successor company. In most countries this is the date when the merger is entered into the (company) registry of the Member State. The decisive date, on the other hand, is the date from which the transferor company's transactions are treated for accounting purposes as those of the transferee/new company, and is governed by Article 5 (f) of the CBMD.[261] Under some national laws the accounting date may precede the date when the merger takes legal effect, other national laws require that the two dates coincide and others accept both alternatives.[262] In certain instances this differentiation could be very problematic as exemplified below.[263]

[255] Ibid, p. 22
[256] When, for example it only uses external contractors, freelance collaborators, etc.
[257] Ibid with further references. See Bech Bruun/Lexidale (op.cit.), p. 85 et seq
[258] See Bech Bruun/Lexidale (op.cit.), p. 234 et seq
[259] See Schmidt J. (op.cit.), p. 22
[260] Ibid. See Bech Bruun/Lexidale (op.cit.), p. 64
[261] See Schmidt J. (op.cit.), p. 22
[262] Ibid, p. 22 et seq. See Bech Bruun/Lexidale (op.cit.), p. 64 et seq.
[263] For this example See Bech Bruun/Lexidale (op.cit.), p. 65

Box 2. Case Example: Accounting Effects of CBMD in Germany and Romania

In a cross-border merger case between German and Romanian companies, the German company is established in a Member State where the decisive date is prior to the legal date on which the merger enters into effect. The Romanian company is in one of the Member States where the decisive date is the same as the legal date of effect. If the German company sought to merge into the Romanian company, it would be faced with an accounting impossibility: there is a gap in time where none of the companies reports the transaction. Conversely, were the Romanian company to seek to merge into the German one, the opposite problem would occur. The Romanian company would have to include assets and liabilities in two accounting units.

With a view to solving such issues, further harmonisation of accounting rules seem appropriate : a revision of the CBMD could set a specific date to be applied in all Member States, for example the date of registration in the (company) registry, since this is an event that can be monitored by creditors.[264] Further proposals include the right of the companies to freely determine the decisive accounting date, on the basis of the specific characteristics of the individual merger,[265] provided that adequate time (possibly in the form of a minimum period of time) is ensured for the procedures relating to the exercise of minority shareholder, creditor, and employee rights.

3. I. 4.4. Obstacles due to divergent accounting rules – valuation rules

As for national mergers, the valuation is important also in cross-border mergers, both with regard to the transfer value (the value at which the assets and liabilities are transferred to the transferee company), and with respect to the merger ratio (the share exchange ratio) which only works properly if the two companies merging are valued according to the same standards.[266]

In cross-border mergers, however, different national rules and traditions with regard to the valuation of the merging companies apply, and these may vary substantially.[267] Indicatively, with respect to the transfer value, German law does not provide for valuation rules but, by way of an industry standard,[268] the method of capitalized earnings (Ertragswertverfahren) has prevailed.[269] France, on the other hand applies a multiple criteria approach (approche multicritères) as required by its Autorité des Marchés Financiers.[270] In practice, Member States apply most commonly one of two different types of valuation methods: the fair value method and the book value method, which may

[264] Ibid, p. 66

[265] See Schmidt J. (op.cit.), p. 23. Compare also with the Bech Bruun/Lexidale Study p. 66 with reference to the respective solution of the Slovak Republic, and for further reference see Sklenár, R., Development, Energy, Environment, Economics, 2010, p. 109

[266] See Schmidt J. (op.cit.), p. 23

[267] Ibid

[268] The IDW S 1 (WPg Supplement 3/2008, p. 68 ff., FN-IDW 7/2008, p. 271 ff.), which have been published by the Institut der Wirtschaftsprüfer (Institute of Public Auditors), provides for the use of either the *Ertragswertverfahren* ('capitalised earnings method') or the Discounted Cash Flow (DCF)-method (para. 101)

[269] See indicatively Kiem, R., ZGR, 2007, pp.542, 543, 551

[270] Position – recommandation AMF n° 2011-11. Opérations d'apports ou de fusion

result in different valuations, since the fair value method is based on the current market value of the asset or liability, versus its historic, sometimes depreciated, book value.[271] In order to solve the above difficulty, the rules on valuation of the merger ratio and the transfer value could perhaps be harmonised, and a uniform standard introduced in all Member States.[272] Alternatively, and to the extent it is not possible to reach a consensus about uniform rules, a standardized menu of valuation methods could be introduced, from which Member States would have to choose their preferred option.[273]

3. I. 4.5. Issues in need of clarification

Stakeholders in various questionnaires[274] have at times indicated that the CBMD could benefit from clarifications with regard to different requirements and deadlines. By way of example, Article 11 CBMD provides that in order to scrutinize the legality of the cross-border merger, the merging company must submit a certificate to the Member State where the successor company will be situated, a certificate issued by the other Member State together with the approved draft terms at the general meeting. When, however, any of the exceptions apply and approval by the general shareholders' meeting is not required (for example, because it is a simplified merger), there is obviously no approval to attach to the certificate despite the respective requirement, and uncertainty ensues as a result.[275] The solution to this lack of correlation between Articles 11 and 9 CBMD requires the simple clarification that where the draft terms do not have to be approved, no approval must be attached to the certificate.[276] The CBMD could benefit from such clarifications in provisions in which stakeholders have already marked relevant technical difficulties.

3. II. The shortcomings of Directive 82/891/EEC concerning the division of public limited liability companies

Key findings

The lack of an EU legal framework on cross-border divisions is the key problem with the scope of this Directive, since it is limited to domestic divisions.

In addition, most Member States do not have supplementary rules to those prescribed by Directive 82/891/EEC, in order to enable cross-border divisions and complicated transactions have to be followed instead.

The nonexistence of a structured procedure for cross-border divisions is a considerable obstacle to the mobility of companies within the EU.

[271] See Bech Bruun/Lexidale (op.cit.), p. 66
[272] Ibid, p. 67
[273] See Schmidt J. (op.cit.), p. 23
[274] See for example Bech Bruun/Lexidale (op.cit.), p. 87 et seq
[275] Ibid
[276] Ibid

3. II. 1. Problem definition: no EU cross-border division rules

As already explained, the 1982 Domestic Divisions Directive[277] does not constitute an EU legal framework for cross-border divisions. It covers only national divisions of public limited liability companies. In addition, it does not oblige Member States to permit divisions, but applies only where Member States opt to allow them and where these are carried out.[278] As a consequence, and as already indicated, Member States have adopted all kinds of approaches to cross-border divisions. Some have included rules on cross-border divisions within the framework of the transposition process of the CBMD.[279] A few others have enacted special legislation, which at times follow on from the EU Court judgments in *Sevic*[280] and *Vale*[281] on the freedom of establishment.[282] At least two Member States, France and Romania, allow cross-border divisions, mostly on the basis of their national case law.[283] The majority of the EU/EEA Member States,[284] however, do not provide rules for cross-border divisions at all. Therefore, at present, in most Member States, complicated transactions have to be followed to carry out a cross-border division, such as to first create a subsidiary and thereafter transfer the assets and liabilities to that subsidiary, or companies carry out a domestic division with a subsequent cross-border seat transfer.[285] Consequently, in practice, the 'freedom to divide' is largely inapplicable: the legal uncertainty and the high risk of failure seem to have a deterring effect on companies[286] and the non-existence of a structured procedure seems to constitute a substantial obstacle to the mobility of companies within the EU.[287]

3. II. 2. The need for an EU legal framework for cross-border divisions

Reasons for establishing an EU legal framework for cross-border divisions are first and foremost economic. Cross-border divisions offer legal entities a further attractive tool for cross-border reorganisations.[288] They are considered to be an important tool for changing and/or simplifying the organisational structure, for adapting to changing market conditions and for realizing new market opportunities.[289] Furthermore, divisions can be used to create smaller independent units for the purpose of isolating liability risks, in order to sell them (carve out). Divisions can also be used for an isolated Initial Public Offering (IPO) of the separated part or to transfer the separated part to other companies

[277] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Art. 54 (3) (g) TEC, concerning the division of public limited liability companies, OJ L 378, 31.12.1982, p. 47
[278] See Article 1(1) of Directive 82/891/EEC
[279] See Bech Bruun/Lexidale (*op.cit.*), p. 27 et seq., 102 et seq
[280] CJEU, *Sevic*, ECLI:EU:C:2005:762
[281] CJEU, *Vale*, ECLI:EU:C:2012:440
[282] See Bech Bruun/Lexidale (*op.cit.*), pp. 104, 345, 750
[283] Ibid, pp. 103, 427
[284] See e.g. ibid, p. 243 (Austria), p. 292 (Bulgaria), p. 368 (Denmark), p. 384 (Estonia), p. 451 (Germany), p. 476 (Greece), p. 495 (Hungary), p. 537 (Ireland), p. 687 (Malta), p. 714 (Netherlands), p. 784 (Poland), p. 854 (Slovenia), p. 919 (Sweden)
[285] Ibid, p. 104
[286] See Schmidt J. (op.cit.), p. 12
[287] See Bech Bruun/Lexidale (op.cit.), p. 104
[288] See Schmidt J. (op.cit.), p. 26
[289] See the Commission's Feedback Statement, Part II, Cross-border divisions, p. 19

belonging to the same group (sidestream, upstream or downstream merger).[290] In addition, divisions can be used to apportion different sectors of an undertaking between different heirs, family lines or quarrelling shareholders.[291] Reorganisation by way of a division can be achieved by other means, for example, by the creation of a new company A in another Member State and the transfer of assets and liabilities to the new company B of the Member State of origin before new companies A and B merge cross-border. However, such procedures are considerably more time-consuming and costly.[292]

There are legitimate concerns that cross-border divisions may be abused to selectively divide assets and liabilities to the detriment of creditors and employees.[293] However, it should be noted that this risk also exists in divisions at national level (for which the Domestic Division Directive is in place). This risk could be mitigated with the implementation of an appropriate legal framework,[294] which would also ensure creditor, minority shareholders and employee participation rights. Notably, under these circumstances, the enactment of a Directive on cross-border divisions could even enhance the protection of creditors, minority shareholders and employees, *vis a vis* alternative methods intending to achieve the same goal (of the division of a company) but do so in a less direct or evident manner.

Additionally, the right to give effect to a cross-border division (the freedom to divide) seems to be protected as an inherent aspect of the freedom of establishment (Articles 49 and 54 TFEU), as also supported by the case-law of the Court in the *Sevic*[295] and *Vale*[296] cases. Finally, the prospect of enacting legislation for cross-border divisions at EU level has been particularly welcomed by many of the stakeholders taking part in the Study for the Application of Cross-border Mergers Directive: from their perspective, the nonexistence of a structured procedure for cross-border divisions is a considerable obstacle to the mobility of companies within the EU.[297]

3. II. 3. Possible features of an EU directive on cross-border divisions

Divisions are generally characterized as the mirror image of mergers and it is accordingly understood that they can be governed by rules reflecting legislation on mergers.[298] This principle seems to have been followed by the Domestic Divisions Directive, whose rules correspond substantially to those of the Domestic Mergers Directive.[299] This principle could also apply with regard to a new EU legal framework on cross-border divisions.

[290] See Schmidt J. (op.cit.), p. 26
[291] Ibid
[292] Ibid
[293] See the Commission's Feedback Statement, Part II, Cross-border divisions, p. 19
[294] See Schmidt J. (op.cit.), p. 26
[295] CJEU, *Sevic*, ECLI:EU:C:2005:762
[296] CJEU, *Vale*, ECLI:EU:C:2012:440
[297] See Bech Bruun/Lexidale (op.cit.), p. 104
[298] See Schmidt J. (op.cit.), p. 27
[299] See Lutter, M., Bayer W., Schmidt, J., *Europäisches Unternehmens und Kapitalmarktrecht*, 5th ed., 2012

However, differentiations would be needed where specific characteristics of cross-border divisions require it.[300] The scope of an EU legal instrument for cross-border divisions should cover all possible divisions, namely:

a) split-up divisions (operations whereby, after being wound-up without going into liquidation, a company transfers to more than one company all of its assets and liabilities in exchange for the allocation of shares of the receiving companies to the shareholders of the company being divided[301]),

b) spin-off divisions (whereby a company spins off a part or several parts of its assets by transferring the part or parts, to one or to several companies in return for shares in this/these company(ies), or alternatively, these companies become owners of the shares in the company transferring assets[302]) and

c) hive-down divisions (where a company hives down a part or several parts of its assets by transferring this part or these parts to one or several companies in return for shares in this company or these companies being allocated to the company transferring assets[303]).

In this respect, the cross-border division rules could be broader than the ones prescribed in the Domestic Division Directive, which covers only divisions in the form of a complete split-up.[304] A reopening of the Directive could, in particular, consider permitting both proportionate divisions (i.e. the shares in the recipient or new legal entities are allocated in proportion to the shareholding in the transferring legal entity) and disproportionate divisions (i.e. the shares in the recipient or new legal entities are allocated disproportionately to the shareholding in the transferring legal entity).[305]

The rules on cross-border mergers laid down in the CBMD, either in its current form, or in the form it will have following future amendments could also be reflected in a new cross-border division legal framework. This could be the case with regard to all rules relating to the subsidiary applicability of national law, the division procedure, and stakeholder protection (creditors, minority shareholders and employees).[306] Finally, special rules could also be set for intra-group divisions.[307]

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[300] See Schmidt J. (op.cit.), p. 27

[301] See Article 2(1) and Article 21 (1) of the Domestic Division Directive. See Schmidt J. (op.cit.), p. 27

[302] See Schmidt J. (op.cit.), p. 28 with reference to § 123(2) UmwG (Germany), explaining that in contrast to a split-up, the 'original' company continues to exist.

[303] Ibid, explaining that the crucial difference to a spin-off is that the shares of the company or companies to which assets are transferred are allocated to the company transferring assets (and not its shareholders)

[304] Ibid, p. 29

[305] Ibid

[306] Ibid, p. 30 et seq

[307] Ibid, p. 31, explaining further that given the special risks for minority shareholders associated with divisions, they could (like in Article 20 of the Domestic Division Directive) be preferably restricted to cases of 100 %-upstream-mergers and should generally only mirror Art. 15 CBMD insofar as this is compatible with the special characteristics of divisions

Chapter 4

The possible steps forward

In light of the previous analysis, the purpose of this Chapter is to examine the European Commission's 2015 Feedback Statement, and to then provide a short presentation of the options available with regard to possible actions in the relevant field, and finally, to clarify the purpose and extent of the Commission's codification proposal of 3.12.2015.

4. 1. The European Commission 2015 Feedback Statement

On September 2014, the European Commission launched a public consultation about cross-border mergers and divisions, [308] in order to collect information which would allow the Commission to assess the functioning of the existing EU legal framework for cross-border operations of companies and the potential need for changes. The questions related to two sets of issues: the improvement of the existing framework for cross-border mergers and a possible framework for cross-border divisions. DG Justice and Consumers received 151 responses to the online consultation, submitted by public authorities, academia (universities, research institutes etc.), liberal professionals (lawyers and notaries), EU-wide and national business organisations and chambers of commerce, trade unions and employee bodies, companies, and finally, individuals. Replies originated from 27 Member States and many of the companies and individuals who took part mentioned that they were engaged in cross-border activities in the EU. Some replies expressed their support for a similar legal framework for all cross-border conversions: mergers, divisions, transfer of registered office and potentially other types of conversion (e.g. cross-border spin-off), with reference at times to the Court's judgement in the *Sevic* (C-411/03) case; a few replies assessed a potential directive on cross-border transfer as more important than a proposal on cross-border divisions.

4. 1. 1. The Feedback Statement on cross-border mergers: Summary of responses

In relation to cross-border mergers, the questionnaire included a broad range of questions encompassing almost all of the issues analysed above regarding scope, stakeholder protection and procedure.

With regard to the scope of the CBMD, the majority of the respondents were in favour of the extension of application of the cross-border merger rules to: a) cross-border mergers of companies that have not been formed in the EU but have converted into an EU/EEA form and b) to cross-border mergers between different company types.[309] Notably,

[308] See the Commission's Feedback Statement, Summary of Responses to the Public Consultation on Cross-border Mergers and Divisions of the European Commission (October 2015), available at: http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf

although no such question was addressed to stakeholders, in some of their comments, it was stated that the scope of the Directive should be broadened in order to cover partnerships and cooperatives, while in others this was dismissed as unfeasible.[310]

With regard to the rights of creditors, most stakeholders taking part in the Questionnaire were in favour of harmonising the rules on creditor's rights across the EU.[311] A majority of those in favour of harmonisation supported the provision of guarantee or security to the creditor, following a request by the creditor(s), either to the company or to the court.[312] On the other hand, the introduction of a veto right (right to block the merger) was supported by only a minority of respondents (12%).[313] The majority of stakeholders has furthermore supported the harmonisation of the date determining the beginning of the creditor protection period.[314] Among those in favour of such harmonisation, there was a clear preference (75%) for an ex-ante starting date, whereby the creditor protection period should not block the merger.[315]

A majority of respondents (65% of those who expressed an opinion) took the position that minority shareholders' rights should be harmonised, whereas one third thereof did not think it necessary. Although more business federations and chambers of commerce were in favour, other entities, and specifically trade unions, took a stance against harmonisation.[316] Most respondents in favour agreed on full harmonisation, with only few of them supporting either a two-option approach (whereby Member State would be given the choice to implement one of two sets of rights for minority shareholders provided by EU law), or an open-menu approach (whereby Member State could, but would not be obliged to, avail themselves of one of two proposed sets of rights for minority shareholders provided by EU law).[317] With regard to which rights minority shareholders should have, most respondents favoured the right to request compensation (70%) with other proposals receiving substantially less support (e.g. only 46% for the right of investigation and only 15% for the right to block the merger).[318] Most

[309] Ibid, answers to Question 2, p. 5
[310] Ibid
[311] See the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 3, p. 5 et seq
[312] Ibid, p. 6 et seq. See also stakeholder answers to Question 4 of the Feedback Statement (on cross-border mergers), p. 7
[313] Ibid, p. 6
[314] Only 14% were against this proposal, see the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 5, p. 8. In individual comments, stakeholders also expressed their support for harmonisation of the start and duration of the protection period for creditors when answering Question 4 of the Questionnaire, see the Commission's Feedback Statement (Part I, Cross-border mergers), p. 7
[315] See the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 5, p. 8. In individual comments to Question 4, stakeholders also supported harmonisation of the consequences of creditor rights on the merger, see the Commission's Feedback Statement (Part I, Cross-border mergers), p. 7
[316] Ibid, answers to Question 6, p. 9
[317] Ibid
[318] Ibid, p. 10

respondents (75% of those answering this question) also agreed on the need to harmonise the date determining the beginning of the period throughout which the minority shareholders of merging companies could exercise their rights.[319] 73% of the respondents in favour of such harmonisation and who expressed an opinion thought that the general meeting should trigger the start of the protection period. When there is no general meeting, a thin majority favoured as the triggering event the publication of the common draft terms of the cross-border merger in the register or on the company's website with other option (ranging from 12-15%) being the registration in the business register and the application to the authorities for the pre-member certificate.[320] Respondents also favoured by a majority the harmonisation of the length of the protection period for minority shareholders, and most agreed on a period of one month.[321]

As regards employee participation, approximately 40% of respondents who expressed an opinion favoured the modification of the corresponding CBMD rules, 28% were against and 31% did not express a view.[322]

In relation to the valuation of assets and liabilities (when the merger involves the issuance of new shares), most of the respondents (77% of those who expressed an opinion) were in favour of common rules to be introduced across the Union.[323] Almost half of those in favour of harmonisation thought that the choice between fair or book value should be left to the company, while for 25%, the best solution would be a common standard on fair value and for 15% a common standard on book value.[324] With regard to the harmonisation of the date from which the transactions of cross-border merging companies are treated for accounting purposes as being those of the company resulting from the cross-border merger, most respondents (71% of those who expressed an opinion) were in favour of such harmonisation. Of these, most (73%) opted for the accounting date (decisive date) of the merger, and only 20% for the legal date (registration date).[325]

The majority of respondents also supported the harmonisation of the rules on the date for the publication of the common draft terms of cross-border mergers, when no general meeting is necessary albeit with no clear preference as to what the 'event' should be i.e. the reference to which the publication date of the draft terms is determined.[326] Indeed, some proposed that the publication should be determined by the submission of the documents to the national authority responsible for scrutinizing the legality of the cross-border merger (31%), others proposed the submission of documents to the business

[319] See the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 7, p. 10 et seq
[320] Ibid, p. 11
[321] Ibid, answers to Question 8, p. 11 et seq
[322] Ibid, answers to Question 14, p. 17 et seq
[323] Ibid, answers to Question 9, p. 12 et seq
[324] Ibid, page 13
[325] Ibid, answers to Question 10, p. 14
[326] Ibid, answers to Question 11, p. 14 et seq

register (20%) and another group of respondents proposed the disclosure of the merger in the business register.[327]

A majority of stakeholders also supported the introduction of a harmonised fast-track cross-border merger procedure. Most of those respondents thought that such a procedure should be available when all shareholders agreed (83%), when a company had no employees[328] (64%) and when there would be no impact on creditors (58%). Finally, many respondents also supported such an option when 90% of the shareholders agree.[329]

Finally, in response to a specific question of the consultation, three fourths of respondents opined that each of the corresponding national authorities involved in the cross-border merger should only check compliance with the requirements imposed by its own Member State and only very few preferred that national authorities should be checking the documents and compliance with the requirements of both Member States.[330]

4. 1. 2. The Feedback Statement on cross-border divisions: Summary of responses

In relation to cross-border divisions, the Commission questionnaire included also various questions regarding the importance and mechanics of cross-border divisions. In this respect, many respondents stated that their company was engaged in a division in the previous 5 years (some in national, other in a cross-border one), or planning to engage in such activities.[331]

Stakeholders also explained that the three most important reasons for carrying out a cross-border division would be in order to: a) change/simplify its organisational structure (82%), b) adapt to changing market conditions (80%) and c) realize new Internal Market opportunities (72%).[332]

In terms of what the benefits of an EU cross-border division instrument would be, a majority of respondents contented that harmonised rules would result in the reduction of cost, either transactional (e.g. cost of translation and advice), regulatory, or operational with regard to a group of companies.[333]

[327] Furthermore, 30% proposed that another event should be chosen, see the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 11, p. 15
[328] When, for example it only uses external contractors, freelance collaborators, etc.
[329] Proposal by 47% of the respondents in favour of fast track harmonisation who expressed an opinion, see ibid, p. 16
[330] See the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 13, p. 16 et seq
[331] Ibid, Part II, Cross-border divisions, p. 18
[332] Ibid, answers to Question 1, p. 18 et seq
[333] Ibid, answers to Question 2, p. 19 et seq

In relation to the obstacles to the execution of cross-border divisions when compared to national divisions, most stakeholders thought that they were the following: a) the duration and complexity of the current procedures necessary to execute a cross-border divisions, b) costs thereof since it is now required to first effect a national division and then a cross-border merger and c) tax issues.[334]

The respondents who supported regulation for cross-border divisions at EU level mostly favoured the tackling of procedural issues, creditors' issues, minority shareholder issues, employee participation and accounting issues (almost half of respondents),[335] very much as in the case of cross-border mergers. Interestingly, more than three fourths of respondents who expressed an opinion also supported the integration of the harmonised rules on cross-border divisions in the framework of the Directive about cross-border mergers.[336] Public authorities answered the questions whether the introduction of harmonised rules on cross-border divisions would impose additional costs for them, most of which stated that this would be the case; the costs would be associated with investments to adapt the existing IT system and an increase in human resources.[337]

The Commission addressed to public authorities the question of how many cross-border divisions were executed in their respective Member States. This concerned the last 5 years and the cross border divisions could either have involved the dividing company being registered in the authority's Member State or one of the companies resulting from the division being registered in that Member State.[338] Eight authorities responded that there had been between 0 and 1 cross-border divisions and one reported that there had been between 11 and 20.[339] When asked about national divisions executed in their respective Member States, the majority of the responding public authorities mentioned that more than 20 national divisions took place in the last five years. A number of Member States indicated much larger numbers[340] (for example 193[341], 196[342], 682[343], 768[344], etc).

[334] See the Commission's Feedback Statement, Part II, Cross-border divisions, answers to Question 3, p. 20 et seq
[335] Ibid, answers to Question 4, p. 23 et seq
[336] Ibid, answers to Question 5, p. 24
[337] Ibid, answers to Question 6, p. 24 et seq
[338] Ibid, Question 7, p. 25
[339] Ibid
[340] Ibid, Question 8, p. 25
[341] In Sweden, see the Published Results in the EU Survey, available at: https://ec.europa.eu/eusurvey/publication/cross-border-mergers-divisions#
[342] In Latvia, see ibid
[343] In Poland, see ibid
[344] In Austria, see ibid

4. 2. The Commission's Codification Proposal

In its Proposal of 3.12.2015 for a Directive of the European Parliament and of the Council relating to certain aspects of company law,[345] the Commission states that it attaches great importance to the simplification and clarification of the Union law, 'so as to make it clearer and more accessible to citizens, thus giving them new opportunities and the chance to make use of the specific rights it gives to them.'[346] This is particularly necessary with regard to legislative instruments which have been amended several times and in such instances a codification is essential.[347] In fact, codification efforts are encouraged by the Commission[348] and an accelerated procedure may be used for fast-track adoption of codification instruments, to the extent that the respective instruments affected by the codification undergo no changes of substance.[349] In this respect, the Proposal clearly states that its purpose is to undertake the codification of a number of Directives, including the Domestic Division Directive and the CBMD.[350] The proposed Directive would therefore supersede the various acts incorporated in it, while fully preserving the content of the acts being codified, without undertaking amendments which are not formal and required by the codification exercise itself.[351]

True to its purpose, the Proposal mainly incorporates into one coherent text the provisions already existing in the CBMD[352] and the Domestic Divisions Directive.[353] Therefore, the Proposal neither addresses the difficulties in the application of the CBMD highlighted by stakeholders as presented above, nor does it introduce the new legislative framework necessary for the facilitation of cross-border divisions referred to in the previous sections of this analysis. Despite its important codification value, the Proposal is in effect just that, a valuable codification effort. Indeed, one should not undermine the benefit of codification work, especially since they follow a fast-track adoption process.

[345] Proposal for a Directive of the European Parliament and of the Council relating to certain aspects of company law (codification) of 3.12.2015, COM(2015) 616 final
[346] Ibid, recital No. 1
[347] Ibid
[348] See Commission decision of 1 April 1987, COM(87)868 PV
[349] See Interinstitutional agreement of the European Parliament, the Council and the Commission dated 20 December 1994, Accelerated working method for official codification of legislative texts, 96/C 102/02, available at:
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996Y0404(02)&from=EN
[350] In particular, the codification proposal was drawn up on the basis of a preliminary consolidation, in 23 official languages of Directives 82/891/EEC, 89/666/EEC, 2005/56/EC, 2009/101/EC, 2011/35/EU and 2012/30/EU and the instruments amending them, see ibid, recital 5
[351] See ibid, recital No. 4
[352] See e.g. recitals No. 55-67 (incorporating respective recitals No. 2-14 of the CBMD) and Articles 117-134 of the Proposed Directive (incorporating the CBMD provisions)
[353] See e.g. recitals No. 68-73 (incorporating respective recitals No. 5-11 of the Domestic Divisions Directive) and Articles 136-138; 139-143; 145-160 (incorporating the Domestic Divisions Directive provisions)

4.3. Tentative proposals for improving the current system of cross-border mergers and divisions

With institutions and stakeholders in favour of improvements to the current system of cross-border mergers and divisions, the question of how this can be achieved follows. Proposals with regard to creditor or shareholder protection typically include three options: full harmonisation, the fixed-menu approach and the open-menu approach.[354] Under full harmonisation, a standard would be set for all Member States based on the most common practices among the Member States, whereby minority shareholder rights and creditor protection schemes would be fully harmonised. This solution could eliminate the costs associated with inter-State complexity.[355] Under the fixed-menu approach, two options would be given to Member States to choose from, either high creditor protection or high mobility. Choosing one of these options would come with a prefixed set of standards, for example, choosing high creditor protection would entail a fixed early date, a fixed duration, and procedural and veto rights.[356] This solution would have the advantage of allowing Member States flexibility with respect to the type of creditor protection they seek to afford and would significantly reduce costs, since all that one would need to know about a State is whether it is a high creditor protection or high-mobility State.[357] For the same reasons, another fixed-menu approach would entail in addition two sets of rights for minority shareholders, from which Member State would choose to implement one.[358] Finally, under the open-menu approach, Member States would be able to mix and match from a fixed set of options.[359] This would provide Member States with the highest amount of discretion, but they would still retain some of the advantages of cutting costs by offering only limited fixed dates from which to choose.[360]

Irrespective of the above decision on the degree of harmonisation of the cross-border mergers and division rules, it is interesting to note that Member States could also consider the option to introduce specific provisions with regard to another corporate operation, within the general context of company mobility: that of the seat-transfer[361]. The CJEU's jurisprudence in the *Cartesio*[362] and *Vale*[363] cases seems to have established the right of legal entities within the meaning of Art. 54 TFEU to effect a cross-border transfer

354 As for the creditor protection option, See Bech Bruun/Lexidale (op.cit.), p. 59. For these three options with regard to minority shareholder protection, see the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 6, p. 9
355 See Bech Bruun/Lexidale (op.cit.), p. 59
356 Ibid
357 Ibid
358 See also the Commission's Feedback Statement, Part I, Cross-border mergers, answers to Question 6, p. 9
359 Ibid
360 See Bech Bruun/Lexidale (op.cit.), p. 59
361 See Schmidt J. (op.cit.), p. 32
362 Case C-210/06, ECLI:EU:C:2008:723, paras. 111-113 (available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62006CA0210&from=EN)
363 Case C-378/10, ECLI:EU:C:2012:440 (available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CJ0378&from=EL)

of seat and possibly a cross-border conversion. This right is protected as an inherent aspect of the freedom of establishment pursuant to Articles 49 and 54 TFEU (the freedom to convert)[364]. It is noted in this respect that cross-border transfers of seat also constitute an attractive tool for cross-border re-organisations, hence, the economic arguments for establishing a special EU legal framework for cross-border divisions and mergers also applies here.[365]

4. 4. Conclusion

It is evident that the CBMD should be regarded as a very successful instrument. By requiring all EU (and EEA) Member States to permit cross-border mergers of limited liability companies and by establishing a more predictable and structured framework, this Directive has led to a significant reduction of the transaction costs for cross-border mergers, enhanced legal certainty, and increased mobility for EU and EEA companies.

Nevertheless, there also seems to be a clear consensus of practitioners, institutions and scholars, that there are still obstacles to the full effectiveness of the CBMD and, in particular, difficulties with regard to i) the scope of the CBMD framework, since it only covers limited liability companies and only companies that can merge under national law, ii) the incompatibility and significant differences in the national protection regimes of stakeholders (creditors, minority shareholders and employees) and iii) some procedural and other practical obstacles.

These difficulties could be overcome by a revision of the CBMD addressing one or more of the following issues: a) extending the scope of the CBMD to include all legal entities within the meaning of Article 54 TFEU, b) further harmonising the rules on creditor protection (possibly with the introduction of an ex-post protection system which would not delay the merger), c) further harmonising minority shareholder protection (possibly with the award of an exit right against adequate compensation and a right to receive additional compensation in case of an inadequate exchange ratio), d) by way of

[364] See Schmidt J. (op.cit.), p. 32, further explaining that legal entities would be more effectively able to exercise their freedom to convert if the EU legal framework for cross-border mergers and divisions included also common framework legislation on transfers of seat

[365] Ibid, p. 32 et seq, further explaining that the other options currently available to move the registered office to another Member State are not really equivalent alternatives as they have significant drawbacks in comparison to a cross-border conversion: a) winding-up in the Member State of origin, incorporation of a new company in the host Member State and individual transfer of all the assets and liabilities (which is cumbersome and costly, and there is also no continuity of the legal personality. Accordingly, there may be some assets and liabilities which cannot be transferred); b) cross-border merger by acquisition upon a company in the host Member State on the basis of the CBMD. This has the advantage of a universal transfer of all assets and liabilities *uno acto*, but it requires the formation (or acquisition) of a company in the host Member State – which entails costs and efforts, but is also not really what the parties involved require; and c) converting the company into an SE (or an SCE) and then effecting a cross-border transfer of seat pursuant to Article 8 SE-Regulation (or Article 7 SCE-Regulation). This method preserves the legal identity but it is also complex and costly, especially for SMEs. Moreover, the parties involved often do not really want an SE (or SCE) as the end result (making a further conversion into a national legal form necessary)

introducing exemptions from the requirement of a merger report, e) harmonising the rules on the accounting date and on valuation, f) streamlining documentation and communication between competent national authorities. A further careful and light adjustment to the rules on employee protection, or new Commission guidelines could also perhaps prove useful.

With regard to cross-border divisions, the main difficulty relates to the fact that, since Directive 82/891/EEC applies only to domestic divisions, there is currently no EU legal framework on the subject. The current situation - in which only few Member States have introduced corresponding procedures, while most do not provide for cross-border divisions (these taking place through other sophisticated and overly complex procedures) - is not satisfactory, especially in view of the importance of cross-border divisions as a re-organisational tool for companies and group companies, and in view of the CJEU's jurisprudence in the *Sevic* and *Vale* cases on the freedom of establishment. A new framework for cross-border divisions could be proposed on the basis of, and in accordance with, the CBMD and its revisions.

MEPs would therefore be justified in their interest for possible legislative initiatives in the field of company mobility either in the form of revising the CBMD or establishing new rules for cross-border divisions (and possibly transfers of seat).[366] This legislative initiative would exceed the scope of the proposal for a Directive tabled on 3.12.2015. This is purely a codification instrument which does not address the difficulties of the existing EU rules in the case of cross-border mergers, and the absence of EU rules in the case of cross-border divisions. Although this proposal is not aimed at delivering the expected reform, it may nevertheless constitute, as a pure codification instrument following a fast-track adoption procedure, a necessary first step in the legislative reform process.

366 For an expansion of the CBMD into a cross-border mobility directive, which covers not only cross-border mergers, but also cross-border divisions and cross-border conversions of all legal entities within the meaning of Article 54 TFEU, see Schmidt J. (op.cit.), p. 9

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Denmark: Danish Act on Public and Private Limited Liability Companies 2009 (*Bekendtgørelse af lov om aktie- og anpartsselskaber*)

Estonia: Estonian Commercial Code (CC) 1995 (*Äriseadustik*)

Finland: Limited Liability Companies Act 2006 (*Osakeyhtiölaki*)

France: Commercial Code 1807 (*Code de commerce*)

Germany: Reorganisation Act 1995 (UmwG) (*Umwandlungsgesetz*)

Iceland: Act on Public Limited Companies No. 2 of 1995 (*Lög um hlutafélög*)

Iceland: Act on Private Limited Companies No. 138 of 1994 (*Lög um einkahlutafélög*)

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In a global business environment, which is moving ever more rapidly and constantly changing, the flexibility of enterprises to quickly evolve, adapt and reorganise is generally regarded as central to maximising comparative advantage, financial health and profits, and to fostering innovation and therefore growth.

However, the reorganisation of enterprises is often damaging in terms of employment security and sustainable jobs.

In a context in which the cross-border dimension of business has grown tremendously from both a company and a consumer perspective, this study provides an ex-post analysis of the EU framework in the area of cross-border mergers and divisions. While acknowledging the major steps taken at EU level to promote the mobility of companies across the EU, the analysis examines the remaining difficulties and obstacles.

This is a publication of the Ex-Post Impact Assessment Unit
EPRS | European Parliamentary Research Service
European Parliament

PE 593.796
ISBN 978-92-846-0423-4
doi:10.2861/246369
QA-06-16-352-EN-N