Protection of Creditors and Minority Shareholders in Cross-Border Mergers

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I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.

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Abstract

This dissertation was composed for the purpose of accomplishing the requirements of my Master of Laws program in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

This dissertation will delve into the law instruments regulating cross-border restructurings, in particular cross-border mergers, which advanced among others due to the competition between enterprises and the change in the customers' preference. Mergers constitute corporate restructurings performed without the liquidation of the merging companies, which further demonstrates their importance in modern national and cross-border transactions. An evaluation of the CBMD as the cornerstone for the harmonization and facilitation of cross-border mergers will be presented, including a historical background and the scope of application of the aforementioned Directive, as well as the process for the completion of the merger and the crucial contribution of the freedom of establishment to the current status quo. Furthermore, the dissertation will examine the regime applicable to creditors and minority shareholders, as participants highly affected by the change of the law governing the cross-border merger transactions. The protection regime of creditors and minority shareholders is reviewed under an EU Law perspective, followed by a detailed presentation of the national protection system of certain Member States, such as Italy, Germany, the Netherlands and Luxembourg. The system of the latter as regards minority shareholders presents a genuine interest by virtue of the imposition of additional protection mechanisms. A distinction and an emphasis on their differences are made between ex-post and ex-ante creditor protection mechanisms. The last chapter of this dissertation is devoted to the harmonization steps of the EU Company Law. This chapter is composed of the EU Directive 2017/1132, which codified six existing Company Law Directives, accompanied by the Company Law Package, regulating cross-border conversions and divisions and fostering the regime for cross-border mergers.

Keywords: Cross-border mergers; creditor protection; protection of minority shareholders; cross-border mobility.

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Last but not least, I am extremely thankful to my partner, Christos, for his love, understanding and continuous support for the completion of this project.
### Abbreviations

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<th>Description</th>
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<tr>
<td>SE</td>
<td>Societas Europea (European Company)</td>
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<td>CBMD</td>
<td>Cross Border Merger Directive</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>RA</td>
<td>German Reorganisation Act</td>
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<td>SCE</td>
<td>European Cooperative Society</td>
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<td>DCC</td>
<td>Dutch Civil Code</td>
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<td>EEA</td>
<td>European Economic Area</td>
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Introduction

The technological advance of the latest decades, the increase of competition between corporate entities, as well as the change in the preferences of customers has been a definite impulse for the increase of corporate restructurings, such as mergers and acquisitions. The augmentation of international transactions, which created the need for cooperation between companies established in different Member States, resulted in the realization of a great number of mergers between companies of different jurisdictions, i.e. cross-border mergers. The reasons behind the decision of a company to merge may vary. Financial difficulties, creating the need to decrease costs efficiently, on the one hand, and the change of applicable company law as a main reason or as a ‘side effect’, on the other hand, constitute some of the numerous motives leading to corporate restructurings.

National and cross-border mergers, indisputably, represent one of the most efficient ways for the access of a company to a new market. A merger is defined as the combination of two companies, often similar in size, which results in the existence of only one surviving company with a new name and new shareholders. All participating companies are dissolved at the time of the formation of the new company, while their assets and liabilities are absorbed by the surviving company. The shareholders of the merging companies usually exchange their shares for shares in the surviving company. The distinction between a merger transaction and a cross-border merger lays in the cross-border element, according to which at least two of the companies participating to the merger shall be governed by the laws of different Member States. Mergers between public limited liability companies can be performed by the formation of a SE via the SE Regulation, while the Directive 2011/35/EU, having replaced the Third Company Law Directive, forms the regulatory basis for the mergers of public limited liability companies in a national level. A crucial step for the harmonization of the national merger legislation has been accomplished via the Directive 2005/56/EC regulating cross border mergers, which will be examined further in this dissertation.

In particular, this dissertation will examine the regime governing the protection of creditors and minority shareholders in the field of a cross-border merger transaction, including an overview of the EU legislation combined with the national legislative framework.

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2 Ibid
7 Article 1 CBMD
8 Lone L. Hansen, *Mergers, Moving and Division Across National Borders-When Case Law Breaks through Barriers and Overtakes Directives* [2007] EBLR 182-188
10 Third Council Directive of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC)
laws of certain Member States. A cross-border merger, involving companies from different jurisdictions, as defined above, is characterized by a significant complexity due to cultural and geographical divergence, differences related to corporate governance, as well as differences in respect to the protection regime of stakeholders. Creditors and minority shareholders are considered to be of the stakeholders being highly influenced by the merger transaction and by the amendment of the law governing the new company. Despite the fact that the term ‘minority shareholder’ is not clearly defined, it is broadly referenced to shareholders not holding control of the management of the company and possessing less than 50 percent of the company’s shares. The weaker position of minority shareholders in comparison to shareholders, who own the majority of shares and substantially decide on the merger, on the one hand, and creditors, whose interests may be harmed by the merger transaction, on the other hand, demonstrate the necessity for their protection.

This analysis is divided in four parts, presenting the EU Directive applicable to cross-border mergers, i.e. the CBMD, the protection regime for creditors and minority shareholders, as well as the steps for the further harmonization of the aforementioned protection regimes. The presentation includes a historical background of the CBMD, its scope of application and a short description of the merger procedure. An overview of the minority and creditor protection in the EU level is provided, followed by an examination of different national law provisions regarding the protection of the above mentioned stakeholders. Furthermore, the divergences among Member States as well the effects of the CBMD are critically reviewed in respect to minority and creditor protection, accompanied by an assessment of the EU Directive 2017/1132, which codified six existing company law Directives, including the CBMD. The last chapter of this dissertation displays the novelties introduced by the Company Law Package of the European Commission presented on April 2018, aiming at the harmonization of European company law and the contribution of the latter to the harmonization of creditor and minority protection.

CROSS-BORDER MERGER DIRECTIVE

This Chapter will examine the status quo prior to the implementation of the CBMD, focused on the contribution of the freedom of establishment to the harmonization of cross-border mergers. In addition, a historical background of the CBMD, its scope of application and the merger procedure according to this Directive will be presented.

Historical Background

The cornerstone for the regulation of cross-border mergers is undoubtedly the Cross-Border Merger Directive, i.e. Directive 2005/56/EC of the European Parliament and of the Council of 26 October on cross-border mergers of limited liability companies, codified in the Directive (EU) 2017/1132, which was amended on the 27th November 2019 by the Directive (EU) 2019/2121. The new Directive proceeded to certain amendments of the CBMD, which will be analyzed in the following chapters. The CMBD has been implemented into the national law of all Member States with an additional applicability to the countries of the European Economic Area, as a result of the amendment of the EEA Agreement on 2006.

The implementation of the current CMBD constitutes the result of multiple steps and procedures. After the unratified draft convention of 1973, the Domestic Merger Directive resolved the main obstacle of harmonization by creating a common legal ground for domestic mergers of public limited liability companies. The springboard, however, for the creation and implementation of the CMBD has undoubtedly been the adoption of the Council Regulation 2157/2001 on the Societas Europaea (SE). This Regulation introduced, for the first time, provisions for mergers of public limited liability companies, established in different jurisdictions, through the formation of a SE.

Under the status quo before the CBMD, cross-border mergers could be performed by the formation of a SE company, by seat transfer or by a merger based on the case law of the CJEU on the freedom of establishment, without the use of harmonization rules. For a cross-border merger by the SE formation, the SE Regulation imposed the requirement of the existence of the head and the registered office in the same Member State. The second merger option by seat transfer included the transfer of seat and the merger under domestic law, creating a number of

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19 European Parliamentary Research Service, European Implementation Assessment ‘Ex post analysis of the EU framework in the area of cross-border mergers and divisions’, (PE 593.796-December 2016) p 8
20 Ibid, p 22
complexity issues. Practically, this type of cross-border merger was available only between those Member States that permitted cross-border seat transfers, such as Cyprus, Greece, Italy, Malta and France, excluding the other Member States from this procedure. Regarding the third possibility, the performance of a cross-border merger may be fulfilled on the basis of the Sevic Case, where the CJEU explicitly stated that the cooperation of entities in different Member States is accomplished through cross-border merger operations as a mechanism of exercising the right of establishment, defined in Articles 49 and 54 TFEU. The aforementioned case may be considered as a cornerstone, as it introduced the freedom of establishment as the primary legal basis of the CBMD. The above mentioned options, however, created, great conflict of laws issues in cross-border merger procedures, which rendered the introduction and the implementation of a cross-border merger Directive more than a simple necessity.

**Scope of application**

The CBMD applies and regulates the merger procedure of all limited liability companies of every legal form, which have the right to merge provided that they are formed in accordance with the law of a Member State, that they have their registered office, central administration or principal place of business within the European Economic Area and at least two of them are governed by the laws of different Member States. The compliance with the provisions and the requirements of the law of the Member State to which they subject to is a condition to be fulfilled.

The CBMD distinguishes the types of mergers that fall under its scope: i) The merger by acquisition, which is carried out by the transfer of all assets and liabilities of companies acquired or dissolved without liquidation to a pre-existing company in exchange of shares or securities representing the capital issued to the shareholders of the acquired companies. A cash payment that does not exceed 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of these securities, may be paid without invalidating the transaction; ii) the merger with the formation of a new company carried out by the transfer of all assets and liabilities of companies dissolved without liquidation to a newly formed company, in exchange of the aforementioned shares, securities or cash to the shareholders of the acquired company and iii) the ‘simplified merger’ between a company and its thoroughly or almost wholly owned subsidiary. The cross-border merger by acquisition may be carried out in a simplified form, as Article 15 of the Directive exempts the acquiring company from certain conditions where it holds all the voting rights of the acquired company. Member states, however, even if it is not expressly referred to in the...

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22 European Parliamentary Research Service, European Implementation Assessment ‘Ex post analysis of the EU framework in the area of cross-border mergers and divisions’, (PE 593.796-December 2016) p 23
23 C-411/03, 13 Dezember 2005, Sevic Systems AG v Amtsgericht Neuwied
24 Article 1 CBMD
25 Article 4(1)(b) CBMD
27 Article 2(a) CBMD
28 Article 2(b) CBMD
Article 2(2) CBMD, have the discretion to apply the procedure of a simplified merger in case the acquiring company owns less than 100% of the shares of the acquired company. The Directive also applies when the law of a Member State concerned allows the payment of a cash amount in excess of 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of these securities, as CBMD does not establish an upper limit regarding cash payments deriving from a merger.

Merger Procedure

The CBMD provides a detailed description of the merger procedure and is based on a cumulative application of the legislation that applies to merging companies. According to article 4(1) (b) CBMD, a company participating in a cross-border merger must comply with the requirements and the formalities of the national law to which it is subject and which, in particular, concern the decision-making procedure of the merger, by taking simultaneously into consideration the rights of creditors, debenture holders and minority shareholders. Each company must apply the provisions of its national legislation applicable in the event of a purely domestic merger. However, this must not lead to an absolute and unrestricted application of the national legislation. Any specific rules of the CBMD take precedence over the national rules on purely domestic mergers. The freedom of establishment and the free movement of capital, as the basis of the CBMD, should not be restricted by national law provisions, unless there is a justification provided in the case law of the CJEU.

Acceptable restrictions constitute those which are justified by the general interest and which comply with the principle of proportionality. The aforementioned rule was first introduced in the Daily Mail case of 1988 and confirmed in the Cartesio case in 2008. The third recital of the CBMD clarifies that the imposition of formalities on cross-border mergers is prohibited if those requirements are stricter than those imposed on domestic mergers. Such an imposition leads to the violation of the freedom of establishment through discrimination.

The cross-border merger procedure comprises of certain steps that ensure the validity of the final transaction. The management or the administrative body of each company participating in the merger must draft the so-called ‘common draft terms of cross-border mergers’, which include the principal terms and conditions of the merger proposal and demonstrate the outcome of negotiations, providing shareholders with the necessary information. The content of the draft terms shall be approved by each of...
the merging companies and must contain specific identical information, regardless of the merging companies’ jurisdiction\textsuperscript{39}. The minimum content of the draft terms is defined in article 5 of the CBMD, whereas additional information is required in the event of a merger with a wholly owned subsidiary\textsuperscript{40}. The next step of the merger process requires the publication of the common draft terms for each of the companies participating in the merger at least one month prior to the general meeting of the shareholders that has to decide on the merger\textsuperscript{41}. The draft terms should be published according to the laws of the relevant Member States with respect to Article 3 of the Publicity Directive\textsuperscript{42}. A sum of minimum information defined in article 6 § 2 CBMD shall be published in the national gazette of the Member States of the merging companies. Furthermore, the management or administrative board of the companies taking part in the merger must draft a written report (‘the management report’) and display it to employees and shareholders one month prior to the shareholders’ general assembly at the latest\textsuperscript{43}, in order for the latter to be informed about the legal and financial aspects of the cross-border merger, as well as regarding the impact of the merger on their status. In case of a merger by acquisition, the merging company should provide its shareholders with the annual accounts and the annual management reports for each of the participating companies for the last three financial years. This ‘interim accounting statement’, defined in article 11 (1) (b) of the Domestic Mergers Directive, should be filed at the latest one month before the shareholders’ general assembly\textsuperscript{44}. Within the same deadline, shareholders must be supplied with an independent expert report concerning the terms of the merger to be approved\textsuperscript{45}, including the information required according to article 10 (2) of the Domestic Mergers Directive. A separate report must be prepared for each company\textsuperscript{46}, with the exemption in the event of a merger with a wholly owned subsidiary, where a report is not obligatory\textsuperscript{47}.

Following the above-mentioned steps, the shareholders’ general assembly shall approve the merger. In a ‘simplified merger’, its approval by the shareholders’ general meeting of the subsidiary company is not necessary\textsuperscript{48}. Article 9 § 3 CBMD provides Member States with the possibility to continue the merger process without the approval of the general meeting of the shareholders of the company resulting from the merger, provided that the conditions of article 8 of the Domestic Mergers Directive are fulfilled. It should be clarified, notwithstanding, that the formalities concerning the general assembly procedure, such as quorums and majorities, are subjected to national law provisions that should not be stricter than those applicable to domestic

\textsuperscript{39} Ibid p 12-13
\textsuperscript{40} Ibid p 14, Article 5 and 15 (1) CBMD
\textsuperscript{41} Article 6 CBMD
\textsuperscript{42} Directive 68/151/EEC
\textsuperscript{43} Article 7 CBMD
\textsuperscript{45} Article 8 CBMD
\textsuperscript{47} Article 15 (1) CBMD
\textsuperscript{48} Ibid
mergers. Usually a percentage of 2/3 of the votes is required. The employee participation process should take place before the entry into effect of the merger.

The cross-border merger is completed via the verification process, comprising of two different stages. Firstly, each competent national authority shall examine the compliance of the merging company to its national law, resulting to the issuance of a ‘pre-merger certificate’, in case of verification of the aforementioned compliance. The ‘pre-merger certificate’ must be communicated within 6 months to the designated national authorities of the state of the company resulting from the merger. In the second stage, the competent national authority of the acquiring company, i.e. the company depriving from the merger, shall control the appropriate completion of the steps of the merger, including the approval of the merger by each participating company under the same circumstances. A cross-border merger cannot be effective before the completion of the verification stages. Specific formalities should be fulfilled following the merger procedure. The merging companies must proceed to the publication of the cross-border merger in the public register in respect to article 3 of the Publicity Directive and register the company depriving from the merger. The date of entry into force of the merger is determined by the national legislation of the Merger State of the company resulting from the merger.

As a consequence of the merger, the total assets and liabilities of the acquired company are transferred to the acquiring company, the shareholders of the acquired company become shareholders of the acquiring company and the acquired company ceases to exist. With the exemption of a ‘simplified merger’, the company depriving from the merger may issue shares for the benefit of the former shareholders of the acquired company. The allocation of shares between shareholders is subject to national legislations.

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50 Article 7 of the Domestic Mergers Directive

51 Article 11 (1) CBMD

52 Recital and article 10 (1) CBMD


54 Ibid

55 Article 13 (1) CBMD

56 Pierre-Henri Conac, Fusions transfrontalières de sociétés, Droit luxembourgeois et droit comparé, (Larcier 2011) p 24

57 Article 14 (1) CBMD

PROTECTION OF MINORITY SHAREHOLDERS IN CROSS-BORDER MERGERS

This Chapter will analyze the protection awarded to minority shareholders, as participants highly affected by the cross-border merger transaction. An overview of the EU legislation as regards the aforementioned protection will be presented, followed by the national provisions of certain Member States, furnishing minority shareholders with additional protection mechanisms. The broad discretion of Member States as regards the minority shareholder protection is critically commented.

Protection provided in the EU Level

The legislation for the protection of minority shareholders in cross-border mergers, i.e. the CBMD, is highly inspired by its ancestor, the ‘Third Directive’\(^ {59} \), which regulated the merger of public limited liability companies, without being applicable to cross-border mergers\(^ {60} \). The aforementioned Directive does not provide for minority protection mechanisms, with the exception of article 28 in the event of a ‘simplified merger’. The ‘Third Directive’ introduces a sell out right of shares against cash, awarded to the shareholders of the acquired company, with the possibility for the determination of the share value by court proceedings in the event of disagreement. Following the Third Directive, the Regulation (EC) 2157/2001 on the Statute for a European Company (the ‘SE Regulation’), where the aim of the EU legislator was oriented at the award of a monetary compensation to the minority shareholders of the acquired company\(^ {61} \), provided Member States with the right to ‘adopt provisions in order to ensure the protection of minority shareholders that have opposed to the merger’\(^ {62} \). The CBMD, largely duplicating the provisions of the SE Regulation concerning the minority shareholders’ protection, includes certain broadly formulated principles. The SE Regulation and the CBMD are the only European instruments that harmonize the rights and responsibilities of shareholders.

Minority protection is not obligatory under the CBMD. Article 4.2 of the CBMD gives discretion to Member States to introduce additional mechanisms for the protection of minority shareholders. However, Member States must not act in violation of the third consideration of the Preamble of the CBMD, i.e. they may not impose restrictions on the freedom of establishment, unless justified by ECJ case law or required by the general interest in accordance with the principle of proportionality\(^ {63} \). In addition, article 6.2 CBMD requires the publication of the draft terms of a cross-border merger to include the arrangements concluded by the merging companies regarding the rights of dissenting shareholders, whereas article 10.2 reads as follows: ‘If the law of a Member State to which a merging company is subject

\(^{59}\) Third Council Directive 78/855/2 of 9 October 1978 concerning mergers of public limited liability companies


\(^{61}\) Ibid p 42

\(^{62}\) Article 24.2 SE Regulation

provides for a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the cross-border merger in accordance with Article 9(1), the possibility for the members of that merging company to have recourse to such procedure, to be initiated before the court having jurisdiction over that merging company... The decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members.64 Briefly, the CBMD provides either for the performance of the merger after the compensation of the minority shareholders or for the approval of the shareholders’ meeting that dissenting shareholders can obtain relief in their Member States, in case the minority protection interferes with the merger procedure65. The provision of article 10.2 is crucial, because the company resulting from the merger will carry the consequences and the costs of the court proceedings65.

Generally, the protection of minority shareholders can take various forms, including the right to receive information and consultation, the right to object to majority decisions or specific rights provided only due to their status as minority shareholders, such as appraisal rights, compensation rights of monetary nature, withdrawal rights66. The general principle of equal treatment, according to which all shareholders receive information concerning the terms of the proposed merger and the fact that a merger is decided on a majority resolution, which is binding for the dissenting shareholders who vote against it, eliminates the risk for a different treatment between majority and minority shareholders67. However, it remains evident that during the pre-merger stage minority shareholders may only receive information about the proposed merger. The rights awarded to them constitute ex-post remedies68. If the majority has decided on the merger, the votes of dissenting shareholders cannot impede the performance of the transaction69. In the event of an effective merger, the measures provided are either a compensation for damages or the possibility to sell their shares against a fair and reasonable price70, subject to national law provisions.

It is obvious that the substantive decision-making for the protection mechanisms is entrusted to the Member States, which may establish additional protective measures. Member States, such as Belgium, Bulgaria, Lithuania do not provide minority shareholders with additional protection, whereas France disposes protection rules only in the event of a domestic merger, where all shareholders have

64 Ibid
67 Ibid
69 Ibid p 218
the right to nullify the resolution of a meeting in case of a majority abuse\textsuperscript{71}. On the contrary, other Member States impose further protection mechanisms, which will be examined in the next paragraph.

**Minority protection under national laws**

i) Germany

The German law has made use of the provision of the CBMD concerning the additional minority protection. Minority shareholders are awarded with both ex-ante and ex-post protection mechanisms, which justifies the position of law experts characterizing the above mentioned protection as extensive\textsuperscript{72}. The protection regime can be summarized in three important remedies. To begin with, it was highly influenced by the pre-existing methods for minority protection under a domestic merger, with the addition of the cross-border element\textsuperscript{73}. As in the event of a domestic merger, each shareholder is entitled to challenge the resolution for the approval of the merger on the grounds of the improper convention of the general meeting or of the violation of the shareholders’ information rights\textsuperscript{74}. The aforementioned action may prevent the performance of the transaction, after which the court will decide on the continuity of the merger\textsuperscript{75}. The right to withdraw from the company, similar to the right conferred upon for domestic mergers, is also available, under the circumstance of a pre-merger approval\textsuperscript{76}.

The other available remedy is regulated under Section 122i of the German Reorganizations Act. In the event of an outbound merger, i.e. where a German company merges with a company established in another country, and more specifically when the company resulting from the merger is not governed by German law, Section 122i (1) RA law provides for the possibility of the acquisition of shares of the shareholders of the German company that have objected to the merger plan or its draft in contemplation of cash\textsuperscript{77}. The compensation amount must be determined in the merger’s common draft terms\textsuperscript{78}. The shareholders, who wish the review of the compensation offer, may submit a claim to the court for the improvement of the exchange ratio, subject to the conditions of Section 122i (2) of the German Reorganizations Act.

\textsuperscript{75} Ibid
\textsuperscript{76} Ibid
\textsuperscript{77} Prof. Dr. Stefan Simon, Dr. Ingo Stangl, Dr. Daniel Rubner and Dr. Matthias Grundke ‘Cross-border reorganisations in Germany’ in Jérôme Vermeyleen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 335
\textsuperscript{78} Ibid p 336
Reorganizations Act

The aforementioned proceeding, so called *Spruchverfahren* is provided if the company that has been acquired is a German company, if the legislation of the Member States of the participating companies offers a similar process or in case of an agreement between the companies participating in the merger. Should the appraisal proceeding be successful, the court will award the shareholder with a supplementary cash compensation for the deficient exchange ratio. Due to the fact that shareholders are awarded with a specific mechanism for the determination of the exchange ratio, the right to challenge the resolution of the shareholders which approves the cross-border merger in not conferred upon them.

**ii) Italy**

For the implementation of the CBMD, Italy published the ‘Decree’ in 2008. The aforementioned Law regulates mergers between Italian companies and companies that have been incorporated according to the law of another Member State, excluding companies incorporated in non-Member States from its scope of application. The Italian legislator used the option provided under article 4.2 CBMD and broadened the protection of minority shareholders on cross-border mergers. To be more precise, article 5 of the Decree defines that in case the company depriving from the cross-border merger is subject to the laws of another Member State, i.e. other than Italy, shareholders who disapproved the merger have the right to withdraw from the company. The Italian provision, however, broadens the scope of minority protection of the CBMD, which refers only to the shareholders ‘opposed to the merger’. The right of withdrawal conferred upon by the Decree is applicable not only to the shareholders that have opposed to the merger by a negative vote but also to those that have abstained from the voting procedure concerning the merger. The above mentioned provision is in line with articles 2437 and 2473 of the Italian Civil Code, which regulate the withdrawal rights of shareholders on domestic mergers.

The right of withdrawal under Italian law represents an efficient method for the protection of minority shareholders, as it provides an exit possibility at a fair price, in the event dissenting shareholders disapprove the merger due to its contribution to the

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79 Article 122i (1) RA


82 Prof. Dr. Stefan Simon, Dr. Ingo Stangl, Dr. Daniel Rubner and Dr. Matthias Grundke ‘Cross-border reorganisations in Germany’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 337


84 Legislative decree no.108 of May 2008


86 Rosario Zaccà and Luciano Acciarri, ‘Cross-border reorganisations in Italy’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 520

decrease of value of their shares or quotas. Nevertheless it must be stated that the rules regulating the shareholders’ withdrawal right vary among the different corporate forms. For the Italian società per azioni (joint stock company), which is regulated by article 2437 of the Italian Civil Code, withdrawal on the ground of a merger is not an option, unless the merger is influenced by another condition or transaction that constitutes a ground for withdrawal according to the above mentioned article, such as the change of the corporate purpose of the company incorporated in Italy. For limited liability companies (società a responsabilità limitata), on the contrary, article 2473 expressly entails the merger as a reason for the quota holders’ withdrawal, if the latter disapproved the cross-border merger. The exercise of the withdrawal right, which also includes the calculation of the value of the withdrawing shareholders’ shares, is determined by the provisions of Italian law on domestic withdrawal rights.

iii) The Netherlands

The Dutch legislator has also transposed the CBMD provisions in the Dutch commercial Code, adopting additional protection mechanisms for minority shareholders, however only in the event of an outbound cross-border merger. According to article 333h/2 DCC, which is applicable only if the company resulting from the merger is a foreign company, a minority shareholder of a Dutch company that has been acquired is entitled to file a compensation claim, provided that he has voted against the decision on the merger. As minority shareholders under Dutch law qualify those possessing less than 49%, which is based on the general majority rule required for the approval of the merger. Physical attendance of the latter at the shareholders’ meeting is required. In the event of the formation of a SE or a SCE, the right of dissenting shareholders to be compensated is not conferred upon.

Minority shareholders should file the request for compensation within one month from the approval of the merger. As a prerequisite for claiming for compensation, the shareholder must abstain from his shares in the acquired company.

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89 Beck’sches Handbuch Umwandlungen International, 1.Auflage 2013, E.Italien, Rn 45-46
90 Ibid
91 Ibid
94 Ibid
95 Hugo Reumkens, Ewout van Asbeck and Els de Wind, ‘Cross-border reorganisations in the Netherlands’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 617
without obtaining shares in the company resulting from the merger\textsuperscript{97}. The amount of reimbursement is calculated based on the value of shares owned by the dissenting shareholders in the Dutch company that has been acquired and decided by independent experts\textsuperscript{98}. The crucial timeline for the above mentioned calculation is the date of submission of the common draft terms of the merger\textsuperscript{99}. In general, the compensation may be paid by the acquired company, with the possibility, however, of article 333h (4)/2 DCC, which provides the acquiring company with the right to decide for the settlement of the compensation\textsuperscript{100}. The claim, in this case, of the minority shareholders against the acquiring company will be subject to foreign law\textsuperscript{101}. It should be highlighted that the merger cannot move forward if the amount of compensation for two or more shareholders is not settled\textsuperscript{102}. The scope of application of article 333h/2, which does not apply if the company depriving from the merger is a Dutch company or in the case of a domestic merger without a cross-border element, raised issues of discrimination and violation of EU Law\textsuperscript{103} due to the differential treatment depending on the nationality of the company resulting from the merger.

\textit{Minority protection: A necessity or an impediment to the European single market?}

The broad discretion provided to Member States as regards the protection mechanisms for minority shareholders and the inadequate level of harmonization among EU Member States, raises the question if the granting of additional minority rights constitutes an impediment to the European single market, i.e. EU as a territory where internal borders and regulatory obstacles are abolished for the benefit of the free movement of goods and services. It is undisputable, however, that a minimum degree of minority shareholders’ protection is fundamental for the proper operation of the economy. Minority shareholders are ex officio in a weaker position, subjected to the majority decisions and in certain cases to majority abuse. A cross-border merger has a severe impact on the status and the rights of the dissenting shareholders, which renders the provision of additional protection indispensable. However, a sufficient

\textsuperscript{97} Hugo Reumkens, Ewout van Asbeck and Els de Wind, ‘Cross-border reorganisations in the Netherlands’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 617


\textsuperscript{99} Hugo Reumkens, Ewout van Asbeck and Els de Wind, ‘Cross-border reorganisations in the Netherlands’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 617

\textsuperscript{100} Ibid p 619

\textsuperscript{101} Ibid


\textsuperscript{103} ‘Hugo Reumkens, Ewout van Asbeck and Els de Wind, ‘Cross-border reorganisations in the Netherlands’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 618-619
equilibrium must be maintained, in order for the minority protection not to be converted into a veto power that would prevent and hinder efficient transactions.\textsuperscript{104}

The change of applicable law in the corporate structuring constitutes one of the most striking results of a cross-border merger. The shareholders of the acquired company that become shareholders of the company resulting from the merger are subject to a different national law with severe implications especially for those that have not even consented to the merger. To begin with, a cross-border merger may result in the inequality concerning the entities valuation and the exchange ratio depriving from the valuation.\textsuperscript{105} The alteration of applicable law may lead to the change of mandatory law provisions concerning the amendment of the articles of association and to certain difficulties as regards the exercise of shareholders’ rights, such as class rights.\textsuperscript{106} General remedies conferred to minority shareholders, such as information rights, appraisal rights are governed by the national law of the company depriving from the merger, causing a certain inconvenience due to the unfamiliarity with the provisions of the different jurisdiction. It is evident, therefore, that the need for further minority protection stems from the absence of predictability of the extent of the aforementioned changes and of the future effect on dissenting shareholders.\textsuperscript{107}

On the contrary it is argued, yet not successfully\textsuperscript{108}, that the harmonization process of EU company law is hindered by the adoption of additional mechanisms for the protection of minority shareholders. Based on the fact that key concepts of EU company law are delegated to national legislators, even in areas where harmonization efforts have been performed\textsuperscript{109}, the necessity of additional minority protection remains undisputed.

Notwithstanding the negative effect of the non-harmonization of minority protection on the internal market and on the full implementation of the CBMD\textsuperscript{110}, their protection increases the investors’ confidence and contributes to the maintenance of a satisfying level of corporate governance, as minority shareholders have the right to monitor and object to the actions of management and supervisory boards. A better implementation of the CBMD is definitely possible, however, not by denying the significance of article 4.2 CBMD.

\textsuperscript{105} European Parliamentary Research Service, European Implementation Assessment ‘Ex post analysis of the EU framework in the area of cross-border mergers and divisions’, (PE 593.796-December 2016), p 42
\textsuperscript{106} Ibid p 107, ‘Classes are formed by shares with special rights related to voting, dividends or rights in the liquidation process. Class rights differ from other rights supplied by the articles of association, as the latter may be amended by a decision of the shareholders possessing the majority of shares, whereas class shares can be amended, if the majority of the class consents to it’.
\textsuperscript{107} Ibid p 110
\textsuperscript{108} Ibid p 113
\textsuperscript{109} Ibid
\textsuperscript{110} Ibid p 116
PROTECTION OF CREDITORS IN CROSS-BORDER MERGERS

This Chapter will delve into the protection provided to creditors in cross-border merger transactions, including an overview of the EU legislation, as well as of national provisions. A distinction will be made between Member States, depending on whether the provision of protection mechanisms occurs prior or after the submission of the common draft terms of the merger, followed by an assessment of the effectiveness of the CBMD.

Protection in the EU Level

Article 4 § 2 CBMD, being the sole provision referring to creditor protection in cross-border mergers, permits Member States to adopt provisions to ensure the protection of creditors, provided that such protection mechanisms are part of the domestic merger legislation of the relevant Member State. Certain further guidelines are provided by the Directive 2011/35/EU of the European parliament and of the council of 5 April 2011 concerning mergers of public limited liability companies and the ‘Third Directive’, as its ancestor. Principally, article 13 of the aforementioned Directive states that ‘the laws of the Member States must provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication’, providing particular protection to public limited liability companies’ creditors and debenture holders and to the creditors of those companies, whose Member State proceeded to the harmonisation of domestic mergers under the Domestic Mergers Directive. Member States are obliged to provide creditors with safeguards, especially in cases where the financial situation of the companies participating in the merger requires a certain protection. However, the rule of not adopting more protective measures than those provided in a domestic merger must be respected.

Due to the transfer of all assets and liabilities of the company, possible risks arise, on the one hand, for the creditors of the acquired company, if the liabilities of the company resulting from the merger outclass the assets of the acquired company, on the other hand, for the creditors of the surviving company, in case the liabilities of the acquired company exceed the surviving company’s assets. The existing risk of the inferiority of the assets to the liabilities, which may worsen the financial position of the creditors of the acquired company in comparison to their previous financial status, urged EU legislators to introduce creditor protection measures. Main purpose of the protection provided is the decrease of the existing risks and the diminution of the

111 Article 13 (1) Directive 2011/35/EU
113 Article 13 (2) Directive 2011/35/EU
negative effect that the change of the applicable law might cause to creditors. Distinctive example of the latter constitute the insolvency laws, where according to the European Insolvency Regulation, the competent jurisdiction for the insolvency process is determined by the place of registered office and the centre of main interest. Therefore, a change of corporate location based on favourable insolvency regimes may cause serious harm to creditors.

The CBMD supplies Member States with the discretion to adopt measures for the protection of creditors, debenture holders and holders of non-equity securities in the merging companies. The abovementioned measures must be designated in the common draft terms of the merger, in parallel with a publication requirement in the event of existing arrangements in any company taking part in the merger for the exercise of creditors’ rights. The ample flexibility of the Member States leads, however, indisputably to a high divergence among Member States, which are divided based on their creditor protection system into those providing ex-ante protection and those providing ex-post protection. The aforesaid diversity is principally related to the starting point, the duration and the procedure of the creditor protection. The protection regimes chosen by the relevant Member States are distinguished upon whether the creditor protection is provided prior or after the shareholders’ meeting deciding on the merger. The date of the first scenario, where creditors may object to the merger before its entry into effect, coincides with the publication of the common draft terms of the merger, in order for all creditors to have access to the merger information, while the protection of the ex-post system is supplied at the point of the legal conclusion of the merger, providing post-merger remedies. The preference of the protection system is generally balanced among Member States (15 of the EU and EEA Member States have opted for the ex-ante protection system, whereas 13 for the ex-post protection system). Criterion for the choice is either the certainty provided to creditors at the time of the execution of the merger (ex-ante protection system) or the uninterrupted merger procedure without delays by the exercise of creditors’ rights, where the claims can only be filed against the surviving company (ex-post protection system).

The predominant protection method, chosen by Member States that have implemented the CBMD (29 out of 30 Member States), is the provision of ‘security’. Each creditor may request from the company to provide security in the form of collateral as a merger prerequisite. Nonetheless, creditors are not entitled to claim security or different protection measures, if adequate protection mechanisms are provided to them or in the case, in which the financial status of the surviving company

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116 European Parliamentary Research Service, European Implementation Assessment ‘Ex post analysis of the EU framework in the area of cross-border mergers and divisions’, (PE 593.796-December 2016), p 37
117 Articles 3(1) and 4(1) Council Regulation 1346/2000 on insolvency proceedings
118 Article 4 (2) CBMD
119 Article 5 (g) CBMD
120 Article 6 (2c) CBMD
121 European Parliamentary Research Service, European Implementation Assessment ‘Ex post analysis of the EU framework in the area of cross-border mergers and divisions’, (PE 593.796-December 2016), p 38
122 Ibid
124 Ibid p 37
125 Ibid p 39
offers higher creditor protection than before. The type of authority that will determine the provision of security may vary across Member States.

A further option awarded to creditors by some Member States, constitutes the ‘veto’ right, i.e. the right to block or delay the merger until the protection of own rights, which creates, on the one hand, certainty for creditors, however, the risk for potential abuse of their ‘veto’ right is relatively high. The award of the aforesaid right is more common in ex-ante protection systems with certain exceptions, as ‘veto’ rights have been provided to ex-post protection systems and have not been available to countries, such as Poland, Germany, France, which have adopted the ex-ante protection mechanism.

**Creditor protection under national laws**

i) Ex-ante system

a. Germany

The German law has created specific rules for the protection of creditors, which are considered to be stricter than those awarded to creditors in a national merger. Despite the fact that the German legislator has adopted the ex-ante creditor protection system, creditors of German merging companies are not entitled to object to the merger. To begin with, in case of a merger between a German company and a company established in another Member State, should the company resulting from the merger be governed by German law, the creditors of a German acquired company must be awarded with collateral, provided that they cannot demand for fulfilment.

As a prerequisite for the provision of security, the respective creditor shall file his claim in writing within two months from the public announcement of the draft terms of merger and substantiate credibly that his claim will be jeopardized by the merger. As a second case scenario, if the surviving company is subject to German law, Section 122a (2) RA and Section 22 RA apply, which provide for a similar procedure in relation to the merger of foreign companies resulting from the merger. The main difference lies in the timeframe provided for the register of the creditors’ claims, since they should proceed with the registration within 6 months beginning from the filing of the merger into the register of the company resulting from the merger. The creditors in this

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126 Ibid p 36
127 Ibid
129 Prof. Dr. Stefan Simon, Dr. Ingo Stangl, Dr. Daniel Rubner and Dr. Matthias Grundke ‘Cross-border reorganisations in Germany’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 337
130 Section 122d RA
131 Section 122j (1) RA
particular case are protected by the relevant foreign law applicable to each merging company.\textsuperscript{132}

In both cases, according to Section 122j RA and Section 22 RA, i.e. case of a German acquired company, and case of a German surviving company, creditors are obliged to prove the existence of a reasonable risk of their claim as a consequence of the execution of the merger,\textsuperscript{133} i.e. a partial loss. The cross-border character of the merger alone cannot lead to the conclusion of the danger caused to the satisfaction of the claim.\textsuperscript{134} The specific circumstances that create the risk must be displayed to the acquired company accompanied with evidence to support the danger of the claim.\textsuperscript{135} If the company refuses the provision of collateral, creditors are entitled to file an action for damages or collateral.\textsuperscript{136}

Due to the stricter approach of German law for the protection of creditors on cross-border mergers, article 122j RA was debated to violate European law.\textsuperscript{137} Nonetheless, this debate is considered to be terminated after a decision of the ECJ of 2016,\textsuperscript{138} and article 122j is broadly treated as a provision violating European law.\textsuperscript{139}

b. The Netherlands

The Dutch legislator has opted for the ex-ante system, protecting creditors before the submission of the common draft terms of the merger.\textsuperscript{140} This protection is equivalent to the creditor protection in domestic mergers.\textsuperscript{141} Article 316 (2)/2 of the Dutch Civil Code provides creditors of a merging company with the right to object (‘veto’ right) to the common draft terms of the merger. The latter can be informed about the merger and the deadline, within which they may object, by means of an announcement on a daily newspaper with a nationwide circulation.\textsuperscript{142} The deadline provided by the law for the opposition is one month after the filing of the common draft terms of the merger. In the event of an objection performed within the

\textsuperscript{132} Prof. Dr. Stefan Simon, Dr. Ingo Stangl, Dr. Daniel Rubner and Dr. Matthias Grundke, ‘Cross-border reorganisations in Germany’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 337

\textsuperscript{133} Ibid

\textsuperscript{134} Beck’sches Handbuch Umwandlungen International, 1.Auflage 2013, Teil: Verschmelzung, Rn 182-190

\textsuperscript{135} Ibid

\textsuperscript{136} Prof. Dr. Stefan Simon, Dr. Ingo Stangl, Dr. Daniel Rubner and Dr. Matthias Grundke, ‘Cross-border reorganisations in Germany’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 337


\textsuperscript{138} C-483-14 (KA Finanz-Sparkassen Versicherung), ECR I-205


\textsuperscript{140} Hugo Reumkens, Ewout van Asbeck and Els de Wind, ‘Cross-border reorganisations in the Netherlands’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 619

\textsuperscript{141} Ibid

\textsuperscript{142} Ibid
timeframe provided by law, the deed of the merger can only be executed if the objection is withdrawn or lifted\textsuperscript{143}.

The creditors of a Dutch company participating in the merger may request for a security within the timeline of one month after the notice of all companies taking part in the merger process that the common draft terms of the merger have been submitted\textsuperscript{144}. The court may impose the provision of security within a certain period by the company, before deciding on the aforementioned objection\textsuperscript{145}. Furthermore, the court may decide not to provide creditors with security or additional guarantee, if their claim is secured in a sufficient way or if the financial status of the company depriving from the merger offers the same or a higher level of security than previously\textsuperscript{146}. In the event of execution of the deed of merger before the decision of the court on creditors’ objection, article 316 (4) DCC is breached, supplying the court with the competence to impose the provision of security of a certain amount accompanied by a penalty for non-compliance\textsuperscript{147}. Thus, it is suggested that the notary should request first a non-objection certificate from the court before executing the deed of merger\textsuperscript{148}.

\textbf{ii) Ex-post system}

\textbf{a. Luxembourg}

Luxembourg, as a typical jurisdiction opting for the ex-post protection system, does not provide creditors of Luxembourg merging companies with the right to object to the merger, thus solely with the right to request a security for their claims. Pursuant to Article 1021-9 of the Law of 1915 on commercial companies, creditors of either Luxembourg acquired companies or Luxembourg companies resulting from the merger, whose claims exist before the publication of the merger deeds, may file a request within two months from the abovementioned publication to the judge presiding the Tribunal d’Arrondissement that deals with commercial matters in the district of the location of the registered office of the debtor company. The content of this request may be the provision of collateral or any type of guarantee for mature or unmatured claims, where the creditors can credibly attest that their claims are endangered by the execution of the merger. The request may be rejected by the court on the grounds that the creditor is awarded with adequate security, whereas the removal of the application is possible, if the debtor company pays the creditor in full, even in the case of a debt term. The prescription period must be respected; otherwise the debt shall fall due\textsuperscript{149}. However, the merger procedure is not suspended and may

\begin{itemize}
  \item \textsuperscript{143} Article 316 (2)/2 of the Dutch Civil Code
  \item \textsuperscript{144} Article 316 /2 of the Dutch Civil Code
  \item \textsuperscript{145} Article 316 (3) /2 of the Dutch Civil Code
  \item \textsuperscript{146} Article 316 (1) /2 of the Dutch Civil Code
  \item \textsuperscript{147} Article 316 (5) /2 of the Dutch Civil Code
  \item \textsuperscript{148} Hugo Reumkens, Ewout van Asbeck and Els de Wind, ‘Cross-border reorganisations in the Netherlands’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 619
  \item \textsuperscript{149} Article 1021-9 of the Law of 1915 on commercial companies
\end{itemize}
be performed in spite of pending guarantee requests. Article 1021-9 §2, 3 offers specific provisions for Luxembourg companies with shareholders possessing unlimited and joint liability, such as a société en nom collectif, a société en commandité simple, a société en commandité par actions and a société cooperative, imposing the several and joint liability of shareholders for existing obligations of the acquired company before the entry into effect of the merger vis-à-vis third parties.

The aforementioned rules are applicable to bondholders of the companies participating in the merger, provided that the latter have not approved the merger individually or as a collective body. Holders of securities different from shares or corporate units, to which special rights are attached, must be entitled to rights in the company resulting from the merger, at least corresponding to the value of those in the acquired company. The approval of the alteration of those rights by the bondholders’ assembly leads to the exclusion of the acquisition of rights in the surviving company.

b. Italy

The Legislative decree no.108 of May 2008 that implemented the CBMD does not provide any particular remedies for the protection of creditors of Italian companies participating in the merger, thus remedies applicable to domestic mergers also qualify in the case of cross-border mergers. Despite the fact that the Italian legislator has opted for an ex-post protection system, a ‘veto’ right, i.e. a right to object, is awarded to the creditors of Italian merging companies under Article 2503 ICC. Pursuant to the aforesaid Article, the latter must exercise their ‘veto’ right within sixty days beginning from the date at which the general shareholders’ assembly files the decision on the merger with the competent Companies Register. It should be highlighted, that Italian law provides merging companies which have a corporate capital not represented by shares with a thirty-day deadline regarding the objection to the merger, whereas mergers including credit institutions and banks are supplied with a fifteen-day timeframe.

However, the right to object is awarded only to creditors existing at the time of the submission of the common draft terms of the merger with the Companies Register. Should one of the following circumstances be fulfilled, the deadline of sixty days is not applicable: a) the existing creditors at the time of the filing with the Companies Register, possessing the right to object, have consented to the merger transaction, b) dissenting creditors have been fully compensated and the amount of their reimbursement has been deposited with a bank and c) the financial position of the merging companies, attested by the independent expert report, which is produced by

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150 Pit Reckinger, Leon Gloden and Dirk Richter, ‘Cross-border reorganisations in Luxembourg’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’, (OUP Oxford 2012) p 567
151 Article 1021-9 (2) (3) of the Law of 1915 on commercial companies
152 Article 1021-10 of the Law of 1915 on commercial companies
154 Article 1021-11 (2) of the Law of 1915 on commercial companies
155 Rosario Zaccà and Luciano Acciari, ‘Cross-border reorganisations in Italy’ in Jérôme Vermeylen and Ivo Vande Velde (eds), ‘European cross-border mergers and reorganizations’ (OUP Oxford 2012) p 521
an external auditor for all participating companies, does not oblige the granting of additional security to creditors. Should the creditors exercise their veto right, an automatic suspension of the merger process is performed until the competent court decides upon the objection. Nevertheless, if the court considers these oppositions groundless or in the event of sufficient security provided to the objecting creditors’ claims, the merger may be completed pending the relevant objection. In terms of breach of the aforementioned provisions, the merger is rendered ineffective not only opposite the objecting creditor but most importantly opposite any third party, in parallel to criminal sanctions that may be imposed to the management and administrative boards of the participating companies.

**Effects of the CBMD: A positive or a negative outcome?**

The impact of the CBMD on the performance of cross-border mergers has been significant. The outstanding increase in the cross-border merger activity (170% in the last 10 years at the point of implementation of the CBMD) demonstrates its significant contribution. The harmonization of cross-border mergers of limited liability companies regarding all EU and EEA Member States, the improvement of former procedures and the introduction of simplified processes under certain conditions, increased the merger activity and fostered legal certainty. The CBMD harmonized conflict of laws applicable to the merger of companies subjected to different jurisdictions by introducing a provision that imposes the compliance with the national law provisions and formalities for each merging company. Furthermore, EU level measures for the protection of creditors and minority shareholders have been established, providing Member States with a certain orientation. The provision of article 16 CBMD regulating the employee participation is considered a crucial step, as the employee participation constituted the main obstacle for the creation of a cross-border merger Directive. The CBMD facilitated the group restructuring by enabling the merger of subsidiaries of the same group and by introducing the possibility to perform a seat transfer by creating a company in the desirable Member State. Finally yet importantly, the CBMD contributed to the saving of costs of the merger procedure, evidenced by the automatic dissolution of the company without a liquidation process and the immediate transfer of assets and liabilities of the acquired company without further documentation.

Nevertheless, the implementation of the CBMD creates considerable obstacles for the corporate mobility. The high divergence among Member States in respect to

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156 Article 2503 ICC
158 Ibid
160 Thomas Papadopoulos ‘Reviewing the implementation of CBMD’ in Thomas Papadopoulos (Editor), Cross-Border Mergers, EU Perspectives and National Experiences, (Springer 2019) p 5
161 European Parliamentary Research Service, European Implementation Assessment ‘Ex post analysis of the EU framework in the area of cross-border mergers and divisions’, (PE 593.796-December 2016) p 42
162 Ibid p 28

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the creditor and minority protection raises multiple conflicts and procedural problems. In particular, the disadvantage of the ex-post protection system related to the enforcement of creditor claims in the event of the concurrent applicability of the Brussels Regulation, the delay of cross-border merger proceedings as a result of the veto rights provided by the ex-ante system, along with the significant divergence related to the assets and liabilities valuation, the merger ratio, the alteration of articles of association and the new regime for minority shareholders under the new company\textsuperscript{163}, demonstrate the urgency for the creation of an EU level harmonized ground. Law experts suggested the shortening of the protection period for the ex-ante system, in order to minimize the risk of veto rights abuse\textsuperscript{164}, and the provision of a reasonable timeframe (ex.6-9 months) after the completion of the merger process to file their request to receive a debt payment security for the ex-post system\textsuperscript{165}. An additional suggestion referred to the further harmonization of the minority shareholders’ protection by the provision of an exit right against adequate compensation and the right to an additional compensation if the exchange ratio is inadequate\textsuperscript{166}. Undoubtedly the abovementioned problems and suggestions pointed the way to further harmonization.

\textsuperscript{163} Ibid p 11
\textsuperscript{164} European Parliamentary Research Service, European Implementation Assessment ‘Ex post analysis of the EU framework in the area of cross-border mergers and divisions’, (PE 593.796-December 2016) p 26
\textsuperscript{165} Thomas Papadopoulos ‘Reviewing the implementation of CBMD’ in Thomas Papadopoulos (Editor), \textit{Cross-Border Mergers, EU Perspectives and National Experiences}, (Springer 2019) p 9
\textsuperscript{166} Ibid p 11
STEPS TO HARMONIZATION

This part of the dissertation will review the steps accomplished towards the harmonization of EU Company Law. A presentation of the Directive 2017/1132, the Company Law Package and the proposed amendments will be made. Finally, this chapter will examine the new Directive on cross border mobility, harmonizing cross-border conversions and divisions and fostering cross-border mergers.

Directive 2017/1132


A correlation table is included in the annex of the aforementioned Directive, in order to provide for clarifications of the legal provisions of the different Directives. Consisting of 168 articles and four Annexes, the Directive covers a wide variety of company law issues, as mentioned above. Concerning the cross-border mergers’ provisions, stated in articles 118-161 of the Directive 2017/1132, no significant amendments of the CBMD can be deducted. Besides the addition of paragraph 4, article 120, according to which cross-border mergers do not apply to companies subject to the use of resolution tools provided in the EU Directive 2014/59/EU and the exemption of the publication requirement under the new paragraph of article 123 (1), awarded to companies which publish the common drafts of the merger on their

\(^{167}\) Sixth Council Directive of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies

\(^{168}\) Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State


\(^{170}\) Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent

\(^{171}\) Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies

\(^{172}\) Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent
website without additional fees to the public\textsuperscript{173}, the CBMD remains invariable. The provisions concerning the creditor and minority protection remain unattached, assigned principally to the discretion of Member States.

**The Commission’s Company Law package**

The Commission’s Company Law package, presented on April 2018, was comprised of two proposals for Directives amending the existing Directive 2017/1132, i.e. a Directive regarding the use of digital tools in company law and a Directive concerning cross-border conversions, mergers and divisions. The first proposal on Cross-Border Mobility, which will be examined in this dissertation, focused on the harmonization of other corporate restructurings, i.e. cross-border conversions and divisions, in order to promote cross-border mobility within the EU and at the same time foster the freedom of establishment\textsuperscript{174}. Since the cross-border merger constituted the only available procedure for a cross-border setting, the need for the regulation of the corporate mobility via a coherent European secondary law, which would refer not only to cross-border mergers but also to cross-border conversions and divisions, became evident\textsuperscript{175}. Therefore, the Company Law package established a great innovation for the European Company law, as it enabled the completion of companies’ incorporation proceedings completely electronically, created new procedures for the setting and reorganization of companies, such as conversions and divisions and contributed largely to the further harmonization of the existing rules on cross-border mergers. The chapter on cross-border mergers is amended and reformed in order to award creditors and minority shareholders in cross-border mergers with the same safeguards provided in cross-border conversions and divisions. The Company Law package focused on the facilitation of companies as regards the exercise of the freedom of establishment and as a result on the abolition of barriers and restrictions, establishing an indisputable input\textsuperscript{176}. The guarantee of adequate protection measures to stakeholders, such as creditors and minority shareholders had been a priority, in order to ensure the fairness in the Single Market\textsuperscript{177}.

The amendments to the CBMD introduced by the proposal have been remarkable towards the harmonization of the protection of the aforementioned merger participants. To begin with, the merger definition under article 119 was expanded, covering also asset transfers, while more categories were excluded from the scope of the CBMD\textsuperscript{178}. The crucial innovation of the Proposal has been the

\textsuperscript{173} Article 123 (1) b Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification)


\textsuperscript{176} Ibid p 11


harmonized provisions for the protection of members and creditors. However, only an approach of minimum harmonization was adopted, as Member States are awarded with the right to adopt further protection mechanisms\(^\text{179}\), provided that these mechanisms comply with the rules on the freedom of establishment\(^\text{180}\). Article 126a awards shareholders opposed to the merger with the right to sell their shares against fair and adequate compensation and exit the company. The remaining shareholders of the company must acquire their shares, while they possess the right to object to the share-exchange ratio stated in the common draft terms of the merger. It must be highlighted that the above mentioned right is also provided to absenting shareholders and dissenting shareholders without voting shares\(^\text{181}\). An independent expert will review the amount of compensation\(^\text{182}\), while the shareholders that agreed to the merger but opposed to the share exchange ratio are awarded with the right to challenge the exchange ratio before a national court\(^\text{183}\). However, it becomes evident that in case of an inadequate exchange ratio the shareholders of the company resulting from the merger may face the same threat that the shareholders of the merging companies may face, despite the fact that they do not renounce their shares\(^\text{184}\). The competent jurisdiction for disputes concerning the exit right and the applicable law remains the jurisdiction of the seat of the merging company and is not affected by the cross-border merger, contributing to the avoidance of issues arising due to the change of the applicable law\(^\text{185}\). Indisputably the minority protection is enhanced and the principle of fair treatment is largely respected, since a coherent and fully harmonized legislation regulating the aforementioned provisions concerning creditors and minority shareholders, as participants highly affected by the cross-border


\(^{181}\) Thomas Papadopoulos ‘Reviewing the implementation of CBMD’ in Thomas Papadopoulos (Editor), Cross-Border Mergers, EU Perspectives and National Experiences, (Springer 2019) p 21-24


\(^{185}\) Ibid p 71
transaction due to the change of the applicable laws, is fundamental and imperative.\footnote{186}

The safeguards for creditors are stated in article 126b of the Proposal, according to which the legal basis and the criterion for the provision of sufficient safeguards constitute the prejudice caused to creditors. The existence and the evaluation of the creditors’ prejudice are assessed by an independent expert, creating indisputably an effective and reliable measure.\footnote{187} The Proposal opts for the ex-ante protection system, as the protective measures provided to creditors, as well as a declaration of the financial status of the company must form a part of the common draft terms of the merger. The declaration prepared by the merging company’s management or administrative organ shall affirm that there is no reasonable ground to believe that the acquiring company will not be able to redress its liabilities at the time they fall due.\footnote{189} The creditors that are not satisfied with the protection offered under the common draft of the mergers shall be awarded with the right to file a claim before the competent administrative or judicial authority asking for further protection, possessing the right to be reimbursed against a guarantor or against the company depriving from the merger.\footnote{191} The petition has to be filed at the latest upon the date of the general meeting that shall decide on the merger.\footnote{192} As a prerequisite, creditors must claim and prove the probability that their rights would be unduly prejudiced due to the merger.\footnote{193}

Furthermore, the Proposal introduced reforms concerning the content and the publication of the common draft terms of merger, enriched the information of the interim report and amended the pre-merger certificate provisions.


\footnote{193} ibid
Nonetheless, the Company Law Package carries certain disadvantages. To begin with, the EU legal framework provided via the Company Law package can be considered as narrow, as it covers only limited liability companies and as a result constitutes a choice being in controversy with the freedom of establishment, which ‘embodies’ all legal entities falling under article 54 TFEU\(^{194}\). In addition, the valuation rules are not harmonized, creating a certain divergence in the merger ratio and the value of the transfer\(^{195}\). As regards the existing creditors prior to the merger, i.e. those of the merging company and those of the acquiring company, they obtain access to different types of assets, which become united after the merger, invoking possible detrimental changes in the ratio among debt and the assets in comparison with the situation prior to the merger\(^{196}\). Furthermore, a majority requirement is imposed for the approval of the cross-border conversion and division, which may not be less than 2/3, however, not more than 90% of the votes attached to the shares or the capital being represented (article 86i (3) and 160k(3)). That rule, however, does not exist for cross-border mergers\(^{197}\). Fortunately, it is set out evidently in the Company Law package that the obligation imposing the payment of additional compensation shall be governed by the law that shall apply to the company depriving from the merger\(^{198}\).

**The new Directive on the cross-border mobility**

*Scope of application and main provisions*

The new Directive on cross-border mobility, i.e. Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, extends the Directive’s scope of application and harmonizes the rules on cross-border divisions and conversions. The facilitation of cross-border mobility and the abolition of restrictions via the harmonization of the aforementioned provisions are undisputable. The latter has been adopted on the 27th November 2019, published on the 12th December 2019 in the Official Journal of the European Union and is applicable since the 1st January 2020, i.e. twenty days after its publication in the Official Journal. According to article 3 of the Directive, Member States shall transpose the Directive into national law by the 31st January 2023. It follows widely the text of the Commission’s Proposal and the

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\(^{195}\) Prof. Dr. Jessica Schmidt LLM (2019). European Company and Financial Law Review, Volume 16, Issue 1-2, Pages 222-272, ISSN (Online) 1613-2556, ISSN (Print) 1613-2548, DOI:https://doi.org/10.1515/ecfr-2019-0005, p 244


\(^{197}\) Prof. Dr. Jessica Schmidt LLM (2019). European Company and Financial Law Review, Volume 16, Issue 1-2, Pages 222-272, ISSN (Online) 1613-2556, ISSN (Print) 1613-2548, DOI:https://doi.org/10.1515/ecfr-2019-0005, p 250

\(^{198}\) Ibid 258
Assessment of the latter, including however, a few changes in respect to the minority and creditor protection in cross-border mergers.

Before analyzing the amendments introduced to cross-border mergers, a reference shall be made to the legal framework for cross-border conversions and divisions. To begin with, the scope of the Directive covers the conversion of limited liability companies, which have their registered office, their central administration or principal place of business within the European Economic Area. The Directive enables a company to convert into a company of the same legal form established in a different Member State via the transfer of its registered office without losing its legal personality. Furthermore, cross-border divisions of companies, i.e. where at least two of them are governed by the laws of different Member States, fall under the scope of the Directive, which, however, excludes companies dealing with collective investment of capital offered by the public. The cross-border operation is subject to a legality control comprised of two steps, similar to the oversight provided for cross-border mergers. As regards the first type of control, it is conducted prior to the division by the competent authority of the Member State of the divided company and is responsible for the issuance of a certificate, ascertaining the legality of the cross-border operation. The aforementioned issuance must be impeded if the cross-border operation is performed under national law for fraudulent or abusive purposes. Following the issuance of the pre-operation certificate, the competent authority of the Member State of the company depriving from the division ensures the compliance of the cross-border operation with the national law requirements.

The new Directive proceeded to the amendment of article 119 of the Directive 1132/2017 by extending its scope on operations where ‘one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, without the issue of any new shares by the acquiring company, provided that one person holds directly or indirectly all the shares in the merging companies or the members of the merging companies hold their securities and shares in the same proportion in all merging companies’. Pursuant to the new Directive, the exit right against adequate compensation is awarded ‘at least’ to the members that voted against the merger transaction, allowing, however, Member States to provide other members with the same exit right. Discretion is given to Member States regarding the timeframe for the expression of the members’ intention to renounce their shares, as well as for the payment of the cash compensation. Nonetheless, in respect to the first case, the period of one month after the general meeting shall not be exceeded, while the latter must be determined within two

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months from the entry into effect of the merger\textsuperscript{204}. The member wishing to dispose of his/her shares is entitled to demand additional compensation on the ground of inadequacy before competent bodies and authorities determined under national law\textsuperscript{205}. An independent expert is responsible for the examination of the common draft terms of the merger, as well as for the amount of compensation and the exchange ratio\textsuperscript{206}. Any supplementary cash compensation included in the draft terms of the merger must be taken into consideration\textsuperscript{207}. Despite the fact that the Directive does not refer to national courts, as stated in the Proposal, it is clearly defined in the Recital of the New Directive that Members may file a claim ‘before a competent administrative or judicial authority or a body mandated under national law including arbitral tribunals\textsuperscript{208}’. The right to challenge the exchange ratio is also awarded to members that have not expressed their intention to relinquish their shares before national competent bodies and authorities, with the remedy of cash compensation or additional shares in the company resulting from the merger\textsuperscript{209}.

As regards creditors, the new Directive introduces an amendment in respect to the declaration of the financial status of the company. The declaration must demonstrate the current financial position of the company at the time of the declaration; it shall not be provided earlier than one month prior to its disclosure\textsuperscript{210} and must accompany the common draft terms of the merger. The new article for the creditor protection does not include the prejudice criterion imposed in the Commission’s Proposal. Creditors that do not agree with the protection awarded in the common draft terms of the merger and who have proceeded to the prior notification of the company may apply for protection measures before the competent authorities, provided that no suitable agreement could be achieved with the company\textsuperscript{211}. The new Directive, by assigning the competent authority to examine if the claim of the creditor corresponds at least to the value and the credit quality prior to the merger transaction\textsuperscript{212}, additionally solves an issue arising from the Assessment of the Commission’s Proposal regarding the credit quality and the person responsible for its evaluation. In general, creditors are awarded with the right to be informed about the protection measures offered by the company and observe before the general meeting deciding on the cross-border merger, as well as with the right to apply to the competent authorities for additional protection measures.

\textsuperscript{204} Ibid article 126 a § 2a
\textsuperscript{205} Ibid 126a §3a
\textsuperscript{206} Ibid Recital (21)
\textsuperscript{207} Ibid
\textsuperscript{208} Ibid Recital (20)
\textsuperscript{209} Ibid article 126 a §8
\textsuperscript{210} Ibid article 126b §3
\textsuperscript{211} Ibid Recital (23)
\textsuperscript{212} Ibid
Conclusions

To conclude, it is evident that the protection of creditors and minority shareholders constitutes an issue creating various obstacles in the harmonization of EU Company Law due to the existing divergences among different Member States. The importance of a cross-border merger as the key for the integration in EU markets without the winding up of the company and therefore its regulation via the CBMD are indisputable. The CBMD, as analysed above, is considered to be an effective regulatory tool, which constituted a step to the harmonization of EU Company Law, and which led to the increase of merger activity since its implementation. Regarding minority shareholders’ protection under the CBMD, Member States could choose the intensity of the protection, having also the right not to provide minority protection at all. For creditors, on the other hand, the granting of protection mechanisms was mandatory due to the possible harm of the creditors’ interests by the amendment of the law governing the new company. Member States, however, possessed the right to choose the intensity of the above mentioned protection. The discretion provided to Member States in respect to the stakeholders’ protection, in particular creditors and minority shareholders, demonstrated the possible exploitation of the freedom of establishment, which could arise due to the lack of a structured protection system, and therefore the necessity for further harmonization in this field. According to the majority of the respondents of a public consultation launched in 2015, a full harmonization of the starting date of creditor protection, as well as the full harmonization of minority shareholders’ protection via the granting of an exit right against fair compensation, was desirable. The latter was largely established via the Company Law Package, which offers a reliable framework for changing shapes and splitting across borders. Fortunately, the Commission, the Council and Parliament agreed on this objective and regulated the protection of stakeholders, i.e. minority shareholders, creditors and employees, in the new Directive on cross-border mobility of the 12th December 2019. The new Directive constitutes a great innovation due to the establishment of a mandatory minority protection, as minority shareholders are granted with the right to exit the company by disposing of their shares against compensation. Creditors, on the other hand, possess the right to file a claim for adequate safeguards in case their claims are jeopardized by the cross-border merger transaction. It has become now also clear that only those shareholders, who are subject to the applicable company law changes during the process of the cross-border merger transaction, have a mandatory right of withdrawal. The harmonization established via the new Directive, which further regulates cross-border divisions and conversions, is expected to largely solve previous problems and uncertainties of the CBMD. However, a question may arise in respect to whether the changes to the rules on cross-border mergers will not lead to an excessive bureaucratization of the cross-border transformations. This question arises in the light of the fact that the existing rules of the former Merger Directive essentially work, proven by the impact of the CBMD and the significant increase of cross-border merger transactions. Nonetheless, the Directive as a whole represents a successful balancing of the various interests.

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affected by it. Whether the procedure is really efficient, providing legal certainty in practice, however, remains to be seen.
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