European Provisions for the Protection of Dissenting Shareholders within the Framework of Cross-border Mergers

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Abstract: *The European legislative framework of cross-border mergers is a result of a long process of identifying the needs of the common market, domestic laws and national businesses and bringing them closer together. From virtual impossibility of merging across national borders, to a transfer of seat, to the Cross-Border Mergers Directive private and public limited companies can now engage in a cross-border merger transaction under best harmonised rules to date. However, the diversity of national company laws leaves gaps that are not resolved on a European level - there is no harmonising instrument in the area of creditor protection and the protection of dissenting minority shareholders, among others. The CBM Directive contains a framework provision referencing the need of protection of minority members, whereas specific mechanisms are left for the Member States to implement. The question that arises is whether the status quo of minority protection is sufficient to ensure smooth functioning of the cross-border mergers framework or whether further harmonisation is required.*

Keywords: *Cross-Border Mergers Directive, corporate mobility, cross-border mergers, protection of dissenting minority shareholders*

1. Introduction

In the process of international business a merger is the fastest way to expand production and access new market opportunities that lie beyond national borders. In the context of the four freedoms celebrated in the European Union, this desire is predetermined. However, until relatively recently, even though the right of establishment allowed companies to pursue economic activities in Member States other than their own, in practice a lot of manoeuvres were too complex and, at times, legally impossible to carry out.

In the framework of the historical dynamics of M&A (Merger and acquisitions) transactions, the period between 1994 and the first years of the 21st century is referred to as the *fifth merger wave* that was of a truly international character. Particularly, the

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number of mergers escalated in Europe with their peak in 1999, one third of which were cross-border transactions with the most active participants coming from the UK, France and Germany.[2] This was not only due to increase in worldwide economic demand, but also because the economic situation in Europe changed significantly. The regulatory barriers were being broken down after the creation of the European Community.[3]

Since the Treaty of Paris of 1951, what we now call the European Union has expanded its membership to include as many as 28 countries[4], a large number of which have been working together towards a common goal only a bit over a decade[5]. The different historical backgrounds and different understandings of how to fit in the Union's functional architecture showcase in the hardships of bringing legal discrepancies to a common denominator. Although a number of competences are exclusively within the ambit of the EU law making, some areas, albeit within the EU reach, have always been passionately guarded from any interference by the Member States. Company law is one of those areas. The harmonisation of corporate laws has been piecemeal and painful, with the Member States not letting the national provisions on core aspects of company law – such as structure, duties and responsibilities of the board of directors and cross-border mergers – be altered.[6]

Albeit a handful, the Directives in the area of European company law provide a legal framework within which a number of crucial aspects are aligned among the Member States, making the forum shopping for best company laws less of a necessity. Ever since the F-word failed to sneak into the EU fundamental texts, the EU's non-federalist nature is one more obstacle to a smooth harmonisation of company law on the Union level, and a reminder of why only three Regulations have been adopted in this area so far. The reality, in which the European corporate legal landscape has existed for a long period of time, can be characterised as a "non-mobility equilibrium".[7] This means that the Member States persistently maintained the relative autonomy of their company laws and thus reduced any chance of cross-border mobility of companies to an unattractive, and at times legally impossible, opportunity.

The paper provides an account of how corporate mobility in the EU developed up to the point of adoption of the Cross-Border Mergers Directive (hereinafter also referred to as the 'CBM Directive') and locates the status of minority shareholder protection within the existing framework of cross-border mergers. Part I tracks the beginnings of the recognition

[2] Martynova, M., Renneboog, L. Mergers and Acquisitions in Europe. Tilburg CentER Discussion Paper, 2006-6. https://pure.uvt.nl/ws/files/777056/6.pdf. (29.04.2016).

[3] Gaughan, PA. Mergers, Acquisitions and Corporate Restructurings. 4th ed. USA, John Wiley & Sons Inc 2007, pp 3-4.

[4] Croatia acceded on 1 July 2013 becoming the 28th member.

[5] The largest enlargement of 2004 simultaneously brought under the EU roof 10 new Central and Eastern European states (Estonia, Latvia, Lithuania, Slovakia, Slovenia, Czech Republic, Poland, Hungary, Malta and Cyprus), followed by the accessions of Romania and Bulgaria in 2007. The fifth wave of enlargement also brought about the individual historical legacies, including the former Soviet Union countries, which had to be accommodated within the Union's complex mechanisms.

[6] McCahery, JA., Vermeulen, EPM. Understanding corporate mobility in the EU. A working Paper Prepared for the 5th European Company Law and Corporate Governance Conference 2007, Berlin, p. 16. http://www.ecgi.org/presidency/presentations/2007_berlin_vermeulen_paper.pdf. (29.04.2016).

[7] Ibid, p 3.

of the need of harmonisation of rules relating to cross-border mergers. Part II outlines how the employee representation issue was untangled, which gave way to the adoption of the CBM Directive. Part III gives an overview of the most prominent case law in the area of corporate mobility, including one of the pillars of a cross-border merger, the *Sevic Systems* case. Part IV looks at where the European legislator has placed the provisions relating to minority shareholders protection, if at all, and inquires whether the existing framework is sufficient. In our Concluding remarks, the authors propose the way forward and the area for potential further research.

2. Cross-border mergers as a method of establishment

The Treaty of Rome[8] provided that for the purpose of, *inter alia*, a harmonious development of economic activities measures must be taken to abolish obstacles to the freedom of movement of persons, services and capital as between the Member States, as well as to approximate the laws of the Member States in order to ensure proper functioning of the common market.[9] Freedom of movement of persons is a compound concept consisting of four principles: right of establishment, right of circulation, elimination of controls at the internal borders and the right of residence.[10] The right of establishment covers both natural and legal persons, who can engage in activities as self-employed persons as well as set up and manage undertakings in a Member State other than their own under the same conditions as are laid down in that state for its own nationals. No restrictions shall be imposed on foreign nationals wishing to establish in the host state other than those provided for in the Treaty.[11] For the purposes of cross-border mergers, the freedom of establishment is the most important principle incorporated in the Treaty.

Cross-border mergers by virtue of their international character inevitably involve a clash of legal systems. Essentially, the absence of or inadequate harmonisation of relevant rules in different states may make cross-border transactions less attractive or preclude their realisation. The practical impossibility to merge across borders can render the freedom of establishment obsolete. For example, when no common rules exist to govern cross-border mergers or when tax treatment of mergers differs significantly among jurisdictions, companies are able to engage in such a transaction only if the states of their establishment match in terms of respective legal provisions. Thus, until recently mergers were possible only as between certain Member States, like France and Italy that had specific provisions for cross-border mergers.[12] In the Netherlands, Sweden, Ireland, Greece, Germany, Finland, Denmark and Austria cross-border mergers were simply not legal as of 2003.[13]

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[8] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. (Hereinafter the "Treaty of Rome").

[9] Treaty of Rome, Art 2, Art 3(c)(h).

[10] Zaman, *supra nota* 6, p 128.

[11] Treaty of Rome, Articles 52 and 53.

[12] Zaman, *supra nota* 6, p 126.

[13] European Commission Press Release, MEMO/03/233, 18th November 2003.

In its Communication[14] in May 2003, the Commission acknowledged the need for a proper legal instrument to facilitate cross-border restructurings with the view of the growing integration of the common market and increasing cross-border business transactions, and set forward a new proposal for the cross-border mergers Directive. The Cross-Border Mergers Directive (hereinafter also referred to as the 'CBM Directive' and the 'Tenth Directive'), which was adopted by the European Parliament and the Council on 26th October 2005 and has entered into force on 15th December the same year, was a product of lengthy negotiations that started as early as 1965.

In 1967 a preliminary draft of the "cross-border mergers" Convention was prepared under Article 220 of the EC Treaty (currently Article 293). Article 220 instructs the Member States to negotiate with one another with a view of securing for the benefit of their nationals the "possibility of mergers between companies or firms governed by the laws of different countries". The Convention, however, as well as the subsequent draft of 1972, did not offer much relief to merging across borders because it referred back to the national legislations on internal mergers, which at the time had not yet been harmonised.[15]

The necessary step on the way to implementing working legislation on cross-border mergers was thus to harmonise the national rules on internal mergers first. To this end, in 1978 the Directive concerning mergers of public limited liability companies[16] was adopted, which introduced provisions regarding mergers into the laws of every Member State. Article 2 of the Directive required the Member States to implement rules to govern mergers of companies subject to their national laws.

However, the many legislative and administrative obstacles intrinsic in the nature of cross-border mergers remained.[17] Among these was the concern expressed by some states that the existing differences in relation to employee participation could be disadvantageously by-passed. The state of affairs was such that according to the provisions of the Convention Member States were free to choose the country where the company resulting from a merger transaction was to be incorporated, and thus choose the governing law.[18] Employee participation has at the time not been harmonised; the proposed Fifth Company Law Directive of 12 August 1983 on employee participation in supervisory boards following the German model has never been adopted.

On December 14th 1984 the Commission presented a proposal for the Directive on cross-border mergers. The Commission recognised that the work on the new Directive was based primarily on the earlier achievements of both the draft convention and the

[14] Communication from the Commission to the Council and the European Parliament 'Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward', COM/2003/0284, 21 May 2003, § 3.4.

[15] Ugliano, A. The new Cross-Border Merger Directive: harmonisation of European company law and free movement. European Business Law Review, 2007, 18 (3), p 587.

[16] Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, amended by 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, pp 1-11.

[17] Dorresteijn, A. *et al*. European Corporate Law. 2nd ed. Netherlands, Kluwer Law International 2009, pp 60–63.

[18] Ugliano, *supra nota* 18, p 587.

Third Directive, especially so that the mechanisms of national and cross-border mergers are virtually identical. The consensus could not be reached and both the Fifth Directive and the Tenth Directive were not approved by the European Parliament.[19] In the years that followed the wish for a directive on cross-border mergers has not been abandoned.

3. Resolution of the employee participation deadlock and adoption of the CBM Directive

The catalyst that untangled the long-lasting search for codetermination compromise came in the form of the Council Regulation (EC) 2157/2001 on the Statute for a European Company (*Societas Europaea* hereafter referred to as the SE)[20], which was approved on October 21st 2001, and the Council Directive 2001/86/EC on the involvement of employees supplementing the SE statute[21], both of which came into force on 8th October 2004. Besides the progress on employee involvement negotiations, the other significant feature the SE legislative tandem introduced is that the SE Regulation made possible what had otherwise been impossible – cross-border mergers under a single legal framework, albeit within the context of a SE structure. This is due to the fact that one of the methods of creating a European Company is by way of a cross-border merger. The other three include incorporation of a new holding SE, incorporation of a new subsidiary SE and converting an existing public limited liability company into a SE.[22] One of the reasons a SE option itself is hardly suitable for small companies, less so for start-ups doing business *ex novo*, is that the subscribed capital of a SE shall be no less than 120 000 EUR.[23]

It is important for the purposes of chronological accuracy to mention the Tax Directive[24], which created an interesting situation in the EU corporate mobility environment. The Directive was adopted in 1990 and was meant to facilitate cross-border mobility of companies from a tax perspective by establishing a common system of taxation applicable to mergers between companies established in different Member States. The interesting situation so created was the discrepancy in the legal regulation of cross-border transactions: concerning tax issues cross-border mergers were regulated, whereas technically and legal they were not yet possible.[25]

The Regulation on the SE Statute and the accompanying Directive on employee involvement was a turning point in the process of preparation and adoption of the Cross-Border Mergers Directive. In 2001 the 1984 Directive proposal was withdrawn and a new one was submitted in 2003. The primary difference from the 1984 proposal was

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[19] Siems, MM. The European Directive on Cross-Border Mergers: an international model? Columbia Journal of European Law, 2004-2005, 11 (1), p. 172.

[20] Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for the European company (SE), OJ 2001 L294, 10.11.2001, p. 0001–0021.

[21] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ 2001 L294, 10.11.2001, p. 0022 – 0032.

[22] Zaman, *supra nota* 6, pp 130–131.

[23] Regulation on the SE Statute, Article 4(2).

[24] Council Directive 90/434/EEC of July 23rd 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchange of shares concerning companies of different Member States, OJ L 225, 20.08.1990, p. 1.

[25] Ugliano, *supra nota* 18, p 587.

that firstly, the principles underlying the SE Regulation and Directive were taken into account when preparing a system of employee participation in decision-making bodies of a company resulting from a cross-border merger; secondly, the scope of the Directive was extended from public limited liability companies to all limited liability companies.[26] Such are companies with share capital, having a legal personality and possessing separate assets that alone serve to cover a company's debts[27], as well as companies as referred to in Article 1 of the First Company Law Directive.[28] The extension of the scope will allow small and medium-sized enterprises to engage in cross-border mergers as well. The proposed Directive was adopted on 26th October 26 2005 as Tenth Directive[29]. The amendments necessary to bring the national laws in compliance with the Directive were to be completed in the Member States by 15th December 2007. By this date, however, only 16 Member States managed to do so, whereas due to certain technical difficulties some in some states cross-border mergers were made possible only by 2012.[30]

In the period of 2008-2013 the number of cross-border mergers increased by 173 percent, from 132 to 361 mergers in 2012. This is an outstanding result because, despite the continuous increase in cross-border transactions and cooperation among Member States and EEA countries, the global economic crisis that hit in 2008 and the relatively static EU/EEA membership did not account for the most favourable environment. The CBM Directive is a long desired instrument that can be said to be a cornerstone for corporate mobility: it increases efficiency and competitiveness among European companies, removes obstacles to cross-border activities, reduces costs and provides for effective tax planning.[31]

The condition that triggers application of the Cross-Border Mergers Directive is that there must be a cross-border merger between companies with share capital, which can be effected via a company acquisition, creation of a new company or transfer of assets to a holding company.[32] Although it is greatly welcomed that the scope of the Directive was extended to include not only public but also private limited liability companies, it leads to a situation where in the law of the latter the only harmonised aspect is essentially the rules on cross-border mergers. In this respect, public companies have enjoyed a far greater degree of harmonisation[33], including the Third Directive on domestic mergers and the SE Regulation.

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[26] Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital, COM/2003/0703, p. 3.

[27] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. OJ L 310, 25.11.2005, p.1. Article 2(1)(b).

[28] Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards, OJ L 65, 14.03.1968.

[29] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. OJ L 310, 25.11.2005, p.1.

[30] Study on the Application of the Cross-Border Mergers Directive. The European Union, Bech-Bruun and Lexicdale, September 2013. http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf. (29.04.2016).

[31] Ibid, p 31.

[32] Articles 1 and 2(2)(a)-(c).

[33] Siems, *supra nota* 22, p 173.

The basic underlying principle of the Directive is that the companies remain subject to the provisions and formalities of the national laws applicable to them, including those relating to the decision-making process and the protection of creditors, debenture holders and holders of securities or shares, and the rights of employees not covered by the Directive.[34] The application of national laws leads to the situation when companies are precluded from merging due to the fact that under the domestic laws of the relevant Member States they are types of companies that are not "mergeable".[35] It is noteworthy that the CBM Directive thus does not create a unified system of rules for cross-border mergers, rather, it refers to the existing domestic rules on mergers under the Third Directive. A unification approach is arguably not necessary as it would contradict the principle of subsidiarity; rather, a clear system of rules on the conflict of laws would have been preferable.

4. The European Court of Justice contribution to corporate (non)-mobility

The trinity of decisions in *Centros*[36], *Ü ntrosnity*[37] and *Inspire Art*[38] already introduced several breakthroughs regarding the mobility of companies within the EU. In *Centros* the ECJ established that even when a state's law is based on the "real seat" theory, it cannot deny recognition to a company formed under the laws of another Member State.[39] It was pointed out that the status of the company was to be determined according to the law of the state where it was formed.[40] Besides, if a company seeks to establish a branch in the host state to enable it to carry out all its economic activity in that state, while having its registered office in another one, it does not justify the refusal of the host state to register the branch and is contrary to the freedom of establishment. *Ü it does n* judgement revealed the significance of *Centros* to the real seat theory. *In casu*, a company formed under Dutch laws moved its head office to the real seat jurisdiction – Germany, under whose laws, accordingly, no company has ever been formed. But, so long as the status of m*berseering* BV was to be established by application of Dutch law, the court concluded that doing otherwise would contradict Article 54 of the Treaty. The facts of the *Inspire Art* case reflected those in *Centros*: a company was formed in the UK with the view of avoiding the otherwise applicable rigid minimum capital requirements. The law of the Netherlands, which was the host state in the case, required a company established under foreign laws but carrying out business exclusively in the Netherlands to add a suffix to its name indicating that the company was, in fact, a pseudo-foreign company. This effectively created an additional status condition that companies were supposed to meet in order to be able to rely on the freedom of establishment.[41] The court, relying in the

[34] Article 4.

[35] Ugliano, *supra nota* 18, p. 599.

[36] C-212/97 *Centros* [1999] ECR I-1459.

[37] C-208/00 *Überseering* [2002] ECR I-9919.

[38] C-167/01 *Inspire Art* [2003] ECR I-10155.

[39] Vargova, P 2010, "The cross-border transfer of a company's registered office within the European Union", LL.M. Thesis, Central European University, Hungary.

[40] Armour, J & Ringe, WG 2011 op. cit., p. 9.

[41] Armour, J & Ringe, WG 2011 op. cit., p. 10.

previous decisions in *Centros* and o*berseering*, struck this down as contrary to the Treaty provisions and reaffirmed that a company's legal status is essentially a matter of the law of its formation.

For the fuller impression of the distinction between application of domestic corporate laws for the purposes of determining a company's status and the European provisions on the freedom of establishment, the *Cartesio* judgment demands notice. Whereas the ECJ trio discussed above dealt with companies wishing to enter the territory of a Member State, i.e. inbound establishment, *Cartesio* was concerned with a Hungarian company seeking to transfer its real seat to Italy while retaining its status under the Hungarian law – outbound establishment. The Hungarian law did not permit such transfer without liquidation. It might seem that the home state preventing its company from migrating across national borders would violate the freedom of establishment just like the host state's reluctance to recognise a foreign company did in the *Centros* case. However, in *Cartesio* the court ruled that a state of incorporation has the authority to not only rule on the initial status of a company, but also on its continuous status. Thus, if according to Hungarian law the company had to be dissolved before moving its head office, the application of Article 49 was not triggered simply because of the fact that no company existed anymore. Such a condition was considered legitimate only due to the fact that the company *in casu* indeed wished to remain subject to Hungarian law instead of changing the applicable law to that of Italy, in which case the tables would have turned.[42] The line of reasoning of the court in these cases follows the distinction between a company's emigration and immigration, covering only the latter with undoubted right of establishment.

Two days before the entry into force of the CBM directive, on 13th December 2005, the ECJ passed down a decision in the *Sevic Systems* case.[43] Remarkably, in as much as its reasoning and solution agree with the ratio of the new CBM Directive, the court did not mention it in its judgment, and decided the case on the basis of the Treaty's provisions on the freedom of establishment. The *Sevic* case was the first case to deal with cross-border mergers. Before that there were neither domestic laws allowing them, nor existing EU-level framework, except for the possibility of merging via creating a European Company. Therefore, *Sevic* forms one of the pillars on which the EU legislative framework on cross-border mergers rests.

Advocate General Tizziano maintained that "the right of establishment covers all measures which permit or even merely facilitate" the pursuit of economic activity in the territory of another Member State under the same conditions as its nationals.[44] He also recognised the particular effectiveness of a merger transaction due to the fact that a company can continue carrying out business in a new form, but without liquidation, which reduces the costs, time and complexity compared to other forms of company consolidation.[45]

[42] Vargova, P 2010 op. cit., p. 21.

[43] C-411/03 *Sevic Systems AG* [2005] ECR I-10805.

[44] Opinion of July 7th 2005, case C-411/03 *Sevic Systems*, par. 30.

[45] Ibid, par. 47.

The significance of the *Sevic* decision, now that the CBM Directive's implementation deadline has passed, cannot be underestimated. By recognising that a merger is a particular method of exercise of the freedom of establishment, *Sevic* altered the conventional view on what an establishment in another Member State is. It is thus not only the formation of a subsidiary or a branch, but any measure that facilitates access to another Member State with the view of participating in its economic life. *Sevic* introduced another model for cross-border mergers: accordingly, the provisions on freedom of establishment in the Treaty secure a possibility of cross-border mergers to all companies falling under Article 54 TFEU that could merge under the national law of a Member State. The requirement of availability of a domestic merger ensures equal treatment of national and foreign companies.[46] Secondly, a cross-border merger is now available under the CBM Directive. Thirdly, the possibility to carry out a merger exists under the Regulation for the SE Statute through creation of a European Company. And finally, a merger could be effected via a seat transfer. As such, a company could transfer its seat and then merger under the national laws on mergers.

5. Minority shareholder protection – where does it fit in?

Article 50(2)(g) TFEU[47] (ex Article 44 EC Treaty) is the ancestor of all the secondary legislation adopted in the EU with the purpose of protection of shareholders' rights. The Article pursues the attainment of the freedom of establishment and imposes on the European Parliament, the Council and the Commission a duty to coordinate the safeguards "for the protection of the interests of members and others", which the Member States require of their companies. The continuous integration of the internal market led to acknowledge that the differences in corporate governance provisions across the Community may jeopardise its sound functioning.[48] In its Communication "A Plan to Move Forward" the Commission mentioned the strengthening of shareholders' rights as an essential part of the dynamic and flexible systems of company law and corporate governance in the EU.[49] Specifically, the Communication addressed strengthening of the shareholder's rights in the three areas: access to information, shareholder democracy and other shareholders' rights.[50] Since then a number of Company Law Directives have incorporated provisions that cater for shareholder protection.

On the face of it, there is no pan-European instrument that would specifically cater for the needs of minority shareholders.[51] Their protection could only be inferred from the generally available provisions that cover all shareholders with respect to, for example,

[46] Rønfeldt, T., Werlauff, E. Merger as a Method of Establishment: on Cross-Border Mergers, Transfer of Domicile and Divisions, Directly Applicable under the EC Treaty's Freedom of Establishment. European Company Law, 2006, 3 (3), p 125.

[47] Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47.

[48] Xiangxing Hong, F. Protection of Shareholders; Rights at EU level: How far does It Go? European Company Law 2009, 6 (3), p. 124.

[49] COM2003/0284, p. 3.

[50] Ibid, pp 13-14.

[51] Save the Shareholder's Rights Directive, which covers information and voting rights of shareholders in listed companies.

information and voting rights. The elaboration of protection mechanisms is left to the Member States. This is the case with mergers and cross-border mergers, too – the national legislation provides for a safety net of remedial and other rights for the minority, which need to be interwoven when a cross-border merger occurs.

As the SE Regulation allows for merging across borders only when a resulting from a merger company takes a form of a *Societas Europaea*, the Regulation will not be considered within the scope of this paper. However, the relevant minority protection principles contained in the Tenth Directive repeat those in the SE Regulation; these are analysed in detail below.

Article 4(1) of the Tenth Directive refers the company participating in a cross-border merger transaction to the provisions and formalities of the law of the Member State to which it is subject.[52] The national law is meant to cover, *inter alia*, the decision-making process relating to a merger and the protection of shareholders as regards the cross-border nature of a merger. Specifically, the Article indicates that for the purpose of affording adequate protection to minority shareholders that opposed a cross-border merger (the dissenting shareholders), Member States may adopt appropriate national provisions. Indicative here is the word "may", which is expressive of the discretional nature of such protection. As it will become evident in the following from the brief analysis of the available relief afforded to minority shareholders across the Member States, the degree and ways of protection differ significantly.

Article 6 prescribes that the common draft terms of a cross-border merger are to be published in a national gazette of each Member State of the merging companies at least one month before the general meeting, on which the merger is to be agreed. The publication must indicate, among other things, the specific arrangements made in each of the merging companies for the exercise of rights of their minority members as well as the address, where the details of such arrangements can be obtained free of charge.[53]This provision satisfies shareholders' right to information – in order to be able to cast a vote at a general meeting, a shareholder shall be made acquainted in advance with the meeting's agenda and the matters that are up for a vote. This is ever more important when one considers that some shareholders vote distantly by appointing a proxy or electronically.

Further, Article 10(2) provides that when the law of a Member State, to which a merging company is subject, contains a mechanism for compensating minority shareholders that does not prevent the registration of a cross-border merger, such mechanism can only be employed with explicit acceptance of the other merging companies. Specifically, the other companies shall agree by a vote of a general meeting upon approval of the draft terms of the cross-border merger that the members of that merging company can have recourse to such a mechanism and can initiate it before the competent courts. The approval precondition is important because the resulting from a cross-border merger company will bear the results, and costs, of the court proceedings.[54]

[52] Cross-Border Mergers Directive, Article 4.

[53] Cross-Border Mergers Directive, Article 6(2)(c).

[54] Wyckaert and Geens, *supra nota* 54, p 43.

The Tenth Directive minority protection provisions are evidently framework provisions - the substantive decision-making is delegated to the Member States. The Directive, however, indicates some important minimum requirements that the national laws cannot overstep as well as reminds about the compliance of national protection provisions with the freedom of establishment and the free movement of capital.

However, whereas some states have interpreted the provisions of the Cross-Border Mergers Directive by introducing minority protection provisions in their national laws, some States provide for no such special remedies. For example, no special rights are afforded to minority shareholders in Belgium, Bulgaria, France, and Lithuania.[55] The spectre of the remedies that dissenting shareholders may have recourse to is limited. Whereas providing for one or several protection mechanisms, the Member State national laws provide for the same options: the right of withdrawal; repurchase or redemption of shares; monetary compensation in case of inadequacy of the share exchange ration; judicial remedy in case of procedural flaws and liability of the responsible company members, management and experts.

Moreover, the common denominator amongst the available rules in the Member States is that they can only be applied in two cases: if the laws of the Member States, to which the merging companies are subject, provide for similar protection rights, or in case of a Member State with no specific protection rules – if the protection rights are agreed upon by the general meetings of all the merging companies. This illustrates that even though the European legislator did not provide for a system of substantive rules applicable in cross-border merger transactions, there is a basic coordination platform that merging companies can fall back onto. There is only a handful of states that did not introduce specific provisions in their national laws. So, if a company governed by the laws of the State with minority protection merges with a company from, for example, France, where protection mechanisms in case of cross-border mergers are absent, an unobtrusive transaction is still possible because appropriate treatment of dissenting shareholders can be mutually agreed upon. The question that arises is whether such framework is sufficient to reconcile the conflicting national provisions, satisfy the dissenting shareholders' claims and not delay the merger process.

In September 2014 the Commission launched a consultation with the stakeholders on the effectiveness of the EU rules relating to cross-border mergers and divisions.[56] The summary of the consultation, which returned 151 contributions, was published in October of 2015.[57] The responses came from scholars, practitioners, public authorities, chambers of commerce, business organisations and others, which aid in identifying the general attitudes regarding the proposed questions. The most noteworthy are the three questions relating to minority shareholder protection: the Commission inquired whether the rights of minority shareholders in cross-border mergers shall be harmonised; whether the date when minority shareholders can start exercising those rights shall be harmonised; and

[55] Van Gerven, D. Cross-Border mergers in Europe. Volume 2. UK, Cambridge University Press 2011, pp. 23 and 81.
[56] European Commission Press Release, Daily News 08.09.2014.
[57] European Commission web-page, EU Company Law. http://ec.europa.eu/justice/civil/company-law/eu-company-law/index_en.htm.

whether the period of time when minority shareholders may exercise those rights shall be harmonised.[58] The majority of responses reacted positively to all the three questions (over 60%). The authors, however, wish to point out that a considerable number of stakeholders were against such harmonisation (35%, 25% and 31%, respectively), which illustrates that the issue of minority protection in cross-border mergers is a rather debatable and multifaceted concern. For example, the Council of Bars and Law Societies of Europe (CCBE) was also of the opinion that no specific protection is required in a case of a cross-border merger as there is perceivably no difference between domestic and transnational mergers regarding minority protection.[59]

Concluding remarks

Mergers are often referred to as being among the most complex transactions, which is aggravated by the fact that cross-border mergers involve the laws of different jurisdictions. The differing legal forms and national laws have been recognised by the European lawmaker as an impediment to the unobstructed functioning of the common market and the freedom of establishment. As a result, corporate mobility has been facilitated by the prominent ECJ decisions, the adoption of the Cross-Border Mergers Directive and several other instruments that paved the way to the possibility of cross-border mergers. After the revision of the overall success of the CBM Directive several gaps still remain, such as the protection of minority shareholders and creditors. The voiced concern is whether the gaps compromise the effectiveness of the cross-border mergers legislative framework to such an extent that the transaction becomes burdensome and unwarranted. Whereas the overwhelming majority favour further harmonisation of minority shareholders protection provisions, many still advise against such harmonisation maintaining that the existing national provisions are sufficient to secure the efficiency of cross-border merger transactions.

In light of the existing domestic rules and the umbrella provision in Article 4(2) of the Cross-Border Mergers Directive, the authors submit that no further harmonisation of substantive rules regarding minority shareholder protection shall be introduced by the European legislator. However, mindful of the variety of national laws, of the importance of a shareholder's right to be heard, of the importance of further integration of the common market and the role that freedom of establishment plays in pursuing this goal, minority protection rights may be brought to the spotlight in ways other than full or partial harmonisation. Improved transparency and pan-European information platforms for pooling the national minority protection laws together could be one option.

Noteworthy is the absence of consensus as regards to the temporal rules pertaining to protection mechanisms, that is – when the protection period shall commence and how

[58] Summary of responses to the Public Consultation on Cross Border Mergers and Divisions, European Commission, October 2015. Questions 7-8, pp. 9-12. http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf. (29.04.2016).

[59] Council of Bars and Law Societies of Europe (CCBE), Response to European Commission consultation of cross-border mergers and divisions, 22.02.2015, p. 1. http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/22022015_EN_CCBE_Con1_1424700904.pdf. (29.04.2016).

long it shall last. The recent Commission consultation returned varying results – both for and against harmonisation. The authors consider that this aspect requires further research: the procedural construct could be the piece of Union harmonisation that is perceived as missing in the context of minority protection. It could be possible that when the Member States' respective protection mechanisms are further aligned or at least disclosed and standardised, a partial or full harmonisation instrument could be adopted on the EU level to create a coherent timeline regarding the administration of the different protection mechanisms among all the Member States.

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