STUDY ON THE APPLICATION OF THE CROSS-BORDER MERGERS DIRECTIVE

BECH-BRUUN

FOR THE DIRECTORATE GENERAL FOR THE INTERNAL MARKET AND SERVICES,
THE EUROPEAN UNION

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Letter to the Directorate General for the Internal Market and Services

Pursuant to the terms of the tender Markt/2012/031/F titled "Study on the Application of the Cross-Border Mergers Directive," I am pleased to submit the final report, which brings together the rigorous study we have conducted over the past six months on the implementation of the Cross-Border Mergers Directive (CBMD) in all EU and EEA Member States.

The research team was led by Bech-Bruun and Lexidale. Bech-Bruun is a prominent Scandinavian law firm with rich experience in mergers and acquisitions and a profound understanding of the European Union market. Lexidale is an international consultancy firm that operates a research network of expert lawyers, law firms, economists and scholars in all 31 EU/EEA Member States. Lexidale boasts extensive experience in multi-market analysis, policy research, and comparative regulatory research.

In order to provide the most comprehensive overview of the transposition of the Directive, we have employed a range of methodologies, including theoretical, legal, economic, quantitative, and qualitative research. The findings have undergone rigorous quality-assurance processes and were cross-checked based on various sources. The analysis was conducted by leading experts in the field and has been carefully and meticulously reviewed.

Our analysis shows unequivocal evidence that the CBMD has brought about a new age of cross-border mergers activity. Stakeholders across the continent have consistently reported their satisfaction with the CBMD and its transposition, and consider it to be a vital step in creating a more vibrant and robust market environment within the EU and EEA.

The study also provides insight into the main drivers for cross-border mergers and sheds light into the motivation to conduct them, as reported by stakeholders. Much of our approach in analyzing the data has been oriented toward pointing at areas for potential improvement, and we therefore devoted much attention to the problems the Member States and stakeholders have reported in connection with the application of the CBMD and the proposed means of solving or mitigating them.

I trust that this study would prove useful for future policy on cross-border mergers and that the implementation of its recommendation will further the goal of creating a strong and vibrant single market.

Yours respectfully,
Yonathan A. Arbel,
Research Team Manager

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Executive Summary

Disclaimer

The information and views set out in this study are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.

1. Executive Summary

It is widely established that "European company law is a cornerstone of the [European] internal market."[1] Until 2005, one crucial piece of this cornerstone had been missing: the possibility for limited liability companies to merge across borders within the geographical area of the European Union (EU) and the European Economic Area (EEA) on the basis of a clear, predictable, and structured framework. The creation of such a possibility is of crucial importance to the free flow of labor and capital across Member States and to the assurance of the strength of European financial markets.[2]

As early as 1984, the European Commission had started addressing this issue by adopting a proposal for a Directive on cross-border mergers.[3] However, this proposal encountered many obstacles and faced strong opposition on the grounds of employee protection—a central tenet of the values that the European Union protects[4]—and consequently, the proposal was not approved.

More than 30 years later, a solution was reached and on October 26, 2005, the Cross-Border Mergers Directive of Limited Liability Companies (CBMD) was adopted.[5] The CBMD created a procedure for cross-border mergers that was set to be transposed before the deadline of December 15, 2007. As part of the European Union's quality assurance mechanisms and regulatory oversight, Article 18 CBMD called for a review of the Directive five years after the final date of transposition "in light of the experience acquired in applying it."

On the basis of this provision, the European Union's Directorate General on Internal Markets and Services (DG) has commissioned a review with these five main objectives:

1. *To provide a description of the transposition of the Cross-Border Mergers Directive into the law of the EU and EEA Member States;*

2. *To describe the scope of the application of the national rules on cross-border mergers;*

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[1] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740 final.
[2] Communication of the Commission 'Financial Services: Implementing the Framework for Financial Markets: Action Plan' COM (1999).
[3] OJ C 23 25.1.1985, p. 11.
[4] Article 3 TEU. 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, p. 8
[5] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/ 1.

3. *To map, compile, analyze the cross-border mergers carried out under the scope of the Cross-Border Mergers Directive;*
4. *To identify (i) the reasons for using the Cross-Border Mergers Directive, (ii) its practical benefits, (iii) its impact on the cross-border mobility of European companies, (iv) the main problems related to the application of the Cross-Border Mergers Directive, and (v) potential gaps or inconsistencies in the European or national legislation that may reduce the attractiveness of cross-border mergers;*
5. *To provide a comparison of the rules on cross-border mergers and the application thereof across Member States and the EEA countries, based on the information gathered about the national legislation, the examination of cross-border mergers cases, information about national practices, and the input from stakeholders and the information mentioned in point 4.*

To conduct this study, the DG commissioned the services of Bech-Bruun, a prominent Scandinavian law firm with rich experience in mergers and acquisitions and a profound understanding of the European Union market, and Lexidale, an international consultancy firm that operates a research network of expert lawyers, law firms, economists, and scholars in all 31 EU/EEA Member States, and has extensive experience in multi-market analysis, policy research, and comparative regulatory research.

The Team consulted and benefited from the experience and knowledge of M&A lawyers and academics from every EU and EEA Member State. As stakeholder feedback was a major pillar of the study, The Team reached out to hundreds of legal advisors who have been involved in cross-border mergers, as well as other stakeholders, such as executives and employees.

Finally, The Team conducted interviews with public agencies and private entities involved in the cross-border mergers procedure, such as national registries, courts, governmental departments responsible for the transposition of the Directive, accountants, and tax advisors.

The main conclusions from the study concern the impact and efficacy of the Directive and the means of improving it. **First, there is strong and substantial evidence that the CBMD has brought about a new age of cross-border mergers activity. Stakeholders have consistently reported their satisfaction with the Directive and consider it to be an important step toward a more vibrant and robust market environment within the EU and EEA.** Second, the study identifies the main obstacles impeding the full operation of the Directive and outlines solutions. **The main obstacles concern under-harmonization of rules, the absence of clear**

standards on inter-agency communications and safeguards for stakeholders, the lack of certain fast-track procedures, and gaps and potential inconsistencies in the Directive. Proposed solutions for these obstacles and others revealed by the study are outlined in the report.

2. Impact of the Directive

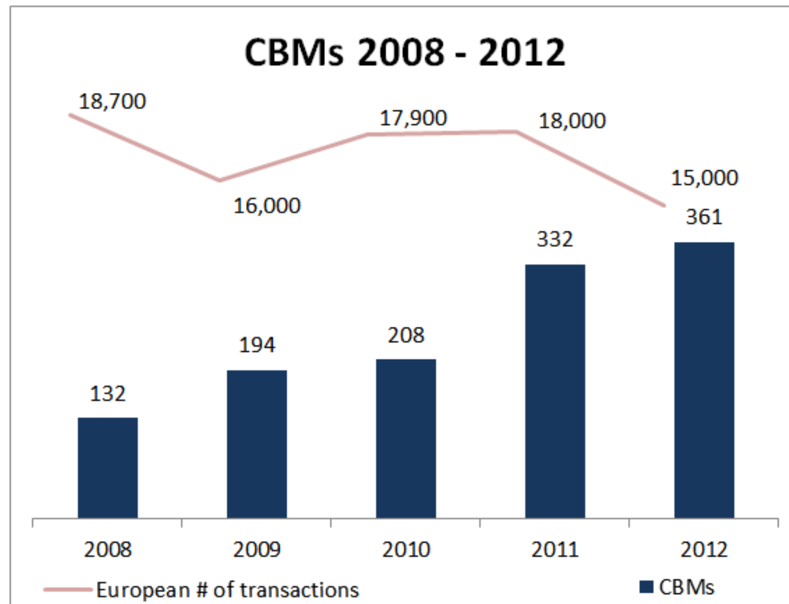
Based on the combined findings of this study, it is concluded that the Directive has ushered in a new age for cross-border mergers. The Directive has provided market participants with a clear and predictable framework for carrying out cross-border mergers within the EU and EEA, a framework that makes cross-border mergers a cost-effective, quick, predictable, and practical solution. Stakeholders are highly supportive of the new procedures set out by the Directive, applaud the simplicity of the general framework, and report lower costs and shorter timeframes.

The volume of cross-border mergers is also indicative of this conclusion. Between 2008 and 2012, **merger activity has increased by 173 percent,** from 132 CBMs in 2008 to 361 in 2012, **indicating that the new procedure has opened up a bottleneck in economic activity within the EU and EEA by improving cross-border mobility**.

Considering the rise in cross-border activity in the context of sluggish European growth following the global economic crisis, the rise in cross-border mergers activity is even more impressive. In the period of 2008 to 2013, the EU/EEA suffered from a downturn in growth as a result of the global economic crisis, which led to a general reduction in merger activity. Therefore, **when the volume of cross-border mergers activity is taken into account in the context of a prolonged economic downturn, the rise in said mergers activity is even more pronounced.** It is also important to remember that the CBMD faced a rather bumpy start in terms of its transposition. Only 16 Member States had transposed the CBMD into national law by the deadline of 2007. Ten Member States completed transposition in 2008, and 4 Member States only finished the process as late as 2009. These delays in transposition were accompanied by technical difficulties encountered by the national authorities, such that in certain Member States the first cross-border mergers were only made possible in 2012. **In conclusion, when considering the slow rate of transposition, the amount of post-2007 cross-border mergers activity is indicative of very strong reception by stakeholders.**

Figure 1 – The Number of Transactions in Europe Decreased between 2008 to 2012, while the Number of CBMs Increased

Mergers and cross-border mergers in EU and EEA from 2008 to 2012.

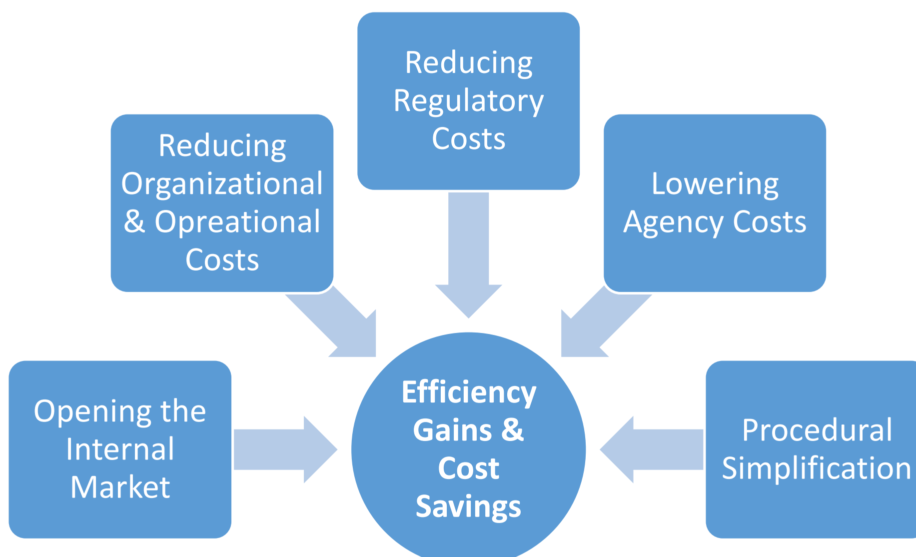


3. Main Benefits of the Directive

The Directive resulted in various important benefits and cost-saving effects. In the following we describe the main benefits, efficiency gains, and cost savings attributed to the Directive.

Figure 2 – Benefits and Cost Savings Resulting from the Directive

Cost savings through the Cross-Border Mergers Directive. Data: Lexidale.

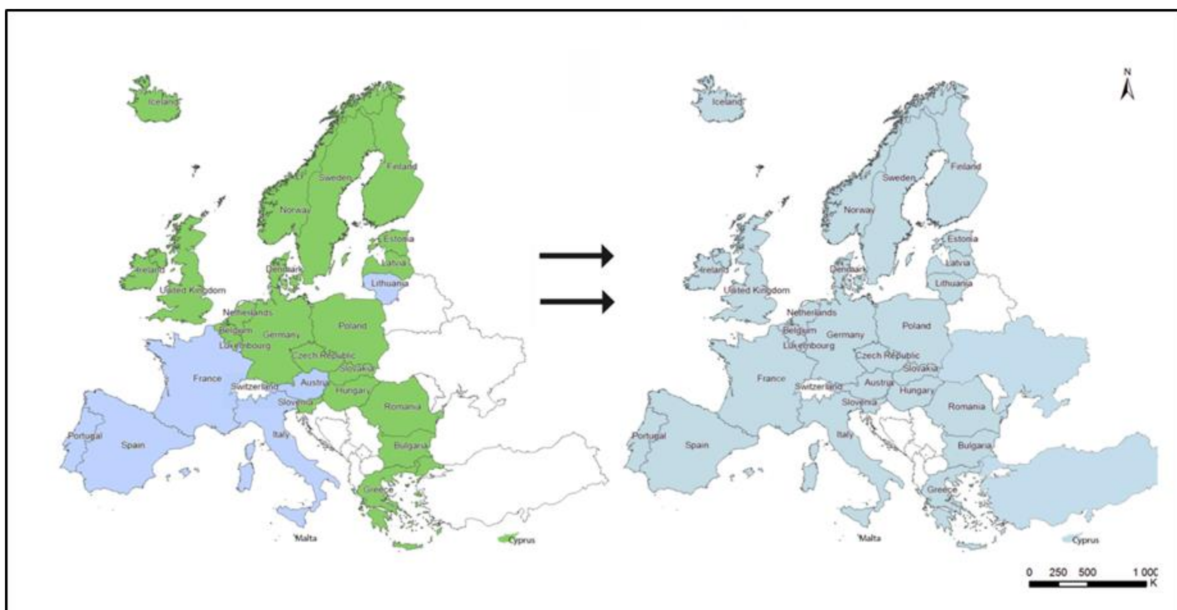


3.1. Opening the Internal Market

Before the transposition of the CBMD, only a few Member States enacted legislation dealing with the possibility of cross-border mergers or allowed such transactions without specific legislation. To effectively merge across borders, companies had to go through cumbersome processes fraught with uncertainty, costs, and delays. For example, in certain Member States companies were able to use cross-border seat transfers followed by subsequent domestic mergers; they could set up an SE through a cross-border merger; or, at a later date, they could have relied on a legal precedent set in 2005, which rendered cross-border mergers potentially permissible, albeit without defining any clear procedure for carrying them out. The options outlined above were deemed unfavorable by stakeholders as they were too costly, lengthy, or uncertain, and this frustration discouraged cross-border economic activity.

Figure 3 – The Directive Opened a Bottleneck and Made Cross-Border Mergers Possible Across All Member States

EU/EEA countries with procedures for cross-border mergers before and after the directive (blue=possible, green=impossible). Data: Lexidale.



The Directive has enabled large-scale cross-border mergers that have led to greater market integration.

3.2. Cutting Down on Operational and Organizational Costs

A group reorganization provides value to the companies involved in the form of cutting down on organizational and operational costs of separate entities. It also provides other strategic and business value brought about by the leaner operational model. For

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example, board meetings do not have to be convened for each single entity, and the control over such entities is stronger. A cross-border merger may be a form of corporate reorganization, whereby a subsidiary is turned into a foreign branch. In a cross-border reorganization, those savings are arguably greater than in a domestic reorganization due to the international dimension, which may introduce legal, business, and economic complications.

Based on the inventory of mergers created for this study, an emerging finding is that a large portion of the mergers that took place under CBMD were group reorganizations. This suggests a highly beneficial aspect of the Directive.

3.3. Reducing Regulatory Costs

Regulation is an important and inescapable aspect of the modern business environment. However, companies operating in more than one country may be subject to multiple regulatory reporting duties and other overlapping requirements that could be costly to implement and bring about little—if any—value to the public. In regards to these costs, an important benefit of the Directive is that it paved the way for companies to avoid excessive costs by merging across borders, thus reducing their regulatory obligations to one regulator, at least in some aspects of their operation. This has the added benefit that only one Member State, rather than two, needs to supervise those companies.

3.4. Reducing Agency Costs

The CBMD addresses conflicts that may arise between the various stakeholders (shareholders, creditors, employees) in a standardized way. This reduces the need for stakeholders to design specific conflict resolution mechanisms. Furthermore, the reporting duties that are required in the case of a proposed merger provide stakeholders with information that previously could only have been received through costly processes. The standardized solution reduces these expenses.

3.5. Procedural Simplification

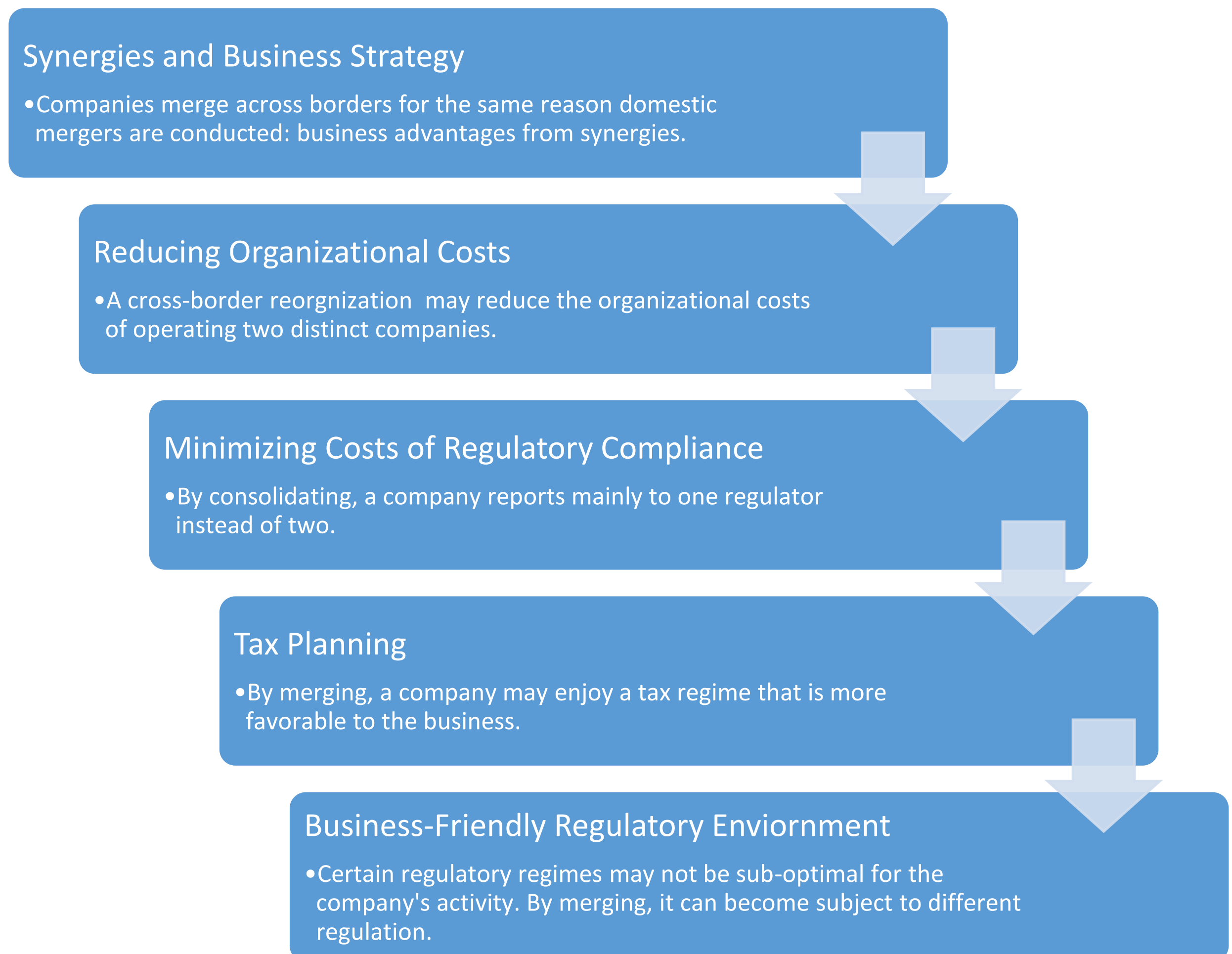
Prior to the transposition of the Directive, companies could merge across borders only through cumbersome, unreliable, or costly processes. For example, one could set up a European SE that would incorporate both companies, or carry out a cross-border seat transfer followed by a domestic merger. Such a process, however, was not clearly regulated, was costly in terms of setting up an SE, and added an artificial construct—the SE—which might not have been oriented with the business goals of the companies

involved. The Directive provides a simplified procedure, which saves on many of those costs.

4. Drivers of Cross-Border Mergers

To understand the main motivation behind cross-border mergers, dozens of interviews and consultations were made with stakeholders across all the Member States. The following figure identifies the five main drivers of cross-border mergers:

Figure 4 – Main Drivers of Cross-Border Mergers



5. Obstacles

The CBMD has been highly successful in facilitating cross-border mergers activity; nonetheless, our analysis shows that the cross-border mergers environment could potentially be further improved with the removal of several minor and major obstacles that were identified in this study. These obstacles can be classified in different categories:

5.1. Under-Harmonization of Rules

Even though the CBMD provides for a streamlined and structured procedure for all EU/EEA Member States, many aspects are not harmonized by the Directive. Member States have taken, in many of those cases, stances that are very different from one another. This creates delays in the merger procedure, for example due to different deadlines and waiting periods. In addition, it often leads to higher costs of legal consulting as a result of the complexity of the procedure, and in general might render cross-border mergers more difficult to conduct when conflicting provisions exist in the Member States of the merging companies. Such obstacles can particularly be observed with regard to creditor and minority shareholder protection, to accounting and valuation rules, and in general with respect to overall merger timelines in the Member States or other requirements set individually (such as the notarization of documents). Some stakeholders complain that these variations increase costs without conferring any substantial benefits, and desire a standardized process.

Proposed Solution:

The Team suggests one of three approaches to deal with these complexities: full harmonization, "fixed menu," or "open menu." Under full harmonization, the Directive would set a fixed rule for all involved Member States; this has the potential of solving the general problem of under-harmonization, but given basic differences in each Member State's legal framework is not necessarily feasible. As an alternative, we suggest a "fixed menu" approach, whereby the Directive would set a specific array of options—a menu—from which the Member State would be able to choose. Although this is the recommended approach, a third option, the "open menu", should also be considered, whereby countries would be able to mix and match from various arrangements set out in principal by the Directive. The Team recommends the "fixed menu" approach, because the accumulated experience allows one to understand the set of options the Member States are interested in and to provide for those options in a more standardized manner.

Additionally, we also consider and propose the creation of an online database that details the different rules applicable in the different Member States. Such a tool would allow companies and legal counselors to properly plan, in a cost-effective manner, future cross-border mergers.

5.2. Absence of Clear Standards on Inter-Agency Communications

One recurring obstacle is the fact that the national authorities to whom one needs to report under the Directive rarely have effective means and clear standards for communicating with their counterparts across the border. This creates some uncertainty among the stakeholders, who sometimes need to step in themselves and bridge over the gaps. This problem increases costs and uncertainty.

Proposed Solution:

Following Directive 2012/17/EU, we suggest the creation of clear standards on inter-agency communications. Such a standard would require, where possible, e-communications, use of EU standardized forms for notifications between the registries, the flexibility for companies to self-report and to confer translation responsibilities to companies, the determination of clear responsibilities as to the translation of documents, and the stipulation of a strict deadline for registries to notify their foreign counterparts. Moreover, we suggest that the national registries would have to publish the cross-border mergers in the *Official Journal of the European Union* in order to allow transparent traceability of this transaction.

5.3. Obstacles Pertaining to Safeguards for Stakeholders

A merger may change, hinder, or infringe on the rights of stakeholders, such as the creditors, employees, and minority shareholders. Members of those groups may require protection in the merger process, and the Directive set various mechanisms for this purpose.

These procedures, however, were heavily criticized by stakeholders. One focus of critique is Article 16 CBMD, which concerns the employee protection mechanism. Legal advisors interviewed state that the system is cumbersome, lengthy, and involves prohibitive costs. A certain law firm even reported that due to the issue of employee participation, a proposed cross-border merger was abandoned.

Naturally, this poses a significant problem, as a balance has to be struck between two objectives: high mobility for companies within the EU/EEA, and providing stakeholders with sufficient protection in the cross-border mergers transaction.

From The Team's perspective, both objectives are linked to the same goal: achieving economic growth and raising the overall welfare of the EU/EEA's citizens. Cross-border

mergers have an important function by decreasing the costs of business in the Member States. However, creditors or minority shareholders require protection against risks that can arise in cross-border mergers. If such protection is not provided, in the long run, this can lead to higher interest rates demanded by creditors or higher costs for the acquisition of external capital.

Furthermore, as regards employee protection, two aspects need to be taken into account: the European internal market is a social market economy, as enshrined in the Treaties (Article 3 TEU), and therefore involves not only economic but also social considerations when protecting stakeholders. Equally crucial is the procedure for the determination of employee participation under Article 16 CBMD, which has been a political compromise that, to a large extent, made the enactment of the CBMD possible.

Proposed Solutions:

Decision in favor of one interest or the other would obviously facilitate the process but in the Team's view, it would be unwarranted in light of the complex interests that are at the balance. Instead, the current arrangement could be improved by using the fixed menu approach, filling in gaps and clarifying certain provisions. One area of overly complex mechanisms is the creditor protection area, where Member States have adopted highly varied solutions. This variation is reflective of different and legitimate approaches to the proper extent of creditor protection. Nonetheless, within the groups of countries where either stronger or weaker protection is afforded, the internal differences seem to be of lesser overall importance. It may therefore be possible to create two sets of rules to which the Member States can subscribe, stronger or weaker protection, but that the arrangements in each group will be set by the Directive. This will allow the Member States to both have choice over the extent of protection they choose to accord and also reduce complexities and costs.

Other matters to address include the ambiguities in Article 16(2), as well as the issue of sanctions for non-compliance, which are not defined. Such gaps require clarification that would reduce the overall complexity of the system and therefore might allow better stakeholder protection at reduced costs.

5.4. A Need for a Fast Track

The Directive sets a simplified procedure for certain circumstances. However, there are other circumstances where meeting the requirements of the Directive is timely and

costly, while legal advisors argue that those do not create any actual benefits. For example, if there are no extra-group creditors involved in a cross-border merger, the waiting periods for the creditor protection are unnecessary. A second example pertains to the management report. Stakeholders noted that creating the management report when there are in fact no employees and the shareholders waive the requirement is an unnecessary expense.

Proposed Solution:

Under the circumstances described above, there is a need for a fast-track mechanism that would remove certain formal requirements that do not confer actual benefits. The admissibility of a fast-track mechanism would be self-assessed by the merging companies and checked by the national authority authorized to scrutinize the legality of the cross-border mergers.

5.5. Gaps and Potential Inconsistencies

The accumulated experience with the Directive has exposed certain gaps and inconsistencies. Some relate to aspects such as deadlines, which are set against the general meeting even under certain circumstances where a meeting does not have to take place.

In addition, some of the identified gaps refer to matters not clearly regulated under the Directive. For example, it is not clear whether the competent authorities who have to verify the legality of the cross-border mergers scrutinize only the company belonging to their jurisdiction, or all companies involved in the procedure. The consequence is that in practice, foreign companies are forced to comply with requirements that their own local legal framework does not impose. This might lead to a situation where it is impossible to meet all the relevant requirements, when the domestic requirements are incompatible with the foreign ones.

Another problem appears within the context of Article 16 CBMD, which regulates employee participation. Gaps exist within the procedure that may lead to uncertainty in its application. For instance, it is unclear whether the relevant organs of the merging companies may choose to apply the standard rules without prior negotiations (Article 16(4)(a) of the Directive), whether Article 16(2) consists of three exceptions or only two, and whether these have to be applied cumulatively or not.

Proposed Solution:

The gaps and inconsistencies described above require clarification. Some concrete suggestions are offered in the Main Findings Chapter.

5.6. Trends and Developments

The CBMD faced a rather bumpy start, with only 16 Member States transposing it by the 2007 deadline. Technical difficulties faced by national authorities prevented some Member States from being legally set up for cross-border mergers until as late as 2012. In addition, on June 5, 2008, the Commission decided to start infringement proceedings against 11 Member States that had not transposed the CBMD. This resulted in legal proceedings before the European Court of Justice against Belgium, Sweden, Greece, and Liechtenstein.

Today, our analysis indicates that most of the provisions were transposed in full. Additionally some of the provisions were gold-plated and expanded by the Member States.

The extent of the gold-plating can be explained by two factors. The first is that Member States have to adapt the framework of the CBMD to an existing legal system. This is, for example, the reason for the way the notarization of documents is undertaken in Austria and Germany. The second factor is the case-law of the Court of Justice of the European Union obliging Member States to enact further provisions in order to comply with its own case-law and higher-ranking internal market law, such as the freedom of establishment.

Particularly prominent among the gold-plating provisions are the types of companies that can engage in cross-border mergers and the type of mergers that can be carried out, with the most prevalent company type being partnerships (both limited and general). Such an expansion took place in eight countries.

Other areas of extensive gold-plating are restructuring and divisions. Despite a lack of a clear, harmonized stipulation on cross-border divisions, countries such as Belgium, the Czech Republic, Finland, France, Luxembourg, Romania, Spain, Iceland, and Norway decided to create mechanisms that allow for cross-border divisions (although not always under the auspices of the Directive).

Implications:

In light of those trends in transposition and gold-plating, The Team suggests the harmonization of cross-border divisions in the EU/EEA in order to further strengthen the internal market for European companies.

Glossary

2. Glossary

Acquired company	This is the company that ceases to exist and transfers its assets and liabilities to the acquiring company in a merger.
Acquiring (or resulting) company	In a merger, the acquiring company is the surviving entity that receives the assets and liabilities from the acquired company.
Agency costs	Costs that arise due to the diverging and potentially conflicting interests between different stakeholders of a company, such as creditors or shareholders.
Company conversion	A company transforms into a different company law type.
Company seat transfer	A company seat transfer can refer either to a transfer of the real seat or the registered office.
Connecting factor	The connecting factor is a conflict-of-law rule determining which law is applicable to a legal subject.
Corporate seat	The corporate seat can either refer to the real seat or the registered office of a company.
Court or Court of Justice	The Court of Justice of the European Union.
Cross-border company conversion	In this operation, a company transfers the connecting factors to its company law to a different country and by that converts into a foreign company law form.
Cross-border division	In a cross-border division, a company is split up in two or more separate legal entities, whereby the resulting entities will be incorporated in at least two different countries.
Cross-Border Merger Directive (also CBM Directive or 10th Company Law	Directive 2005/56/EC of the European Parliament and of the Council of 26

Directive)	October 2005 on cross-border mergers of limited liability companies.
Domestic Merger Directive	Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies. (Before 1 July 2011: Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) Treaty Concerning Mergers of Public Limited Liability Companies).
Employee participation	Refers to the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of: - the right to elect or appoint some of the members of the company's supervisory or administrative organ, or - the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ (see Article 2(k) SE Directive).
EU Tax Merger Directive	Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets, and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.
European Company (also SE or *Societas Europaea*)	The company law form regulated by Council Regulation (EC) No. 2157/2001 of

	8 October 2001 on the Statute for a European Company (SE).
European Cooperative Society (also SCE)	The company law form regulated by Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
'Ex-ante' group	The group of Member States where the date for creditor protection commences before the general meeting deciding on the merger proposal.
'Ex-post' group	The group of Member States where the date for creditor protection commences after the general meeting deciding on the merger proposal.
Gold-plating	"Gold-plating" refers to cases where Member States voluntarily set up an obligation that exceeds the minimum required by the Directive.
Group reorganization	The restructuring of legal or operational structures within a corporate group.
Improper transposition	Subtraction, divergence, or other modification of the obligations set out by the Directive.
Inbound merger	Cross-border merger from the perspective of a Member State. In an inbound merger, the surviving company is situated in this Member State.
Intra-group merger	A merger between companies belonging to the same corporate group.
Major obstacle	A difficulty that potentially hinders parties to carry out a cross-border merger.
Member State	This refers to the countries of the EU and the EEA.
Merger by acquisition	One or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to

	another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 percent of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares (Article 2(2)(a) CBMD).
Merger by formation of a new company	Two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 percent of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares (Article 2(2)(b) CBMD).
Minor obstacle	A difficulty that potentially does not hinder parties to carry out a cross-border merger but nevertheless poses an obstacle to the full effectiveness of the Directive.
Non-harmonized merger	This refers to a cross-border merger which is not carried out based on legislation but by referring to case-law of the Court of Justice of the European Union, arguing that based on such case-law, cross-border mergers have to be possible if national rules allow domestic mergers.

Optional provision	"Optional provisions" refer to those Articles in the Directive that are explicitly optional for Member States to either transpose or not.
Outbound merger	Cross-border merger from the perspective of a Member State. In an outbound merger, the surviving company is situated in a different Member State.
Principle of subsidiarity	In accordance with Article 5 TFEU, the principle of subsidiarity determines the competence of the EU and the national level to legislate in policy areas.
Real seat	The real seat is where the management of the company is situated or takes its essential decisions (this can vary from country to country).
Registered office	This is the address under which the company is registered at the Commercial Registry.
SE Directive	Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees.
Surviving company	In a merger, this is the company to which the assets and liabilities of the other merging companies are transferred.
Transposition	The transposition of a provision of European law, e.g., an Article of a Directive into national law.

Main Findings

Benefits, Obstacles, and Trends in the Application of the Cross-Borders Merger Directive

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3. Main Findings: Benefits, Obstacles, and Trends in the Application of the Cross-Border Mergers Directive

3.1 Methodology and Main Findings

This chapter analyses, from a comparative perspective, the main benefits, obstacles, and trends associated with the transposition of the Cross-Border Mergers Directive (CBMD) in all EU and EEA Member States. Other than a legal analysis of the different legal frameworks in the underlying Member States and its de-facto implementation, the findings are also based on empirical evidence, gathered by means of interviews and email correspondences with stakeholders.

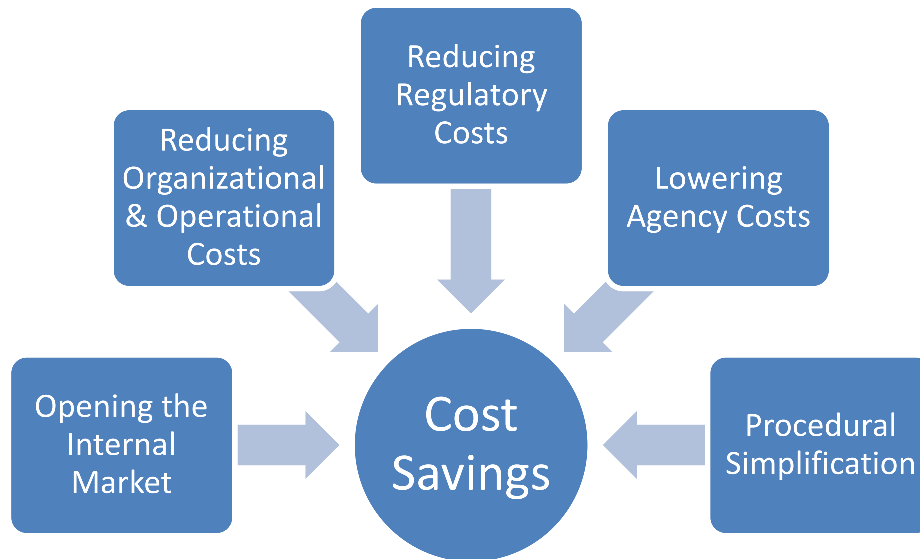
The study then draws main lessons from this rich body of experience, including the identification of the advantages, difficulties, and obstacles that affect the broader transposition and implementation of the Directive. The study also suggests solutions to those difficulties that, if implemented, will lead to greater inter-state mobility of companies and more vibrant economic activity in the EU/EEA.

According to our research and analysis, the main conclusion of the study is that the **Directive has ushered in a new era for the EU**, with the promotion of cross-border mergers increasing economic activity between Member States. The Directive is not only considered a **cornerstone for the mobility of companies** in the EU and EEA, but is also **highly welcomed and praised** by entrepreneurs, legal advisors, shareholders and other relevant stakeholders. **After the Directive was enacted, the number of cross-border mergers in the EU has increased**, counteracting a general trend of decreasing merger activity. Since December 15, 2007 to the end of December 2012, the number of accomplished cross-border mergers increased by 173 percent in total compared with the number of cross-border mergers in the first year under the Directive (or 35 percent on an annual basis).

The Directive promotes the efficiency and competitiveness of European companies by reducing the costs of organization across borders, removing obstacles to cross-border activity, lowering agency costs, reducing regulatory compliance costs, allowing companies to operate effectively across borders, and allowing for effective tax planning. All of these advantages enable companies to adapt their corporate structure to the challenges and conditions of a competitive environment in the European internal market. In addition, since increased merger activity oftentimes increases the capital of the companies, greater overall creditor protection may be achieved.

Figure 1 — Gains and Cost Savings Resulting from the Directive

Data: Lexidale.



The Directive has therefore reached its goal of deepening and supporting a competitive internal market by facilitating corporate restructuring and mobility for European industries, ranging from national powerhouses to small and medium-sized enterprises.

Notably, feedback received from various stakeholders has shown that there was also room for improvement, especially with respect to specific areas, and that certain difficulties impeded the full effectiveness of the Directive. **The main obstacles concern under-harmonization of rules, the absence of clear standards on inter-agency communications, safeguards for stakeholders, the lack of certain fast track procedures and potential inconsistencies and gaps in the Directive**

Some of the obstacles that were identified stem from improper or divergent transposition of the Directive in the various Member States. To understand which obstacles require Directive-level revision and which should be addressed at the Member State-level, we examined the legal transposition of the Directive in the various Member States and identified key areas where Member States have domestic provisions that diverged from the provisions of the Directive.

An important finding of this study is that oftentimes Member States have expanded the scope of the Directive into new areas (a procedure known as "gold-plating"). For example, Nearly one-quarter of all Member States have expanded the scope of the Directive so that it would apply to additional company forms than set by the Directive. Similarly, the trend of expansion can also be found in terms of restructuring

possibilities that Member States allow on a cross-border basis, such as cross-border divisions. Those trends are in line with judgments of the Court of Justice of the European Union pronounced after the enactment of the Directive.

Based on responses from stakeholders and The Team's analysis, recommendations are provided below to solve the underlying obstacles or difficulties.

The following tables summarize the main benefits, difficulties, and solutions proposed.

Table 1: Gains and Cost Savings Resulting from the Directive

Data: Lexidale.

Effect of the Directive	Impact on Costs, Examples
Opening the internal market	Greater mobility of companies across borders
	Allowing strategic business decisions
Reducing regulatory compliance costs	Allowing companies to report to fewer regulators
Decreasing organizational and operational costs	Through cross-border reorganizations, companies can save considerable expenses related to operation, management, and supervision
Increasing company's capital	Greater merger activity can increase each individual company's capital, which benefits potential creditors
Reduction in agency costs	Standardized information requirements in the common draft terms of the merger or management report reduce the need for alternative monitoring investments
Procedural simplification (compared with pre-existing merging procedures)	The resulting company is not required to be an SE, thus avoiding costs of becoming public when unwanted
	Reduction in number of formal actions needed for merger (compared with using seat transfer for merging)

Table 2: Practical Difficulties and Trends Related to Provisions in the Directive

Data: Lexidale.

♦ = major obstacle; ♦ = minor obstacle

Article, Title	Sub-Section, Issue	Practical Difficulty and Trends	Optional Recommendation
Article 1: Scope		♦ Companies have to fulfil cumulative criteria: they must have been formed in accordance with the law of a Member State, and have the company's registered office, central administration, or principal place of business within the EU/EEA (p. 64).	Feedback suggests that the Directive should also apply to companies that have not been formed in the EU/EEA but have converted into an EU/EEA company law form (p. 64).
Article 2: Definitions		In accordance with case-law of the CJEU (*SEVIC*, *Cartesio*, *Vale*), Member States have expanded the type of companies that can profit from the CBMD provisions (p. 78).	Current scope is considered to be sufficient (p. 80).
Article 3: Further provisions concerning the scope		No difficulty reported.	N/A.
Article 4: Conditions relating to cross-border mergers	Article 4(1): Cross-border merger are only applicable to companies that can merge under national law.	♦ Reports of difficulties when merging private and public companies in certain Member States due to Article 4(1) allowing Member States to choose what types of companies could merge with each other (p. 59).	Consider allowing mergers between different company types in general (p. 60).
		♦ This provision needs to be clarified as to whether companies have to be able to merge under the law of all involved Member States (p. 59).	Consider providing clarification, potentially referring to either the acquirer Member State's laws or the acquired Member State's laws (p. 60).

Article, Title	Sub-Section, Issue	Practical Difficulty and Trends	Optional Recommendation
	Article 4 (2): Creditor protection	♦ **Date:** This Article can be activated both before and after the shareholder meeting, which might lead to a situation where both periods do not run simultaneously but have to be added up (p. 32).	Feedback suggests a need for harmonization (p. 37).
		♦ **Duration**: Varies between 1 month (the Netherlands), 6 months (Czech Republic), and no specific date (Lithuania) (p. 33).	
		♦ **Consequences:** In some Member States the protection might block the merger or might lead to considerable delay (p. 34).	
		♦ **Procedure:** Varies between Member States, from creditor meetings, through asking for guarantees, to separate management of assets and liabilities (p. 35).	
	Article 4 (2): Minority shareholders	♦ **Date:** The date when the protection commences may vary (p. 47). ♦ **Duration**: The duration of the may vary (p. 47).	Consider harmonization (p. 48).
	Article 4: Holders of other rights	No difficulty reported.	N/A.

Article, Title	Sub-Section, Issue	Practical Difficulty and Trends	Optional Recommendation
	Article 4: National authorities	No difficulty reported.	N/A.
Article 5: CDTMs	Article 5(f)	♦ Difficulties with the differences in the decisive date for accounting purposes (p. 43).	Consider prescribing a specific date (p.45).
Article 6: Publication		♦ Date of reference is set against the general meeting. If exceptions apply, a general meeting is not necessary and it is therefore not clear how the deadline is set (p. 65).	In case a general meeting does not have to take place, a different date needs to be set (p. 65).
Article 7: Management report		♦ Deadline set against the general meeting (p. 65). ♦ Differences in the length of the board reports (p. 57). ♦ Not necessary in cases where companies do not have employees and the shareholders unanimously waive it (p. 64).	In case a general meeting does not have to take place, a different date needs to be set (p. 65). Creation of a "fast-track" option: waive the report if there are no employees and the shareholders unanimously waive it (p. 65).
Article 8: Independent experts		♦ Date set against the general meeting (p. 65).	In case a general meeting does not have to take place, feedback suggests a different date needs to be set (p. 65).
Article 9: General meeting	Article 9(3)	♦ It is unclear whether a different approval or other formality is required when the exception applies (p. 66).	Consider providing a clarification (p. 66).
Article 10: Pre-merger		♦ Differences in the competent authorities (p. 61):	Stakeholders propose that judges should only deal with the complex

Article, Title	Sub-Section, Issue	Practical Difficulty and Trends	Optional Recommendation
certificate		- Notaries are reported to be quicker and cheaper - Unclear which authority is competent in different Member States ♦ Competent authorities are reported to verify whether all companies involved in a CBMD comply with the legal regime of this Member State (p. 61).	cases (p. 63). Consider compiling a database with information on the competent authority (p. 63). Stakeholders suggest a parallel track procedure where each authority only reviews whether the company belonging to its jurisdiction has complied with all rules and formalities (p. 63).
Article 11: Legality		♦ Inconsistency between Articles 9 and 11 when approval by shareholders is not required (p. 66). ♦ See in addition the problems related to Article 10 (p. 61).	Possible clarification of the consequence if approval by shareholders is not required. See optional solutions proposed for Article 11 (p. 63).
Article 12: Entry into effect		No difficulty reported.	N/A.
Article 13: Registration		♦ No clear and standardized system for the communication between registries (p. 39).	Feedback suggests a standardized system with clear deadlines that addresses language barriers (p. 41).
Article 14: Consequences		♦ In certain Member States (e.g., the United Kingdom), it is not clear whether the merger is binding on third-parties (p. 46).	Consider providing a clarification (p. 47).
Article 15:	Article 15 (1)	♦ If the exception applies, it is	Consider providing a

Article, Title	Sub-Section, Issue	Practical Difficulty and Trends	Optional Recommendation
Simplified procedure		unclear whether different approval or formalization is necessary (p. 66).	clarification (p. 66).
Article 16: Employee participation	General	♦ Stakeholders report that this procedure is too complex, takes too much time, and is too costly (p. 49).	A more streamlined procedure is suggested (p. 54).
		♦ Unclear situation as to sanctions for non-conformity with the rules on employee participation (p. 49).	Consider including similar provision as Article 12 SE Directive (p. 54).
		♦ No inclusion of rules on information and consultation duties (p. 49).	Consider including provisions to this end (p. 54).
	Article 16(2)	♦ It is not clear whether the exceptions of Article 16(2) have to be applied cumulatively (p. 49).	Consider clarification (p.54).
		♦ Article 16(2)(b) leaves open an ambiguity as to whether a deviation from the rule set out in Article 16(1) CBMD is only possible where employees are subject to an employee participation regime at the time when the cross-border merger becomes effective (p. 49).	Consider clarification (p.54).
	Article 16(4)(a)	♦ Unclear whether the relevant organs of the merging companies may choose to apply the standard rules without prior negotiations (p. 49).	Consider clarification (p. 54).

Table 3: Practical Difficulties Related to Areas Outside of the Directive

Data: Lexidale.

♦ = major obstacle; ♦ = minor obstacle

Topic	Practical Difficulty and Trends	Optional Recommendation
Accounting	♦ Differences in the decisive date among Member States may lead to difficulties in carrying out cross-border mergers from an accounting perspective (p. 43).	A possible solution is setting the same date for all Member States, or allowing companies to adapt the date (p.45).
Valuation	♦ Differences in the valuation of assets and liabilities (fair vs. book value methods) may cause difficulties in carrying out the cross-border merger unless the acquiring company issues new shares (p.45).	It is suggested that Member States would allow companies to choose whether they take over assets at book or fair value (p.46).
Timelines	♦ Differences in the timelines lead to major complexities and delays in the merger process (p. 55).	Consider a harmonized timeline or let the timeline of the acquirer's company dominate (p. 56).
Tax rules	♦ Remaining difficulties with exit taxation (p. 59).	Consider removing tax obstacles (p.59).
Cross-border seat transfers	♦ Difficulties with carrying out cross-border seat transfers via the Directive (p. 60).	Having a separate Directive on cross-border seat transfers (p. 61).
Cross-border divisions (and other cross-border restructurings)	In accordance with the case-law of the CJEU, some Member States have expanded the scope of cross-border restructurings. This particularly concerns cross-border divisions. There is no other European-level legal instrument	Consider inclusion of cross-border divisions in the Directive or regulate this matter in a new Directive (p. 84). Alternatively, consider

Topic	Practical Difficulty and Trends	Optional Recommendation
	allowing cross-border divisions—rendering this form of restructuring almost impossible in the EU/EEA (p. 81).	enacting one general Directive on cross-border restructurings covering mergers, divisions, asset transfers, and seat transfers (p. 84).

3.2 Main Benefits of the Directive

3.2.1 A New Era for Cross-Border Merger Transactions in the EU/EEA

Feedback from stakeholders, data on merger activity, and legal-regulatory findings show that **the Directive has had a profound impact on the cross-border merger activity between Member States**. **Stakeholders are highly supportive of the new procedure set out by the Directive, applaud its simplified procedure and general framework, and report lower costs and shorter times relative to pre-Directive cross-border merger procedures. Merger activity has increased by 173 percent between 2008 and 2012, indicating that the new procedure has opened a bottleneck and dramatically improved cross-border economic activity.**

Prior to the enactment of the Directive, three main methods for cross-border mergers existed: European company (SE) formation, seat transfer, and a non-harmonized merger. Cross-border mergers through the formation of an SE make use of the European company form.[1] This option, however, is not regarded favourably because it requires the resulting company to be an SE, which is often viewed as cumbersome. Under the second option- a seat transfer- one first transfers the seat and then merges under domestic merger laws. Apart from being complex, however, this procedure can only be used between certain Member States (e.g., Greece, Cyprus, Malta, Italy, and France)[2] because it is only available when national legislation allows cross-border seat transfers. Interestingly, the Supreme Court specifically ruled that cross-border seat transfers were permissible, and the procedure was carried out by the biggest bank in Greece in order to absorb a foreign subsidiary in France. According to the third option, it is possible to carry out a "non-harmonized" cross-border merger based on the case-law of the Court of Justice of the European Union (*SEVIC*[3]). Yet, this option only

[1] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), [2001] OJ L 294/1. The same is also possible for cooperatives by setting up a European cooperative society.
[2] Following the CJEU Case C-378/10 *VALE Építési kft,* 12 July 2012, not yet reported, it is possible to argue that all Member States must allow cross-border seat transfers under certain circumstances. Yet seat transfers on the basis of EU case-law involve a lot of uncertainty, a risk that legal advisors will not take for bigger companies.
[3] Case C-411/03 *SEVIC* [2005] ECR I-10825.

became available on 2005 and there is a great deal of uncertainty concerning it. Legal advisors have used this mechanism for holding companies or shell companies, but refrain from using it for more complex transactions.

The complexity of these methods has therefore rendered cross-border mergers costly and often outright impossible. A Romanian stakeholder stated:

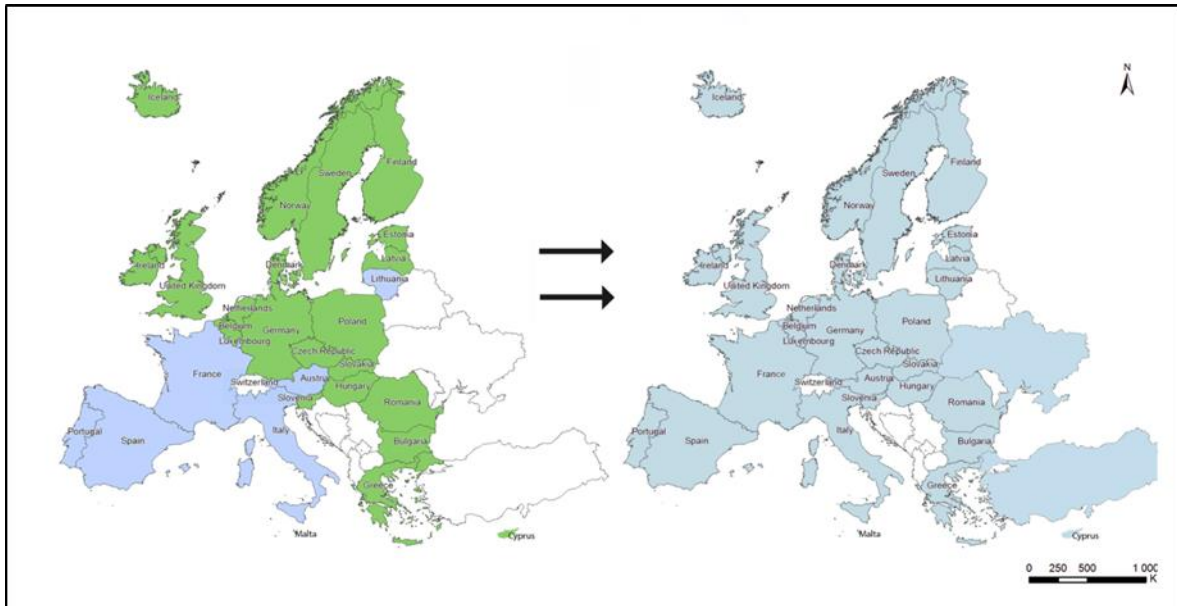
> *"The Directive has clarified the availability of, and has provided the framework for, the cross-border merger. Before the implementation of the Directive under Romanian law, we have been involved in an operation aimed to achieve effects similar to a cross-border merger, which has taken two years to study, approve and prepare for implementation."*

Before the promulgation of the Directive, only Austria, France, Italy, Lithuania, Luxembourg, Portugal, and Spain allowed cross-border mergers without using methods such as setting up an SE. With the promulgation of the Directive and its transposition by the Member States, a new legal channel has opened. In that regard it should also be noted that part of the success is also due to the Tax Merger Directive, which solved main obstacles to cross-border mergers within the area of tax law.[4]

[4] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, [2009] OJ L 310/34.

Figure 2 – The Directive Opened a Bottleneck and Made Cross-Border Mergers Possible Across All Member States

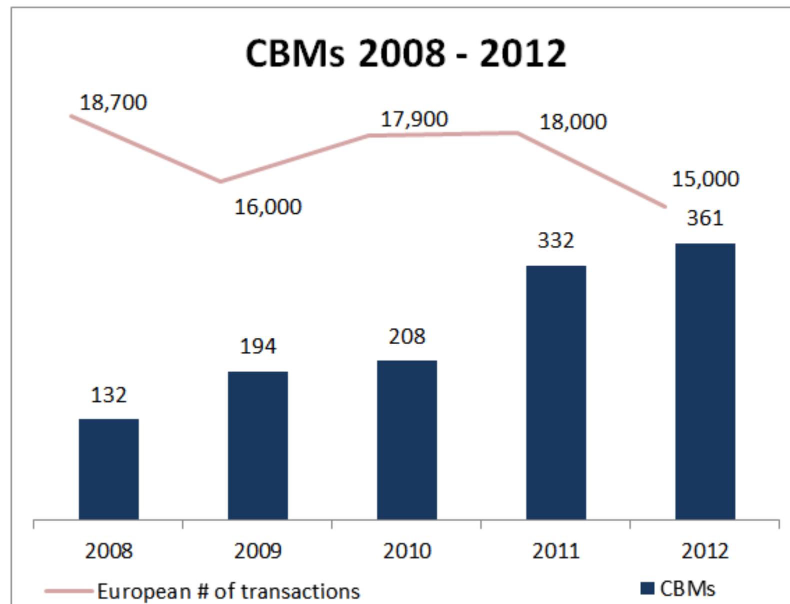
EU/EEA countries with procedures for cross-border mergers before and after the Directive (green=impossible, blue=possible). Data: Lexidale.



The new procedure has been highly successful. Analysing the number of cross-border mergers indicates that there has been a major increase in the number of said mergers between the end of 2007 and 2012. The annual number of cross-border mergers increased from only 132 in 2008 to 361 in 2012. This implies an increase of 173 percent within the time range, with an average annual increase of 35 percent. This strongly suggests that the Directive has been extremely effective in promoting economic activity across Member States, as was also confirmed by legal advisors who reported a steep increase in cross-border merger activity since the transposition of the CBMD in the legislation of the Member States. Said increase in cross-border mergers activity is even more dramatic when comparing to the trend of general mergers in the EU, which has significantly decreased from 2008 to 2012.

Figure 3 – The Number of General Transactions in Europe Decreased from 2008 to 2012, While the Number of CBMs Increased

Mergers and cross-border mergers in EU and EEA from 2008 to 2012. Data: Lexidale, Thompson Financial, Institute of Mergers, IMMA.



3.2.2 More Effective Cross-Border Merger Legislation

The Directive has not only rendered cross-border mergers possible in various Member States, but it also created improvements over pre-existing procedures. Even where cross-border mergers were possible under national law, it was not necessarily practical to do so, and in this regard the Directive has brought about an important change and improvement over previous arrangements. In Austria, for example, it has been reported that CBMs have been possible to some extent on the basis of the *Umwandlungsgesetz* and by referring to the freedom of establishment in Article 49 TFEU; Such a procedure, however, was considered impractical, and the only procedure applied in practice is the new underlying procedure.[5]

Another example could be found in Luxembourg, where cross-border mergers took place despite the absence of an explicit procedure set out by law. Nonetheless, those transactions encountered several practical difficulties and were imbued with uncertainty to an extent that hindered their usage considerably.

3.2.2.1 Harmonization of Conflicting Laws

The existence of domestic rules on cross-border mergers prior to the enactment of the Directive was, in many cases, problematic in itself. When companies from two countries where domestic rules allowed for cross-border mergers wished to merge, complicated questions of conflict of laws had to be resolved. Sometimes, those conflicts were resolved by treating each company differently (e.g., different rules for

[5] C. Mader, 'Die grenzuberschreitende Verschmelzung am Beispiel Deutschland – Osterreich', *RWZ 4/2001*, www.rwz.lexisnexis.at (last visited 8 August 2013).

the two companies for different aspects of the merger); other times, both companies adhered to the law of one State, but only after costly resolution of the conflict of law issues. In addition, post-merger challenges also led to sub-optimal results, as there was uncertainty concerning the effects of the mergers. Those difficulties had been resolved by the CBMD.[6] Conflict-of-law rules were provided and the consequences of a cross-border merger have been stipulated in Article 14 CBMD, according to which all assets and liabilities of the merging company are transferred to the resulting company; the shareholders of the merging company become shareholders of the company resulting from the merger; and the disappearing company will be dissolved without liquidation.

3.2.2.2 Overcoming Stalemates Caused by Shareholder Unanimity Requirements

Before Luxembourg had transposed the CBMD, it was necessary to have the unanimous consent of the shareholders of the absorbed company to approve a cross-border merger, since they were subject to a change of law (as was the case in France as well)[7]. This was considered to be a fundamental change and therefore required approval by each shareholder. Due to this requirement, it was reported that cross-border mergers were rare and limited to intra-group mergers where the condition of unanimity was easier to fulfil.

Since the transposition of the Directive into Luxembourgish law, a two-thirds majority of shareholder votes is sufficient.[8] It was reported that this, for the first time, made several cross-border mergers possible.

3.2.2.3 Enhancing Protection for Creditors and Minority Shareholders

Creditors and minority shareholders protection is needed as a merger may derogate from the financial stability of the resulting company if, for example, the other company has debts of its own.

Pre-existing arrangements for cross-border mergers did not always properly protect the rights of minority shareholders and creditors. Such was the case, for example, in Luxembourg.

This was changed by the CBMD, which accorded protection to the various stakeholders. One important area of protection is the creation of information requirements, which provide minority shareholders with relevant information

[6] At least to a large extent; See the section on obstacles.
[7] J.-M. Moulin, 'Fusion, scission et apport partiel d'actif', Dalloz 6, Répertoire de droit des sociétés.
[8] Article 263 of the Luxembourg Company Act; However, unanimous consent is still necessary if the partners of the acquiring company or company being acquired bear unlimited liability for the debts of the partnership.

regarding the proposed merger. Member States can also expand protection further by providing for withdrawal rights or other similar rights.

Important provisions in this context are the CDTMs, for which the Directive established minimum criteria in terms of the content of the draft terms and established the rule that these terms have to be approved at the general meeting of the companies involved (Articles 5 and 9 CBMD). These draft terms, the completion of the merger, the creditors' rights, and the location where further information can be found must all be published (Article 6 CBMD).

3.2.2.4 A Simplified Procedure

The simplified procedure was specifically noted as an important tool. To use the simplified procedure, the resulting company must hold all shares and other securities entitled to vote at the general meeting of the merging companies (Article 15(1) CBMD).

If the simplified procedure applies, a number of provisions concerning the protection of minority shareholders will not be invoked, due to the reason that all shares and other voting securities are already held by the acquiring company, and no shares will be issued in exchange for the transfer of the subsidiary's assets and liabilities.

3.2.3 Efficiency Gains through Group Reorganization

According to stakeholders and our analysis, another major advantage is that the Directive provides a simple and cost-effective way to carry out group reorganizations. Group reorganization is the process of restructuring the internal division of companies within one large group of companies. Before the Directive was enacted, this was difficult to achieve because subsidiaries in different Member States could not merge with each other or with the holding company, thus leading to corporate inefficiencies; today, as a consequence of the Directive, these problems are mitigated.

Based on our analysis of the materials and interviews with stakeholders,[9] we have identified savings in the following areas, which were raised as a consequence of the Directive:

a) Saving organizational costs

Operating a branch is considered to be less expensive and complicated than running an independent company. An example given is the requirement to convene and arrange board meetings in legal entities or the duplication of bodies required by law.

[9] The following factors have been based on several interviews and the practitioners article from the Baltic law office Sorainen by A. Peksys, K. Madisson, R. Agur, 'Efficiency and cost-saving through cross-border mergers' (2009), http://www.sorainen.com/en/Publications/legal-blogs/198/efficiency-and-cost-saving-through-cross-border-mergers (last visited 8 August 2013).

b) Decision-making by the parent company

Parent companies might actively want to set the decisions and transactions made by the subsidiaries. This, however, might conflict with local legal requirements, such as the number of management bodies, membership, work procedure, and liability. Subsidiaries must act in their best interest, which can diverge from that of the company. Based on a branch structure, where the parent company is liable for the branches, it may exercise more influence and better protect its creditors.

c) Saving regulatory costs

The matter of saving regulatory costs concerns companies that are subject to supervisory authorities, such as insurance companies. By merging the companies in the Baltics, insurance companies reduced the number of financial supervisory authorities to which they had to report. As a result of such mergers, the licensing requirements had to be fulfilled in one country only, saving large supervisory fees that had to be paid in each country.

d) Reducing capital maintenance costs

If subsidiaries are turned into branches, capital maintenance costs can be reduced since branches are not required to keep share capital, reserve capital, and net assets level. As reported by stakeholders, this is particularly the case for companies under financial supervision where capital maintenance is substantially higher. After a merger is carried out, these capital maintenance requirements will only apply to the successor company and not to each company separately.

e) Other costs

Other costs that can be reduced relate to intragroup transactions, administrative costs related to drafting, filing of reports to authorities, and providing clients with simpler and faster service. As regards intragroup transactions, if a parent extends a loan to a subsidiary, this is subject to interest rates because the transaction has to be made in a reasonable commercial setting. From a tax perspective, it can happen that the interest rate is not deductible for tax purposes based on thin capitalization rules, and moreover the parent company might have to pay profit taxes on the interests received from the subsidiary. By turning the subsidiaries into branches, such costs can be avoided. In addition, other payments between the subsidiary and the parent company can trigger negative withholding taxes and VAT consequences. Through internal contracts with a branch, such costs can be minimized, e.g., VAT will not be applicable.

The Baltic market can serve as an example to illustrate the point about group reorganization. In this market, many internationally operating companies operated on

the basis of subsidiaries that had been set up in each of the countries. This was not perceived to be effective because the Baltic market was treated by such group companies as one, and for planning purposes, the subsidiaries in each country were seen as one entity. The subsidiaries were then merged as soon as this was possible under the CBMD.

Cross-border mergers that have been carried out for this reason on the Baltic market include Elektroskandia. This company, part of the leading global electrical supplies distributor Rexel Group, has carried out a cross-border merger of its Baltic operations into an Estonian corporation. Elektroskandia Baltics is now registered in Estonia and will continue to operate branches in Latvia and Lithuania. Other examples involve the insurance companies ERGO and If P&C Insurance, or the three separate legal entities—Sia Grundfos Pumps Baltic in Latvia, Grundfos Pumps Eesti OÜ in Estonia, and Grundfos Pumps UAB in Lithuania—being merged together into Sia Grundfos Pumps Baltic in Latvia.

A final example is a Romanian life insurance company. In 2012, Aegon Asigurari de Viata SA, a Romanian life insurance company, was absorbed by Aegon TUnZ, a joint-stock company registered in Poland and part of the Aegon group. The merger was in accordance with the long-term strategy of the Aegon group for Central and Eastern Europe. The purpose of the merger was to increase the operational efficiency and improve services to customers.

3.2.4 Special Advantages for the Banking Sector

Another advantage is identified in the banking sector, where we identified a trend of turning subsidiaries into branches. Some of the advantages noted in this regard are:[10]

a) No authorization requirements

Due to the “Single European Passport” for the banking industry, credit institutions authorized in their home Member State by a competent authority can engage through branches in commercial activities in other Member States without having to receive authorization there.

b) Reducing capital and prudential oversight requirements

If a branch structure is implemented, the company will only have to comply with the capital requirements in its home Member State, and supervision will be conducted by the competent authority of that country. Branches will not have to comply with capital requirements.

[10] This section is based, among others, on the practitioner’s article by A. Munteanu, ‘Romania: Particularities of Cross-Border Restructuring – Practical Highlights’, http://roadmap2013.schoenherr.eu/particularities-of-cross-border-restructuring/ (last visited 8 August 2013).

Yet, it needs to be stated that even though the general supervision is conducted by the authority of the home Member State of the credit institution, the competent authorities of other Member States still have limited supervisory powers, e.g., regarding liquidity requirements and monetary policy.

Various stakeholders noted this effect on the banking system. A Romanian stakeholder stated:

> *"Following the implementation into the Romanian Companies Act of Directive 2005/56/EC on cross-border mergers,* ***several premier international institutions have tackled*** *(in line with corporate restructurings trends in Eastern Europe)* ***the possibility of converting their Romanian banking subsidiaries into branches of the parent institutions by taking advantage of the EU cross-border merger regime.****"*[11] *(italics added)*

Deutsche Bank, the biggest German credit institution, has used the Directive to convert its Portuguese and Hungarian subsidiaries into branches of the German parent company. An involved lawyer in this deal stated:

> *"The merger filings are a sign of progress towards a united states of Europe […] There may have been similar situations between a Delaware company and a Californian company, but this is the first evidence that it's possible between a Portuguese and a German company, operating as banks."*[12]

Two different examples involve Romanian companies. The first one concerns Citibank Romania. Formally a subsidiary of Citibank US, the company became a branch of Citibank Europe in 2009, as a limited liability company registered in Ireland. Based on this change, the new branch came under the supervision of the Central Bank of Ireland. The Romanian Central Bank also has certain limited supervisory powers over the branch, in compliance with the laws of the EU, Ireland, and Romania. The overall cross-border merger included Citibank Europe, Citibank Hungary, Citibank Slovakia, and Citibank Romania.

The second example is RBS Bank Romania. In 2013, RBS Bank (Romania) was absorbed by Royal Bank of Scotland Plc, a public limited company established under the laws of Scotland. The purpose of the cross-border merger was that, following the completion of the merger, RBS Plc would continue the activities that were transferred through its branch, provided that certain activities might be sold or wound-down.

[11] A. Munteanu, 'Romania: Particularities of Cross-Border Restructuring – Practical Highlights'. See G. Verriale, 'Deutsche mergers create pan-European bank model', IFLR (2011), http://www.iflr.com/Article/2949385/Deutsche-mergers-create-pan-European-bank-model.html (last accessed 8 August 2013).

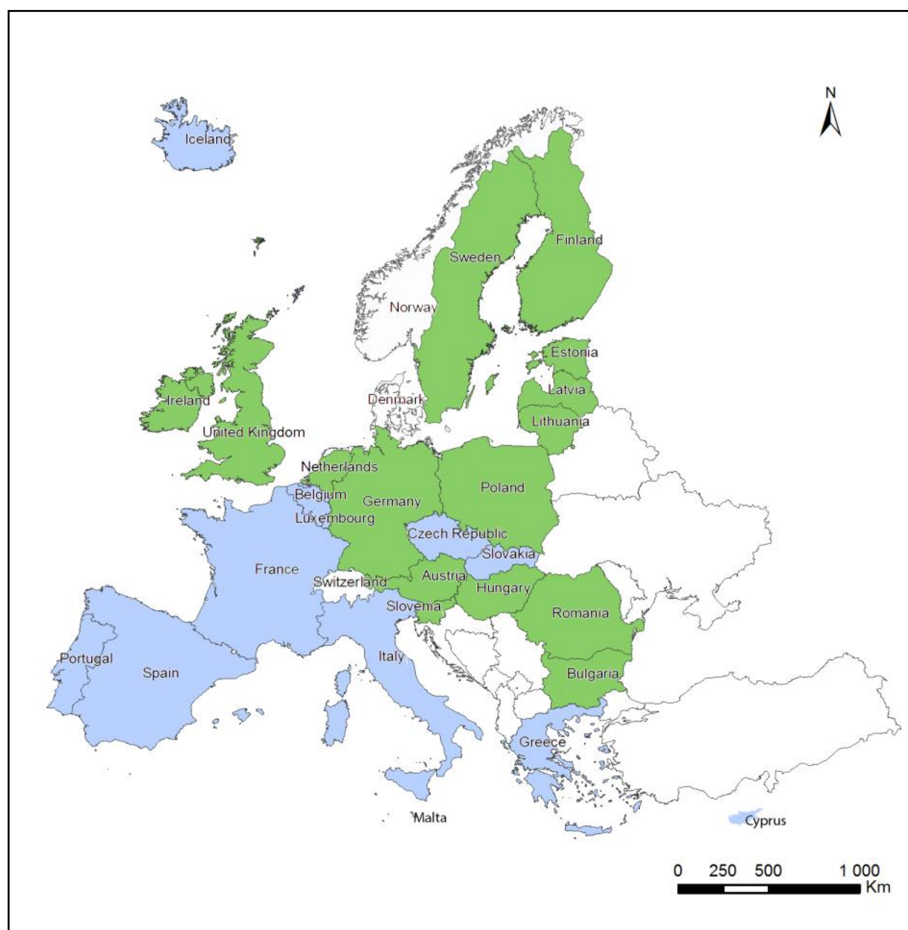
[12] Pedro Cassiano Santos of Portuguese firm Vieira de Almeidaz.

3.2.5 Facilitating Cross-Border Company Seat Transfers

An advantage of the Directive mentioned by some of the stakeholders is the possibility to carry out cross-border seat transfers. A seat transfer is defined as a transfer of the registered office. Stakeholders reported that many disadvantages for seat transfers existed under alternative, pre-existing legal regimes, and that the Directive has brought about a significant solution in this regard. Said difficulties with alternative arrangements include the following: First, the possibility of carrying out a seat transfer through national legislation is only available in certain Member States (as Figure 4 shows). In major countries like the United Kingdom or Germany, national legislation does not allow the transfer of the registered office. A further problem is that no common standards exist for cross-border transfers of the registered office among the countries allowing them, rendering the process very cumbersome.

Figure 4 – Only certain Member States Enacted Laws Governing Transfers of the Registered Office

EU/EEA countries where cross-border transfers of the registered office are possible by national legislation (blue=possible, green=not possible) Data: Lexidale.



As described above, a second option to carry out a cross-border seat transfer is to convert the company into an SE and to transfer the registered office subsequently, because this is possible under the SE Regulation. However, as stakeholders state, the

main disadvantage is that in order to do so, companies have to convert into an SE, an option that is not available for smaller companies. Moreover, the SE Regulation requires that the head office and the registered office are always located within the same Member State.[13]

As noted above, a third possibility is to carry out a "non-harmonized" cross-border seat transfer based on the case-law of the Court of Justice of the European Union (*Cartesio* and *Vale*). Based on both cases, it is possible to argue that Member States must allow such seat transfers if the company accepts to do so in accordance with the connecting factors of the involved Member States. As with "non-harmonized" cross-border mergers, the problem is the legal uncertainty involved. "Non-harmonized" cross-border seat transfers lack a clear procedure on the basis of how they are carried out. As a stakeholder stated, it is particularly difficult if the company transferring its seat is not a shell company. In his view, such a seat transfer could be challenged and notaries might be liable in the end for advancing it.

In light of these disadvantages, it is not surprising that the Directive has been endorsed by stakeholders as an effective means of implementing seat transfers. Analytically, the Directive offers the least complicated means of transferring seats. The procedure for a seat transfer is straightforward: One creates a company in the desired Member State and then merges across borders into this legal entity.

3.2.6 New Tax-Planning Opportunities through the Directive

As stakeholders report, the Directive has opened new possibilities for tax planning within the EU/EEA. A good example is the tax legislation in Estonia, which introduced a favorable taxation system. In Estonia, corporate income taxation is not levied as long as the company does not pay out dividends. Many companies have taken advantage of this favorable regime and merged into domestic Estonian companies.

Taking Poland as another example, it was reported that two types of mergers belonged to structures set up by tax advisors. The first type was a merger of finance companies designed to move the finance activities outside of the Member State. Under this merger, the activities of the Polish companies have been moved to the absorbing company and have no longer been carried out in the Member State. Under the second type, operating companies such as retail companies, have been merged in order to carry out activities in the form of merged branch offices instead of separate entities.

[13] Article 7 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

Such tax planning may confer greater opportunities to European companies to compete in the global market and optimize their strategy based on their capital structure, business needs, and tax opportunities.

3.2.7 Cutting through Red Tape

An important advantage of the Directive is the fact that it allows the formation of companies in Member States where the bureaucratic burden is less onerous than in the original Member State. One example of that was Estonia, which was considered by several legal counsellors to be less bureaucratic than other Baltic countries and therefore attracted cross-border merger activity.

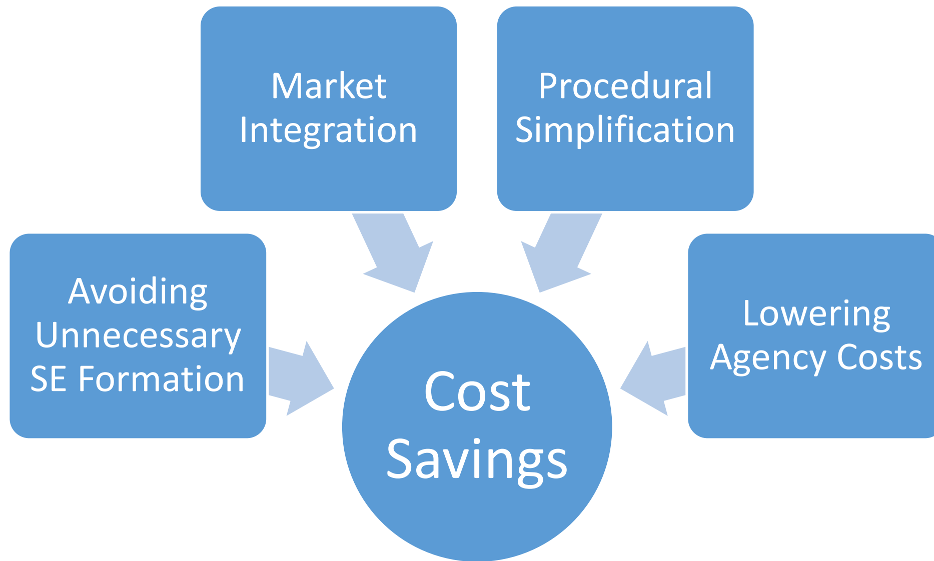
3.2.8 Direct Cost Savings Summary through the CBMD

The last sections demonstrated the very many benefits of the Directive. These benefits have translated into substantial savings for various market players which, in turn, provide for a more robust internal market, decreased prices, and increased overall market efficiency. Some of the savings are direct, as the Directive reduced the price of many of the processes involved in the merger, or indirect, due to the external effect of the actions undertaken by actors responding to the Directive. Direct costs may include a reduction in the need for legal advice, lesser administrative burden and lower filing costs, whereas indirect cost reduction may refer to the effects generated by greater cross-border economic activity. We touch on the direct costs only because those are easier to characterize, but it does not follow that the indirect effects are of lesser importance—in fact, it is very likely that they are greater by a few orders of magnitude.

In the following section, we characterize the direct cost savings brought about by the Directive. At the outset of this summary, however, it should be noted that the current study did not involve the quantification of the different costs, and such a task proves far beyond the scope of the data collected. In light of that, the team identified four main areas where cost savings were most pronounced: market integration, procedural simplification, lower agency costs, and regulatory choice.

Figure 5 – The Directive Has Led to Cost Savings in Four Main Areas

Cost savings through the Cross-Border Merger Directive. Data: Lexidale.



Market Integration: Our analysis suggests that market integration is a main cause of cost savings. Through a consolidated market, companies can make business decisions that are not constrained by political borders within the EU. This allows for a more efficient and cost-effective management strategy that can lead to higher profitability and savings on waste. The cost savings stem from various sources, such as unnecessary organizational, regulatory, and tax costs. Such costs can range from several thousand to several million EUR in one single merger, and since these cost savings are generally the reason for carrying out the merger, it can be assumed that this is the main area where costs have indeed been saved.

Procedural Simplification: Before the transposition of the CBMD, cross-border mergers have been possible in certain Member States or through various alternative legal instruments, such as carrying out a cross-border seat transfer with one of the companies and then merging under the domestic merger provisions. The process set out by the Directive is a much more simplified and cost-effective means of doing so, thus saving on various unnecessary expenses. Furthermore, the Directive sets a simplified procedure, which is even more streamlined, and is highly effective in cases of, for example, companies where the parent company already holds a substantial degree of shares. Costs are saved because certain regulatory aspects of the Directive do not apply, such as producing an expert report (Article 15 CBMD). Savings are also created by the option set in the Directive for participating companies to draw up one report instead of many (Article 8(2) CBMD), or no report if all shareholders of all involved companies agree (Article 8(3) CBMD). Similarly, in accordance with the amendment to Article 6 CBMD by Article 4 Directive 2009/109/EC, companies can make their CDTMs available on their website free of charge instead of publishing them,

e.g., in the official gazette of the country, which has been reported to be rather costly. In the case of Romania, for example, the publication costs in the official gazette amount to approximately 125 to 840 EUR. Moreover, the cost of an independent expert report in Romania is around 1,000 EUR.

This means that costs are lower because, for example, it is no longer necessary to carry out two procedures to attain the same result. Therefore, the procedure under the CBMD is less complex, leading to lower legal advisory costs.

Lower Agency Costs: The CBMD regulates these conflicts in a standardized way and therefore can decrease costs vis-à-vis prior existing legislation that did not address these matters. An example is standardized information requirements in the CDTMs or the management report, providing stakeholders with a substantive overview of key areas of the planned merger.

Avoiding Unnecessary SE Formation: Before the transposition of the CBMD, cross-border mergers were already possible by forming an SE that would incorporate both companies. The direct cost-saving aspect vis-à-vis the SE is that entrepreneurs are not forced to choose the European company law form of the resulting company but can rely on national company law forms. Moreover, as was remarked by a legal advisor comparing both options, with the CBMD the creation of the special negotiation body (SNB) can be avoided, which can be a major issue depending on the situation of the companies and the number of employees involved.

From an overall perspective it is thus possible to conclude that the savings brought about by the Directive and the transactions carried out under this instrument are fully in line with the objective of the European internal market by providing a more integrated, competitive marketplace, particularly through efficiency gains.[14] The costs in the field of market integration are a main example of such efficiency gains. Through group reorganizations, unnecessary costs can be saved, which allows enterprises to invest the gains in different ways, also benefiting the consumer if passed on in the form of lower prices or new products or services. Larger group companies can also protect stakeholders, such as creditors, in a better way. The procedural simplifications also tie into the internal market objectives and particularly also into the objective of "smart regulation," i.e., "delivering EU policies and laws that bring the greatest possible benefit to people and businesses in the most effective way."[15]

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[14] See on the overall topic F. Ilzkovitz, A. Dierx, V. Kovacs and N. Sousa, 'Steps towards a deeper economic integration: the Internal Market in the 21st century: A contribution to the Single Market Review', *Economic Paper - European Commission Directorate-General for Economic and Financial Affairs* (2007).
[15] http://ec.europa.eu/smart-regulation/index_en.htm; Note that this is also very much in line with one of the main objectives of the Action plan on the future of European company law, which is to provide a simplification of cross-border operations of European businesses, particularly for SMEs; See Commission

3.3 Drivers

Based on the foregoing section and the data used in this section, we have identified several drivers for carrying out cross-border mergers.

3.3.1 Group Reorganizations

The overall main driving force for carrying out cross-border mergers is the possibility to conduct group reorganizations. Based on very conservative figures, at least 38 percent of all cross-border mergers have been group reorganizations; the actual figure could possibly be much higher.[16] Moreover, stakeholders also reported this to be the main reason for cross-border mergers. As noted above, group reorganization can lead to considerable operational and organizational cost savings, compared with the operation of different legal entities.

3.3.2 Business-Oriented Mergers

One straightforward reason for mergers is business considerations. Two companies may seek to merge across borders to enjoy greater returns to scale, consolidated branding, or other synergies between different business activities. Several examples can be given:

The 2011 cross-border merger between TomTom Sales BV and Tele Atlas AB is also an appropriate example. In 2008, TomTom, a large navigation solution provider, acquired Tele Atlas,[17] which delivered digital maps and other dynamic content for navigation and location-based services, for 2.9 billion EUR, and then merged with this company in 2011.[18]

Another example is the merger between Danske Bank Group and Sampo Banka.[19] Sampo Banka, one of the newest banks in Latvia, was purchased in 2007 by Danske Bank Group,[20] a multi-branch financial service group with a variety of services serving up to 4.9 million private individuals and 150.000 corporate customers across Scandinavia and Northern Europe. In 2008, it was decided to merge Sampo Banka into Danske Bank Group. The Chief Executive Officer of Sampo Bank stated: "Many

Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final, p. 5.

[16] Please consult the methodology for the quantitative part in order to see how this figure was calculated.

[17] See Heise, 'Weg für Tele-Atlas-Übernahme durch TomTom ist frei', http://www.heise.de/newsticker/meldung/Weg-fuer-Tele-Atlas-uebernahme-durch-TomTom-ist-frei-196584.html (last visited 15 August 2013); see also TomTom News, 'TomTom N.V. intends to make a cash offer of € 21.25 per ordinary share for Tele Atlas N.V.', http://www.tomtom.com/news/category.php?ID=4&NID=379&Language=1 (last visited 15 August 2013).

[18] For the CBM of TomTom Sales B.V. with Tele Atlas Sweden AB see Staatscourant, 'Overige aankondigingen', https://zoek.officielebekendmakingen.nl/stcrt-2011-8864.html (last visited 15 August 2013) and Staatscourant, 'Overige aankondigingen', https://zoek.officielebekendmakingen.nl/stcrt-2011-7165.html (last visited 15 August 2013); Further Tele Atlas Iberia, S.L.U., Télé Atlas France S.à r.l. and Tele Atlas (Portugal) LDA have been merged by means of a CBM with TomTom Sales B.V.; See Staatscourant, 'Overige aankondigingen', https://zoek.officielebekendmakingen.nl/stcrt-2010-21192.html (last visited 02 October 2013).

[19] See for further information Danske Bank AS, 'Sampo Banka Has Been Transformed into Danske Banka', http://www.danskebank.lv/en/about/press/2008/sampo-danske-banka/ (last visited 15 August 2013).

[20] See for the takeover Helsingin Sanomat, 'Finnish Sampo Bank Group to be sold to Danish Danske Bank for 4.05 billion EUR, http://www.hs.fi/english/article/1135222874867 (last visited 15 August 2013).

cross-border banking services will be easier for our customers because we are now part of a large northern European bank."[21]

Another major cross-border merger concerned RBS Holdings N.V. (formerly known as ABN Amro Holding N.V.) and the Royal Bank of Scotland N.V. (formerly known as ABN Amro Bank N.V.) with RBS Plc. of 2012,[22] which was the result of a takeover of ABN Amro by the Royal Bank of Scotland Group Plc. for 70 billion EUR (99.9 billion US dollars).[23]

Following the withdrawal of the Barclays Bank bid for ABN AMRO on October 5, 2007, the way was cleared for the RBS-led consortium's bid to go through, along with its planned dismemberment of ABN AMRO and the resulting cross-border merger of the ABN Amro operations with the RBS group by means of a demerger of RBS N.V. (as the demerging company) and RBS II B.V. (as the acquiring company), which was subsequently merged into RBS plc. by means of a CBM.[24]

3.3.3 Cutting on Organizational Costs

Depending on the nature of the business, companies seek to streamline their company structures and turn subsidiaries into branches in order to save costs. For example, board meetings do not have to be convened for each single entity, and the control over such entities is stronger. As a consequence of this driver, as stakeholders report, most cross-border mergers are carried out in the form of group restructurings.

A few examples of large-scale pan-European group restructurings can be given. In 2012, Nokia, a large mobile phone supplier, integrated its subsidiaries from Belgium, the Czech Republic, Italy, the Netherlands, Poland, Portugal, Spain, and Sweden into Nokia Sales International Oy.[25] Honda Motor, a large manufacturer of automobiles and motorcycles, integrated companies from Austria, the Czech Republic, France, Germany, Italy, Hungary, Poland, Portugal, Slovakia, and Spain in 2013.[26] In 2010,

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[21] Danske Bank, 'Sampo Bank – a branch of Danske Bank', http://www.danskebank.ee/en/36208.html (last visited 15 August 2013).

[22] Royal Bank of Scotland Group PLC, 'Dutch Scheme - Approval of Cross-Border Merger', http://www.investors.rbs.com/servlet/HsPublic?context=ir.access&ir_option=RNS_NEWS&ir_client_id=16&item=1024407682235699 (last visited 15 August 2013).

[23] See Financial Times, 'ABN Amro takeover battle', http://www.ft.com/intl/indepth/abnamro (last visited 15 August 2013); see also ABC News, 'Royal Bank of Scotland wins biggest financial takeover', http://abcnews.go.com/Business/story?id=3698102&page=1 (last visited 15 August 2013).

[24] The cross-border merger was finalized on 10 September 2012; See Royal Bank of Scotland Group PLC, 'Implementation of Dutch Scheme', http://www.investors.rbs.com/download/rbs_nv/RNS7_UC_NLS_Implementation.pdf (last visited 15 August 2013); See for the details of the CBM: Royal Bank of Scotland Group PLC, '26 March 2012 - Further step in proposed transfers of a substantial part of the business activities of RBS N.V. to RBS plc: Dutch Scheme', http://www.investors.rbs.com/ir/rbs/ir.jsp?page=news-item&item=971107138035431 (last visited 02 October 2013).

[25] Nokia Belgium N.V., Nokia Czech Republic s.r.o., Nokia Italia S.p.A., Nokia Nederland B.V., Nokia Poland SP. Z.o.o., Nokia Portugal S.A., Nokia Spain S.A.U. and Nokia Svenska AB had been integrated into Nokia Sales International Oy in 2012.

[26] Honda Motor Czech Republic, Honda Portugal, Honda Nederland B.V., Honda Italia, Honda Poland, Honda Hungary, Honda France, Honda Nordic AB, Honda Nordic AB Honda Motor Spain, Honda Motor Europe Limited, Honda Motor Slovakia, Honda Motor Austria and Honda Motor Germany have been merged into Honda Motor Europe Limited in 2013.

Sony, a multinational conglomerate corporation with diversified businesses primarily focusing on the electronics, gaming, entertainment, and financial services sectors, merged subsidiaries from Greece, Italy, Poland, Portugal, and Central and Southeast Europe into Sony Europe limited.[27] Finally, in 2011, IP Maestrale, a company active in the energy and financial sectors, investment banking, and private equity, merged 13 subsidiaries into IP Maestrale Holdings SRL.[28]

3.3.4 Cutting on Regulatory Reporting Costs (Banks & Insurance):

Banking and insurance companies turn subsidiaries into branches in order to decrease compliance costs with regulatory supervision and costs associated with capital requirements. Again, this is accomplished through group restructurings.

3.3.5 Tax Planning:

A further driver for cross-border mergers is tax planning. As stated above, taxation considerations play a role in a cross-border merger operation. Companies use cross-border mergers in order to adapt their tax structures to their business environment. In a group reorganization, this can play a role when considering where the resulting company will be incorporated and where the headquarters (place of effective management) will be situated. The example of the tax legislation in Estonia has been elaborated on above.

Said potential tax advantages provide competitive edge to European companies when dealing in the international market. It also has additional benefits, as it allows companies to optimize certain decisions on the overall business environment offered by the Member State.

3.3.6 Choosing More Efficient Regulatory Regimes

Through the CBMD, a business can choose a regulatory regime that is friendlier to its line, which ensures greater competitiveness. This, of course, may be open to manipulation, but can nevertheless generate important benefits in reducing unnecessary red tape.

Finally, in the context of the drivers, it should be stated that there is no strong indication that cross-border mergers are used to circumvent employee rights. For example, Hans-Böckler Stiftung, which has conducted a study on cross-border mergers in Germany, has found that from a total of 381 cross-border mergers from or to Germany between 2007 and 2012, there were only 22 cross-border mergers in

[27] Sony Italia S.P.A., Sony Poland SP Z.O.O., Sony Portugal Unipessoal Lda, Sony Hellas SA, Sony Central and Southeast Europe Kft, Sony Espana S.A., Sociedad Unipersonal and SONY ESPAÑA SA have been merged into Sony Europe Limited in 2010.

[28] IP Maestrale Limited, Ip Maestrale (SG 1) Limited, IP Maestrale Holdings (BB2) Limited, IP Maestrale (HB1) Limited, IP Maestrale (HB2) Limited, IP Maestrale (JGL1) Limited, IP Maestrale (JGL2) Limited, IP Maestrale (BB1) Limited, IP Maestrale (SG2) Limited, IP Maestrale 4 (Ireland) Limited, IP Maestrale 5 (Ireland) Limited, IP Maestrale Engineering (IV-4) Limited, IP Maestrale Holding (Ireland) Limited merged into IP Maestrale Holdings SRL in 2011.

which the issue of employee participation became relevant at all.[29]

3.4 Obstacles

Even though the Directive is widely considered to be highly successful, there are still obstacles and impediments that hinder its full effectiveness, as also noted by the public consultation of the European Commission on the future of European company law.[30] In our view, there are two main factors that impede the successful implementation of the Directive: The first is improper transposition of the Directive, and the second is the practical difficulties that have emerged in the process of implementing the Directive. We shall now analyse those difficulties, based on our analysis of the legal materials, interviews with stakeholders, and review of the academic literature. To provide guidance for future revisions, we list the obstacles in an order that corresponds, albeit roughly, to The Team's estimate of their relative importance in practice.

3.4.1 Complexities with Creditor Protection

Article 4(2) CBMD allows Member States to apply mechanisms that ensure the protection of creditors to the extent that such mechanisms exist in the Member State's domestic merger legislation. Among others, the reason for such protection to begin with is the risk that the creditors will be in a worse financial situation than they were before the merger because liabilities of the acquiring company would exceed its assets.[31] Additionally, the new legal system governing the merged entity may also negatively impact creditors. One example of such an effect is in insolvency laws, where, under the European Insolvency Regulation, the jurisdiction for insolvency proceedings is determined by the location of the registered office and the center of main interest.[32] The shift in location would allow shareholders to forum-shop based on insolvency laws, to the detriment of creditors.[33]

This issue was, and continues to be, of considerable interest for the Member States: 29 out of 30 Member States have chosen to implement the optional provision on creditor protection. This was to be expected since creditor protection is also ensured

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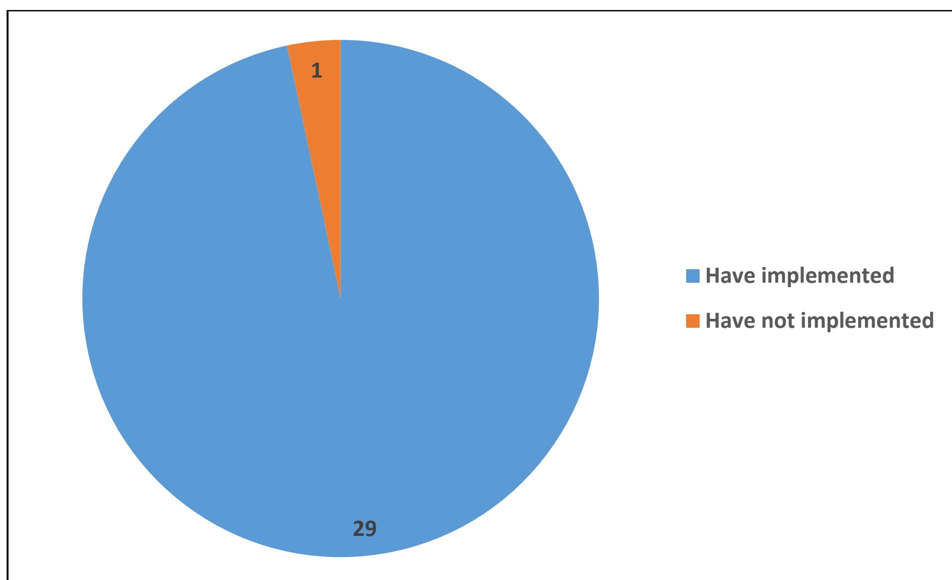
[29] W. Bayer, Grenzüberschreitende Verschmelzungen im Zeitraum 2007 bis 2012 (2013), http://www.boeckler.de/pdf/mbf_2013_06_verschmelzungen_bayer.pdf.
[30] 331 out of a total of 496 replies support an improvement of the Directive; See http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf; Consult also the Commission Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final, p. 12.
[31] G. T.M.J. Raaijmakers and T. P.H. Olthoff, 'Creditor protection in cross-border mergers: unfinished business', 4 *Utrecht Law Review* 1 (2008), p. 35.
[32] See Article 3(1) together with Article 4(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160/1; See on this topic for example J. Israel, *European Cross-Border Insolvency Regulation* (Intersentia, Oxford 2005); M. Virgos and F. Garcimartin, *European Insolvency Regulation: Law and Practice* (Kluwer Law International, The Hague 2004).
[33] See e.g. W.G. Ringe, 'Strategic Insolvency Migration and Community Law'; L. Webb et al., 'Insolvency proceedings: shopping for the best forum', *PLC* (2009), p. 39; M. Szydło, 'Prevention of Forum Shopping in the European Insolvency Law', 11 *European Business Organization Law Review*, p. 253-272; H. Eidenmüller, 'Abuse of law in the Context of European Insolvency Law', *ECFR* (2009), p. 1-28.

under Articles 13 and 14 Domestic Merger Directive for internal mergers. However, when it comes to the actual forms and methods of creditor protection, great variation exists between the States. This fragmentation creates an obstacle to effective cross-border mergers.

The main differences featured in the various national laws include the date when the protection commences, its duration, its consequence, and also the procedure as such. The diverse rules result in a high level of complexity, which impedes the merger process and leads to uncertainties.[34]

Figure 6 – Most Member States Have Implemented the Optional Creditor Protection Provision

EU/EEA countries that chose to implement the provision. Data: Lexidale.



The next sub-sections will deal with specific issues pertaining to creditor protection.

3.4.1.1 Date When Creditor Protection Commences

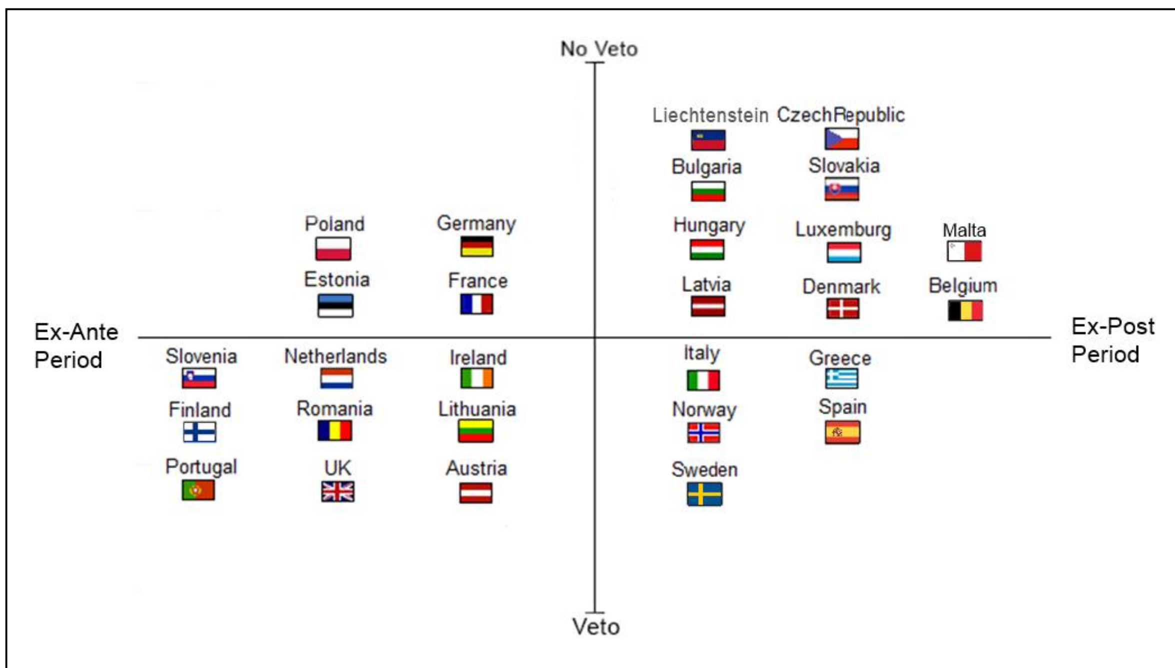
An issue that stakeholders found to be central is the determination of the date when creditor protection takes place. The Directive grants discretion to Member States over this date, and the Member States have taken diverse views on the issue. To simplify, we divide the Member State into "ex-ante" and "ex-post" groups. The "ex-ante" group sets the creditor protection date prior to the general shareholders meeting, and the "ex-post" group sets the date at a point of time that follows the meeting. In the former case, the specific date corresponds with the publication of the common draft terms. In the latter case, the specific date may vary between the decision to merge by the general meeting of shareholders or the date of the legal effectiveness of the

[34] An issue which has also already been noted in the Commission Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final, p. 12; and Report of the Reflection Group On the Future of EU Company Law (2011), p. 28.

merger. Problems with this system arise when a company situated in a Member State governed by laws where the date starts prior to the general meeting works with another company in a different Member State where the date starts after the general meeting. As reported, the difficulty of different time periods becomes particularly crucial if the merger certificate has already been issued in one Member State but not in the other, while at the same time the 6 months deadline to file the registration request has started.[35]

Figure 7 – Member States Are Evenly Divided Between the Ex-Ante and Ex-Post Period for Creditor Protection

Grouping of Member States based on whether they provide for 'Ex-Post' or 'Ex-Ante' protection and whether creditors can block the CBM. Data: Lexidale.



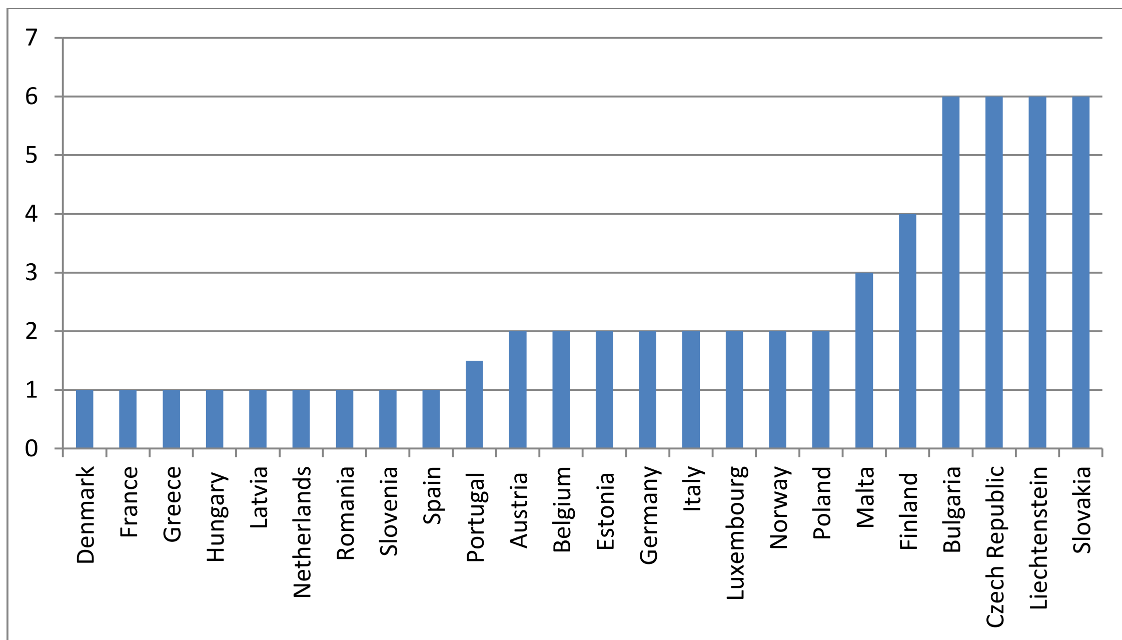
3.4.1.2 Duration of the Creditor Protection

Another source of complexity is the duration of the creditor protection. In practice, Member States have different systems with diverse duration periods ranging from one month (e.g., Denmark, France, Greece, or Hungary), six months (Czech Republic), or with no specific date (Lithuania or the United Kingdom).

[35] See Article 11 (2) CBMD.

Figure 8 – Large Variation in Duration Periods Causes Uncertainty and Complexity

Length (in months) of the duration of creditor protection. (Cyprus, Iceland, Ireland, Lithuania, Sweden and United Kingdom are not included due to different mechanisms or because option is not used) Data: Lexidale.



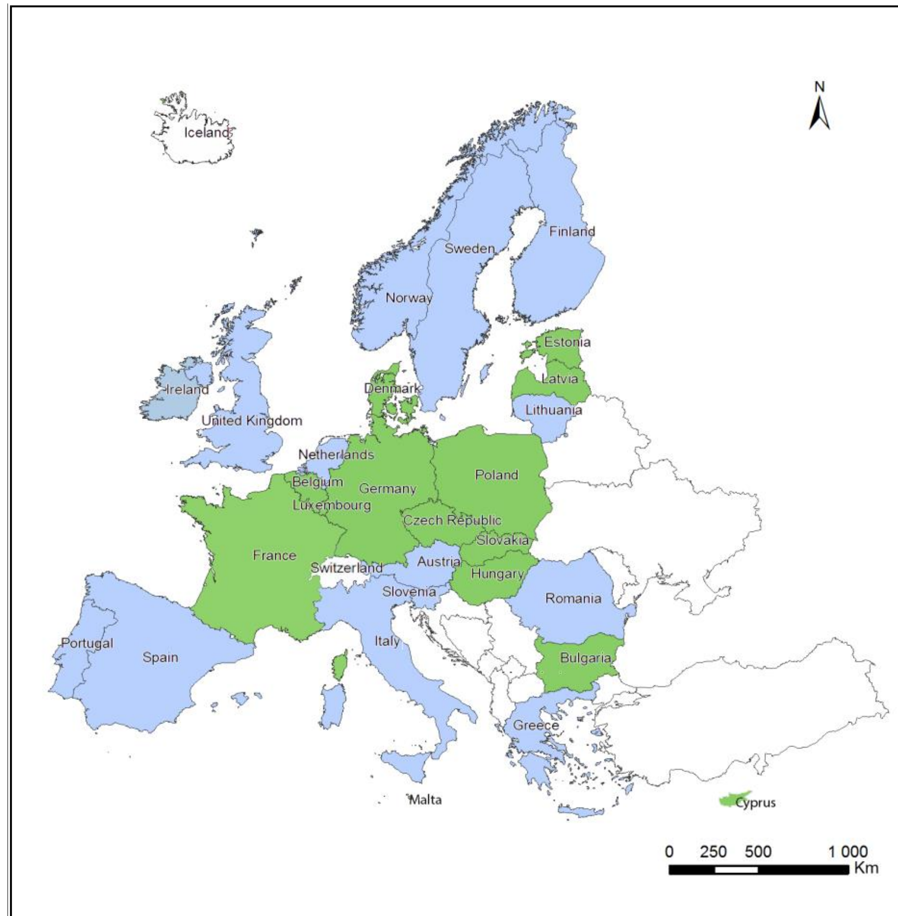
3.4.1.3 Consequences of Creditor Protection

A potentially major impediment to the merger process is the option for creditors to block the merger through the grant of effective veto rights. Our data shows that 14 Member States have given veto rights to creditors, while 15 expressly did not.[36]

[36] In one Member State creditor protection was not implemented.

Figure 9 – In Many Member States, Creditors Can Veto Cross-Border Mergers

Member States where creditors have veto power (blue), do not have veto power (green), or use a different mechanism (white). Data: Lexidale.



3.4.1.4 The Different Procedures for Creditor Protection

In 29 of the 30 States studied, the prevailing rule regarding creditor protection is "creditor security." Under the "creditor security" approach, creditors can request that the company will provide a security as a precondition to the merger, to guarantee that the merged company will meet the claims of the creditors. The United Kingdom model is premised around the notion of a creditor meeting, where creditors convene and decide whether to approve the proposed merger. More specifically, a creditor may petition the court to order a meeting of the creditors under Regulation 11. If the court so orders, then the merger can only take place if the draft terms of merger are "approved by a majority in number, representing 75% in value, of the creditors ... present and voting" (Regulation 14).

The "creditor security" has a few characteristics that are common to all 29 States: creditors may only request security for claims that already existed before a certain date, e.g., the publication of the CDTMs[37] or the effective date of the merger,[38] and

[37] Sec. 13(1) EU Merger Act (Austria) or Regulation 7(2) of Company Regulations (Malta).
[38] See e.g. § 218f (1) Commercial Code (Slovakia); In Hungary the date is the date of the first publication of the approval of the merger (Article 76 of the Company Act); In Luxembourg the date is the date of

only if the settlement of the claim is threatened by the merger and is not secured.[39] This can, for example, be the case in a capital-reducing merger.[40]

Despite those commonalities, certain procedural differences exist. First, there is some variation as to the identity of the authority that decides on whether security will be provided and whether it is a legal decision made by a court of law or an administrative decision rendered by the registry. Some examples of countries belonging to the first group are the Czech Republic,[41] France,[42] Luxembourg,[43] Poland,[44] Portugal,[45] and Slovakia.[46] Among the second group are Finland, Norway and Sweden.[47]

There are also a few notable specific arrangements. In Norway, for example, mergers of commercial banks or insurance companies may allow the depositor to terminate the account of the insurance agreement.[48] In Poland, if the resulting company is located in Poland, the assets and liabilities of the merging companies must be managed separately until the date when all creditors have been satisfied or secured.[49] In Estonia, protection is only available if the resulting company is governed by the law of a different Member State.[50]

In countries such as Italy and Denmark,[51] the right to protection depends on a valuation report. With respect to Italy it has been reported that the merging company does not have to provide security if the independent expert report has been redacted by the same auditing company for all the involved companies and if it has declared that there are no grounds for similar guarantees because the financial and economic situation of the companies is solid enough.

3.4.1.5 Absence of "Fast-Track" Procedure

publication of the deed recording the approval of the merger (Article 268, paragraph 1 of the Luxembourg Company Act).

[39] See e.g. Article 201D Cyprus Companies Law; Article 4338 of the CC (Estonia); Article 8(2) Act 3777/2009 (Greece); Article 351i para 1 PGR (Liechtenstein); Articles 66 of the Law on Companies (Lithuania); Article 516 CPCC (Poland); Articles 251 and 243 Company Law (Romania); Art. 44.1 of the SML (Spain).

[40] See e.g. Sec. 13(1) EU Merger Act (Austria).

[41] See D. Neveselý et al., 'Cross-Border Reorganizations in the Czech Republic', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), p. 225 (6.111).

[42] Com. Code, Article L.236-14 (France); R.236-8 (France).

[43] See M. Wilkenhuysen and L. Silcox, 'Luxembourg', in D. van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 15.

[44] Article 516 CPCC (Poland).

[45] Articles 101-A to 101 – C of the Portuguese Companies Code.

[46] Article 69aa(5) Commercial Code (Slovakia).

[47] For Norway see Art. 13-16(1) PLLC Act.; For Finland see the Finland LLC Act, Part V, Chapter 16, Section 26(4); For Sweden see J. B. Andersson, 'Sweden', in D. van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 186.

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

[49] Articles 495 and 496 CPCC (Poland).

[50] Article 433 of the CC (Estonia).

[51] For Denmark see V. Thorup and J. Buskov, 'Denmark', in D. van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 178.

An obstacle reported is the absence of a "fast-track" procedure for cases when there is no meaningful effect on the position of the creditors. In cases, for example, where the merging companies would be wholly owned subsidiaries and would not have (extra-group) creditors, the merger does not negatively affect the rights of creditors, and therefore the waiting period imposes undue hardship.

Case Study: Creditor Protection in a Merger between a Dutch and an Italian Company

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

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

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

In such cross-border merger, the advisors do not only have to deal with a complex creditor protection. They also have to add up the two periods because one is ex-post and the other is ex-ante. Finally, in both countries the creditors can block the merger, leading to potential high delays and uncertainty that might trigger, as advisors state, the companies to decide not to carry out the merger at all.

3.4.1.6 Optional Solutions

Based on the foregoing sections, a few conclusions can be drawn. First of all, as stakeholders stress, the system as such is highly complex due to high variation in creditor protection among Member States. Adding to the complexity is the fact that part of this variance is procedural (e.g., timelines), while part is substantive (e.g., insolvency laws).

Secondly, we identify several patterns in the practices of Member States. We see that most of the "ex-post" Member States (10 of 15) do not grant creditors veto rights over the merger (with the exception of Italy and Spain).[52] Similarly, most of the "ex-ante" Member States (9 of 13) do provide creditors with veto rights. This suggests that in practice, there are two general regulatory camps in the protection of creditors' rights: Late Date/No Veto and Early Date/Veto.

[52] Note that in both Spain and Italy there are short durations for creditor's protection (1 month and 2 months respectively); all remaining 10 countries, where creditors protection duration is longer (3-6 months), provide creditors with no veto rights.

Third, stakeholders report high costs and uncertainty associated with the current system, and our analysis raises questions regarding whether the gains of giving wide discretion to Member States exceed the costs. In that context, stakeholders raised the example of a case where the merger certificate was already issued in one Member State but not yet in the other, due to the differences in the applicable creditor protection rules, while the six months deadline for having the registration request filed has already started to be counted. Much of the inter-State variation stems indeed from differences in dates and durations, though within the "ex-ante" camp there are only small variations in the duration of the creditor protection period.

While it is understandable, and even desirable, that different Member States will assume different positions on issues such as creditors' rights, the differences within the camps are relatively small, and it is therefore doubtful whether they justify the costs created by the large inter-State variation.

We consider three means of improving the current system. Our approach is based on the recognition that a balance should be struck between means that minimize complexity, and the principle of subsidiarity respecting Member State autonomy. In the space of solutions that meet both criteria, we propose three possible solutions: full harmonization, fixed-menu approach, and open-menu approach.

Under full harmonization, a standard will be set for all Member States based on the most common practices among the Member States. This solution respects Member States by incorporating common choices made by them, and will eliminate the costs associated with inter-State complexity. When choosing between an "ex-post" and an "ex-ante" system, due consideration should be given to the fact that the "ex-ante" model provides certainty regarding the position of creditors when the merger is executed, but at the same time might delay the merger. The "ex-post" model provides the opposite objectives: creditors cannot delay the merger and therefore priority is given to full mobility of companies within the EU, yet the position of creditors is not clear before the merger is executed.[53]

Under the Fixed-Menu approach, two options will be given to Member States to choose from either high creditor protection or high mobility. Choosing one of these options will come with a prefixed set of standards; for example, choosing high creditor protection would entail a fixed early date, a fixed duration, and procedure and veto rights. This solution has the advantage of allowing Member States flexibility with respect to the type of creditor protection they seek to afford. It will also significantly reduce costs, since all that one would need to know about a State is whether it is a high creditor protection or high-mobility State.

[53] G. T.M.J. Raaijmakers and T. P.H. Olthoff, 'Creditor protection in cross-border mergers: unfinished business', 4 *Utrecht Law Review* 1 (2008), p. 37-38.

Finally, under the open-menu approach, Member States will be able to mix and match from a fixed set of options. This provides Member States with the highest amount of discretion, but still retains some of the advantages of cutting costs by offering only limited fixed dates from which to choose.

Three additional factors should be considered when deciding between these models and their content: one suggests lower harmonization and the other call for greater harmonization. First, Member States have their own domestic creditor protection systems in place, which generally apply in the same way to domestic and cross-border mergers. Harmonization might cause divergence between the cross-border and domestic system. A second consideration is that Member States must not discriminate against cross-border transactions,[54] and must also avoid placing unjustified restriction on the freedom of establishment and the free movement of capital.[55] Since current arrangements may not be conducive to the free operations of merger activity, it may suggest a reason to push for greater harmonization. Moreover, since an "ex-post" system with no veto rights is less restrictive than an "ex-ante" system with veto rights, it is also more likely that the former could be justified while the latter could not.[56] Thirdly, "ex-ante" systems can more easily be abused by creditors. If they dispose of a veto option, this might be used in order to attain monetary advantages. Fourthly, we find that while Member States have been very active on the matter in terms of legislation, there are no many cases where creditor protections are reported to have been invoked. In fact, none of the interviewed stakeholders had experienced a case where this had actually happened. This suggests that harmonization would reduce costs while not infringing effectively on Member States' autonomy.

Another solution we propose is the addition of a fast-track procedure, designed to take place only in those cases where creditors (or employees) are not adversely affected by the merger. In such cases, national authorities should have the discretion to waive the waiting periods and create shorter merger periods.

3.4.2 Communication between the National Registries

A major obstacle mentioned by Member States is the absence of standards or procedures for the communication between the national registries of different Member States. Article 13 CBMD as currently in force provides that:

[54] Case C-411/03 *SEVIC*; Case C-378/10 *VALE Építési kft.*
[55] Recital 3 of the Directive; Case C-212/97 *Centros Ltd v. Erhvervs-og Selskabsstyrelsen* [1999] ECR I-01459, para. 34; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd* [2003] ECR I-10155, para. 133; See on this topic also B. J.M. Terra and P. J. Wattel, *European Tax Law* (Kluwer Law International, Deventer 2012), p. 36.
[56] When considering whether a measure can be justified, the CJEU examines whether national legislation is proportionate. This means it analyses whether the legislation is suitable to achieve its objective (0creditor protection in this case) and whether it does not go beyond what is necessary. If it is assumed that both ex-post and ex-ante systems are sufficient to protect creditors in the EU, the ex-ante system goes beyond what is necessary because it is more restrictive on the freedom to merge within the EU.

> *"[T]he registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before."*

This means that some form of established communications between the registries should be created. A similar obligation is also found in the SE/SCE Regulation for the cross-border seat transfers which states, in the context of cross-border mergers, that it is the merging parties' duty to provide the registry with the documents, whereas under the CBMD it is the registry's obligation. The rationale behind this difference is the promotion of legal certainty and creation of a faster procedure.[57] Considering the feedback from legal advisors and the national registries, the full effectiveness of this provision has yet to have been reached, because there is no clear procedure prescribing the format or deadlines.

Having pointed at the difficulties in communication, it is important to note that Article 13 CBMD has been amended by Article 2 of Directive 2012/17/EU[58], which deals with the interconnection of central, commercial, and companies' registries. The transposition deadline for this Directive in general is July 7, 2014. The Directive allows the Commission to set up a Business Registers Interconnection System (BRIS) that solves difficulties in the communication between the registries in cross-border mergers. This system must be defined in further implementation acts, which must be published before July 5, 2015. This system will be set up electronically and has the objective to ensure structured communication, such that the difficulties pointed out above are expected to be addressed in the near future.

Yet, within the current system, when it comes to the communication between the registries, the authorities themselves note that there is no specific format for communication, and that the main forms of communication are letters or, more rarely, faxes. Emails are used only in very limited cases. Secondly, regarding language barriers, the authorities generally send out letters in their own language and receive responses in the language of the foreign registry. However, different models exist as well. For example, the Finnish authority sends out letters to all countries in English, except for Sweden to which letters are sent in Swedish. Slovenia sends certified translated documents. One of the main problems noted by registries is that language barriers can lead to misunderstandings and delays. A second problem reported is

[57] Commission Staff Working Document: Impact assessment - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers, SEC(2010), p. 21.

[58] Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, [2012] OJ L 156/1.

connected to sending documents per mail is that the envelopes sometimes go astray, which also explains why some authorities stated as a difficulty the failure of notification by the foreign registry.

Legal advisors mainly refer to the delays, legal uncertainties, and costs created by the non-standardized communication.

This can lead to several problems. First of all, it involves a huge degree of legal uncertainty for companies and third-parties. Before the old registration has been effectively deleted, the now merged company still exists in principle for creditors and other third-parties in two Member States. To a certain extent, this is unavoidable. However, stakeholders are of the opinion that this period can be reduced. In the current situation, the merging parties themselves step in to close this regulatory gap. A Bulgarian law firm stated that it was fast and easy to obtain the official document from the court of the acquiring company and to present it to the company registry of the acquired company in order to have the former legal entity ceased. This is also confirmed by the Latvian experience. It was deemed even more effective for the public authorities in Bulgaria to receive the complete set of documents required for the completion of the cross-border merger with a clear demand on behalf of the acquired company. In Latvia, this process was reported to last 5 to 7 days.

A second and related problem is that this difficulty increases costs. On a general level, this is the case because the procedure lasts longer and the merging parties notify the national authorities themselves in order to increase legal certainty. More specifically, this can also increase the costs because the merging parties have to inform third-parties in order to solve the fact that the companies still appear to exist in both Member States.

A Latvian stakeholder noted that cooperation of the financial supervision authorities can be taken as an example. During the cross-border mergers of insurance companies, the advising law firm has observed that a good cooperation level has been reached between financial supervision authorities in connection with the coordination of the permits for the merger and the consents for the transfer of the insurance portfolios from the merged companies to the acquiring company.

3.4.2.1 Optional Solutions

Our optional solutions focus particularly on four aspects: means of communication, standardization, language, and duration for communication. In that context it should again be stressed again that Directive 2012/17/EU has been enacted to provide for electronic and structural communication, which, upon its transposition, might render at least some of the following solutions redundant.

Case Study: Communication between National Registries from an Estonian Perspective

In a case reported by the Estonian registry, the Estonian registry had not been informed about a cross-border merger. As a consequence, the Estonian registry could not make an entry and delete the company being acquired from the Commercial Registry. Moreover, the registry of the other country did not make an entry on the basis of the notice, but merely filed the notice. These difficulties would have made the merger impossible had it not been for the resourcefulness of the lawyers involved, who took the initiative and passed the communications between the registries.

As also foreseen in the Business Registers Interconnection System of the 2012/17/EU Directive, we propose that communication between registries will be made electronically instead of through paper, as is currently the case in many Member States. There are numerous advantages to this electronic approach, which will save delays and loss of documents, an unfortunate aspect of the current system. .

Our second proposal deals with standardization, an issue that will also be ensured under Directive 2012/17/EU. It would be beneficial if all registries use the same form for notification. These forms should be created in a way that ensures that language problems occur as little as possible. For example, the forms could be based on a software program that generates the form in English as well as in the languages of the Member States involved in the merger. We believe that inter-State diversity in this regard serves relatively little value, and standardization could greatly save costs, decrease the processing time, and facilitate cross-border activity.

To the very probable extent the forms would still require some amount of free language, setting a protocol with set language choice is recommended. One option would be to choose a standardized language (such as English or French) that will be used in all filings. This has the advantage of saving much of the costs, but may not suit some Member States where English or French is not a primary language.

Another alternative is to provide pan-European standardized forms, which, with the backing of either software or online databases, could be filled in each of the European languages. This has the advantage of creating language independence and meeting the needs of companies from across the EU/EEA.

This approach is only limited insofar as certain details may require the use of free text, where choice of language is a concern. In this case, we believe it will be most efficient to ask the filing company to file in both languages. Putting the burden on the registry would require it to develop translation capabilities to all the languages spoken in the EU, which will most likely be inefficient and cumbersome. Therefore, even if some of

the data in the form is entered by the registry, in our opinion it will nonetheless be more efficient to have the acquiring company translate the documents.

In order to ensure a fast notification process, two complementary options are suggested. One is to allow the acquiring company to notify the foreign registry. This goes well with the proposal above regarding the translation of the documents to be made by said company, and gives the acquiring company the freedom to notify the foreign registry early if it so wishes. The second option is setting a maximum period of time, until which a registry is required to notify its foreign counterpart.

A final proposal concerns the place of registration. The Team proposes, in accordance with feedback received from the stakeholders, to impose a duty on the national registry of the resulting company to publish the cross-border merger in the *Official Journal of the European Union*. This will allow an easy identification of cross-border mergers throughout the European Union.

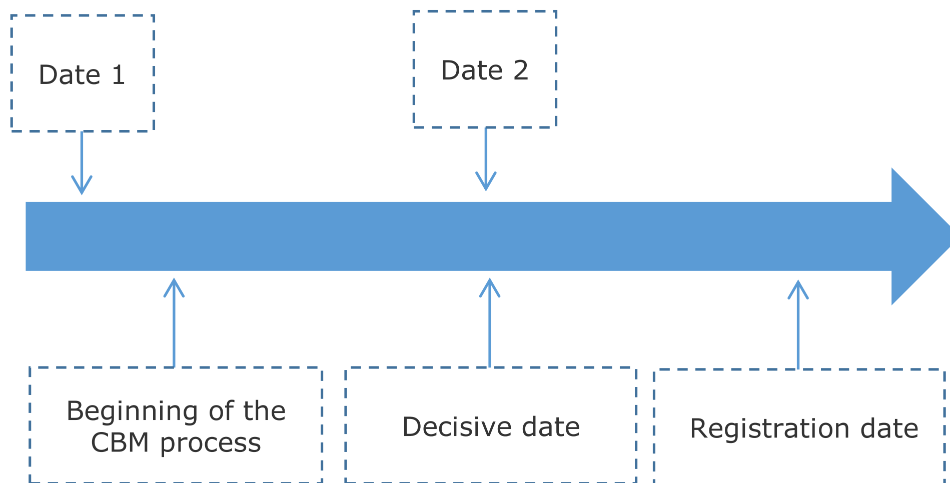
3.4.3 Accounting Obstacles

Stakeholders have reported that some differences in accounting rules among the Member States can impede cross-border mergers. In cross-border mergers there is a distinction between two important dates: the effective legal date ("registration date") and the accounting date ("decisive date") of the merger. The registration date is governed by the law of the Member State of the successor company. In most countries, this is the date when the merger is entered into the Commercial Registry of the Member State. The second date, the decisive date, is governed by Article 5(f) Directive, which stipulates that the CDTMs have to specify the date from which the acquired company's transactions are treated as being those of the acquiring company for accounting purposes. This date varies among Member States, which in general choose between three different dates:

- the decisive date may precede the date of the registration in the Commercial Registry;
- the decisive date is the same as the date of registration in the Commercial Registry;
- the decisive date can be set flexibly by the merging company to either precede or coincide with the date of the registration.

The divergence between those two dates is a source of certain problems that impede the effectiveness of cross-border mergers.

Figure 10 – Example of Discrepancies between the Registry and Decisive Dates



The divergence occurs when an acquired company is registered in a Member State where the decisive date may precede the date of the registration in the Commercial Registry but the acquiring company's decisive date is the time of registration at the Commercial Registry. In such cases and for a certain period of time, transactions related to the merging company are not reported. This is because according to the acquiring company Member State's accounting rules, it should report the merging company transaction only from the registration date, while according to the merging company Member State's accounting rules, the merged company should stop reporting at the decisive date, before the registration date.

Case Example: Accounting Effects of CBM in Germany and Romania

A cross-border merger between German and Romanian companies illustrates the above mentioned problem. The German company belongs to the group of Member States where the decisive date is put prior to the legal date of effectiveness of the merger. The Romanian company belongs to the group of countries where the decisive date is the same as the legal date of effectiveness.

When the German company seeks to merge into the Romanian company, it is faced with an accounting impossibility: there is a gap in time where none of the companies reports the transactions. When the Romanian company seeks to merge into a German one, the opposite problem occurs. The Romanian company would have to include assets and liabilities in two accounting units.

This situation is equally problematic in the opposite case—the acquired company may need to report, accounting-wise, both in its original Member State as a separate accounting entity and in the acquiring company Member State as part of the new

merged company. The company where the decisive date is the same as the legal date of effectiveness has to continue keeping books until the date of the company's deregistration. As a consequence, it is not possible to include its assets and liabilities in another accounting unit in another Member State.[59]

3.4.3.1 Optional Solutions

We consider two possible solutions to the problem at hand: a fixed date approach and a flexible date approach. Under the fixed date approach, a specific date would be decided that would apply across the Member States. A proposed tentative date could be that of registration in the Commercial Registry, since it is an observable event that could be monitored by creditors.

The second suggested solution is that the Directive requires the Member States to provide for a flexible date, as is done in the Slovak Republic. This allows a company to adapt to the accounting date so that they are consistent with the other States.[60]

3.4.4 Valuation Rules

When a cross-border merger involves issuance of new shares to the shareholders of the acquired company, some Member States require the valuation of assets and liabilities. The Second Company Law Directive stipulated that this has to be done by an independent expert appointed by the court or by an administrative authority.

Among Member States, two different types of valuation methods are common: the fair value method and the book value method. Since those two methods may result in different valuations (as the fair value method is based on the current market value of an asset or liability, versus its historic, sometimes depreciated, book value), the same company can be valued differently in different Member States.

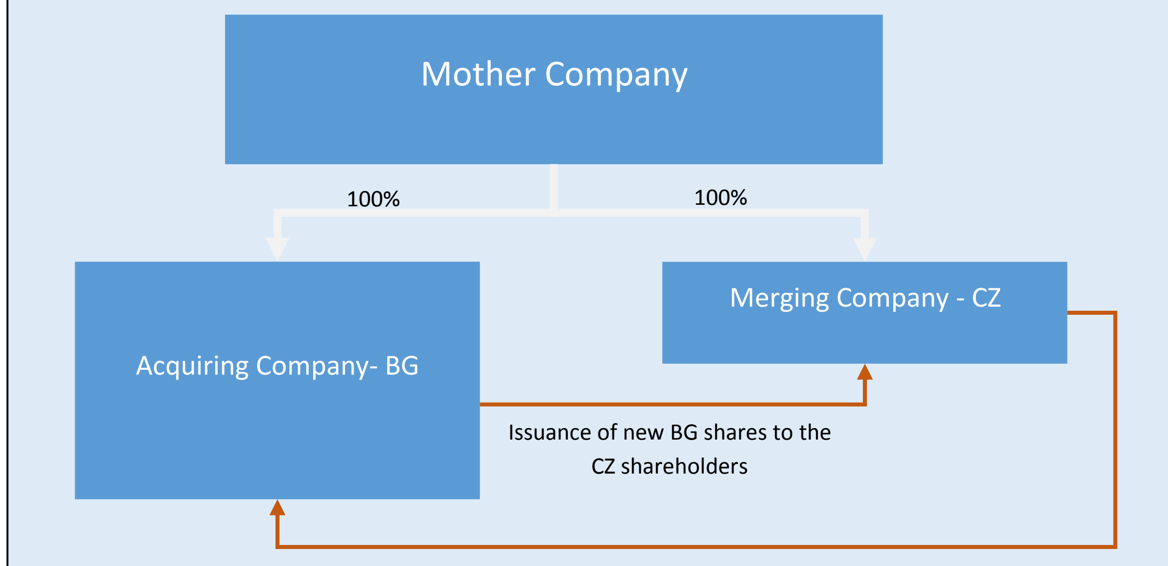
This difference in valuation systems might lead to certain problems. The acquired company can be situated in a Member State that does not allow the revaluation of the company's assets and liabilities (i.e., maintains the book value) unless the acquiring company increases its share capital. Yet the legislation of the Member State where the acquiring company is situated might require that the assets and liabilities acquired through the merger be valued at their fair value. In such cases, there will be a discrepancy between the laws of both Member States. Currently, the only solution to

[59] See in this regard also J. Skálová and L. Mejzlík, 'Cross-Border Mergers in the European Union', 2 *American International Journal of Contemporary Research* 4 (2012), p. 10; and R. Sklenár, 'Barriers of Cross-Border Merger with a Company Located in the Czech Republic', *Development, Energy, Environment, Economics* (2010), p. 106-111.
[60] R. Sklenár, *Development, Energy, Environment, Economics* (2010), p. 109.

these cases would be for the acquiring company to increases its share capital. As a result, the acquired company has to value its assets at fair value as well.[61]

Case Example: Valuation Rules in the Czech Republic and Bulgaria

In the Czech Republic, there are certain conditions dictating when assets can be taken over at book value or fair value. In the case of cross-border mergers, Czech law does not permit revaluation. In Bulgaria, it is the opposite way around, as revaluation of assets to fair value is obligatory. When a Czech company seeks to merge into a Bulgarian company, the following may occur: Assume that both companies are the subsidiaries of a holding company that owns 100 percent of the shares of both companies. The Czech company will furthermore be changed into a branch. In this case, the Czech law does not allow a revaluation of the assets as long as no shares are issued. The way to solve this issue under current rules is to have the Bulgarian company issue new shares, and render revaluation possible under Czech law.



3.4.4.1 Optional Solutions

Some of the stakeholders proposed to allow companies to choose whether they took over assets at book or fair value. A model Member State for this approach is Germany.[62] The Team believes that such an approach is possible and should be considered, as well as setting a fixed valuation rule. What is critically important is that an equal standard be set across all Member States.

3.4.5 Consequences and Third-Party Effects of Cross-Border Mergers

A major obstacle, limited to the United Kingdom, is that it is not clear whether cross-border mergers are binding upon third-parties who have contracted with the transferring entity. The reason for this difficulty is that the United Kingdom does not

[61] J. Skálová and L. Mejzlík, 2 *American International Journal of Contemporary Research* 4 (2012), p. 12 and R. Sklenár, *Development, Energy, Environment, Economics* (2010), p. 110.
[62] See Section 122c of the *Umwandlungsgesetz* (Reorganisation Act, Germany).

employ the doctrine of universal succession. In certain parts of continental Europe, e.g., Germany, the concept of *in "universum jus"*, or universal succession, is part of the legislation, providing that the resulting successor of a merger is treated as the party it succeeded, which means that there is no requirement to seek consent to assignment of contracts or run the risk of such contracts being terminated in accordance with their terms by the relevant third-parties. In the field of private international law, the universal succession concept is not alien to the United Kingdom. However, with respect to the transposition of the Directive, stakeholders state that the third-party effect is unclear.[63]

Moreover, stakeholders report that due to said lack of clarity, clients are simply not prepared to take that risk in relation to large, heavily contract-reliant businesses—particularly if those contracts are long-term contracts (including leases). There have been examples where the United Kingdom was left out of multi-million-pound, global restructurings in multi-jurisdictions due to this point alone.

3.4.5.1 Optional Solutions

The Team suggests that Article 14 CBMD on the consequences of a cross-border merger should include a clear provision stating that the merger is binding on third-parties.

3.4.6 Minority Shareholder Protection

Minority shareholder protection is similar to creditor protection. In general, it is an issue of great importance in company law for several reasons. One reason is the potential change of corporate law applicable to the company. Minority shareholders might lose rights under the new corporate law. For example, under Dutch law, minority shareholders have the right of investigation, which may be revoked if the company merges and becomes subject to the laws of a jurisdiction that does not recognize said right. A different reason can be that minority shareholders do not agree with the terms of the merger, such as the valuation of the entities and the exchange ratio resulting from the valuation. It can also be the case that minority shareholders do not agree with amendments of the company statutes of the resulting company.[64] Unlike creditor protection rules, minority shareholder protection rules could not rely on the Third Company Law Directive on domestic mergers, simply because it does not provide for such rules (with the exception of a minor provision in Article 28). This was, however, different in the SE Regulation as well, which provided for the same possibility as the CBMD in Article 24(2) Regulation, allowing Member States to adopt "provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger." In this area, we find inter-State variation in protection of

[63] See Regulation 17 of the 2007 Regulations (United Kingdom).
[64] M. Wyckaert and K. Geens, 'Cross-border mergers and minority protection: an open-ended harmonization', 4 *Utrecht Law Review* 1 (2008), p. 40-52.

minority shareholders, although the impact of it is not as significant as it was for the issue of creditor protection. In all countries, the procedure starts either at the general meeting or at the date of the registration or publication of the registration of the merger at the registry. The duration of protection varies from 10 days to 3 months. However, since it is not "ex-post" or "ex-ante mechanisms," as with creditor protection, the durations do not have to be added up. Finally, the procedures are rather similar in providing for withdrawal or appraisal rights.

Nevertheless, stakeholders regard minority shareholder protection as a major concern in cross-border mergers. The reason is that a minority shareholder can own up to nearly half of the shares of a company. Paying compensation to a shareholder owning, for example, 30 percent of the shares can be very costly, which requires capital reserves. Moreover, stakeholders also stated that if issues such as potential minority shareholders invoking protections are not rectified in advance, the merger will not be carried out because it would involve too many uncertainties.

3.4.6.1 Optional Solutions

As to minority shareholder protection, we propose three main solutions: full harmonization, a fixed menu approach, and a no-protection approach.

Under the first approach, minority shareholder protection would be fully harmonized on the European level. The advantage is cost reduction, because stakeholders would no longer have to deal with different minority shareholder protection systems in the different Member States, thus creating higher legal certainty. This can be supported by the argument that risks for minority shareholders in cross-border mergers should be the same in all Member States, therefore justifying that those risks are tackled by the same protection measures across the EU/EEA.

The second approach is one of a fixed menu. Under this option, Member States would be given an option to choose between a limited number of protection systems. This approach is in line with the principle of subsidiarity, and does not fully harmonize minority shareholder protection. At the same time, it provides for certain fixed options based on best practices among Member States, allowing for a higher legal certainty and reduction of costs vis-à-vis the current situation. In that way Member States, if they believe that minority shareholder risks have a local component, can adequately react to it.

Finally, considering that a main obstacle is presented by the minority shareholder protection as such, regardless of whether it is made complex by different implementations in the Member State, a last option would be to follow the Domestic Merger Directive and to no longer provide for the implementation of minority shareholder protection. The advantage of this approach is that it would lead to a full

reduction of costs associated with the fragmented minority shareholder protection in the Member States. This option would be in line with the view that minority shareholder protection in a cross-border merger is less based on an actual need but rather on a current trend to protect this group of stakeholders. The risk, it is argued, would not to be different from the risk associated with domestic mergers, where such protection does not exist.[65] Moreover, full mobility of companies would be ensured by erasing the obstacle that minority shareholder protection might pose in general. The disadvantage is that, presuming minority shareholders face an actual risk by, e.g., losing certain rights, costs might increase and investments in the financial market may be discouraged.

3.4.7 Employee Participation

A crucial issue with regard to the Directive is the determination of the employee participation system applicable to the company resulting from the cross-border merger. The concept of employee participation refers to the influence of employees on the corporate decision-making process within companies, for example by having seats in the management or the supervisory boards of the company.

Article 2(k) Directive 2001/86/EC on Employee Participation in European Companies defines participation as:

> "participation" means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:
> - the right to elect or appoint some of the members of the company's supervisory or administrative organ, or
> - the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

One major difference between corporate law systems in the EU/EEA is that some Member States require employee participation and others do not regulate this matter. However, even within the Member States that introduced a system of employee participation, the rules are not homogenous and can vary to a large extent.

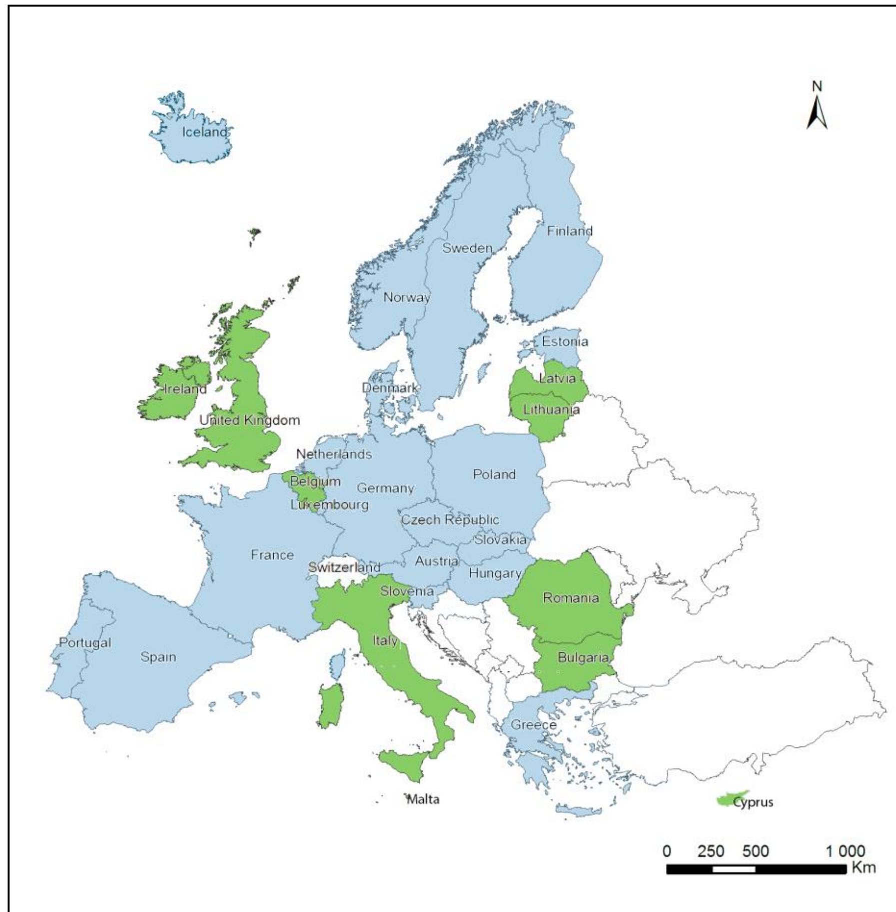
Generally, in 19 out of 30 Member States, employees have a right to be represented in the management or supervisory board of companies to which the national legislation on employee participation applies.[66] From the 19 countries which have employee participation, the underlying rights apply to the public and private sector in

[65] See e.g. M. Wyckaert and K. Geens, 4 *Utrecht Law Review* 1 (2008), p. 49-51.
[66] Please note that this and the following observations are based on data of A. Conchon, 'Board-level employee representation rights in Europe: Facts and Trends', *ETUI Report 121* (2011), which has been updated for the purpose of this study by Lexidale country researchers; See in that respect also the table in Part 5.

14 Member States, whereas in other States the rights can only be invoked in state-owned companies. Finally, in 11 Member States, such rights do not exist at all.

Figure 11 – Half of the Member States Have Adopted an Employee Participation System

Employee participation (blue), no employee participation (green). Data: Lexidale.



Yet employee participation does not only differ in the above mentioned context. It also differs in terms of the minimum size of the company for which employee participation is required. In some Member States, for example, there is no minimum number of employees applicable (such as for Austrian Plcs). In others, a minimum threshold applies, which can vary from 25 to more than 500 employees.[67]

Another variation exists as to the type of voice employees receive: a seat on the management board or alternatively on the supervisory board of companies. This depends on the corporate governance structure in the Member States, which is generally a monistic model (single board) or a dualist model (management board and supervisory board). Within the board structures, a further difference might be found in the number of board-level employee representatives, varying between 1 representative[68] to half of the board.[69] The responsibilities of the board members can

[67] See table in the Annex and A. Conchon, *ETUI Report 121* (2011), p. 14.
[68] Estonia, France, Greece and Norway.

also vary, which in turn impacts the different degrees of influence employee representatives can have. Finally, the process of appointment and the rules regarding potential candidates differ widely among Member States.

Based on these differences between the Member States, prior to the enactment of the Directive stakeholders feared that cross-border mergers would allow companies to decrease the levels of employee participation applicable to them. This could, for example, be the case if a German company merged into a company from the United Kingdom. If UK law would apply to the successor company, there would be no employee representatives sitting on the supervisory board, as required before for the German company.

This issue is also regarded as one of the main obstacles for creating a directive on cross-border mergers in the first place. After much debate in 2001, when the SE Regulation was enacted, a solution was found and put into law in the SE Directive. The solution provided that under certain circumstances, the management would negotiate with the employees the form of employee participation in the successor company, otherwise certain standard rules would apply determining the applicable employee participation.

This solution was also adopted by the Directive, but with small adaptions. First, the threshold for the application of the standard rules was increased from 25 to 33.3 percent.[70] Moreover, under the Directive, the relevant company organs can also choose to make the standard rules immediately applicable. Finally, unlike the SE Regulation, the Directive has not included provisions on information and consultation regarding employees.[71]

As a consequence, the difficulties associated with employee participation must also be taken into account in the context of the findings of the study on the operation and impact of the Statute for a European Company,[72] and of responses by stakeholder representatives[73] and by other organizations.[74]

One law firm contended that most issues related to the current system were solved in practice and that, with the accumulation of experience, the system is workable;

[69] Czech Republic, Denmark, Germany and Slovakia.
[70] Article 16(3)(e) CBMD.
[71] See e.g. also M. Andenas and F. Woolridge, *European Comparative Company Law* (Cambridge University Press, New York 2009), p. 499.
[72] Study on the operation and the impacts of the Statute for a European Company (SE), 2008/S 144-192482 (2009).
[73] See for example the reaction of ETUC and Business Europe to the European Commission's First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees, C(2011) 4707 final.
[74] See the Eurofund study on Employee involvement in companies under the European Company Statute (2011), http://www.eurofound.europa.eu/pubdocs/2010/78/en/1/EF1078EN.pdf (last visited 8 August 2013).

however, most other stakeholders raised concerns and complained that the current system was overly complex—regardless of substance—and that this complexity resulted in unnecessary costs, delays, and problems. In general, legal advisors have the perspective that the employee participation procedure increases complexities and costs of the cross-border merger.[75] One Greek law firm even reported that due to the issue of employee participation, a proposed merger between a Greek listed company and a Spanish company was abandoned.

In addition, a recurring issue is the duration of the employee participation agreement; some reported that concluding such an agreement may take months. National legislation, however, is not always accommodating of that, with, for example, Austrian legislation that stipulates that the cross-border merger has to be filed with the registry within nine months of the effective date of the merger. If employee participation is an issue, this deadline is difficult to meet.

Stakeholders also refer to several gaps that exist in the Article 16 CBMD procedure. It is noted that the position of the exceptions under Article 16(2) is not clear, for example, whether those exceptions are cumulative. Moreover, the literature too discusses whether Article 16(2) consists of two or three exceptions. It is argued that it is not sufficient if Article 16(2)(a) or (b) applies, but the situation always has to be within the scope of the first exception.[76]

Secondly, Article 16(2)(b) leaves open an ambiguity whether a deviation from the rule set out in Article 16(1) CBMD is only possible if employees are subject to an employee participation regime at the time when the cross-border merger becomes effective. This has, for example, created some ambiguity in the German transposition.[77] In that context, it has also been reported that it was unclear whether, in such cases, the relevant organs of the merging companies might choose to apply the standard rules without prior negotiations (Article 16(4)(a) Directive).

A similar issue is also reported in the Austrian context. The Austrian legislation transposing the rules on employee participation is so broadly interpreted that it also covers cases where no employee participation rights existed in the company being acquired. The example given was the following: If a foreign SPV that does not have employees and therefore is not operating any employee participation system is

[75] This has been reported by legal advisors from 14 Member States.
[76] See e.g. M. Tepass, 'Employee Participation Schemes and European Employment Rules for Cross-Border Reorganization', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 280; It should be noted that Case C-635/11 *Commission v. Netherlands* shed some light on this question because in its judgment, the Court refers to 'three exceptions specified at Article 16(2) of the Mergers Directive'; See Case C-635/11 *Commission v. Netherlands*, 20 June 2013, not yet reported, para. 31 read together with para. 34; Yet it does not specifically refer to the matter whether the second and the third exception can only be applied together with the first.
[77] Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung, MgVG (Germany).

merged into an Austrian company, a procedure similar to the procedure for SEs will then be triggered. Employee representatives from the Austrian company's European subsidiaries may be delegated to the Austrian company's supervisory board (*Aufsichtsrat*). The result is astonishing: on the one hand, there are no employees of the company being acquired (SPV) and therefore no participation rights to be protected. On the other hand, the Austrian employee representatives already sitting on the supervisory board usually have no interest in being diluted by employee representatives from the company's European subsidiaries. Further, if the Austrian company does not already have a supervisory board, it will be required to establish one, even if there is otherwise no need for it.

A different issue brought up in multiple ways by legal advisors and also by the European Trade Union Confederation (ETUC) is the unclear situation as to sanctions for non-conformity with the rules on employee participation. Article 11 CBMD requires that the authority of the Member State of the resulting company ensures that "arrangements for employee participation have been determined in accordance with Article 16." But the standard of review by this authority is not clear, and seems only to include a check as to whether an agreement has been concluded or a decision not to negotiate has been taken. It does not include a review as to the conclusion of the agreement or its content.[78] Another legal advisor has remarked in this context that since non-compliance did not necessarily have an impact on the validity of the cross-border mergers, it could happen that deadlines were violated.

Some stakeholders believed that there should be an obligation to carry out a social impact assessment. Such an assessment would provide better information to those involved and would improve decision-making.

Finally, it has also been criticized that Article 16 only dealt with participation and not with information and consultation duties. In principle, the European Works Council Directive[79] does not apply to SEs. This is different for situations under the CBMD, where the European Works Council Directive remains applicable. In the context of the Works Council Directive, it was stated by a stakeholder that in cases where both works council and employee participation issues were present, the situation could become complicated. This is the case because several sets of rules can be applicable if there is no coordination in this regard, which might lead to parallel procedures in order to make sure that everything is in compliance with the rules.

[78] For Germany, see on this matter for example D. Weyde and J. Hafemann, 'Praxisrelevante gesellschaftsrechtliche und steuerrechtliche Aspekte', in *Festschrift für Wienand Meilicke* (2010), p. 796-797.

[79] The European Works Council Directive, i.e. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, [2009] OJ L 122/28.

Case Study: Employee Participation

An Austrian company employing more than 5,000 employees was seeking to merge into a UK company employing 3,500 employees. According to Article 16(1) CBMD, the applicable employee participation system would be that of the United Kingdom, where the registered office of the surviving entity is situated. The United Kingdom, however, does not have employee participation system. Since the Austrian company employed, during the six months that preceded the merger, more than 500 employees covered by an employee participation system, an SNB has to nevertheless be formed or standard rules will be applied. As stated by the partner of a major M&A law firm in Austria that has carried out several cross-border mergers, the formation of an SNB in such a case would be avoided at any cost, and would possibly be a "knock-out" criteria for not carrying out the cross-border merger at all.

3.4.7.1 Optional Solutions

Considering the existing discussions of stakeholders on this topic, there are two main approaches proposed on a general level: a high employee participation or high-mobility approach. Under high employee participation, the current system will be kept, thus allowing for considerable negotiation power for employees, which could also be further expanded. As addressed by stakeholders, the percentage of the application of the standard rules could be lowered again from 33.3 percent to 25 percent, in order to align it with the requirements for the European company. Under the high mobility approach, SNBs would only be formed under a more narrow set of conditions than currently exist. The reason is that those bodies, while providing for greater employee participation, greatly increase negotiation periods and encumber the procedure. This can be achieved, for example, by limiting the exceptions to the general rule under Article 16(1) CBMD. Similarly, one can raise the percentage of the application of the standard rules above 33.3 percent, as stipulated in Article 16(3)(e) CBMD. Other possibilities consist of limiting the duration of the negotiations or changing majority requirements in the SNB.

Three points are worth mentioning in this regard. First, compared with the SE system of employee participation, the CBMD already offers a less stringent protection of employees, because it allows the management to apply the standard rules laid down in Article 16(4)(a). Secondly, there is a potential tension between Article 16 CBMD and the freedom of establishment, as stronger protection limits establishment flexibility.[80] Third, it has to be taken into account that the negotiations on the SE Regulation and the CBMD took so long because it was not possible to find a consensus between Member States on how to deal with employee participation. As a consequence, the current system potentially represents a balance of interests that may be difficult or

[80] See on this issue P. Storm, 'Cross-Border Mergers, the Rule of Reason and Employee Participation', 3 *European Company Law* 3 (2006).

undesirable to disrupt. To a certain extent, it is clear that if employee participation rights should be protected, certain costs have to be incurred. At the same time, though, it is also clear that the European internal market has as an objective to ensure the mobility of companies within the EU, and therefore giving full priority to employee participation seems equally difficult.

A middle way might be to address only specific issues raised by stakeholders, thus making the procedure under Article 16 more efficient by reducing extra costs and complexities. This refers, for example, to the ambiguities in Article 16(2) as well as the issue of sanctions for non-compliance.

3.4.8 Different Timelines in the Member States

An issue that has been raised by stakeholders is that timelines differ between Member States. This complication has already been raised in the context of stakeholder protection and the different timelines that exist in each Member State in that respect. For example and as discussed above, the protection period in certain Member States starts before the general meeting, while in others it only starts afterwards. As a consequence, the periods of both countries might have to be added, which can substantially prolong the duration of the merger. Differences exist not only in this area, but relate also to the date of filing of the merger documentation, the date when documentation has to be made available to shareholders, the date of the shareholder meeting, and the timelines to receive the pre-merger certificate. As a consequence, it is necessary to draw up a clear timeline for all involved countries before carrying out a cross-border merger, which requires additional time and resources.

The filing of merger documents provided by stakeholders has exemplified the different procedures for publishing the CDTMs in different Member States by the authorities. It was reported that in some Member States, it only took 3 or 4 days, while in others it could take up to 2 weeks. This causes uncertainties regarding the date for the general meeting approving the CDTMs. If, for example, five to six entities from different Member States were involved in a cross-border merger where legislation provides for different procedures to publish the CDTMs, the result is a complicated and cumbersome procedure for setting dates for the general meetings.

Case Study: Timelines in a Merger between the United Kingdom and Italy

In a cross-border merger between a UK company and an Italian company, the merger procedure has to adhere to the timelines of both countries.
In Italy, the CDTMs have to be filed with the Companies' Registry at least 30 days before the general meeting convened in order to approve the merger. During the same time, the merger terms and the balance sheets of the involved companies have to be made available to the shareholders at the registered office of the Italian company.
In the United Kingdom, the documents have to be submitted to the Company Registry 60 days before the general meeting. 30 days before the meeting, the documents have to be made available to the shareholders at the registered office of the UK company. The period can also be longer than the 60 days, because the general meeting has to be called by court order which has to be filed with the Companies' Registry at least 60 days before the meeting. For the court to give this order, the authority requires to receive the CDTMs. As a consequence, it is stated that a period of 3 months should be expected in the United Kingdom once the CDTMs have been drafted until the shareholders could approve the cross-border merger.
In addition, following the approval of the merger in the relevant jurisdictions by the shareholders, the timelines between Italy and the United Kingdom differ. In accordance with Italian legislation, the pre-merger certificate is issued by a notary, which increases the flexibility over the timing issue. In the United Kingdom, on the other hand, the certificate is issued by court order. Thus, once again, a hearing has to be scheduled to obtain it.
In Italy, the pre-merger certificate can be delayed by 60 days due to the waiting period and the creditor protection period. In the United Kingdom, a delay can also arise if creditors require a meeting in order to approve the meeting on their part.[81]

3.4.8.1 Optional Solutions

We consider two possible solutions for this difficulty: harmonization and provision of information.

Under the first option, the differences in the timelines between the Member States are decreased. This would, for example, consist of aligning the periods for the stakeholder protection or the timelines for submitting the merger documents to the company registry, etc. To refer to the example above, stakeholders had remarked that the publication of the CDTMs should be simultaneous in all Member States taking part in the cross-border merger. The advantage of said option is a decrease in the complexity of the cross-border merger procedure. This can potentially lead to a decrease of the and then costs involved in advising on cross-border mergers, and also the decrease in delays caused by differences in the timelines. The disadvantage, though, is that this would require legislative action on the European-level regarding several aspects of the cross-border merger process. This is so because the differences in the timeline are caused by different parts in the procedure. Many of these parts depend on national legal regimes applying not only to cross-border mergers but also to other legal transactions handled within the specific Member State. As a consequence, an

[81] F. Strumia, 'Cross-Border Mergers between UK and Italian Entities' *Business Jus* (2012).

alignment of the timeline requirements in cross-border mergers would lead to divergences between how similar transactions are handled on the national level. It would have to be examined whether the benefits of harmonization of the cross-border merger timelines would outweigh the costs of the divergence on the national level.

As a second option, we would consider to make available to stakeholders an effective and easily accessible tool that provides a good overview as to the differences between the timelines of the Member States. An example of such a tool is the CMS Guide to Cross-Border Mergers. By providing clear information about the timelines in each Member State, stakeholders can effectively choose when to merge and can plan ahead in an informed manner. This would make mergers more approachable, though it would obviously not solve the underlying problem completely.

3.4.9 Documentation and Other Requirements Set Differently by Member States

Apart from differences in time limits, Member States have set documentation requirements and other requirements differently. Regarding documentation, the differences are primarily those of language, but they also include a different organization of the forms and additional content requirements. This has been reported to be the source of significant costs. It was reported, for example, that the German notaries required German translations of most of the cross-border merger documents, even those being ruled by other Member States law.

A different issue in that context raised by stakeholders was the notarization of documents such as the CDTMs in certain Member States. Said notarization creates extra work and associated costs. In Austria, for example, notary costs have been reported to amount to 6.000 to 7.000 EUR. With respect to Italy, it has been stated that these costs could amount to more than 10.000 EUR. Yet, from a comparative perspective, there are not many Member States requiring notarization. EU/EEA countries that do so are, for example, Austria, Estonia, Germany, Slovakia, Luxembourg, and Malta under certain circumstances.[82]

Admittedly, the notarization costs are low compared with the overall costs of a cross-border merger, yet those could be reduced at a low investment and were therefore included as part of the analysis.

[82] Luxembourg: In the absence of the approval of the cross-border merger by all merging companies; Malta: if not original.

Case Study: Feasibility Study

Hungarian law requires companies that intend to carry out a cross-border merger to prepare a so-called "feasibility study." This includes preparing draft balance sheets and draft inventories with a cut-off date that may be defined by the general meeting of shareholders of the merging companies, and having the documents audited by an independent auditor. This requirement has the objective of determining whether the resulting company will be able to continue doing business. In Hungary, the feasibility study cannot be waived even if there is a unanimous decision of all shareholders to forgo the audit of the merger documents.

Case Study: Draft Merger Agreement

In Latvia, a draft merger agreement has to be submitted to the Latvian Company Registry. Said agreement will come into effect as soon as the merger agreement is approved by the shareholders. When mergers are carried out involving companies from other Member States, the procedure is generally commenced by signing the merger agreement. In Latvia, it is nevertheless required to file an additional explanatory letter to the Latvian Company Registry in order to comply with the stage of the "draft merger agreement."

Case Study: Auditing Requirements

A cross-border merger between an Icelandic company and a French company (Alfesca hf. and Cooperative Lur Berri, respectively) can serve as an example as to the difficulties arising due to differences in auditing requirements. French law required a court-appointed specific merger auditor to review the merger documents. This auditor then issued a report that did not include audited accounts. An issue subsequently arose as to whether the Icelandic authorities can approve the merger based on the auditor's report without audited merger accounts. In the end, this issue was resolved.

3.4.9.1 Optional Solutions

The most direct approach would be to create a standard set of regulations that Member States can choose to adopt. Such a standard would not interfere with the freedom of the Member States because it will be optional, but will nonetheless provide those States that seek to improve their procedure with an off-the-shelf solution.

An alternative solution, and a more modest one, is to create an effective and accessible database for stakeholders that shows, in an easily comprehensible manner, the different requirements existing in the Member States and perhaps even examples of how these different standards can be addresses in an effective way. The advantage is that this would not require alignment of the legislations of different Member States and would therefore not create major costs. Moreover, such a best-practice database

could decrease costs related to the differences in the merger procedures between the Member States. The disadvantage is that the differences as such would persist.

3.4.10 Remaining taxation problems in Cross-Border Mergers

A crucial obstacle to CBMs, but also to inter-state mobility in general, has been the taxation of unrealized capital gains and the possibility to carry forward losses. This issue is also referred to as "exit taxation." In domestic transactions, Member States provide for a tax deferral, which means that capital gains on assets or shares will be carried over to the new entity and will only be taxed as soon as they are realized. In a cross-border merger situation, such a deferral is normally not provided, because countries might lose their taxation rights in a cross-border transaction if, for example, the merging company is not deemed to be resident for tax purposes anymore. In general, this problem has been solved by the Tax Merger Directive,[83] providing that the assets remain connected to a permanent establishment in the jurisdiction.

Nevertheless, stakeholders from Finland, France, Iceland, and Slovenia have reported that tax treatment remained a problematic issue in cross-border mergers, and could also lead to using different structures than a cross-border merger to carry out such an operation.

3.4.10.1 Optional Solutions

There seem to be some regulatory activity in the context of cross-border mergers taxation that may solve the abovementioned problem.[84] The EFTA and EU authorities are already active in requiring Member States to comply with internal market law and to minimize those obstacles. For example, the EFTA Surveillance Authority has been reported to have brought a case in front of the EFTA court in May 2013 dealing with discriminatory treatment of domestic and cross-border mergers from a taxation perspective in Iceland.[85]

With further action of this type, the problem should be mitigated.

3.4.11 Limitation on Cross-Border Mergers between Certain Types of Companies

Article 4(1)(a) CBMD provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant

[83] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

[84] This should also be regarded, for example, in the context of the Survey of the implementation of Council Directive 90/434/ conducted by Ernst&Young for the European Commission in 2009, http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/mergers_directive/study_impl_direct.pdf (last visited 20 August 2013).

[85] EFTA Surveillance Authority, 'Internal Market: Iceland to be brought to Court for taxation of cross-border mergers', http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/1988 (last visited 03 September 2013).

Member State. Stakeholders report that this is an obstacle to the full effectiveness of cross-border mergers in the EU/EEA. The reason is that this limitation creates an artificial stage to a proposed merger; instead of merging directly, one has to convert the acquired company to a recognized type and only then is able to merge. This process costs both time and additional expenses for the companies undergoing the merger. Member States that have placed such a limitation are the Czech Republic, Lithuania, the Netherlands, and Iceland.

It also has to be considered that this raises a potential tension with the freedom of establishment. Courts might find that non-discriminatory obstacles are in violation of Article 49 TFEU if they unjustifiably hinder the exercise of the freedom of establishment.[86] Limitations on cross-border mergers between certain types of companies could potentially be regarded as such a violation, unless justified.

Case Study: Limitation on Cross-Border Mergers between Certain Types of Companies

In Lithuania, the Law on Cross-Border Mergers only permits mergers between private limited liability companies (*Uždaroji akcinė bendrovė*, or UAB) or public limited liability companies (*Akcinė bendrovė*, or AB). In other words, it is not possible in Lithuania to have both public and private limited liability companies in the same cross-border merger. In some cases, therefore, companies had to transform a private limited liability company into a public one, or vice versa, before carrying out the merger.

3.4.11.1 Optional Solutions

A possible solution, and one which may be in line with the relevant case-law such as *Sevic* or *Vale*, is to remove this restriction and allow all companies that fall within the scope of the Directive to merge. This corresponds with the feedback received from stakeholders and also the transposition trend of Member States.

3.4.12 Limitation on Cross-Border Seat Transfers via the Cross-Border Mergers Directive

As stated above, stakeholders use the CBMD in order to carry out cross-border seat transfers (defined as transfers of the registered office). Inasmuch as the Directive is meant to promote seat transfers, the current system poses obstacles. The most important point is the following: A cross-border seat transfer via the Directive is similar to a "pure" cross-border seat transfer, yet it is not the same. For a seat transfer on the basis of the CBMD to take place, a company in a different Member State has to be in existence, or has to be set up. In a cross-border merger, therefore, the ownership of the assets and liability will change. In a cross-border seat transfer,

[86] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165, para. 37 and Case C-210/06 *Cartesio* [2008] ECR I-09641, para. 113.

on the other hand, there is legal continuity, which could be of great significance, especially for tax reasons. A further problem relating to tax law might also make seat transfers on the basis of a cross-border merger difficult. Stakeholders have reported that legislation of certain Member States required, for anti-avoidance of tax reasons, that the underlying companies must exist for a certain period of time before the cross-border merger is possible.

Case Study: Limitation on Cross-Border Seat Transfers via the Cross-Border Mergers Directive

For tax-planning reasons, a UK company sought to carry out a cross-border seat transfer to Italy. In this case, the Italian companies already existed and therefore this aspect did not pose any problems. Had these companies been newly established, however, the UK authorities would have refused to allow the cross-border merger.

3.4.12.1 Optional Solutions

The Team suggests, based on stakeholders' proposals, to consider a new directive dealing with the transfer of the registered office. The main advantage of this approach would be that legal continuity would be kept, and obstacles such as those mentioned previously would be eliminated. Legal continuity would also strengthen creditor protection. Moreover, an individual legal instrument would also decrease costs, because there would be no obligation for a subsidiary to be set up. Ultimately, said actions would render the procedure more simple and structured, and thus result in a higher number of seat transfers.

3.4.13 The Competent Authorities Scrutinizing the Legality of the Cross-Border Merger

According to Article 11 CBMD, mergers will be scrutinized by a court, notary, or other competent authority. The relevant authority has to ensure that the merging companies have approved the CDTMs of the cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been made in accordance with Article 16.

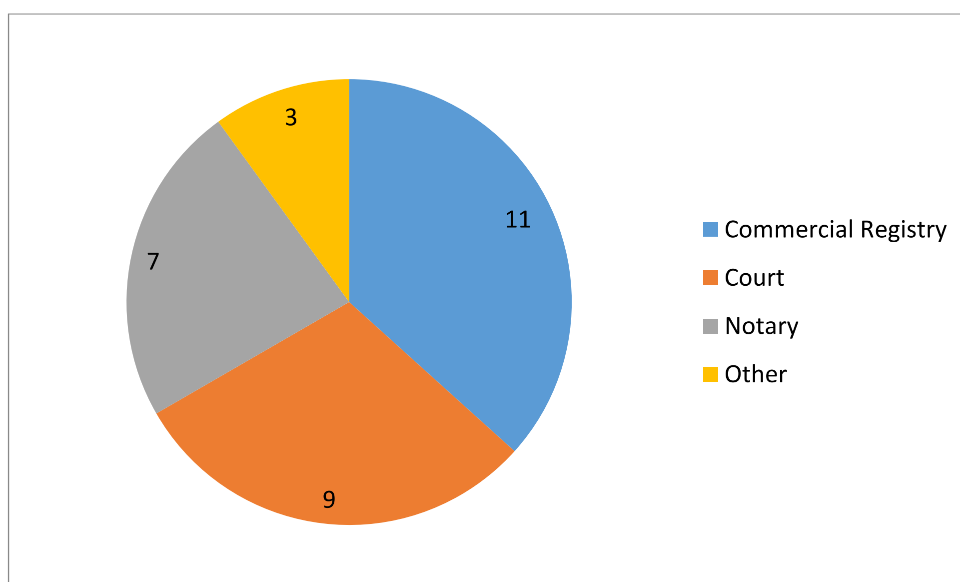
Stakeholders have raised three issues in this context: First, there was agreement among many of the stakeholders that notaries provide a better solution, as they are more flexible, can be approached beforehand in order to discuss issues, and allow for a quicker and cheaper disposition of the case than in a court. It has also been noted by both national authorities and legal advisors that it was unclear for national authorities where they had to send documents to in other Member States. As stated, this was particularly related to the lack of a common database where said information could be found.

A second issue is that the differences in authorities cause some uncertainties with respect to the process, and require investment in legal counselling. In this context, it can be noted that the highest proportion of designated authorities consist of the national registries, as 11 Member States[87] conferred the pre-merger certificate under Article 10 CBMD and the legal scrutiny under Article 11 CBMD to them. 9 Member States[88] have assigned this role to the courts, and 7 Member States[89] have assigned this role to notaries. 3 Member States have chosen to use a different authority: the Commerce and Companies agency in Denmark; the Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development (now called the Ministry of Economy, Competitiveness and Marine) in Greece; and the Office of Justice in Liechtenstein.

A third issue is that competent authorities are reported to verify whether all companies involved in the cross-border merger complied with the legal regime of the underlying Member State. The consequence is that requirements are imposed on foreign companies that do not stem from their own legislation. A Spanish law firm reported that this could lead to a situation where it was impossible to meet the requirements, because the domestic requirements were incompatible with the foreign requirements.

Figure 12 – The Highest Proportion of Member States Has Designated a Registry as the Competent Authority under Articles 10 and 11 CBMD

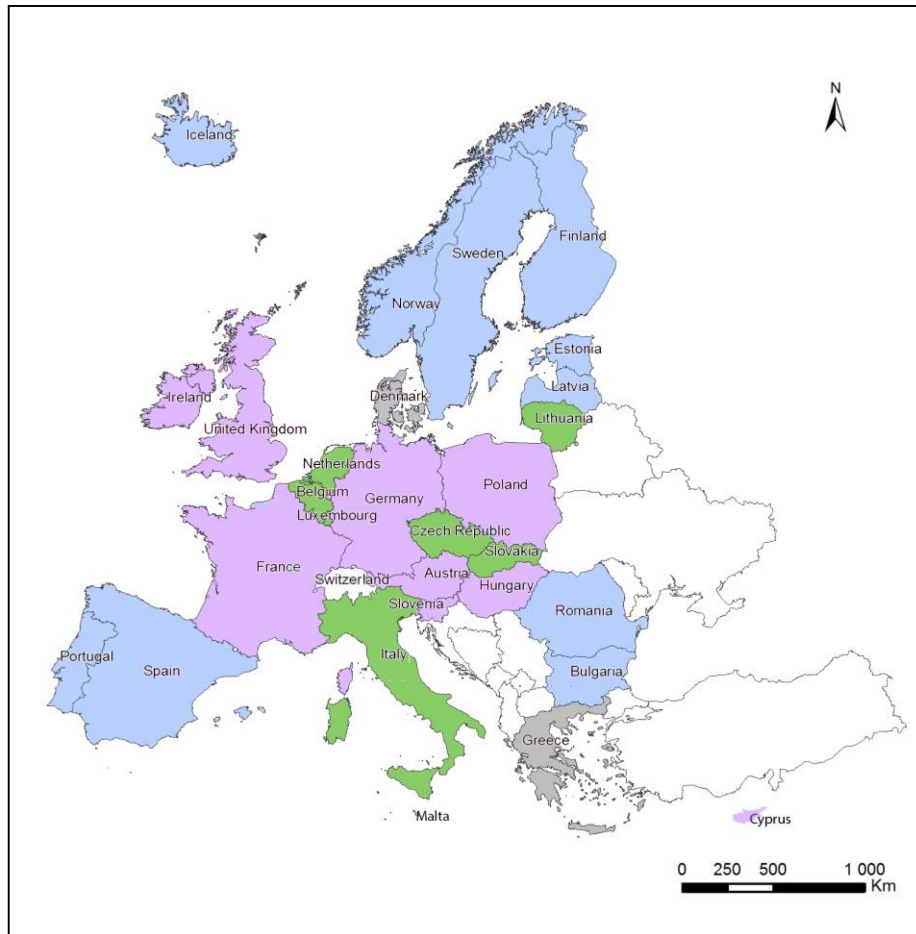
Authorities that have been designated under Articles 10 and 11 CBMD. Data: Lexidale.



[87] Bulgaria, Estonia, Finland, Iceland, Latvia, Latvia, Norway, Portugal, Spain, Sweden, Romania and Malta.
[88] Austria, Cyprus, France, Germany, Hungary, Ireland, Poland, Slovenia and UK.
[89] Belgium, Czech Republic, Italy, Lithuania, Luxembourg, Netherlands and Slovakia.

Figure 13 – Member States Have Designated Different Authorities to Carry Out the Legal Scrutiny

Authorities that Member States have designated to carry out the legal scrutiny. Court (lilac), notary (green), registry (blue), different (gray). Data: Lexidale.



3.4.13.1 Optional Solutions

The choice of competent authority lies within the States' discretion, yet a possible solution is that the registries would be assigned this role in all Member States.

As to the information side, The Team recommends that within the more general recommendation to compile an updated database of cross-border mergers information, attention will be given to the relevant authority.

Lastly, we propose as an optional solution a "parallel track" procedure, where each national competent authority would only review whether the company belonging to its jurisdiction has complied with all rules and formalities. In more detail, this would mean that the authority of the absorbed company would validate the requirements of its legal regime, such as resolution, public disclosure, opposition, etc., with the objective of issuing the certificate of compliance. The authority of the absorbing company would review the compliance of the company situated within its jurisdiction,

and with regard to the absorbed company it would require an authenticated document evidencing compliance with the requirements of its own jurisdiction.

3.4.14 Companies Formed in a Non-EU/EEA Member State

Article 1 CBMD states: "This Directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different Member States (hereinafter referred to as cross-border mergers)."

The consequence of Article 1 is that companies are required to fulfil cumulative criteria: They must have been formed in accordance with the law of a Member State and must have their registered office, central administration, or principal place of business within the EU/EEA. In other words, the legislation does not apply to companies that have been formed outside of the EU/EEA but have transferred their domicile to the EU/EEA. As a consequence, companies that carry out a cross-border seat transfer from a non-EU/EEA country into the EU/EEA, and by that operation convert into an EU/EEA company law form, are excluded from carrying out cross-border mergers under the CBMD framework. This is regarded by many stakeholders as an important issue. For example, stakeholders have raised this issue as problematic with respect to Liechtenstein and Germany.[90]

3.4.14.1 Optional Solutions

An optional solution can be to clarify in Article 1 CBMD that the Directive also applies to companies that have not been formed in the EU/EEA, so long as they have converted into an EU/EEA company law form.

3.4.15 Waiver of the Management Report

In accordance with Article 7 CBMD, the management or administrative organ of each of the merging companies should draw up a report explaining and justifying the legal and economic aspects of the cross-border merger, and explaining the implications of the cross-border merger for members, creditors, and employees. Stakeholders state that drawing up such a report generally requires substantial effort. Since it is intended to inform shareholders and employees, it is perceived as a difficulty that this report has to be prepared even in cases where the merging companies do not have employees and the shareholders resolve to waive the requirement (This interpretation is adopted practice in Germany).

[90] § 122b UmwG (Germany) and Article 352a PGR (Liechtenstein).

3.4.15.1 Optional Solutions

The Team perceives it as a possibility to waive the report in cases where no employees are involved and shareholders waive said requirement, a solution in line with the stakeholders' suggestions, who believe substantial costs could thus be saved.

3.4.16 Technical Difficulties in the Cross-Border Mergers Directive

3.4.16.1 Dates Set Against the General Meeting

Technical difficulties arise due to some ambiguous definitions in the Directive. A major issue raised in that context is that the date of the general meeting convention has been set as the effective date for certain procedural deadlines, even though a general meeting does not always have to take place at all. In such cases, it is not clear what these deadlines are, or, in other words, whether a hypothetical general meeting should be used to determine the deadlines or not.

A deadline dictated by the date of the general meeting is, for example, the deadline for publication of the common draft terms under Article 6 Directive. The draft terms have to be published one month before the date of the general meeting. This is also the case for the report of the management under Article 7 CBMD, which has to be made available to members and to the representatives of the employees no less than one month before the date of the general meeting. The same applies to the independent expert report under Article 8 CBMD.

As stakeholders state, a difficulty arises with setting the date against the general meeting of shareholders because the Directive provides for exceptions where a general meeting is not mandatory. For example, by referring to Article 8 Domestic Merger Directive, Article 9(3) CBMD provides, under certain circumstances, the option to waive the need for approval by the acquiring company's shareholders. Similarly, in accordance with Article 15(1) CBMD, when merging with a wholly owned subsidiary, approval by the general meeting of shareholders of the subsidiary is not required.

In a combined application of both exceptions under Articles 9(3) and 15(1) CBMD, this leads to a practical difficulty because it is not clear against which date the deadlines discussed above should be set.

3.4.16.1.1 Optional Solutions

One possible solution could be to follow the one used within the Domestic Merger Directive (Article 25), which sets the reference date as the entry into effect of the merger. This solution has already proven to be applicable, and has the added advantage of harmonization with the Domestic arrangement.

A second optional solution would be to set the date as the date where the competent authority has authorized the legality of the merger in the merging company -- the

'second verification'. This has the advantage of setting an earlier date than the former solution, but in general this approach is less desirable because it diverges from the rule set under the domestic merger Directive.

In principle, it should be determined that if Member States replace the approval of the general meeting with the approval of a different company organ, the date should be set against the approval by said organ.

3.4.16.2 Formalization of the Cross-Border Merger in Case of the Exceptions to the General Meeting

A further technical difficulty is that the Directive does not clarify whether a merger has to be approved or formalized differently when any of the two exceptions mentioned above apply. In practice, most Member States do not require formalization or approval in such cases, but some oblige approval by another organ of the company.[91] Stakeholders state that a clarification in the Directive on that matter would be welcomed.[92]

3.4.16.2.1 Optional Solutions

Following on stakeholders' feedback, we suggest a clarification be made in the Directive. As to the content of the clarification, it seems that additional formal approval would be unnecessary in the cases described above, based on The Team's interpretation of the intention of the Directive. This is because the underlying exceptions were added based on the understanding that an approval in such instances would be overly cumbersome. Given this understanding, it is suggested that a clarification be made that no additional approval is necessary in those cases, unless required by other laws.

3.4.16.3 Lack of Correlation between Articles 9 and 11 CBMD

A final technical difficulty arises since there is no clear correlation between Articles 11 and 9 CBMD. Article 11 CBMD provides that in order to scrutinize the legality of the cross-border merger, the merging company must submit a certificate to the Member State where the successor company will be situated, a certificate issued by the other Member State together with the approved draft terms by the general meeting.

Stakeholders remark that when any of the exceptions apply and the approval by the general shareholders' meeting is not require (for example, because it is a simplified merger), there is obviously no approval to attach to the certificate despite the requirement of Article 11 Directive. Various practical misunderstandings may be triggered by this inconsistency.

[91] See for example under certain conditions the Czech Republic, Finland, Germany, Ireland, Italy, Netherlands and Norway.
[92] See e.g. J. Vermeylen, 'The Cross-Border Merger Directive', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 23.

3.4.16.3.1 Optional Solutions

A solution to this technical difficulty is to clarify in the Directive that where the draft terms does not have to be approved, no approval must be attached to the certificate.

3.4.16.4 Lack of Synchrony between the Cross-Border Mergers Directive and Directive 2001/23/EC on Transfer of Undertakings

Directive 2001/23/EC on the Transfer of Undertakings is meant to safeguard the rights of employees in the event of a transfer of the business or its undertakings to a different entity. One difficulty reported by stakeholders was that cross-border mergers were not expressly mentioned in Directive 2001/23/EC, and therefore it was not clear to what extent the Transfer of Undertakings Directive applied to cross-border mergers. If the Transfer of Undertakings Directive were to apply, that would imply a different, sometimes stronger, set of obligations toward employees.

In principle an argument can be made in favour of the application of Directive 2001/23/EC because, for example, Recital 12 Directive 2005/56/EC refers to the provisions of Directive 2001/23/EC, and in addition Directive 2001/23/EC does not distinguish between domestic and cross-border mergers and therefore cross-border mergers should fall into its scope.[93] This, however, does not solve the uncertainty surrounding this question.

A second problem in this regard is that the CBMD applies to both the EU and the EEA, while Directive 2001/23/EC is not extended to Norway, Liechtenstein, and Iceland.[94]

3.4.16.4.1 Optional Solutions

We suggest making a clear cross-reference between Directive 2001/23/EC and the CBMD in order to solve this lack of clarity, also with regard to the application of the Directive to cross-border mergers involving Norway, Liechtenstein, or Iceland.

3.5 Trends and Developments

In the eight years that have passed since the publication of the Directive, there have been various changes in the laws of the Member States and the European Union itself. In this study, we identified several important trends that are likely to impact the Directive and its implementation. In this part, we highlight those trends and explain their relevance to the Directive. Policy-makers could benefit from understanding those trends in order to channel them in desirable ways or stop unwanted trends.

[93] See for these arguments also F. Bejan, 'The European Law regarding the Impact of Merger on Employees' Rights', 13 *Romanian Journal of European Affairs* 2 (2013), 31.
[94] Ibid.

3.5.1 Transposition of the Cross-Border Mergers Directive

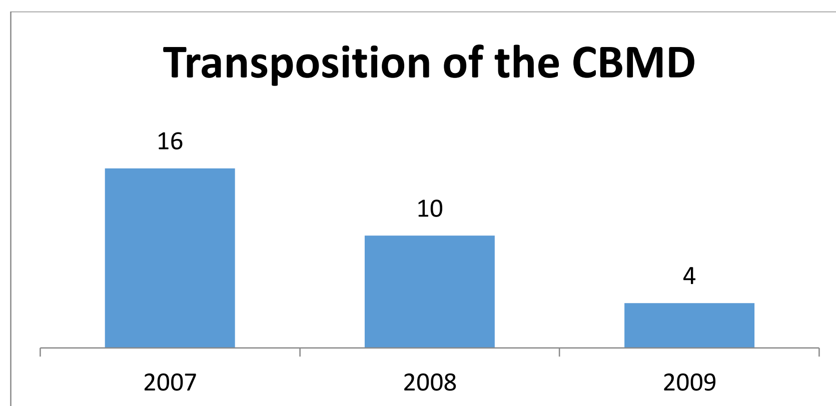
3.5.1.1 Transposition Dates

Considering the transposition dates by the Member States, the Directive faced a bumpy and slow start. As Article 19 Directive provides, Member States were under the obligation to transpose the Directive by December 15, 2007. However, only 16 Member States managed to do so,[95] among them 5 Member States did so exactly on the date of the deadline.[96] The first country to transpose the Directive was Norway on March 20, 2007, followed by Germany on April 25, 2007. Cyprus, Denmark, and Finland transposed the Directive in 2007, but only after the deadline has passed.

Ten Member States transposed the Directive in 2008,[97] and transposition finally followed in Luxembourg, Portugal, Spain, and Liechtenstein in 2009. With an implementation date of September 16, 2009, Liechtenstein was the last country to implement the Directive with a delay of nearly two years.

Figure 14 – Almost Half of the Member States Did Not Transpose the Directive by 2007

Transposition of the CBMD in the EU/EEA Member States. Data: Lexidale.



This incompliance with the transposition obligation for the EU/EEA countries has not gone unnoticed by the European Commission. On June 5, 2008, the Commission decided to start infringement proceedings against the 11 Member States that had not transposed the Directive by that date.[98] This resulted in legal proceedings before the Court of Justice of the European Union against Belgium, Sweden, Greece, and Liechtenstein.[99] It should be noted that the Commission had again opened proceedings

[95] Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Iceland, Latvia, Lithuania, Malta, Norway, Slovakia and United Kingdom.
[96] Austria, Hungary, Latvia, Malta, United Kingdom. Lithuania transposed the Directive two days before the deadline.
[97] Belgium, Czech Republic, France, Ireland, Italy, Netherlands, Romania, Slovenia and Sweden.
[98] Belgium, France, Greece, Italy, Latvia, Lithuania, the Netherlands, Portugal, Slovenia, Spain and Sweden.
[99] See Cases Case C-575/08 *Commission v. Belgium* [2009] ECR I-00163; Case C-555/08 *Commission v. Sweden* [2009] ECR I-00099; Case C-493/08 *Commission v. Greece* [2009] ECR I-00064; Case E-7/09 *EFTA v. Liechtenstein* [2009] EFTA Ct. Rep [2009-2010] p. 38.

against the Netherlands on December 9, 2011, in relation to the non-transposition of Article 16(2)(b) CBMD. On June 20, 2013, the Court of Justice of the European Union ruled that the Netherlands had failed to transpose this provision.[100]

These difficulties in the transposition of the Directive must be considered in the context of different difficulties faced by certain Member States that further delayed or hampered the transposition of the Directive. For example, stakeholders stated that before June 3, 2012, the Bulgarian Commercial Registry was not able to handle cross-border mergers, even though the CBMD had already been transposed in 2007. This is because the provisions relating to the registration procedure had only been transposed as late as January 2009. Moreover, until June 1, 2012, the Bulgarian Commercial Registry had not developed the software modules supporting the registration procedure and did not have the technical capacity to issue pre-merger certificates.

Finally, it seems that a considerable amount of Member States were confused as to the manner of transposition expected of them. In Slovakia, for example, the transposition involved the amendment of the existing Commercial Code rather than adopting new legislation to uniformly transpose the Directive. Having chosen this approach, the transposition was not done in a systematic manner and included many cross-references to provisions applicable to domestic mergers. In Hungary, the Directive was only literally transposed into Hungarian law without a clear adaptation of its content to national legislation. As a consequence, the terminology used for the transposing legislation was different than the local one, and created legal uncertainty as to whether parts of the general Hungarian law were still applicable to CBMs (for example, with respect to the requirement for the feasibility study). The working assumption by many Hungarian stakeholders is that it is not applicable, but certain general provisions are nevertheless applied in order to ensure that the cross-border merger can be carried out. Difficulties with respect to the relationship between the national law on domestic mergers and cross-border mergers have also been reported for the Netherlands. Another example pertains to Slovenia, where it was stated that-until recently- the CBMD was not transposed completely into Slovenian law. Particularly, certain exemptions and waivers were not foreseen in the Slovenian legislation.

There are several important implications to be drawn from the delayed transposition by many of the Member States. First, this puts in perspective the findings on the amounts of mergers; the influx of cross-border mergers is likely an underestimate of the actual potential, and once those bottlenecks are opened, one can expect more mergers to take place. Second, the late transposition suggests a benchmark for transposition of future directives.

[100] Case C-635/11 *European Commission v. Kingdom of the Netherlands*.

3.5.1.2 Definition of the Terms Transposition, Gold-Plating, Optional Provisions, and Improper Transposition and Methodology

Before examining the transposition and gold-plating trends of Member States, it is necessary to briefly discuss the terms used in this study to achieve transparency as to the methodology in the analysis.

The term "transposition" is used here to refer to the proper and full implementation of the Member State's obligations under the Directive. A Member State may transpose a specific provision in accordance with the letters or spirit of the Directive, in which case it will be deemed as having transposed a specific provision; or it may subtract, diverge, or otherwise modify the obligations set out by the Directive, in which case it will be deemed as having "improperly transposed" the Directive. While there may be good justifications for the diverging transposition, our focus here is not on the justification but rather on the formal side, and the term "improper transposition" should be read in this narrow sense. Furthermore, some discretion is required in this process, as it is not always clear what constitutes improper transposition and what is simply a different means of achieving the same end. In assessing that, The Team used its best discretion and tried to remain consistent and as close as possible to the spirit of the Directive, if not its language.

Gold-plating refers to cases where States voluntarily set up an obligation that exceeds the minimum required by the Directive.[101] "Optional provisions" refer to those Articles in the Directive that are explicitly optional for Member States to either transpose or refrain from doing so—e.g., the provision of creditors or minority shareholders with protection.[102] When a Member State refrains from using an optional provision it will not be deemed as failing to transpose it, and when it does, it will be counted as using an optional provision and not as transposing it (and neither as gold-plating).

The proper classification of legal instruments as gold-plating raises some difficulties, as it is often not a clear-cut issue but rather a matter of discretion. This is because the Directive allows its implementation through various means and those may be viewed as either meeting the provisions of the Directive or going beyond them. The Team therefore used discretion and classified as gold-plating only those instruments that clearly go beyond the scope of the Directive. Also note that some States (e.g., the

[101] European Commission, 'Smart Regulation', http://ec.europa.eu/governance/better_regulation/glossary_en.htm (last visited 8 August 2013).

[102] It should be noted that in practice, there are also provisions not classified as optional by the Directive, but where Member States are of the opinion that they do not have to transpose them. For example, Article 14(3) CBMD is such a provision. The German government is of the opinion that this provision is not important for German law as it addresses an issue crucial for French law and therefore transposition is not required. Germany is of the same opinion with regard to Article 2(2)(c): the country does not regard this as a special case since it is already included in general (merger by acquisition) and therefore transposition was not necessary.

United Kingdom, the Netherlands, Germany, or Ireland) [103] view gold-plating negatively and have a principled approach against what they view sometimes as "over-implementation."[104]

Even the interaction between the categories is not always straightforward, because there may be some overlap. Article 16(2) CBMD provides an example of a case where the same domestic provision may be deemed both as improperly transposing the Directive and gold-plating it. In this case, the Directive sets the scope of employee participation and sets out an exception for companies that employed more than 500 employees and have previously operated an employee participation system. When a State sets the exception to 250, it is simultaneously improperly transposing the Directive and, from one perspective, gold-plating it, because it expands the scope of the employee participation system set out by the Directive. Despite this overlap, the Team classified such cases as improper transposition, because it was understood to be the dominating element.

Considering this examination of the terms, it should be stressed that the analysis of this report regarding transposition, gold-plating, and so on has to be regarded within the limits mentioned above. Whether a rule has to be regarded as improper transposition, gold-plating, or as not transposed depends on many factors.[105] This report takes a certain position in this regard and does not exclude different perspectives. In order to assure the accuracy of the findings in a complex legal environment, The Team has approached the governments of all Member States in order to gather their input on matters such as the non-transposition of certain provisions.[106]

3.5.1.3 Overall Trends regarding the Substantive Transposition of the Directive in the Member States (Transposition, Gold-Plating, Improper Transposition, and Optional Provisions)

Despite a slow start, the Directive has been widely transposed by all EU/EEA countries. Reviewing the results of the transposition raise the following conclusions: First, the great majority of the Directive's provisions have been transposed into

[103] See Department for Business, Enterprise & Regulatory Reform, 'Transposition guide: how to implement European directives effectively', http://www.berr.gov.uk/files/file44371.pdf (last visited 8 August 2013) and Tweede Kamer, 'Kamerstukken 2005/2006', 29 515, nr. 143 and 151; Angela Merkel's Government-declaration of 30.11.2005: "Wir haben uns vorgenommen, die EU-Richtlinien im Grundsatz nur noch eins zu eins umzusetzen."; See also J.H. Jans et al., 'Gold plating' of European Environmental Measures?', http://ssrn.com/abstract=1485386 (last visited 8 August 2013), p. 4-5.

[104] W. Voermans, 'Gold-plating and double banking: an overrated problem?' in H. Snijders and S. Vogenauer (eds.), *Content and Meaning of National Law in the Context of Transnational Law* (Sellier European Law Publishers, Munich 2009), p. 84.

[105] An example is where the provision as such is not transposed, but it is nevertheless arguable whether transposition could be deduced from other provisions in the national law which provide for the same or a similar rule.

[106] Feedback was received from Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Norway, Slovakia, Sweden and the United Kingdom.

national legislation. Moreover, due to the fact that the Directive provides for minimum harmonization, Member States can set higher standards than provided for in the Directive. Considering that this was done only in a small number of cases, Member States appear to be satisfied with the standards set on the European-level.

This part will focus particularly on four aspects: gold-plating, the transposition of non-optional provisions of the Directive by Member States, the use of optional provisions, and implementation that diverges from the standard set out by the Directive.

Within the areas of transposition, gold-plating, improper transposition, and optional provisions, certain trends can be identified. Member States typically use gold-plating to expand the scope of the Directive in terms of the company types that are subject to the Directive, the merger types, restructuring forms, and cash payments. This trend is presumably motivated by the case-law of the Court of Justice of the European Union obliging Member States to support the freedom of establishment. This is particularly true regarding company types that could be included in cross-border mergers and cross-border restructuring forms. Similarly, States have used gold-plating to address issues of employee participation and to expand the requirements of the CDTMs. Gold-plating was also observed in instances where harmonization with local laws was required— Austria and Germany, for example, required the notarization of documents in accordance with local legislation.

As for optional provisions, those were implemented widely, despite being voluntary. The most dominant areas of such elective expansion are creditor and minority shareholder protection, the exception to the shareholder approval under Article 9(3) CBMD, the simplified procedure under Article 15(2) CBMD, and Article 10(3) on minority shareholder protection and the issuance of the merger certificate.

With respect to diverging transposition trends, there are in fact no clear trends associated with it. This suggests that there is no one central issue that Member States have difficulties implementing. The situation is also quite similar with respect to non-transposition, though as a general trend it can be noted that where Member States have not transposed provisions, they generally were of the opinion that they were not formally required to do so (as opposed to negligently or intentionally not transposing certain provisiond). For example, the German government is of the opinion that Article 14(3) CBMD is not important for German law since it addresses an issue crucial for French law, and transposition, in their opinion, is not required. Norway too has stated that it was not required to complete the formalities as set in this provision. Article 2(2)(c) raised the same reaction in Germany- the government considers it to be included in Article 2(2(a) (merger by acquisition) and therefore believes that transposition is not necessary. Another example is Article 4(1)(a) CBMD. Since

Belgium permits mergers between all company forms, this provision did not require transposition. Finally, Denmark remarked regarding Article 3(3) that this provision was not applicable in Denmark since such companies did not exist in this country. Moreover, it was not even possible to register such companies in Denmark.

The following sub-sections deal with each of the above mentioned topics individually.

Table 4: Transposition of the Directive in the Member States

Data: Lexidale.

Provision in the CBMD	Conformity Assessment		
	Non-Transposition	**Gold-Plating**	**Improper Transposition**
Article 1		CZ, BE, DK, EL, IS, IT, LU, NL, SK, SI, UK	BG
Article 2			
Article 2(1) (a)	IS	SK	SE
Article2(1) (b)	DE, IS	CZ, SK, SI	SE
Article 2(2)		NL, FI	
Article 2(2)(a)	FR	NL, SI	FI, IS, IE, SE
Article 2(2)(b)	FR	SI	FI, HU, IS, IE, SE
Article 2(2)(c)	FR, DE, LI, SI	IE	FI
Article 3			
Article 3(1)	IS, PT, SI	LV, NL, SE	BG
Article 3(2)	Optional provision		
Article 3(3)	DK, HU, IE, SK		EE, NL, UK
Article 4			
Article 4(1)(a)	AT, BE, FR, IS, IE, LI, SI	CY, SK	
Article 4(1)(b)	Optional provision		
Article 4(2)	Optional provision		
Article 5		BE, IE, IT, LV, LT, PL, PT, SI, SE	
Article 5(a)		IS, IT	

Provision in the CBMD	Conformity Assessment		
	Non-Transposition	**Gold-Plating**	**Improper Transposition**
Article 5(b)	IS	BG, SI, NL	
Article 5(c)		BG, SI	
Article 5(d)		AT, ES	
Article 5(e)			SE
Article 5(f)	IS	SI	
Article 5(g)			
Article 5(h)			
Article 5(i)			IE
Article 5(j)	IS		
Article 5(k)		IT	
Article 5(l)		BG	
Article 6		EL, MT, SI	
Article 6(1)		BE, DK, LT, NL, SI	FI, DE
Article 6(2)(a)	IS	IE, IT	BG, PL
Article 6(2)(b)	IS		BG, PL
Article 6(2)(c)	IS		EE, PL, SI
Article 7	PT, SK (not the third sentence)	BG, FI, IT, LT, NL, SE	
Article 8		IE, IT	
Article 8(1)		BE, BG, IE, LT, NL, SI	ES
Article 8(2)	LV	DE, IT	EE
Article 8(3)		FI	
Article 8(4)		FI, SE	IS, ES
Article 9		MT	
Article 9(1)		EL, IS, IE	FI, UK

Provision in the CBMD	Conformity Assessment		
	Non-Transposition	**Gold-Plating**	**Improper Transposition**
Article 9(2)	BG, FI, IS		
Article 9(3)	Optional provision		
Article 10			
Article 10(1)			LT
Article 10(2)		BG, IT	FR, IE
Article 10(3)	Optional provision		
Article 11		SI	
Article 11(1)		IE	LT, IE
Article 11(2)	BG		
Article 12			
Article 13		CY, EL, IS, SI	
Article 14		IT	FI
Article 14(1)(a)		SI	
Article 14(1)(b)		IS, SI	
Article 14(1)(c)			
Article 14(2)(a)		SI	
Article 14(2)(b)		IS, SI	
Article 14(2)(c)			
Article 14(3)	DE, IS, LI, NO, PT, ES, SE, NL, LV	IE	
Article 14(4)	IS, LI, NL		
Article 14(5)(a)	IS, NL	LT	
Article 14(5)(b)	IS, NL	LT	
Article 15			
Article 15(1)		IT, SI	FI, FR

Provision in the CBMD	Conformity Assessment		
	Non-Transposition	**Gold-Plating**	**Improper Transposition**
Article 15(2)	Optional provision		
Article 16		LU	
Article 16(1)	NL	LU	
Article 16(2)			BG, FI, SE
Article 16(2)(a)	IS, LV, LT, PL, RO		BG
Article 16(2)(b)	FR, IS, LV, LT, PL, RO, NL		BG, LU
Article 16(3)		DE, IT	RO
Article 16(4)(a)		LT	
Article 16(4)(b)	IT, PL		IE
Article 16(4)(c)	Optional		
Article 16(5)	Optional		
Article 16(6)	BE, EE, IS, PL	SI	
Article 16(7)	BE	AT, EL	UK
Article 17	IS	SI	UK
Provision in Directive 2009/109/EC			
Article 4			
Article 4(1)	BG, DK, PT	CY	FI, FR
Article 4(2)	BG, FI, HU, IS, LI, NO, SE	CY	FR
Provision in Directive 2011/35/EU			
Article 8	Optional provision		
Article 8(a)	Optional provision		
Article 8(b)	Optional provision		
Article 8(c)	Optional provision		

Provision in the CBMD	Conformity Assessment		
	Non-Transposition	Gold-Plating	Improper Transposition
Article 10(2)		CY	FI
Provision in Directive 2009/101/EC			
Article 3	FR, EL, IS, IT, RO, SI		HU

A full version of this table is found in Annex 4.

In the following sections, we discuss the provisions where a trend regarding non-transposition or gold-plating by Member States can be identified.

3.5.1.4 Specific Trends in the Transposition, Gold-Plating, and the Use of Optional Provisions

This part identifies important trends regarding the transposition, gold-plating, the use of optional provisions, and improper transposition of the Directive. It should be noted that the discussion will not deal with every individual provision of the Directive but rather with those where specific trends can be identified. To facilitate the interpretation of our results, we ordered the trends from the most important to the least important.

3.5.1.5 Expanding the Scope of the CBMD

A significant issue regarding the transposition of the CBMD, particularly in terms of gold-plating, is the scope of the cross-border merger legislation in the Member States. This issue consists of several aspects: the type of companies that can carry out cross-border mergers, the restructuring operations under the national law, the geographical scope of the legislation, whether companies in liquidation can merge, and whether the cash payment limitation from Article 2(2) has been followed.

The general trend we have identified is the expansion of the scope of the Directive, rendering it applicable to more company forms than strictly required by the Directive. In more details, some Member States have added companies that are not limited in liability to the list of company forms subject to the Directive; others have expanded the scope of their legislation to cross-border restructurings, and in general apply it on a worldwide basis. Most Member States also chose to include companies in liquidation, and many of them also went beyond the cash limit of 10 percent.

Based on the feedback from stakeholders, there does not seem to be a demand for a revision of the Directive in this regard, or for setting a higher common standard. Stakeholders reported satisfaction with the current situation. With respect to cross-

border divisions, though, there did seem to be a high degree of interest in enacting legislation on the European level covering this topic.

3.5.1.6 Company Forms

There are several provisions in the Directive that limit its scope to limited liability companies. Article 2(1) CBMD defines the term "limited liability company" as:

> *"A company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others."*

The Article also states certain limitations for the type of companies the CBMD could apply to, in reference to Article 1 of the first Company Law Directive.

Additionally, Articles 3(2) and 3(3) CBMD can further limit the scope of the Directive. Article 3(2) allows Member States to exclude cooperatives, even if those fall within the definition of limited liability companies. Article 3(3) excludes certain investment companies, which are defined as:

> *"A company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company."*

Mergers involving open investment companies, as defined under Article 3(3) CBMD, are subject to a special regime, governed by Articles 37 to 48 UCITS IV[107] and Articles 3 and 4 Commission Directive 2010/42/EU,[108] whose implementation date was June 30, 2011.

A noteworthy trend is that Member States engage in gold-plating by expanding the scope of the Directive to companies not covered by Article 2(1) Directive. Eight countries,[109] roughly one-fourth of the Member States, have gone beyond the default of limited liability companies, most expanding the scope of the legal framework to apply to general/limited partnership as well. Belgium's transposition, however,

[107] Directive 2009/65/EC of 13 July 2009 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), [2009] OJ L 23/203.
[108] Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure, [2010] OJ L 176/28.
[109] Belgium, Czech Republic, Italy, Slovakia, United Kingdom, Iceland, Luxembourg, and Denmark.

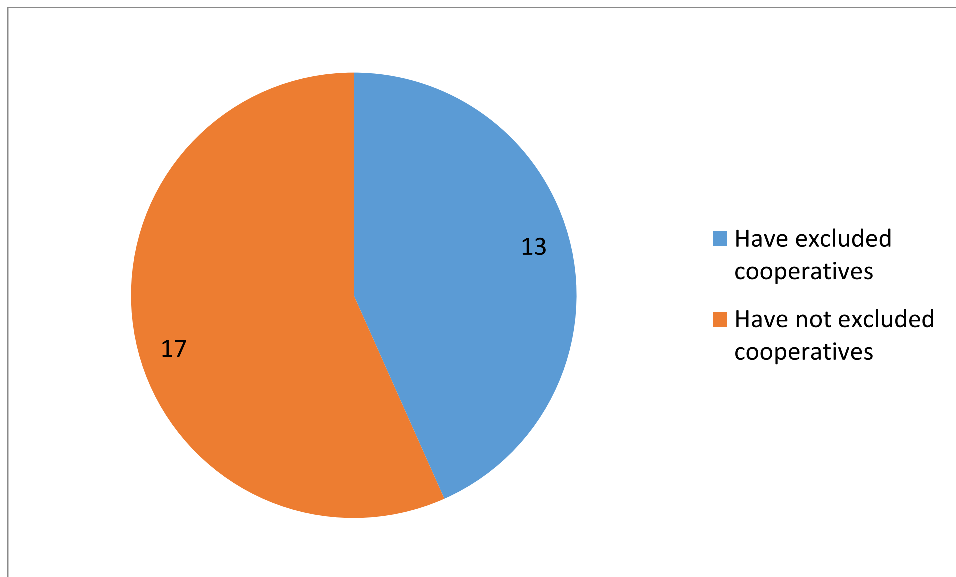
encompasses cooperative societies with no limited liability, while the United Kingdom goes even further by including general unlimited companies and unregistered companies as well. Iceland follows the same path in transposing the CBMD by applying it to non-profit organizations engaged in business operations. On the other hand, one Member State has chosen to narrow down the scope of the Directive: in Liechtenstein, only public limited liabilities are allowed to carry out cross-border mergers.

One reason for the trend of expanding the scope of the Directive, as expressed by certain Member States including Italy and the Czech Republic, is the case-law of the CJEU.

Regarding cooperatives, 13 Member States have included said entities in the scope of their legislation,[110] the remaining 17 Member States have not.[111]

Figure 15 – More Than Half of the Member States Have Excluded Cooperatives

The use of the optional provision to exclude cooperatives. Data: Lexidale.



To touch upon the issue of SE, it should be noted that SEs are technically within the scope of the Directive, since they are public limited liability companies. Practically, most Member States have indeed included the SEs under their transposition.[112] Member States that have not done so are Lithuania, Slovenia, and Iceland, which is quite remarkable considering the fact that SE could be set up in those countries through a cross-border merger. As a consequence, in those countries CBMs are possible at the formation stage but not later on.

[110] Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Greece, Hungary, Iceland, Lichtenstein, Luxembourg, Slovakia and Sweden.
[111] Austria, Bulgaria, Estonia, Germany, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain and United Kingdom.
[112] Among those countries are Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Sweden and United Kingdom.

As to European cooperative societies, 12 of the Member States namely Belgium, Czech Republic, Finland, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Romania, Slovakia, and Sweden have chosen to include said form. Bulgaria, France, Germany, Iceland, Lithuania, Norway, Poland, Slovenia, and the United Kingdom, on the other hand, have excluded SCEs.

Finally, it should be stated that nearly all Member States have followed the provision under Article 3(3) CBMD and excluded investment companies, with the exception of Hungary, Ireland, and the Netherlands. At least with respect to the Netherlands, though, it was stated that this would change with the transposition of Articles 27 to 48 UCITS IV and Articles 3 and 4 Commission Directive 2010/42/EU. For the Slovak Republic, it is stated that Article 3(3) has not been transposed and that the *Sevic* case would apply for those companies.

3.5.1.7 Implications

The implications of the above mentioned trend for future policy-making are important. First, we observe a push by Member States to expand the scope of application of the Directive. This suggests that Member States wish to create a level playing-field for their companies. On the other hand, the data on actual mergers taking place, when analysed by type of company, shows that in practice, such alternative forms are rarely involved in mergers. All in all, 66 percent of the acquiring companies and 70 percent of the merging companies involved in cross-border mergers were private limited liability companies, whereas 32 percent of acquiring companies and 28 percent of the merging companies involved in CBMs were public limited liability companies. But, as an example, only 10 general partnerships with apportioned liability have been part of a cross-border merger.

Figure 16 – Most Acquiring Companies Were Private Companies

Acquiring companies involved in CBMs by type.

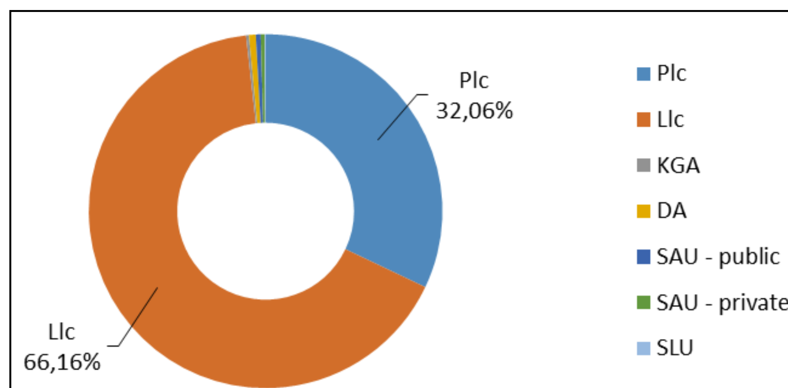
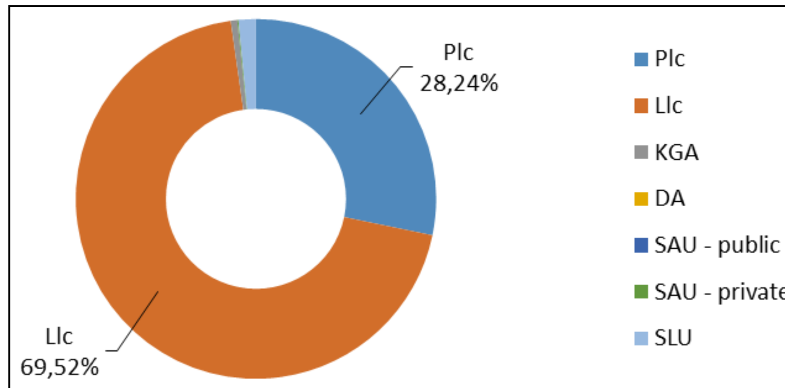


Figure 17 – Most Merging Companies Were Private Companies

Merging companies involved in CBMs by type.



Plc: AG Austria, NV/SA Belgium, AD Bulgaria, plc Cyprus, AS Czech Republic, A/S Denmark, AS Estonia, Oyj Finland, SA France, AG Germany, SA Greece, nyrt Hungary, hf Iceland, plc Ireland, Spa Italy, AS Latvia, AG Lichtenstein, AB Lithuania, SA Luxembourg, NV Netherlands, ASA Norway, SA Poland, SA Portugal, SA Romania, AS Slovakia, d.d. Slovenia, SA Spain, ABp Sweden, plc UK
Llc: GmbH Austria, BVBA/S.p.r.l Belgium, OOD Bulgaria, ltd Cyprus, Sro Czech Republic, Aps Denmark, OÜ Estonia, Oy Finland, SARL France, GmbH Germany, ltd Greece, kft/zrt Hungary, ehf Iceland, ltd Ireland, s.r.l Italy, SIA Latvia, GmbH Lichtenstein, UAB Lithuania, SARL Luxembourg, ltd Malta, BV Netherlands, AS Norway, SPZoo Poland, LDA Portugal, SRL Romania, SRO Slovakia, d.o.o. Slovenia, S.L. Spain, AB Sweden, ltd UK
KGA: Publicly traded partnership
DA: General partnership with apportioned liability
SAU-public: Unipersonal public limited company
SAU-private: Unipersonal private limited company
SLU: Simplified public limited company

3.5.1.8 Restructuring Options

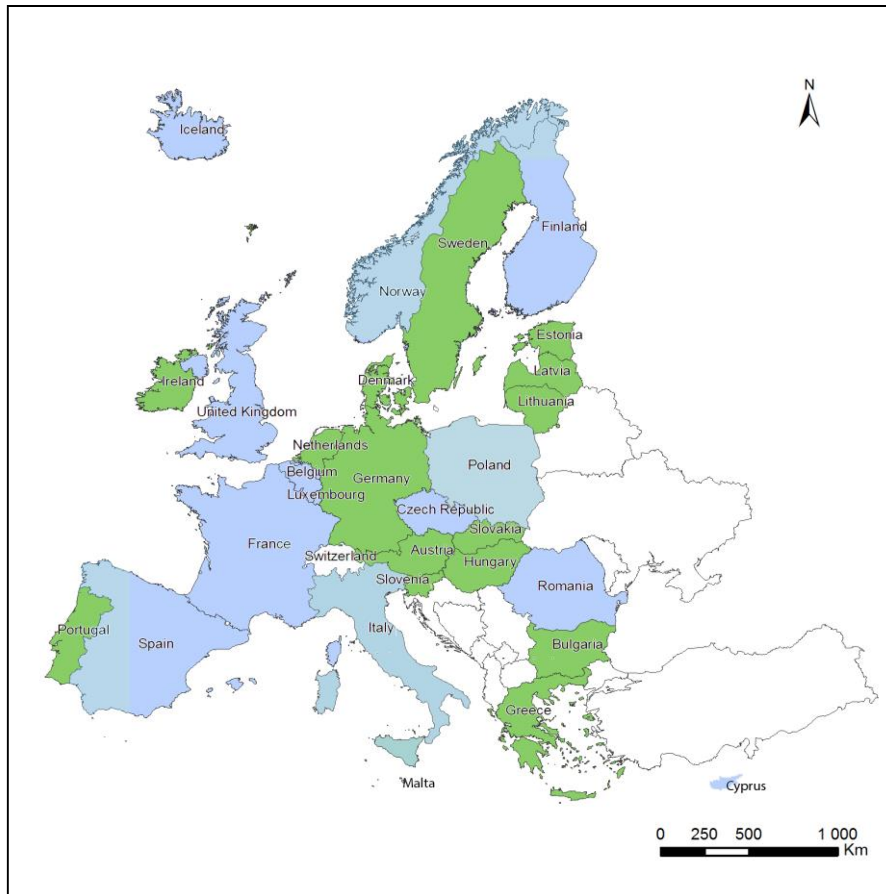
Certain Member States have extended the scope of the cross-border restructuring possibilities. Article 1 CBMD provides that the Directive applies to cross-border mergers. The term "merger" is defined in Article 2(2) CBMD as one of three alternatives. Even though not harmonized on a European level,[113] some Member States also include cross-border divisions. This is the case in Belgium,[114] the Czech Republic,[115] Finland,[116] France,[117] Luxembourg,[118] Romania, Spain,[119] Iceland,[120] and Norway.[121] For Cyprus, Italy, Poland, and the United Kingdom, it was also reported that this restructuring could in principle be possible.

[113] The EU has harmonized company divisions for public limited liability companies in the Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, [1982] OJ L 378/47.
[114] D. Van Gerven, 'Belgium', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 117.
[115] T. Dvorak, 'Promeny a cezhranicny promeny obchodnich spolecnosti a druzstev', *Wolters Kluwer* (2013).
[116] Ministry of Justice of Finland, 'Facilitations in Cross-Border Restructuring Operations', http://www.om.fi/en/Etusivu/Ajankohtaista/Uutiset/Uutisarkisto/Uutiset2007/1198084587280 (last visited 08 August 2013), hereinafter Ministry of Justice.
[117] CA Versailles, 12e ch., 3 oct. 1996, Sté Pier Import of Huston c/Sté Esders, RJDA 1997, no 60, Bull. Joly Sociétés 1997, p. 116, note Tilquin, JCP E 1997, I, no 676, obs. Viandier et Caussain (France).
[118] Section XV of the Luxembourg Company Act.
[119] Article 73.2; BOE number 82. April 4th, 2009. Sec. I, pag. 31948 (Spain), http://www.boe.es/boe/dias/2009/04/04/pdfs/BOE-A-2009-5614.pdf (last visited 08 August 2013).
[120] Chapter XIV of Act No. 2/1995 on Public Limited Companies and Act on Private Limited Companies / Art. 160 (1) Act on Public Limited Companies (Iceland).
[121] S. Berge and H. Bondeson, 'Norway', in D. van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 307.

Figure 18 – Nearly Half of the Member States Provide for the Possibility of Cross-Border Divisions

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

Data: Lexidale.



Among the Member States that allow for cross-border divisions, there are some important differences. For example, there are countries with specific legislation on this topic, such as the Czech Republic, Finland, Luxembourg, Spain, or Iceland. In contrast, there are countries that do not provide specific rules regarding cross-border divisions but do allow them, such as France or Romania. For example, in France, there has been a case where the court held that corporate restructuring between a French and a Dutch company is possible if the law of the other country involved recognizes the validity of this operation, and if the restructuring complies with the legislation applicable to each company.[122]

Moreover, for Italy, Poland, and the United Kingdom, the situation has been reported to be similar to France and Romania in the sense that there were no provisions regulating this issue; therefore, for example, in Italy a scholar assumed that cross-border divisions were possible.

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

Another distinction is that in certain Member States, the legislation has been based on the transposition of the CBMD, whereas in others the legislation exists independently. The former group includes the Czech Republic, Finland, Luxembourg, Spain, and Iceland. For those countries, providing for the possibility of cross-border divisions can thus also be characterized as gold-plating. Differences exist, though, even among those countries belonging to the same group. In the Czech Republic, for example, the original transposition legislation of the CBMD did not address cross-border divisions; however, many legal scholars agreed that based on relevant case-law, cross-border divisions were possible. Since the January 2012 amendment, this has also formally been acknowledged in legislation.[123] In Luxembourg, the legislation is based on the CBMD and was introduced by law of 23 March 2007 into the Luxembourg Company Act; cross-border divisions of public limited liability companies have been in practice since the mid-1990s. Finally, in Iceland it is reported that the provisions are not directly based on the CBMD, but mainly refer to those provisions. For certain Member States, it was reported that local legislation was a reaction to the case-law of the Court of Justice of the European Union, such as in the Czech Republic and Norway.

It should also be noted that Member States have even gone further in providing a variety of restructuring possibilities. For example, Czech legislation includes partial divisions and global transfers of assets and liabilities, and Luxembourgian national law includes cross-border transfer of assets, branch activity transfers, all assets and liability transfers, and transfers of professional assets. Moreover, the Netherlands[124] and Finland[125] allow cross-border triangular mergers. Additionally, in France, other restructuring procedures are considered to be possible, even though not specifically regulated.

The trend of enacting legislation for cross-border divisions has been particularly welcomed by many of the stakeholders. From their perspective, the nonexistence of a structured procedure in this regard is a considerable obstacle to the mobility of companies within the EU. Currently in most Member States, complicated transactions have to be followed to carry out a cross-border division, such as to first create a subsidiary and thereafter transfer the assets and liabilities to that subsidiary, or to carry out a domestic division with a subsequent cross-border seat transfer.

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[123] T. Dvorak, 'Promeny a cezhranicny promeny obchodnich spolecnosti a druzstev', *Wolters Kluwer* (2013), p. 227 (6.123).
[124] Article 2:333(a) DCC (the Netherlands). This possibility is only provided for inbound mergers, and only if the group company is governed by Dutch law. See E.E.G. Gepken-Jager, 'Wetsvoorstel betreffende grensoverschrijdende fusie van kapitaalvennootschappen', *Ondernemingsrecht* (2007-8).
[125] LLC Act, Part V, Chapter 16, Sections 2 (Finland).

3.5.1.8.1 Implications

This trend is in accordance with development in the case-law such as *Sevic* and *Vale*, and the harmonization of domestic divisions is already based on the 6th Company Law Directive.

The European Commission may choose to address this trend in connection with its Action Plan on European company law and corporate governance from December 2012, which should also reflect the underlying rationale of the case-law in *Sevic* and *Vale*; from those cases it can be deduced that the Freedom of Establishment principle may require a Member State to provide for a cross-border division if it is also available internally. Given that, there may be a basis for the incorporation, partially or fully, of this trend into a common directive including both cross-border mergers and divisions. Such an instrument will save the time it would take Member States to individually adopt such a measure, and will thus save costs.[126] A common instrument would also be in line with the proposal for a codification of EU company law, as expressed in the European Commission Action Plan.[127]

3.5.1.9 Geographical Scope

Article 1 CBMD clearly limits the scope of its application to companies "having their registered office, central administration or principal place of business within the Community [read: Union]." However, that does not signify that Member States cannot gold-plate and extend the geographical scope of their cross-border merger legislation.

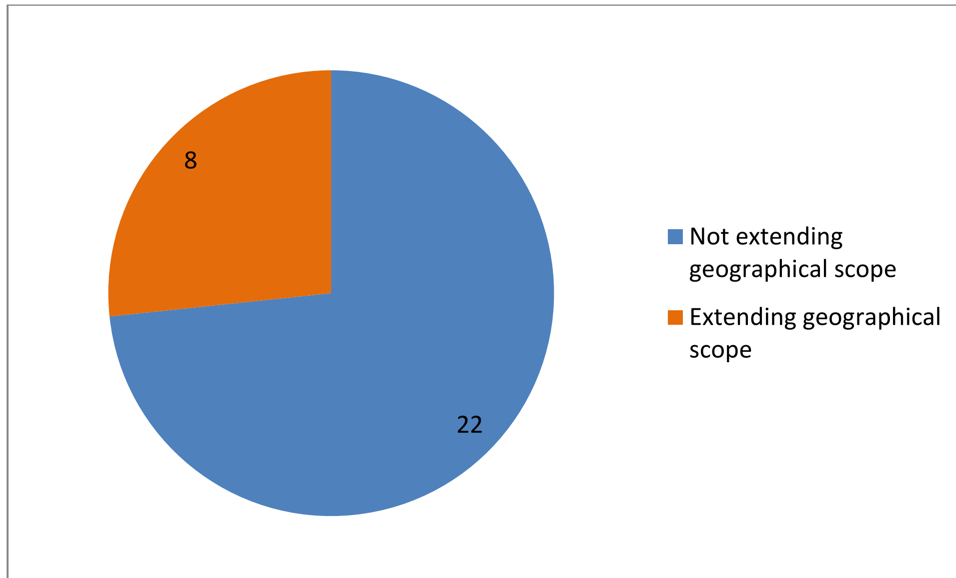
Nevertheless, there is a clear trend of most Member States refraining from doing so. Only 8 Member States have legislation that does not explicitly prohibit cross-border mergers with companies from outside the EEA area: Austria, France, Italy, Luxembourg, Romania, Slovakia, Spain, and Liechtenstein.

[126] See in this regard also the Commission Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final , p. 13; and on the same note also the Report of the Reflection Group On the Future of EU Company Law (2011), p. 21-22.

[127] See in this regard also the positive responses from stakeholders to the consultation by the European Commission on the future of European Company Law, http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf (last visited 08 August 2013); and on the same note also the Report of the Reflection Group On the Future of EU Company Law (2011), p. 28.

Figure 19 – More than Two-Thirds of All Member States Have Not Extended the Geographical Scope

Member States that have not extended the geographical scope (blue), have extended (orange). Data: Lexidale.



These findings, however, should be treated with caution. They do not imply that the Member States mentioned above have enacted legislation on this topic or allow this on a worldwide basis. With respect to Austria, for example, it was reported that cross-border mergers with non-EU/EEA countries are possible on the basis of the Transformation Act (*Umwandlungsgesetz*, UmwG) and particularly the Austrian Supreme Court case 6 Ob 283/02 I, both of which pre-date the transposition of the Directive. Another point to take into consideration is that even though non-EU/EEA cross-border mergers are legally possible on this basis, literature concludes that they are practically not feasible. [128]

As to France, to take another example, it is stated that the law does not specifically forbid cross-border mergers with non-EU/EEA companies. France, indeed, does not provide rules on that matter and it can therefore be assumed that such cross-border mergers are possible. It should be noted, however, that this would not be possible on the basis of the transposition of the CBMD, because it has explicitly excluded the act to operations involving non-EEA companies.[129]

[128] See e.g. H.-C. Kepplinger, 'Grenzüberschreitende Verschmelzungen, zulässig – aber undurchführbar?', *wbl* (2000), p. 485.
[129] Com. Code, Art. L.236-25 (France).

The same situation exists for Greece: The country neither prohibits nor allows this kind of operation.[130] In Italy, the geographical scope of the law on cross-border merger has been extended worldwide, but only for limited liability companies.[131]

Liechtenstein is an example of where an extension has not been made on a worldwide basis; instead, it is reported that cross-border mergers with non-EU/EEA countries are generally not possible. However, an exception is that mergers between companies in Liechtenstein and Switzerland are possible if the responsible authorities allow it. Admissible mergers contain especially those of Swiss corporations (*Aktiengesellschaften*) with limited liability companies of Liechtenstein.[132]

In Romania, international mergers are acceptable if the cumulative conditions of both countries allow for them.[133] In Spain, international mergers are possible, but again, not on the basis of the legislation transposing the CBMD but rather because of the provisions of the respective countries involved.[134] [135]

Finally, Iceland is also an interesting example. The Icelandic Minister of Economic Affairs can name by regulation other countries to which the legislation transposing the CBMD applies. Yet, the Minister has not used this authority to date.[136]

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[130] Ernst & Young, 'Cross-border mergers: 10 questions regarding mergers between EU companies ("EU Mergers") and mergers between EU and non-EU companies ("International Mergers")', http://www2.eycom.ch/publications/items/tas/2010_cross-border_mergers/2010_EY_cross-border_mergers.pdf (last visited 08 August 2013).

[131] Article 2(2) of the Decree (Italy).

[132] Statement of the Liechtenstein Government to the Liechtenstein Parliament regarding questions raised on the occasion of the first reading concerning the amendment of the PGR Nr. 58/2009, http://bua.gmg.biz/BuA/index.jsp?erweitert=keep (last visited 21 August 2013), p. 6.

[133] Article 46 of Law 105/1992 on international private law (Romania). See Ernst & Young, 'Cross-border mergers: 10 questions regarding mergers between EU companies ("EU Mergers") and mergers between EU and non-EU companies ("International Mergers")', http://www2.eycom.ch/publications/items/tas/2010_cross-border_mergers/2010_EY_cross-border_mergers.pdf (last visited 8 August 2013).

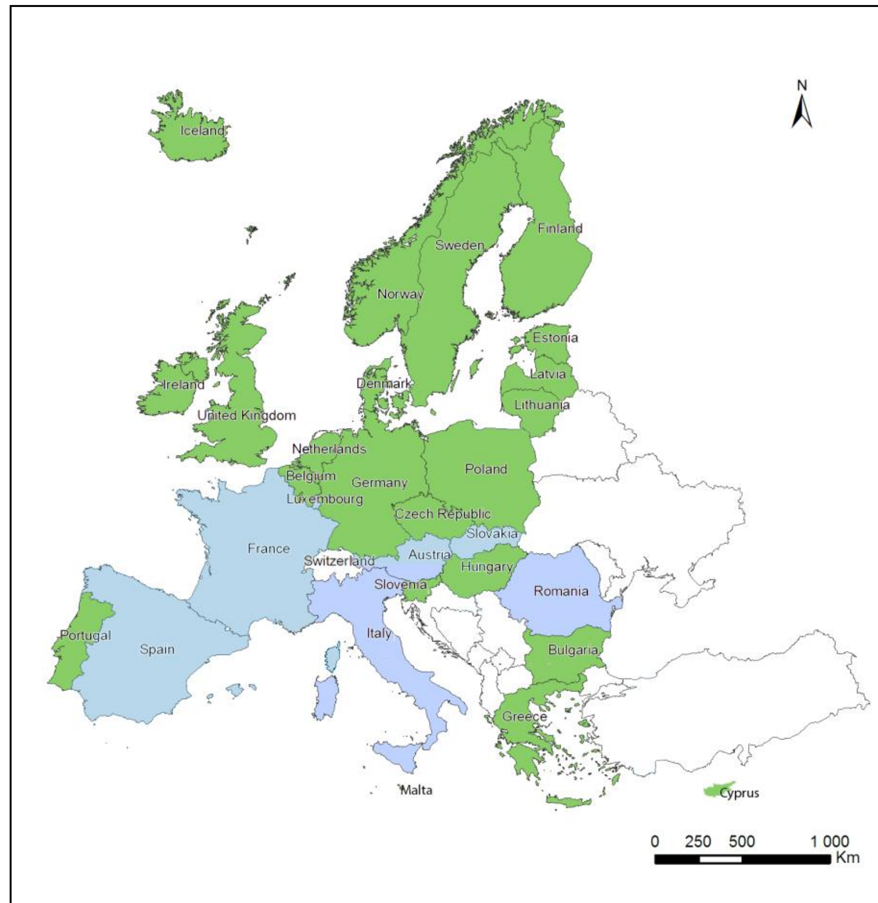
[134] I.C. Dale, 'Cross-Border Reorganizations in Spain', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 4.

[135] BOE number 82. April 4th, 2009. Sec. I, pag. 31936 (Spain), http://www.boe.es/boe/dias/2009/04/04/pdfs/BOE-A-2009-5614.pdf (last visited 08 August 2013).

[136] Article 133(a) of the Act on Public Limited Companies and Article 107(b) of the Act on Private Limited Companies (Iceland).

Figure 20 – Austria, France, Italy, Liechtenstein, Luxembourg, Romania, Slovakia, and Spain Have Extended the Geographical Scope of the CBMD

Member States where cross-border mergers with non-EU/EEA companies are possible (blue), are not possible (green). Data: Lexidale.



3.5.1.9.1 Implications: Geographical Scope

Since the extension of a Member State's geographical scope regarding cross-border merger legislation primarily concerns the competence of the national legislator, The Team believes this expansion can be beneficial. The positive qualities are, to a large extent, the same as provided for under the category "market integration" in the section on cost savings by the Directive. For example, a company that seeks to turn its subsidiaries into branches might not only have subsidiaries in the EU and the EEA but also in neighbouring countries to which the CBMD does not apply.

3.5.1.10 Companies in Liquidation

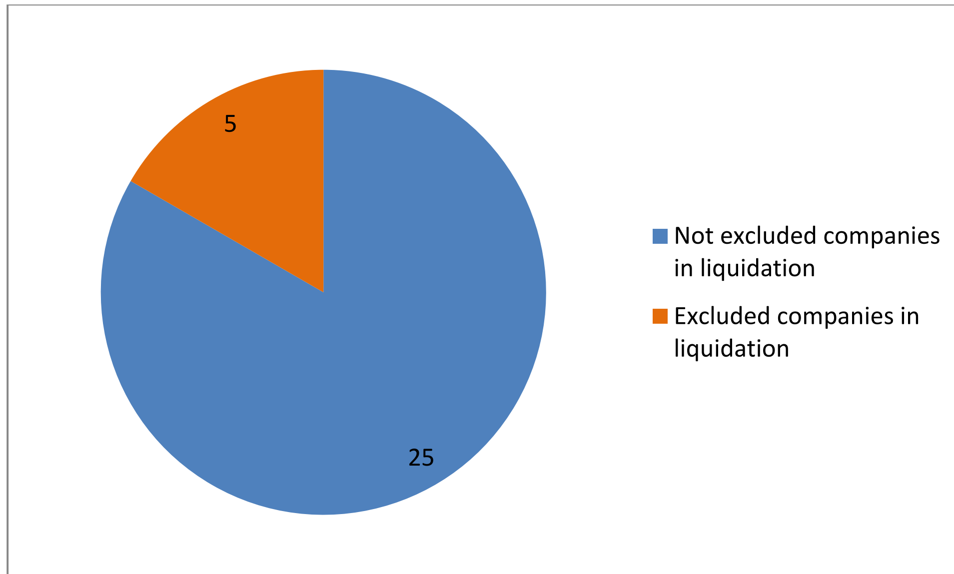
Article 2(2) CBMD states that a merger involves the transfer of all assets and liabilities of companies "being dissolved without going into liquidation." There are different views on whether this excludes companies in liquidation from taking part in cross-border mergers. Some scholars claim that companies should not be allowed to take

part in cross-border mergers, even if they have yet not started distributing their assets.[137]

Member States have decided to implement the opposite view: Only 5 Member States have excluded companies in liquidation from carrying out cross-border mergers. These are Cyprus, Hungary, Romania, Slovakia, and the United Kingdom.

Figure 21 – More than Three-Quarters of All Member States Have Not Excluded Companies in Liquidation

Member States that have not excluded companies in liquidation (blue), have excluded (orange). Data: Lexidale.



The above, however, does not signify that all other countries sweepingly allow companies in liquidation to partake in cross-border mergers. As a general rule, companies are only included if they have not yet distributed their assets or if they decide to continue their activities. The first requirement is, for example, reported for Finland,[138] France,[139] Italy,[140] Latvia,[141] Liechtenstein,[142] Poland,[143] Spain,[144] Sweden,[145] and Iceland.[146]

[137] See J. Vermeylen, 'The Cross-Border Merger Directive', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganizations*, p. 8; referring to M. Evrard and E. Van Der Vaeren, 'Les fusion transfrontalieres: un pas de plus vers une Europe harmonisee' *Le droit des affaires - Het ondernemingsrecht (DAOR)* (2007), p. 112; G. Palmaers and A. Gubbels, 'De Grensoverschrijdende fusie', *Tijdschrift Financeel Recht* 4 (2008), p. 255; M. Wyckaert, 'Grensoverschrijdende fusies', *Tijdschrift voor Rechtspersoon en Vennootschap* (2006), p. 96; F. Bernard, 'Les fusions transfrontalieres au sein de l'Union europeene' *Le droit des affaires Het ondernemingsrecht (DAOR)* 97 (2011), p. 22.
[138] LLC Act, Part V, Chapter 16, Section 15(3) (Finland).
[139] Lamy Sociétés Commerciales, 2012, n° 1925 and Com. Code, art. L.236.1 (France).
[140] Article 2501(2)c.c. (Italy).
[141] Paragraph 1 of the Article 331 of the Commercial Law (Latvia).
[142] Article 352b in connection with Article 351 para 2 PGR (Liechtenstein).
[143] M. Wroniak et al., 'Cross-Border Reorganizations in Poland', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 3.
[144] BOE number 82. April 4th, 2009. Sec. I, pag. 31936 (Spain), http://www.boe.es/boe/dias/2009/04/04/pdfs/BOE-A-2009-5614.pdf (last visited 08 August 2013).
[145] Art. 23:4 and Art. 23:36 CA 2005 (Sweden).

3.5.1.10.1 Implications: Companies in Liquidation

It would seem that confusion exists regarding whether companies in liquidation are permitted to merge, and a clear policy may be needed.

3.5.1.11 Cash Payment

Another trend in the transposition of the Directive relates to Member States' reaction to the cash payment definition under Article 2 CBMD. This article defines the types of mergers that fall under the scope of the Directive. The definition states that the merger is recognized only if it involves an exchange of no more than 10 percent of the nominal value of the company. In the absence of a nominal value, accounting par value of the shares issued will apply.

The rationale of the 10 percent role is that it is meant to preserve the character of the merger. Transactions exceeding this limit are viewed as more akin to takeover bids, which have the payment of cash as a component, and not as mergers. Similarly, the Domestic Merger Directive does not allow the cash payment to exceed 10 percent.[147]

This, however, does not necessarily limit Member States to stick to the 10 percent limit, and it can theoretically reach 99.99 percent. In accordance with Article 3(1) CBMD, a merger involving a cash payment exceeding 10 percent can take place if one of the Member States involved allows so.

Many Member States have also not set such a limitation. In Finland, for example, there is no cash limitation,[148] nor does it exist in Germany[149] or Iceland.[150] Luxembourg allows a transfer of assets of merging companies in liquidation against shares of another merging company with or without a cash balance.[151] In the Netherlands, it is stipulated that the 10 percent threshold is only applicable if the surviving entity is a Dutch entity.[152]

3.5.1.11.1 Implications: Cash Payments

The cash payment issue has involved gold-plating by Member States, thus leading to differences between them on that point. Whether such gold-plating leads to higher costs is difficult to determine. As was noted in the literature, giving Member States the freedom to exceed the 10 percent limit is a rule "more realistic and closer to capital market conditions”. Waiving the 10 percent limit also aligns better with the freedom of

[146] Article 124(1) of the Act on Public Limited Companies and Article 99(1) of the Act on Private Limited Companies (Iceland).
[147] T. Papadopoulos, ‘The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive’, 23 *European Business Law Review* 4 (2012), p. 539; J Rickford, ‘The Proposed Tenth Company Law Directive on Cross-border mergers and its impact in the UK’ *European Business Law Review* (2005), p. 1395–1396.
[148] Act on LLC Chapter 16 sections 1 and 2(1) (Finland).
[149] 2 No. 1 RA (Germany).
[150] Article 133(1)(a) Act on Public Limited Companies; Article 107(1)(a) Act on Private Limited Companies (Iceland).
[151] Article 284 (2) (Luxembourg).
[152] Article 2:325(2) (the Netherlands).

establishment by providing all available market mechanisms, such as cash payments.[153] In that context, it should also be noted that stakeholders have not reported any obstacles based on the differences in cash payment requirements between the Member States. As a consequence, a revision of this rule does not seem necessary.

3.5.1.12 Summary of Trends in Scope Expansion

In general, with respect to Member States reaching beyond the scope of the CBMD, it can be seen from the study that Luxembourg is the country that has expanded on the largest amount of issues, followed by Finland and Iceland. Many countries, on the other hand, chose to expand on only one aspect, such as whether companies in liquidation can merge.

Figure 22 – Most Member States Have Expanded the Scope of the CBMD

Member States that have expanded the scope in a specific area (blue dot). Data: Lexidale.

Point of comparison	Companies in liquidation	Inclusion of cooperatives	Cross-Border Divisions	Company law forms	Geographical scope	Cash payments	Inclusion of investment companies	Triangular mergers
Luxembourg	●	●	●	●	●	●		
Finland	●	●	●			●		●
Iceland	●	●	●	●		●		
Belgium	●	●	●	●				
Czech Republic	●	●	●	●				
France	●	●	●		●			
Netherlands	●					●	●	●
Slovakia		●		●	●		●	
Italy	●		●	●	●			
Hungary		●				●	●	
Denmark	●	●		●				
Spain	●		●		●			
Sweden	●	●				●		
Liechtenstein	●	●			●			
Cyprus		●	●					
Germany	●					●		
Romania			●		●			
Slovenia	●					●		
United Kingdom			●	●				
Austria	●				●			
Greece	●	●						
Rep. of Ireland	●						●	
Poland	●		●					
Norway	●		●					
Lithuania	●							
Malta	●							
Bulgaria	●							
Portugal	●							
Estonia	●							
Latvia	●							

3.5.1.13 The Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called "CDTMs." These have the purpose of informing shareholders, reflecting the results of negotiations between the merging companies, and providing the basis for other required documents such as the

[153] T. Papadopoulos, 'The Magnitude of the EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Merger Directive', *EBLR* (2012), p. 540.

management report. Article 5 CMBD provides for certain particulars that have to be included in the CDTMs.

A trend identified by The Team in that context is that Member States tend to gold-plate provisions contained in the Directive, and add provisions to their national legislation that do not appear in the Directive.

One example of gold-plating involving new provisions is Article 5(d), which states that the CDTMs have to include likely repercussions of the cross-border merger on employment. In Austria, the local legislation requires not only to include said likely repercussions, but also additional information on the merging companies, the terms of employment, and the general employment situation.[154] In Spain, the CDTMs must also contain likely consequences of the merger on the social responsibility of the company.[155]

Certain countries, moreover, added further requirements to the ones stipulated in Article 5 CBMD: Italy, Lithuania, Poland, Portugal, Slovenia, and Sweden. Italian law requires that the CDTMs specifies other information that might be required under the respective national law,[156] the date of effectiveness of the merger or the criteria necessary to determine this date,[157] and, in the case of a leveraged buy-out, the CDTMs also have to specify the resources utilized to satisfy the obligations of the resulting company.[158]

In Lithuania, the method of the merger must also be specified.[159] In Poland, information must be provided regarding arrangements made for the exercise of the rights of creditors and of any minority members.[160] In Portugal, three further requirements have been added: the equity interests a company owns in the other merging company must be published, and measures must be taken to protect the rights of non-partner third-parties to the company's profits and to protect creditors' rights.[161] Slovenia requires mentioning that "the CDTMs contain the offer for the acquisition against payment of adequate cash compensation of the shares of those holders who gave an oral statement opposing the resolution on the approval of the cross-border merger at the general meeting that decided on the merger and provides that this right shall also be enjoyed by a shareholder in the acquired company who did not attend the general meeting was unlawfully prevented from doing so, or if the general meeting was not correctly convened, or if the subject put to a resolution at

[154] Sec. 5(2)(4) EU-VerschG (Austria).
[155] Article 31.11 of the SML (Spain).
[156] Article 6(1) (h) Decree (Italy).
[157] Article 6(1) (i) Decree (Italy).
[158] Article 2501-bis(2) c.c (Italy).
[159] Article 3(1)(2) (Lithuania).
[160] 516(3)(9) CPCC (Poland).
[161] Article 98 PCC (Portugal).

the general meeting was not correctly published."[162] And in Sweden, annual reports and other financial information (investments and so forth) have to be attached to the report.[163]

3.5.1.13.1 Implications: CDTMs

The gold-plating by the Member States leads to differences in the CDTM requirements between Member States. As stated previously, stakeholders have reported that this variation contribute to the mergers' complexity. On the other hand, the great variety in arrangements seems reflective of differences between countries, and their freedom to choose the principles they wish to emphasize seems to be valued.

It would nonetheless seem useful to establish a dialogue between Member States, to determine whether all requirements are strictly necessary and to evaluate whether further specificities should be added to Article 5 CBMD. On this basis, Article 5 could be revised to include a provision according to which Member States should not go beyond what is required by the Directive.

3.5.1.14 Employee Participation

There is variation between the Member States regarding the transposition of the provisions under Article 16 CBMD. This does not only involve gold-plating, but also simple non-transposition of provisions under Article 16.

The framework of determining employee participation in the company resulting from the cross-border merger has, for a large part, been taken over from the SE Directive.[164] Under Article 16 CBMD, this framework has been adapted to the logic of cross-border mergers.

The general rule of Article 16 provides that the rules on employee participation shall follow the laws of the Member State where the registered office of the company resulting from the registered office is situated.[165] Since this could lead to a significant deterioration of employee participation rights, Article 16(2) CBMD provides for three exceptions to this rule. The first one is that the national rules do not apply if, for the preceding 6 months to the publication of the draft terms of the cross-border merger, an average of more than 500 employees was operating under an employee participation system in one or more of the merging companies. The second exception provides that the national rules of the registered office do not apply if the company resulting from the cross-border merger does not provide for the same level of employee participation as operated in the relevant merging companies. Article 16(2)(c) provides for the third exception, which applies when the national law

[162] Article 662c of the Companies Act (Slovenia).
[163] Chapter 23, 10 § ABL (Sweden).
[164] See Article 16(3) CBMD.
[165] Article 16(1) CBMD.

applicable to the company resulting from the cross-border merger does not provide the same employee participation entitlement to employees situated in the Member State of the resulting company in comparison to employees of establishments situated in a different Member State.

If any of the exceptions applies, either an SNB will be formed or the standard rules will apply. Article 16(3) regulates this procedure by referring to the SE Directive. The main difference is that for the application of the standard rules, the percentage of employees required to have been previously covered by an employee participation system has been raised from 25 percent to 33.3 percent.

Regarding the transposition of this procedure into national law, it should be noted that although Member States have transposed the general concept of the SNB and the standard rules, a considerable number of them have decided to modify the procedure under Article 16 CBMD. Modifications include either refraining from transposing certain provisions, or by transposing them differently.

A central part of the logic underlying the procedure of Article 16 is to define the circumstances under which the procedure comprising the SNB and the standard rules are triggered. Setting these circumstances, the legislator determines, at least partially, to what extent employee participation rights are preserved. [166] As stated above, the Directive provides for three exceptions with respect to employee participation, and a large part of the Member States follow a somewhat different version of those exceptions.

Article 16(2)(a), stipulates that the national rules of the registered office do not apply if the regime applicable to the resulting company does not provide for the same level of employee participation as the level offered by the relevant merging companies. Said Article has not been transposed by Iceland, Latvia, Lithuania, Poland, and Romania.

Article 16(2)(b), deals with the non-inclusion of foreign establishments. Said Article has not been transposed by France, Iceland, Latvia, Lithuania, the Netherlands, Poland, and Romania. With respect to the Netherlands, for example, the justification given was that since the structure regime was applicable to a surviving entity, employee participation rights were already guaranteed at the highest level.[167]

Similarly, the first exception—the 500 employees rule—has not been fully transposed by the Member States. In Bulgaria, for example, it was reported that a less stringent regime had been transposed, a regime that did not provide a minimum number of

[166] The preservation is of course also mainly determined by the SNB and the standard rules.
[167] P. van der Bijl and F. Oldenburg, 'The Netherlands', in D. van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 250; and Tweede Kamer, vergaderjaar 2006–2007, 30 929, nr. 3, p. 24.

employees. The same is the case in Sweden- The rules apply regardless of the size of the companies.[168] In Luxembourg, the rules are reported to be unclear and can be interpreted as including even companies with as little as a single employee.[169] In Iceland, Latvia, Poland, and Romania the rule is that the exceptions apply once any of the other merging companies is governed by an employee participation system.[170] In Finland, the requirement has been lowered to 150 employees.[171]

The nature of transposition discussed above leads to a situation where some Member States only apply the first exception as the triggering factor for the SNB or the standard rules. This is, for example, the case in Lithuania.[172] In principle, this also applies to Sweden, even though Sweden has, as mentioned, diverted from the general rule in Article 16(2).

Considering the objective of the “before and after” principle, which is preserving employee participation rights, a question can be raised whether merely applying the first exception is in conformity with this concept. The “before and after” principle rests on the notion that preservation is necessary when the resulting company's applicable regime does not provide for the same level of employee participation as was applicable in the other merging companies, or does not grant the same rights for the employees of all establishments of the resulting company. It can be argued that whether one or more merging companies had more than a certain number of employees operating under employee participation system is as such not decisive, because it does not necessarily imply a loss of rights.[173] Yet, it should also be noted that in some Member States, namely in Bulgaria, Latvia, Lithuania, or Romania, no employee participation rules are applicable on the national level. This means that if a Lithuanian company merges with a company whose country applies rules on employee participation, and the resulting company is incorporated in Lithuania, Article 16(2)(a) would in any case be triggered because the Lithuanian rules cannot provide for the same level of employee participation. From that perspective, it seems sufficient to create a rule triggering the application of the standard rules and the SNB so long as one of the companies is operating under an employee participation system.

[168] Government bill 2007/08:20 p. 39 (Sweden).
[169] See Article L.426-14 of the Labour Code. According the parliamentary documentation, the wording of the article should refer to companies between 500 and 1,000 employees (doc. 5829, p. 23; doc. 5829/7, p. 22), however, it has been expressed that there is a risk that Luxembourg would apply the text literally.
[170] For Iceland it has been stated that the mechanism of the standard rules and the special negotiations will be triggered if an Icelandic company merges with a foreign company, operating under an employee participation system, and the Icelandic company is the resulting company, provided that 1/3 of the total number of employees have been covered before by an employee participation system; or less than ¼ of the total number of employees have been covered before by an employee participation system and the SNB decides thereupon.
[171] Act on Personnel Representation in the Administration of Undertakings sections 9 b (Finland).
[172] Article 4(1)(1) of the Law on Employee Participation (Lithuania).
[173] Literature discusses, for example, whether the first exception is therefore an independent exception or has to be treated together with either Article 16(2)(a) or 16(2)(b); See M. Tepass, ‘Employment rules for cross-border reorganizations’, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganizations*, p. 280.

Regarding Article 16(5), dealing with the calculation of the workforce giving rise to participation rights under national law, and to what extent employees employed in other Member States have to be taken into account, this optional provision has not been transposed by Hungary, Iceland, Italy, the Netherlands, Poland, Romania, Slovakia, and Slovenia.

The reasons for the non-transposition of the optional provision Article 16(5) are rather diverse. Regarding the Czech Republic, it was reported that the paragraph has not been transposed. However, for the calculation of the average number of employees, the total number of employees includes the employees of the participating company, its subsidiaries, and employees of organizational units involved in business corporations located in all Member States.[174] As to Italy, it was stated that the provision has not been transposed, since under national law there were no opportunities for employee participation in management. In the Netherlands, the explanation for non-transposition was that the provision refers to Article 16(2)(b) which was not been transposed in the Netherlands. Therefore, the legislator did not consider it necessary to transpose further rules next to the already-existing provisions.[175] Regarding Slovenia, it was stated that any thresholds under the participation act would include employees of the company resulting from the cross-border merger in other Member States. The same is the case for Austria.

3.5.1.14.1 Implications

The different transpositions by the Member States have resulted in the conditions for the procedure under Article 16 CBMD differing between jurisdictions, potentially leading to different levels of protections of employee participation rights. This, in turn, could raise a problem for employees, whose rights are not equally protected in Member States. It could also lead to forum-shopping for companies wishing to undercut employee rights. At the same time, the non-uniformity could also be regarded as a problem for companies, since market conditions are not the same throughout the EU, which can create extra costs. In other words, if contradictory requirements are applicable it might be problematic for all parties involved. It should nonetheless be stressed that none of the stakeholders have reported those differences to be an acute problem. As a consequence, we consider three possible approaches: First, a dialogue could be set up between the Member States to discuss the transposition of Article 16 CBMD more comprehensively and to examine whether the differences are based on specific national needs. The second option is a non-action scenario: Even though there seems to be a trend of inconsistent transposition, stakeholders have not stated that the different transpositions pose an obstacle, and

[174] Section 215 (4) of the Act (Czech Republic).
[175] Articles 2:153 and 2:163 of the DCC (the Netherlands); Tweede Kamer, vergaderjaar 2006–2007, 30 929, nr. 3, p. 28.

action might therefore not be necessary. A third option would be to commence proceedings against Member States for a failure to fulfil obligations, as has been done by the European Commission in the recent case of *Commission v. the Netherlands*.[176]

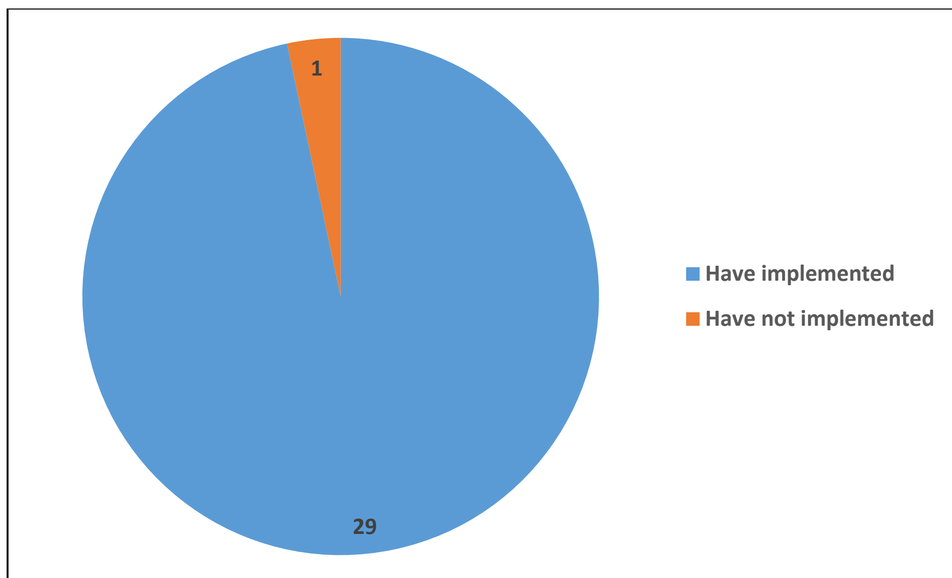
3.5.1.15 Stakeholder Protection under Articles 4(1) and (2) CBMD

3.5.1.15.1 Creditor Protection under Article 4(2) CBMD

Article 4(2) CBMD provides for an optional provision allowing Member States to create mechanisms that ensure the protection of creditors. The section on obstacles to the full effectiveness of the Directive has already dealt with this issue in-depth. Therefore, for this section it suffices to state that there is a clear trend of Member States using this optional provision; apart from Iceland, all countries have created protection for creditors. Moreover, the procedures for SE formation through the cross-border merger or the domestic merger also reveal that Member States regard creditor protection as crucial. Under the SE Regulation for the formation of an SE by cross-border mergers, for example, all Member States except for the United Kingdom have made use of this option.[177] The same is the case for domestic mergers, where apart from Iceland all Member States have enacted creditor protection.[178]

Figure 23 – Most Member States Have Implemented the Optional Creditor Protection Provision

EU/EEA countries that chose to implement the provision. Data: Lexidale.



[176] Case C-635/11 *European Commission v. Kingdom of the Netherlands*; This case is explained below in the section on the case-law of the Court of Justice in the field of cross-border mergers.

[177] Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden; For Belgium, Cyprus, Iceland, Ireland, Liechtenstein and Lithuania no or no clear data was available; See Ernst & Young, 'Study on the operation and the impacts of the Statute for a European Company (SE), Appendix 1 - Legal Mapping' (2009).

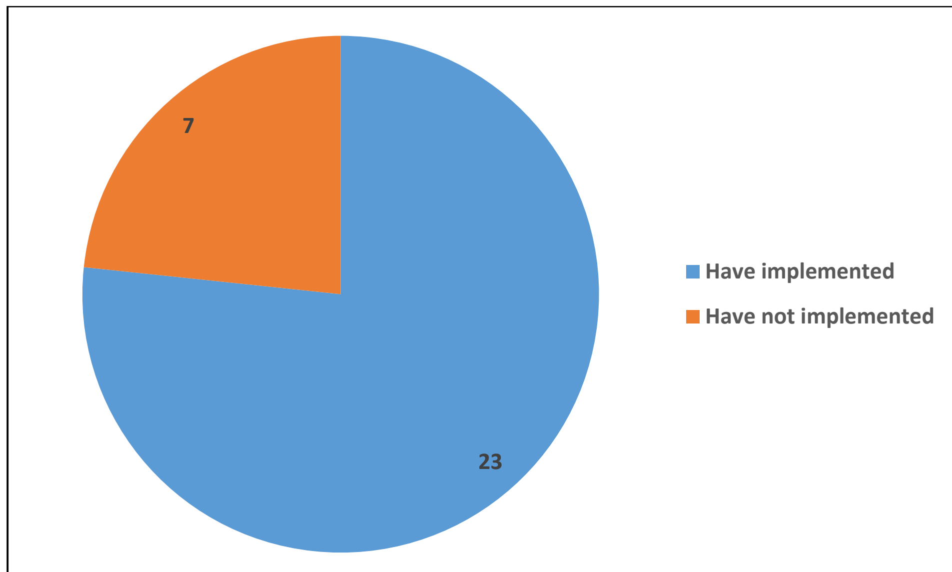
[178] Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and United Kingdom; No or not clear information for Cyprus, Estonia and Greece.

3.5.1.15.2 Minority Shareholder Protection under Article 4(2) CBMD

Article 4(2) CBMD provides for an optional provision allowing Member States to create mechanisms that ensure the protection of minority shareholders. As mentioned, the issue was already dealt with in-depth in the section on obstacles to the full effectiveness of the Directive. Therefore, it suffices to state that there is a clear trend of Member States using this optional provision. This trend, however, is not as strong as with respect to creditor protection trend mentioned above, since six countries have not made use of this provision [179]. A similar trend can be identified when looking at the use of this option for cross-border mergers for the formation of an SE, since five Member States chose not to make use of this option (though it should be noted that a smaller sample of countries was used in this regard).[180] The same is the case for minority shareholder protection in domestic mergers. Seven countries have not made use of such an option.[181] With respect to the latter, there is generally less consistency when looking at the merger procedures. Bulgaria, for example, only provided protection for minority shareholders in the SE context. Italy did so only for domestic mergers and those under the CBMD. Spain, on the other hand, provided protection for mergers under the CBMD and the SE Regulation, but not for domestic ones. Sweden used the option for domestic mergers and those under the CBMD, but not for mergers setting up an SE.

Figure 24 – Most Member States Have Implemented the Optional Minority Shareholder Protection Provision

EU/EEA countries that chose to implement the provision. Data: Lexidale.



[179] Belgium, Hungary, Lithuania, Luxembourg, Norway and Sweden.
[180] France, Italy, Luxembourg, Sweden and United Kingdom; There is no or not clear data for Belgium, Iceland, Ireland, Liechtenstein, Lithuania and Norway; See Ernst & Young, 'Study on the operation and the impacts of the Statute for a European Company (SE), Appendix 1 - Legal Mapping' (2009).
[181] Bulgaria, France, Lithuania, Luxembourg, Norway, Spain and United Kingdom.

3.5.1.15.3 Protection of Holders of Other Rights under Article 4(2) CBMD

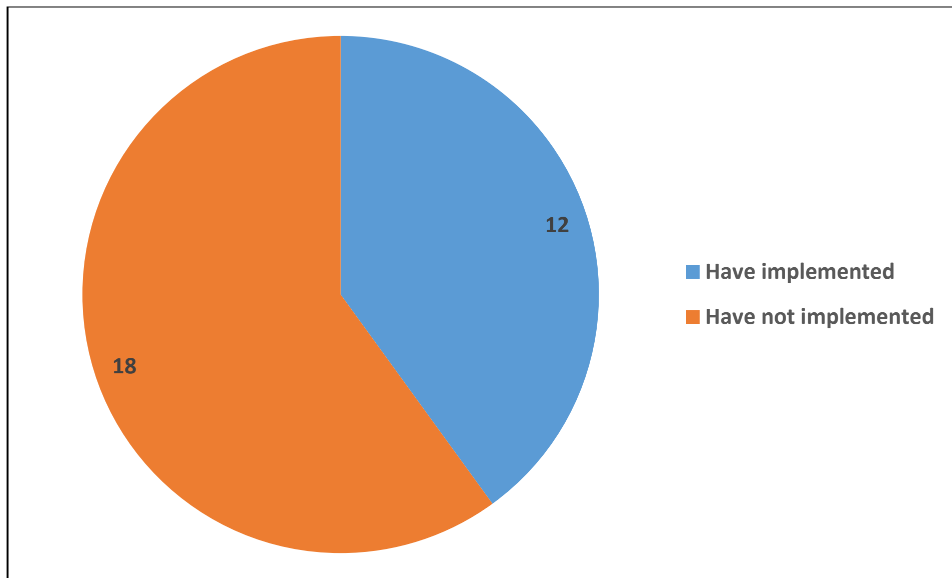
Article 4(2) CBMD provides for an optional provision allowing Member States to create mechanisms that ensure the protection of holders of other rights. The analysis shows a mixed trend in that respect, since roughly half of the countries have made use of this option (Bulgaria, Cyprus, Finland, Germany, Italy, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain, and Sweden).

The Bulgarian company law, for example, does not mention those rights specifically in its cross-border mergers section, but rules governing holders of other rights apply by analogy.[182] In Germany, rights-holders without voting rights must receive the same rights in the resulting company.[183] In Italy, it was reported that an opposition procedure for bondholders follows the same procedure as set for creditors.[184] In Luxembourg, the rights of bondholders and holders of special rights are maintained in the company resulting from the merger.[185] Malta has also implemented protection.[186] In Portugal, holders of other rights can make use of the procedure given to creditors in general, as provided for in Articles 101-A and 101-B.[187] In Slovenia, special rights such as the rights of bondholders holding convertible bonds, bonds conferring pre-emptive rights, or dividend bonds have to be maintained in the resulting company. In Spain, debenture holders have the same protection as creditors, unless there is a debenture holders meeting where the merger is approved.[188] In Sweden, holders of options, convertibles, and other securities shall have the same rights as in the acquiring company or have the possibility to redeem their securities.[189]

[182] Article 262v CA (Bulgaria); Article 262w CA (Bulgaria); Article 262x CA (Bulgaria).
[183] § 23 RA (Germany).
[184] Article 2503-*bis* c.c. (Italy).
[185] Articles 269 and 270 Luxembourg law on commercial companies of 10 August 1915, as amended.
[186] Reg. 13(2) CR (Malta).
[187] Arts 101-C and 101-D (Portugal).
[188] Article 44.2 of the SML (Spain).
[189] Chapter 23, 5 § ABL (Sweden).

Figure 25 –More than Half of the Member States Have Not Implemented the Optional Protection for Holders of Other Rights

EU/EEA countries that chose to implement the provision. Data: Lexidale.



3.5.1.15.4 Protection of Employees under Article 4(2) CBMD

Article 4(2) of the CBMD provides for an optional provision allowing Member States to create mechanisms that ensure the protection of employees. The analysis shows a mixed trend. Only half of the countries have made use of this option.

In general, the protection reported to have been implemented through Article 4(2) CBMD is generally reserved for the members of the SNB or Council Directive 2001/23/EC, and focuses on the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses.

In Bulgaria, For example, members of the SNB and a representative body for employees have an additional leave and certain protections concerning the termination of their labour contracts. Before those employees can be dismissed, the company must receive approval from the Bulgarian Labour Inspectorate.[190]

Similarly, in Cyprus, employee representatives in cross-border mergers have the same protection as in the case of the creation of an SE. This includes attendance of SNB meetings and the management board of the Cypriot company, the payment of wages, and absence permission for the performance of duties.[191] In Iceland as well protection covers employee representatives in the SNB.[192] In the Czech Republic, legislation prohibits direct or indirect benefit or discrimination of a representative of the SNB, and acts performed contrary to those rules have to be nullified. There is no provision for

[190] A. Tatarova, R. Dimitrova and Y. Naydenov, 'Bulgaria', in D. van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 131.
[191] Section 27 Clause 3 (Cyprus).
[192] Article 18 of Employee Participation Act (Iceland).

mandatory vacation days or refund of wages for SNB members.[193] In Finland, Hungary,[194] Poland,[195] Portugal, Romania,[196] and Slovakia as well,[197] the rules cover the members of the SNB.

With respect to Estonia, protections under Article 4(2) refer to information rights for employees, such as the planned date of the merger, the reasons for it, and so on.[198] This is also the case for France[199] and Poland.[200]

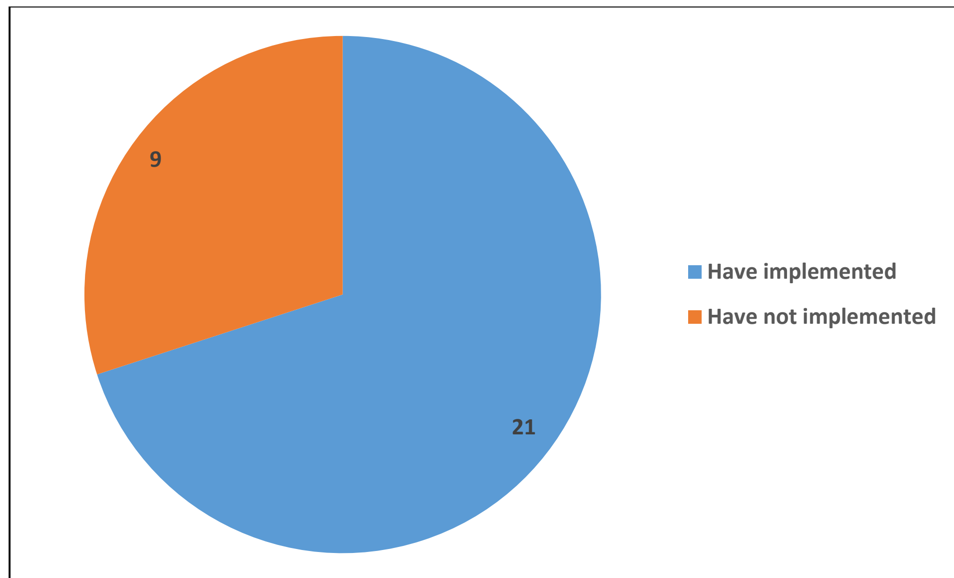
In Italy, the protection rules deal primarily with the safeguard of the employees' position and the negotiation with unions.[201] In Luxembourg, the rules mainly deal with the transfer of rights and obligations from the employment contracts to the company resulting from the merger. The rights have to be maintained and the company cannot lay off employees due to the cross-border merger. [202] This has also been reported for Latvia,[203] Norway,[204] and Spain.[205]

As to Malta, it has been reported that all Maltese companies participating in a cross-border merger have to comply with the rules of the Employment and Industrial Relations Act.[206]

[193] A. Jirousek and J. Lasák, 'Czech Republic', in D. van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 166-167.
[194] M. Barcza et al., 'Cross-Border Reorganizations in Hungary', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* (ref. 9.248).
[195] Article 49 TEP (Poland).
[196] G. Cacerea, 'Romania', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 162.
[197] Article 218lj(1) Commercial Code (Slovakia).
[198] Article 113 of the Employment Contracts Act (Estonia).
[199] Com. Code, Art. L.236-27; Com. Code, Art. R.236-16 (France).
[200] Article 516 CPCC (Poland).
[201] Article 2112 c.c. and Article 47 Legge 29 dicembre 1990, n. 428 (Italy).
[202] Article 274 (4); Articles L. 127-1 s. of the Labour Law (Luxembourg).
[203] Article 118 and 120 of the Labor Law (Latvia).
[204] Article 13-33(1) of the PLLC Act (Norway).
[205] Article 40 and 44 of SoE (Spain).
[206] Reg. 5(1) CR (Malta).

Figure 26 – Nearly Two-Thirds of the Member States Have Implemented the Optional Employee Protection Provision

EU/EEA countries that chose to implement the provision. Data: Lexidale.



3.5.1.15.5 Veto Powers for National Authorities under Article 4(1) CBMD

Article 4(1)(b) provides Member States with the right to oppose mergers on public interest grounds if such right is also granted with respect to internal mergers. Such a veto right provides "the public" with a certain control over cross-border mergers by ensuring that they are in line with public interests. This is particularly an issue for enterprises that are regarded as strategic industries by their home countries. In practice, however, it seems that Member States do not necessarily feel concerned about the impact of cross-border mergers on the public interest. Only eight Member States were mentioned as making use of this possibility: Bulgaria, Czech Republic, Estonia, Finland, Italy, Malta, the Netherlands, and Spain. In this context, two considerations should be raised. First, such opposition rights are not without limitation. Internal market law, such as the freedom of establishment, applies to national veto rights and therefore considerably limits its power.[207] Second, Article 4(1)(b) does not apply to the extent that Article 21 Regulation (EC) No. 139/2004 (regarding merger concentration from a competition law point of view) is applicable.

Two further trends can be identified. The first trend is that most Member States that implemented a right of opposition for national authorities gave a veto right to sectorial authorities.

In the Czech Republic, the consent of the national bank is required for mergers of insurance companies, banks, pension insurance companies, pension funds, and

[207] See e.g. Case C-326/07 *Commission of the European Communities v. Italian Republic* [2009] ECR I-02291, para. 71.

companies trading with securities. For mergers of radio and broadcasting companies, the consent of the Council for Radio and Television Broadcasting is necessary, and the Ministry of Environment can also veto mergers.[208]

In Estonia, the financial supervision authority can oppose cross-border mergers (it should make its decision within 1 to 2 months of receiving all relevant documents).[209] The same is the case for Finland. The Finnish financial supervision authority can oppose mergers between companies subject to its regulatory powers, such as banks or insurance companies. In Italy, the Bank of Italy can veto banking mergers.[210] Mergers between financial intermediaries may be blocked by the Bank of Italy as well as CONSOB (*Commissione Nazionale Società di Borsa*, the stock exchange regulator).[211] Mergers in the insurance field can be opposed by the ISVAP.[212] Moreover, strategic industries, such as defence and transportation, are subject to an opposition right of the Ministry of Economic Affairs.[213] In the Netherlands, the Minister of Justice can block mergers between banking and insurance companies.[214]

In Bulgaria, the Privatization and Post-Privatization Control Agency, the Financial Supervision Commission, and the Commission for Protection of Competition can oppose mergers. The Privatization and Post-Privatization Control Agency can suspend a cross-border merger if the state owns more than 50 percent of the share capital in one of the merging companies. The authority has to issue a clearance, and can reject it if the materials submitted do not meet the legal requirements, if the information is not presented in an accessible way for shareholders, or if true and essential information is not disclosed in an accessible way for the shareholders. The authority has to issue its decision within 10 days after the submission. The procedure for the Financial Supervision Commission is the same.

Other Member States base their right of opposition on more direct public interest criteria. For example, in Spain the Council of Ministers is empowered to oppose a merger on the grounds securing competition.[215] In Malta, the national registry can oppose a merger based on a public interest criterion.[216] In Sweden, the national tax

[208] Section 122(1) of the Act No. 277/2009 Col. on insurance; Section 21(8) of the Act No. 231/2001 Col. on radio and television broadcasting (Czech Republic); Section 20(10) of the Act No. 477/2001 Col. on covers (Czech Republic).
[209] Article 69(1) of the Credit Institutions Act, Article 118(2) of the Securities Market Act, Articles 65 and 214 of the Investment Funds Act, Article 101(2) of the Insurance Activities Act, and Article 57 of the Payment Institutions and E-money Institutions Act (Estonia).
[210] Articles 31, 36, 57 and 150 *bis* of *Decreto Legislativo 1 settembre 1993, n. 385, TUB-Testo Unico Bancario* (Italy).
[211] Articles 34(4), 36(7), 48(1), 49(4), and 117*bis* of *Decreto Legislativo 24 febbraio 1998 n. 58, TUF-Testo Unico della Finanza* (financial marker law) (Italy).
[212] Articles 168, 201, 202, and 347 of *Decreto Legislativo 7 settembre 2005 n. 209, Codice delle Assicurazioni Private* (private insurance law) (Italy).
[213] Article 2, Decreto Legge 31 maggio 1994, n. 332 (Italy).
[214] Articles 96(1) and (2) of the Financial Supervision Act of 1 January 2007 (the Netherlands).
[215] Article 10.4 of the CDL (Spain).
[216] Dr. Edward Dalmas, former Legal Officer, Malta Financial Services Authority, interview on 8 May 2013.

authorities can postpone a merger for as much as year. If there is a specific reason, the period can be extended by 3 months.[217]

A second trend that can be observed is that a similar number of Member States have opted for veto rights in the context of the SE cross-border merger as well. Said countries consist of Bulgaria, Denmark, Finland, France, Greece, Latvia, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom.[218] In the domestic context as well, seven Member States have implemented the veto right: Bulgaria, Finland, Italy, the Netherlands, Poland, Spain, and Sweden.[219] Member States, however, do not necessarily seem to follow a clear route in granting authorities oppositions right when compared with the veto rights conferred in the context of formations of an SE through a cross-border merger or of domestic mergers. The Czech Republic, for example, did provid an opposition right in the CBMD context but not with respect of the other two merger procedures. Denmark has done so for the cross-border merger to form an SE, but not for domestic or cross-border mergers outside of this context. In Estonia, public authorities can only block mergers under the CBMD. In France, mergers to form an SE may be opposed, but domestic ones may not. Greece has implemented legislation giving a veto right in the context of SEs but not for the rest. In Italy, authorities can block mergers under the CBMD as well as domestic mergers, but not mergers setting up an SE. In Latvia, an opposition right applies only in the SE context. In Poland, this is the case for setting up an SE and domestic mergers. In Portugal, a veto right was implemented in the SE context. In Sweden, it applies for SEs and domestic mergers. Lastly, in the United Kingdom, it applies for SEs but not for the rest.

As a consequence, there seems to be a perception in certain Member States that the existence of veto rights indicates that cross-border mergers might create risks for the public. A further reason could also be that for some Member States the potential risks associated with cross-border mergers were not clear, and they therefore reserved themselves a veto right.

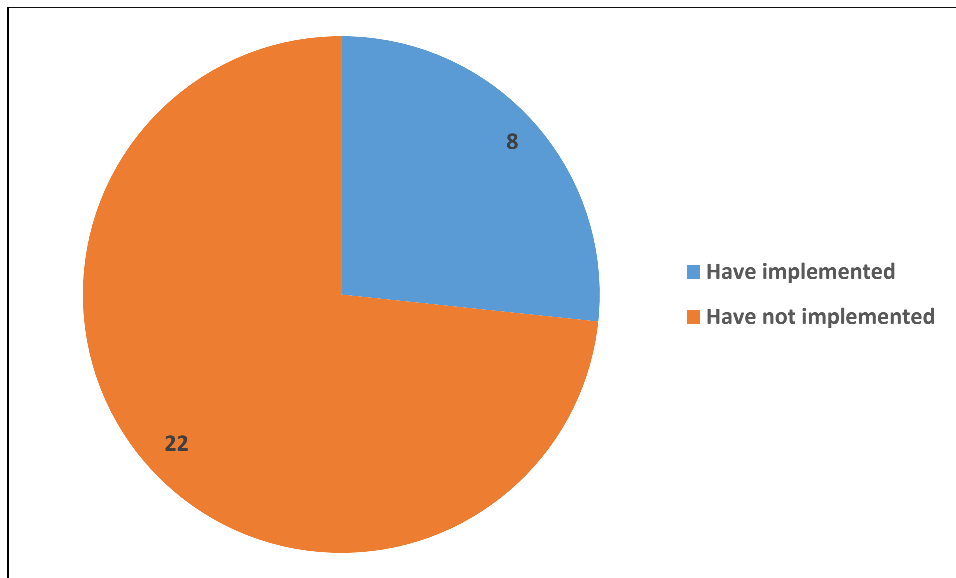
[217] Chapter 26, 21 a § second subparagraph (1) CA (Sweden).

[218] No clear data is available for Belgium, Ireland, Lithuania, Malta, Iceland and Liechtenstein; See Ernst & Young, 'Study on the operation and the impacts of the Statute for a European Company (SE), Appendix 1 - Legal Mapping' (2009).

[219] Please note that this information comes from a more limited sample; There is no data for Belgium, Ireland, Lithuania, Malta, Iceland, Liechtenstein and Norway; See Ernst & Young, 'Study on the operation and the impacts of the Statute for a European Company (SE), Appendix 1 - Legal Mapping' (2009).

Figure 27 – Most Member States Have Not Implemented the Optional Veto Power for National Authorities

EU/EEA countries that chose to implement the provision. Data: Lexidale.



3.5.1.15.6 Stakeholder Protection: Overall Trend

Considering the various options for protecting stakeholders under Articles 4(1) and (2) CBMD, a general trend can be identified: Most Member States seem to believe that stakeholders should be protected, and implement this generally with regard to three[220] or four[221] different types of stakeholders. In comparison, there are few Member States that provide protection for only one[222] or two[223] groups. In 2 Member States, protection is awarded to all possible groups.[224]

If one assumes that stakeholder protection generally inhibits mobility, one can state that from the perspective of Articles 4(1) and (2) CBMD, Lithuanian and Norwegian legislation provide for the highest degree of mobility, while for Finnish, Italian, and Maltese legislation, the choice is clearly in favour of stakeholder protection at the expense of mobility.

[220] France, Germany, Ireland, Latvia, Luxembourg, Netherlands, Poland, Romania and Sweden.
[221] Cyprus, Czech Republic, Estonia, Portugal, Slovakia, Slovenia and Spain.
[222] Norway and Lithuania.
[223] Austria, Belgium, Denmark, Greece, Hungary, Iceland, Liechtenstein and UK.
[224] Bulgaria, Finland, Italy and Malta.

Figure 28 – Most Member States Implemented Stakeholder Protections

Member States that have implemented stakeholder protection (blue dot). Data: Lexidale.

Point of comparison	CBMD Creditor protection	CBMD MS protection	CBMD employee protection	CBMD HOOR protection	CBMD Veto
Finland	●	●	●	●	●
Italy	●	●	●	●	●
Malta	●	●	●	●	●
Bulgaria	●	●	●	●	●
Cyprus	●	●	●	●	
Czech Republic	●	●	●		●
Estonia	●	●	●		●
Portugal	●	●	●	●	
Slovakia	●	●	●	●	
Slovenia	●	●	●	●	
Spain	●	●		●	●
France	●	●	●		
Germany	●	●		●	
Rep. of Ireland	●	●	●		
Latvia	●	●	●		
Luxembourg	●		●	●	
Netherlands	●	●			●
Poland	●	●	●		
Romania	●	●	●		
Austria	●	●			
Denmark	●	●			
Sweden	●		●	●	
Greece	●	●			
Hungary	●		●		
Belgium	●		●		
Iceland		●	●		
Liechtenstein	●	●			
United Kingdom	●		●		
Lithuania	●				
Norway	●				

3.5.2 Developments in European Case Law

The Directive was enacted on the basis of Article 49 TFEU, concerning the Freedom of Establishment. Since the Directive was adopted on October 26, 2005, there have been few developments in the European Law that impacted the Directive, its implementation, and its interpretation. In this section we will describe the major developments and consider their impact and relevance.[225]

The first case to be discussed is *Sevic*, whose judgment was rendered only two months after the enactment of the Directive, on December 13, 2005.[226] In this case, a German company, SEVIC AG, attempted to carry out a cross-border merger by acquisition with Security Vision SA, a company governed by the laws of Luxembourg. The companies intended that the acquiring company would purchase the assets of the acquired company, without the latter being dissolved. Under this scheme, the two companies would continue to exist, but the acquiring company would be in possession of all the assets of the acquired company. The German authorities refused to register the merger since, at the time, the Directive was not yet transposed and no cross-border merger procedure was in place.

[225] J. Armour and W-G. Ringe, 'European Company Law 1999-2010: Renaissance and Crisis', 48 *Common Market Law Review* (2011), p. 125-174.

[226] See on this case M. M. Siems, 'Sevic: Beyond Cross-Border Mergers', 8 *European Business Organization Law Review* 2 (2007).

The Court of Justice of the European Union ruled that the refusal by the German Authorities was in violation of Article 49 TFEU.[227] The court reasoned that such a merger should have been permissible under national German law if it were between two domestic companies. Therefore, the refusal was deemed discriminatory, as it was only based on the fact that it took place across borders. This decision opened the way to non-harmonized cross-border mergers outside the scope of the Directive (which, at the time, was not transposed).[228]

The importance of this decision is twofold. First, introducing the possibility for cross-border mergers before the Directive was transposed opened the way to many companies (although there was much uncertainty regarding the specific procedure, since it was left to an ad-hoc decision by the authorities). Second, the court confirmed the principle of non-discrimination in the context of cross-border mergers.

The second case to be discussed is *Commission v. The Netherlands* from June 20, 2013.[229] In this case, the European Commission had brought an action under Article 258 TFEU for a failure to fulfil obligations to transpose Article 16(2)(b) into Dutch law. The dispute between the European Commission and the Netherlands had been as to whether Member States had the option to choose between transposing options (a) or (b) of Article 16(2). Article 16(1) CBMD contains a general rule on employee participation in the context of cross-border mergers, pursuant to which the provisions in force in the Member State where the company's registered office is are applicable.[230] Article 16(2) creates three exceptions to this rule. The first exception applies when at least one of the merging companies employs more than 500 employees and operates under a system of employee participation. The second exception under Article 16(2)(a) applies when the national law applicable to the company resulting from the cross-border merger provides for a lower level of employee participation than was offered by the companies before the merger. The third exception provided by Article 16(2)(b) applies when the national law of the company resulting from the merger does not provide employees of other establishments of the company in other Member States with the same employee participation rights as bestowed on the employees in this Member States where the registered office is situated. The Court ruled that the exceptions under Articles 16(2)(a) and (b) were not optional, and that the Netherlands had therefore failed to fulfil its obligations to transpose the Directive.[231]

[227] Case C-411/03 *SEVIC Systems AG*, para. 22; See also M.M. Siems, 'SEVIC: Beyond cross-border mergers', 8 *European Business Law Review* 2 (2007), p. 307-316.
[228] Stakeholders also report that those mergers have taken place based on the case *Sevic*.
[229] Case C-635/11 *European Commission v. Kingdom of the Netherlands*.
[230] Ibid., para. 9.
[231] Ibid., para. 50.

Outside of the direct cross-border mergers field, the 2008 case of *Cartesio* also has relevance to our analysis. In this case, a Hungarian company sought to transfer the connecting factor to its company law, to another Member State, Italyf, while remaining under Hungarian company law. The national authorities in Hungary prohibited the company from doing so. The CJEU confirmed the position of the Hungarian authorities. Nevertheless, in an *obiter dictum*, the Court stated that company conversions (such as a transfer of the connecting factor), should be generally permissible "to the extent that it is permitted under that law [of the host Member State] to do so."[232]

What is of importance in this regard is the fact that the law used a "non-restriction standard." By this standard, a Member State is required to refrain from restricting the freedom of mobility of companies by national law, to the extent possible. This standard, however, was only made in *obiter*, which was in general differently interpreted by the legal community. It was not until July 2012 that the Court clarified the meaning of its *obiter dictum*, in the famous *Vale* case.[233] In this case, an Italian company attempted to convert into a Hungarian company by relying on the Hungarian domestic rules on company conversions. This was refused by the Hungarian authorities, who stated that domestic Hungarian legislation only allowed the conversion from a Hungarian company. The Court ruled that this legislation is discriminatory against cross-border activity and is therefore in violation of Article 49 TFEU.

Reading those cases as a whole, several crucial points have to be made. *Sevic* and *Vale* stress that Member States are not allowed to discriminate against cross-border activities in the context of mergers and other cross-border corporate operations, such as seat transfers. This means that if, for example, a Member States provides a restructuring possibility on a domestic level, it may also have to provide this option for cross-border restructuring, unless a justification can be provided. Similarly, restrictions on company types may also prove problematic—if a Member State allows a certain company type to merge on the domestic level, it has to also allow this company to merge in a cross-border merger unless a restriction can be justified.

Second, the restriction may go well beyond the limits of anti-discrimination protection. One way of reading the anti-restriction standard, in cases such as *Centros*, *Inspire Art*, or *Cartesio*,[234] is as providing grounds to challenge any national instrument that hinders, impedes, or renders difficult a cross-border merger. For example, a prohibition on a certain company type to merge on a cross-border level hinders this company in its exercise of the freedom of establishment.

[232] Case C-210/06 *Cartesio* [2008] ECR I-09641, para. 112.
[233] Case C-378/10 *VALE Építési kft*, 12 July 2012, not yet reported.
[234] Case C-212/97 *Centros*, para. 34; Case C-167/01 *Inspire Art*, para. 133.

Another point of importance is that the anti-discrimination clause and the potential anti-restriction standard should induce Member States to revise their laws, identify potential discriminatory or restrictive instruments, and remove them.

In the context of the Directive, a further important point has to be taken into account. The Directive provides a degree of harmonization for national legislation on cross-border mergers for limited liability companies. It is a so-called minimum harmonization instrument. Member States are free to go beyond the bare minimum and use "gold-plating". Member States, for example, are not prohibited from expanding the Directive's scope to include companies that do not have limited liability, as defined in Article 2(1) CBMD. The case-law indicates that meeting the minimum requirements set out by the Directive may not exempt Member States from the scrutiny of the Court, and that they are still required to refrain from discrimination against cross-border mergers. This means that some States, with a wide scope of companies eligible for mergers in domestic law, may be required to similarly expand the scope of the Directive in their jurisdiction. Furthermore, it may not be even necessary to invoke the discrimination standard; it may be possible to show that national law is running afoul of the restriction standard, by proving that it unjustifiably limits the scope of the Directive. [235]

A complication arises with respect to Article 4(1) Directive. The Article provides that "[s]ave as otherwise provided in this Directive, (a) cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States." Member States could defend national legislation that limits cross-border mergers between unspecified company types based on this Article, as permitting this kind of limitation. Whether this argument would in fact hold depends on how far the Court will develop the anti-discriminatory or anti-restrictive case-law. A potential argument would be that the Directive itself is restricting free movement in this regard; such an interpretation, however, currently seems unlikely.

A final provision creating a potential tension with Article 49 TFEU is Article 16 CBMD.[236] In that context as well it remains to be seen how the Court would balance the objectives of allowing for a cross-border mergers within the EU on the one hand, and protecting of employees on the other hand.

[235] See on this matter with a slightly different argumentation also T. Papadopoulos, 'The Magnitude of the EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Merger Directive', *EBLR* (2012), p. 530; G.J. Vossestein, 'Companies' Freedom of Establishment after Sevic', 3 *European Company Law* (2006).
[236] See on this issue also P. Storm, 3 *European Company Law* 3 (2006).

3.5.3 National Case-Law on Cross-Border Mergers within the Context of the CBMD

Even though extensive research of the case-law databases of all 30 countries was conducted, little case-law has been found dealing with legal disputes in the context of the Directive. This is a clear indication that even though stakeholders reported numerous obstacles, these almost never lead to severe legal disputes.[237]

Nonetheless, in the United Kingdom, some relevant case-law has developed. The most recent one relates to the cross-border merger of a parent company having its seat in Germany —House-Clean Verwaltungs GmbH— and its wholly owned English subsidiary —House-Clean Ltd. In re House-Clean Ltd [2013] WLR (D) 165, the litigation revolved around the question of whether the competent court for issuing the pre-merger certificate had the discretion to reject such a petition on behalf of the English subsidiary hereupon, by reason of delay of the management board of the latter company to approve the terms of the merger. Justice Roth ruled that Regulation 6(2) did not afford the court a right of refusal of a request for the issuance of a pre-merger certificate due to delay. Roth underscored further that the existent right of discretion of Regulation 16(1) granted to the court is pertinent to the approval of the cross-border merger, which is a distinct cross-border merger modality from the pre-merger certification. The court held that any tardy approval of the merger terms by the board of directors of a merging party did not have a detrimental impact on creditors' rights justifying the refusal of the pre-merger authorization.

In re Diamond Resorts (Europe) Ltd [2012] EWHC 3576 (Ch), a cross-border merger between 14 Spanish subsidiary companies and an English company, DREL, was to be carried out. The essential objective of the transaction was to streamline the structure of the group whose members were all companies involved in the merger. The main consequence of the merger would be that DREL, as the surviving company, would undertake all rights and obligations of the merged Spanish subsidiaries. The case revolved around the question of the degree of discretion under Regulation 16(1) that the competent courts in the United Kingdom enjoyed. In specifics, the matter addressed the United Kingdom judiciary's discretion in rejecting the pre-merger certification issued by the Spanish Commercial Registry, a foreign competent authority. The court declared the variation in competent authorities among Member States as a justifying factor for a detailed review of the extent of investigation the foreign authority conducted. This could include whether this authority took into account the benefits and disadvantages following from the authorization of the merger, in view of the alleged harm of other stakeholders' interests, such as creditors of the merged companies. In the present case, the court was specifically concerned

[237] It cannot be excluded that there have been cases dealing with the Cross-Border Merger Directive because in many Member States not all judgments are published in the electronic databases.

about the financial distress of the acquiring company, which ensued from the financial accounts of the latter and its dependency on the financial aid of its holding company. the court eventually granted the approval of the merger on the basis of the significantly improved capital position of the acquiring company during the last financial year, as evidenced by its restated balance sheet and its positive net asset position.

In the Matter of ITAU BBA International Limited [2012] EWHC 1783 (Ch), a cross-border merger by absorption between a Portuguese company, Banco Itaú BBA International S.A. ("Itaú BBA Portugal"), and an English company, Itau BBA International Limited, was brought before the Chancery Division of the High Court. The English company had been a dormant, asset-less "shelf-company" and was intended to assume all the Portuguese company's assets after the consummation of the merger. The latent incentive of the Portuguese undertaking appears to have been to immigrate to the United Kingdom by means of a simple and cost-effective process. The contentious matter to be resolved by the court was whether the definition of "existing transferee company'" in case of a merger taking place by absorption is in clash with the case of "a transferee company formed for the purposes of, or in connection with, the operation," which occur in mergers by consolidation, in such a way that when the second definition is reflected on the facts of a merger by absorption, the transaction must be prohibited. Finally, the court opined that such a restrictive and narrow interpretation of the CBMD is not justified from a policy point of view and subsequently permitted the merger to proceed toward its completion. The court redrafted the Regulations to ensure that they conformed to the CBMD.

In re (1) Wood DIY Ltd and (2) Olivero Franco Sarl [2011] EWHC 3089 (Ch), a cross-border merger by absorption wherein the absorbing company is an Italian-based company, Olivero Franco SARL, and the disappearing company is an English company, Wood DIY Limited, was examined. The main legal issue in the case at hand was the discretion accorded to the English competent authority, the court, for approving cross-border mergers pursuant to Regulation 16(1). The entirety of stakeholders associated with the transferor Italian company had expressed their consent and the Italian notary, as the competent national authority for approving the merger, had given its approval. The court emphasized that although the Italian authority had provided its authorization of the transaction, there was still a residual discretion of the English court in relation to the approval of the merger. This discretion should be exercised in accordance with the general principle of "the arrangement an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve." Inasmuch as that test was fulfilled, the court granted the court's approval of the merger.

In re Oceanrose Investments Ltd [2008] EWHC 3475, the disputed question was whether under Regulation 11, the precondition for approval of the draft terms of merger by members at a meeting, was indispensable, even if one of the merging companies has solely one member who has solemnly expressed its assent to the planned merger. The peculiarity of that case consists in the fact that the transaction involved a private UK single-member company —Oceanrose Investments Limited— which sought to enter into a merger transaction with another private company established in Italy —L.A. Filati SRL. Therefore, the requirement of approval of the merger by the members of the merging companies was at stake due to the unipersonal nature of the UK merging party. Eventually, the court ruled in favour of the application of the requirement of approval of the merger in a general meeting relying on the strict formulation of Regulation 13(1) and the analogous reading of Part 26 Companies Act to sanction schemes of arrangement, in which case it was determined that when one class of members or creditors comprised only one member or creditor, a meeting attended by the member or creditor would satisfy the statutory requirements for a meeting. The court adhered to that formalistic test of deciding whether a meeting has been summoned in cases where the collectively of a corporate body is concentrated in just one person and employed the same construction for application of Regulation 13, preventing the transaction to proceed without that requirement.

In Austria, only one case refers to the CBMD and its transposition at the national level, and also there it only plays a minor role, because the court in this matter found that the disputed merger was not of a cross-border nature.[238]

With respect to Slovakia, a case has been reported where it was stipulated that statutory review of a cross-border merger under Provision 69aa, paragraphs 2 and 7 of the Commercial Code at the district court was limited to cases where the acquiring company was based in the Slovak Republic. In other cases, conditions for the de-registration were reviewed formally and the basis for them was a notification addressed to the foreign registry where the company from another Member State was registered, notifying them that the cross-border merger has become effective.[239]

3.5.4 Average Time and Costs in Carrying Out a Cross-Border Merger

Potential obstacles to carrying out cross-border mergers can relate to the costs and time involved. Stakeholders have reported, though, that in general both are not to be

[238] Supreme Court case OGH 6 Ob 226/09t.
[239] 41Cob/108/2012, 'Preskúmavanie cezhraničného zlúčenia', najpravo.sk (2012), http://www.najpravo.sk/judikatura/obchodne-pravo/obchodny-register/preskumavanie-cezhranicneho-zlucenia.html (last visited 20 August 2013).

regarded as major obstacles. They did mention, however, that reducing said costs and time was still an important objective.

The average time to carry out a simple cross-border merger was reported to be between 2 and 4 months. Some mergers took as much as 7 months. It was stressed by stakeholders that the actual duration depended very much on the Member State. Moreover, it was noted that this can vary between countries due to internal circumstances. In Austria, for example, an outbound merger mandates a waiting period of 2 months before receiving the merger certificate. Naturally, the duration also depends on the amount of time it takes the court. To take Austria as an example again, it takes around 10 working days until the certificate is issued. Assuming it takes around the same time in the other Member State, nearly 1 month would have passed for this reason alone. Finally, it should be noted that if issues such as employee participation arise, or if the merger concerns regulated businesses such as banks, a cross-border merger can also easily take 8 to 12 months or longer.

Regarding costs involved in a cross-border merger, it is reported that they were very difficult to pin down, because they depended on many different factors, such as:

- Whether the cross-border merger involves companies operating in the regulated financial market (the process is longer, involves cooperation with the local financial supervisory authorities, involves additional actions);
- The shareholding structure, since within the group companies cross-border mergers may be carried out either as the “up-stream” or “side-step” merger;
- Whether the auditor is involved for review of the merger agreement or establishment of the share exchange ratio;
- Whether employees’ participation is an issue;
- Direct costs related to the cross-border merger, like the notary’s fee, state duties, translation costs, or publication fees. Estonian law, for example, requires the merger agreement to be signed at the presence of a notary public. The notary’s fee is calculated on the basis of the share capital of the acquiring company.

Importantly, the administrative costs involved in cross-border mergers are in any event said to be reasonable and very low. Reported costs vary between 650 and 2.000 EUR. Compared with the other expenses such as legal advisory or auditing costs in a multi-million or multi-billion deal, advisory costs are therefore negligible.

Case Study: Costs Involved in a Cross-Border Merger

Taking a simple cross-border involving an Austrian company as an example, Austrian lawyers' fees are reported to be around 15.000 to 20.000 EUR, covering correspondence, explanations, and so forth. Registration costs around 500 to 600 EUR. Publication may be free if the information can be posted online, but otherwise costs around 1.000 EUR- all costs not including tax or accountant fees. Additional costs to be taken into account are associated translation costs, such as the merger plan, articles of association, and balance sheets. As an example, it was stated that translating 10 pages can easily cost 700 EUR. Finally, there are notary costs that can amount to 6.000 to 7.000 EUR.

3.5.5 Experience with Carrying Out Cross-Border Mergers

When considering obstacles to the full effectiveness of the Directive, an important criterion to be taken into account is the experience of stakeholders in carrying out this kind of operation. An important trend identified in this regard is that legal advisors, as well as national authorities, report that the more often they carry out cross-border mergers, the less problematic the process becomes.

Law firms reported that in their first cross-border mergers, they had to work together with the national authorities very closely in order to make sure that all details of the process worked out. This was, for example, reported by Greek legal advisor with respect to the years of 2010 and 2011. Hungarian legal advisors also reported that the inexperience with the Directive led to situations where national authorities did not apply the national legislation at all, or did so in an incomprehensive manner.

Said phenomenon was reported in the Netherlands as well, with respect to employee participation. Having dealt with this issue several times in cross-border mergers, the interviewed law firm no longer considered employee participation a problem. However, they noted that it became an issue again once they had to work together with smaller law firms that have not gathered the same level of expertise. Such inexperience also easily lead to an explosion of costs.

Summary of the Directive's Transposition:

Gold Plating, Diverging Transposition and Non-Transposition

4. Transposition of the CBMD in National Legislation

In accordance with objectives (1) and (2) of this study, this Annex outlines the transposition of the Cross-Border Mergers Directive in all EU and EEA Member States. The data gathered in this section can be regarded as the skeleton of the study, providing for the national legal framework. On the basis of this framework, the benefits, obstacles and trends regarding the application of the CBMD in practice can be observed from a comparative perspective and best practices can be identified.

In order to map the legal framework, local experts in each Member State have created a report examining the transposition of the Directive in the respective national laws, with particular focus on the scope of the Directive.

The information gathered in the reports has been used for two main purposes: first, it allows a comprehensive analysis of the transposition and gold-plating of the Member States. In addition, the data is used in order to examine benefits, obstacles and trends reported by stakeholders from a comparative perspective.

This Annex thus consists of two parts: the country reports and the comparative tables.

4.1 Methodology and Quality Assurance

The crux of this section is the country reports. The country reports contain an examination of the transposition of each CBMD provision into national law. These reports were prepared by our local experts and contain a thorough analysis of the literature, statutes and pertinent case law.

The reports follow a uniform set of questions, in order to guarantee standardization. For each provision, the reports examine whether the respective provision has been transposed and whether it has been gold-plated by the Member State. Next, the description focuses on specific significant issues for each provision (for example, whether the Member State allows cooperatives to merge, or which authority has been assigned to issue the pre-merger certificate).

The results of these reports are summarized in a special table providing an easy and accessible overview of the main issues: transposition, gold-plating and improper transposition.

Table 1 – Conformity Assessment

Data: Lexidale.

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 1		Czech Republic: These articles apply to all commercial companies in the Czech Republic (§ 68, § 69, § 1, § 3(1)); Belgium: The Belgian legislator extended the applicability of the new cross-border mergers provisions to all Belgian companies entitled to a domestic merger, i.e. all companies having legal personality except agricultural companies and (domestic) economic interest groupings (Article 670 BCC - Article 772/1 BCC); Denmark: The Danish Act on Trusts Carrying on Business for Profit authorizes the Minister of Commerce to lay down rules on CBMs of the trust covered by the Act; Greece: Law applies also to mergers from companies of Member States other than Greece, when the company arising from such merger resides to Greece (Article 1(2)); Iceland: Extended to companies subject to EFTA Convention and Faroe Islands (Article 133(1)(a) Act on Public Limited Companies ; Article 107(1)(a) Act on Private Limited Companies);	Bulgaria: The national law prohibits the execution of mergers pursuant to the Directive in cases where the acquired company has its registered office in Bulgaria and owns land and the surviving/ newly formed company has its registered address in another Member State (Article 265d (3) of Commerce Act).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		Italy: The Decree is applied also to those companies not incorporated in the form of limited liability companies, or limited liability companies incorporated outside of the EU, provided that the national law governing the other involved member state's companies has a similar provision. The employees participation provisions do not apply to those extra-EU companies (Article 2(2) Decree); Luxembourg: The cross-border mergers provisions apply to all legal entity governed by the Law (Article 257 (1) and (2)) moreover cross-border mergers are possible with companies outside the EU (Article 259 (2); Article 257 (3)); Netherlands: NVs, SEs and BVs are allowed to merge with whatever foreign limited liability company while SCEs are allowed to merge with cooperative societies. Another extension is the provision that mergers between foreign entities as disappearing entities in which the surviving entity is a newly incorporated NV, SE, BV or SCE are explicitly allowed (Art 2:333c(1), Art 2:333c(2) DCC); Slovakia: It applies to all companies not only LLC	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		(§ 69aa(1) point e), first sentence); Slovenia: Has expanded on a few points(Article 622.a(2)(2), Article 622.b of the Companies Act); United Kingdom: The definition of "UK company" is vague and if taken literally includes non-EEA companies registered in the UK. R. 3(1).	
Article 2			
Article 2(1)(a)	Iceland	Slovakia: It is expanded based on the case of SEVIC (§ 69aa (1) point b), c)).	Sweden: ABL only defines the subject for a cross-border merger as a company equivalent to the Swedish limited liability company which fulfils the requirements laid down in the directive (Chapter 23, 36 §, first subparagraph, ABL).
Article2(1)(b)	Germany, Iceland	Czech Republic: These articles apply to all commercial companies in the Czech Republic (§ 105 (1), § 221(1), § 222 Commercial Code); Slovakia: It is expanded based on the case of SEVIC (§ 69aa (1) point b), c)); Slovenia: The limited liability company is defined broader (Article 622.a(2)(2) of the Companies Act).	Sweden: ABL only defines the subject for a cross-border merger as a company equivalent to the Swedish limited liability company which fulfils the requirements laid down in the directive (Chapter 23, 36 §, first subparagraph, ABL).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
Article 2(2)		Netherlands: Triangular mergers possible in Article 2.333a DCC; Finland: Triangular mergers possible (in accordance with the CJEU case law).	
Article 2(2)(a)	France	Netherlands: It rules that a 10% threshold is only applicable if a surviving entity is a Dutch entity (Article 2:325(2), Article 2:333a); Slovenia: A cash payment that must not exceed 10% of the nominal value is allowed when the exchange ratio is not equal to one or more acquiring company shares and only the shareholders who do not possess an appropriate number of acquired company shares in order to receive a whole number of the acquiring company shares shall be provided cash payment by the acquiring company or by other person (Article 580 in connection with 622.b of the Companies Act).	Finland: No cash limitation (Act on LLC Chapter 16 sections 1 and 2(1)); Iceland: It does not follow the rules on cash payment (Article 133(1)(a) Act on Public Limited Companies ; Article 107(1)(a) Act on Private Limited Companies); Ireland: No reference to consideration (Regulation2(1)of S.I. No. 157 of 2008No); Sweden: More than 50% must be shares in the company. No 10% cash limit is defined (Chapter 23, 1 §, first and second subparagraph (1), ABL).
Article 2(2)(b)	France	Slovenia: A cash payment that must not exceed 10% of the nominal value is allowed when the exchange ratio is not equal to one or more acquiring company shares and only the shareholders who do not possess an appropriate number of acquired company shares in order to receive a whole number of the acquiring	Finland: No cash limitation (Act on LLC Chapter 16 sections 1 and 2(1)); Hungary: No reference to cash payment (Article 80 Company Act); Iceland: It does not follow the rules on cash payment (Article 133(1)(a) Act on

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Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
		company shares shall be provided cash payment by the acquiring company or by other person (Article 580 in connection with 622.b of the Companies Act).	Public Limited Companies ; Article 107(1)(a) Act on Private Limited Companies); Ireland: No reference to limitations regarding cash payments (Regulation2(1)of S.I. No. 157 of 2008No); Sweden: More than 50% must be shares in the company. No 10% cash limit is defined (Chapter 23, 1 §, first and second subparagraph (2), ABL).
Article 2(2)(c)	France, Germany, Liechtenstein, Slovenia	Ireland: The provision adds a reference to consideration in the form of securities or shares and the potential for an additional cash payment (Regulation2(1)of S.I. No. 157 of 2008No).	Finland: Also requires rights of options to be owned by the mother company (Act on LLC Chapter 16 section 2(2)).
Article 3			
Article 3(1)	Iceland, Portugal, Slovenia	Latvia: The cash payment may not exceed 10 percent of the nominal value of the shares of the acquiring company if that company is an AS or joint stock company (Section 376 of the Commercial Law); Netherlands: It applies if a Dutch entity is a disappearing entity; Sweden: More than 50% must be shares in the company. No 10% cash limit is defined (Chapter 23, 2 § ABL).	Bulgaria: The local legislation does not allow cash payments in favor of the share-holders to exceed 10 per cent of the whole nominal value of the securities or shares acquired in the share capital of the new/surviving company when the latter has its registered office in Bulgaria (Article 261b(2) Commerce Act) in case of a cross-border merger. The national

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
			legislation does not specifically regulate the hypothesis where the acquired company has its registered office in Bulgaria and the surviving/new company's registered office is in another Member State which has implemented Article 3(1) CBMD (Article 261b (2) CA).
Article 3(2)	Optional provision		
Article 3(3)	Denmark, Hungary, Ireland, Slovakia		Estonia: Closed-end non-public investment funds formed as public limited companies can still merge under the Directive regulations (Article 211 of the Investment Fund Acts); Netherlands: Companies as described in Article 3(3) CBMD can merge under certain circumstances (Article 2:333c(4) DCC); United Kingdom: The definition of "UK company" does not exclude investment companies (R. 3(1)).
Article 4			
Article 4(1)(a)	Austria, Belgium, France, Iceland, Ireland, Liechtenstein, Slovenia	Cyprus: Companies limited by guarantee & companies in administration cannot take part in international mergers (201JA(1)); Slovakia: It allows for the merger of private LLC	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		and public LLC if the private LLC dissolves (§ 218l (1),(2)).	
Article 4(1)(b)	Optional provision		
Article 4(2)	Optional provision		

Provision in the CBMD	**Conformity Assessment**		
	Non-transposition	**Gold-plating**	**Improper transposition**
Article 5		Belgium: The obligation to indicate the corporate purpose of each of the merging companies has been added (Article 772/6 BCC); Ireland: Information also required on the governing law of the companies and their registration number. In addition, Article 5(3) of the Regulations permits the inclusion of additional terms which are not inconsistent with the national implementing measure; Italy: Specify the other information that might be required under the respective national law (Article 6(1)(h) Decree); Specify the date of effectiveness of the merger or the criteria necessary to determine it (Article 6(1)(i) Decree); In case of leveraged buy-outs, specify the resources utilized to satisfy the obligations of the resulting company (Article 2501-bis(2)c.c.); Latvia: The activities to be conducted during the reorganization process and the periods for conducting them (Section 335(2) of the Commercial Law); Lithuania: Article 3(1)(2) requires the inclusion of the method of merger; Poland: There is one more provision regarding	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		the arrangements made for the exercise of the rights of creditors and of any minority members (516(3)(9) CPCC); Portugal: It has 3 additional requirements (Article 98); Slovenia: Law sets further requirements (Article 622.c(3) of the Companies Act); Sweden: Annual reports and other financial information (investments etc.) shall be attached to the report (Chapter 23, 10 § ABL).	
Article 5(a)		Iceland: Registered office proposed for the company resulting from the merger not required (Article 120(1)(i)-(ii) Act on Public Limited Companies and Article 95(1)(i)-(ii) Act on Private Limited Companies); Italy: Specify the national law regulating each involved company and the resulting one (Article 6(1)(a) Decree).	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 5(b)	Iceland	Bulgaria: Law goes further by establishing that the exchange ratio of the shares or participating interests has to be determined at a specific date. Furthermore, the national legislation stipulates that further to the requirement for statement of the amounts of cash payments, the CDTM has to include the dates for their payment ((Article 265e(1), p. 2 CA); Slovenia: The cash payment amounts must be expressed in relation to each share of the acquired company (Article 622.c(2)(2) of the Companies Act); Netherlands: Compensation per share for minority shareholders must be included (Article 2:333h DCC).	
Article 5(c)		Bulgaria: Law goes further by stipulating that besides the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger, the CDTM also has to include a description of the shares which each partner or shareholder is to acquire in the surviving/newly formed or acquiring corporation, including the envisaged increase of capital of the acquiring corporation, if such increase is required by the transformation	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
		(Article 265e(3), p.2, p.3 CA); Slovenia: Detailed information on procedures concerning the transfer of shares must be provided rather than information on the terms for the allotment of shares representing the capital of the company resulting from the cross-border merger (Article 622.c(2)(3) of the Companies Act).	
Article 5(d)		Austria: The report requires "the likely repercussions on employment" and "specifically for the employees of the merging companies, the terms of employment and the general employment situation" (own translation) (Section 5(2)(4) EU-VerschG); Spain: The CDTMs must include the likely consequences on the social responsibility of the company as well (Article 31.11 of the SML).	
Article 5(e)			Sweden: Special conditions affecting the entitlement are not mentioned as in the directive (Chapter 23, 38 §, first subparagraph, (5), ABL).
Article 5(f)	Iceland	Slovenia: The Companies Act requires a date from which the transactions of the merging companies will be treated as being those of the company resulting from the cross-	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		border merger (cut-off date of merger) not limited to accounting purposes only. Article namely omits the phrase "for accounting purposes" from the language of the provision (Article 622.c(2)(6) of the Companies Act).	
Article 5(g)			
Article 5(h)			
Article 5(i)			Ireland: For companies which do not have a single document constitution, there is no reference to a requirement to furnish the Memorandum of Association, the only reference is to the Articles of Association (Regulation 5(2)(h)).
Article 5(j)	Iceland		
Article 5(k)		Italy: Specific duty of financial disclosure (Article 2501-quater c.c.).	
Article 5(l)		Bulgaria: Law goes further by stipulating that the CDTM should include not only the dates of the merging companies' financial accounts used to establish the conditions of the cross-border mergers, but the financial accounts themselves (Article 265e(4), p. 2 CA).	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 6		Greece: An exemption was provided for publication (and stays published) in the sub-directory of the website of the General Commercial Registry (Article 4(2); Malta: Date on which registration was made, together with an indication that the document registered relates to the common draft terms of the cross-border mergers (Regulation 7(2)(a)); Slovenia: The notice must also remind the shareholders about their right to examine listed documentation at the head office of such a company, the notice must further contain a reminder to creditors of their right to require security and shall be indicated that cash compensation had been offered by the acquiring company (Articles 586, 592, 600 and 622.j of the Companies Act).	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
Article 6(1)		Belgium: The CDTM has to be published at least 6 weeks (and not one month) prior to the meeting of the general assembly (Article 772/7 BCC); Denmark: The merger plan must be filed with the Danish Commerce and Companies Agency before four weeks have passed since it is signed. If this deadline is not adhered to, the merger plan cannot be issued and the merger cannot be approved (Section 244 and 279 paragraph 1 Companies Act); Lithuania: 3 times with at least 30 days intervals or once at least 40 days before GM and to all creditors in writing (Article 6(1) of Law on Cross-Border Mergers); Netherlands: Double publication in Staatscourant & Staatsblad (Article 2:314 DCC); Slovenia: The Companies Act does not require the publication of the entire CDTM, but merely the publication of the notice that CDTM was submitted to the court register, and it does not provide for a publication on a central electronic platform or that the companies maintain the information for a specific period after the general meeting on their	Finland: Finland has implemented the CBMD requirement that the CDTMs must be kept available to shareholders either on the website or at the head office for at least a month before the meeting. The gazette publication procedure is replaced by a registration procedure where the CDTM is registered in the Trade Register within a month from its signing, and which is then announced by the Trade Register authorities together with a public notice for creditors (Act on LLC Chapter 16 section 5); Germany: Filing has to be made one month before shareholder meeting, under CBMD publication has to be made one month before meeting (122d RA).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
		website or on the central electronic platform (Article 622.e in connection with 586 of the Companies Act).	
Article 6(2)(a)	Iceland	Ireland: Also refers to governing law of the companies and to publication of notice in two national newspapers (Regulation 8(1), 8(3)); Italy: Disclosure of the national law regulating the company (Article 7(1)(a) Decree).	Bulgaria: the national legislation does not provide that the list include information about the merging companies submitted together with the CDTM and the Management Report has to include the type of each merging company (Article 265g (2) CA); Poland: Such information has its place in the draft terms of cross-border mergers (516(3)(1) CPCC).
Article 6(2)(b)	Iceland		Bulgaria: The national legislation does not provide that the list include information about the merging companies submitted together with the CDTM and the Management Report has to include the number of the entry in the Commercial Registry of each

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
			merging company (Article 265g (2) CA); Poland: Such information has its place in the draft terms of cross-border mergers (516(3)(1) CPCC).
Article 6(2)(c)	Iceland		Estonia: Article 6(2)(c) of the CBMD has been incorporated in a way that the publication must include a reference that information regarding minority shareholder and creditor protection can be obtained from the CDTM. The reasoning is that the statutory protection regulation does not need to be included in the publication and any specific protective measures are set forth in the CDTM (Article 433'2 (5)(3) of the CC); Poland: Such information has its place in the draft terms of cross-border mergers (516(3)(9) CPCC); Slovenia: When the cross-border merger results in the transfer of the assets, rights and liabilities of a company having its registered office in the Republic of Slovenia to a company resulting

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
			from the cross-border merger having its registered office in another Member State, and the amount of the share capital and of the capital reserves of the company resulting from the merger will be less than the amount of the share capital and of the capital reserves of the acquired company, the known creditors of the acquired company shall be notified in person (Article 622.e(2)(3) of the Companies Act).
Article 7	Portugal, Slovakia (not the third sentence)	Bulgaria: In cases where the surviving/new company has its registered office in Bulgaria and there shall be an increase in the share capital of the latter, the management report shall include information about all assets, which shall be transferred to the surviving/new company (Article 262i (2) second sentence CA); Finland: No "in good time" requirement (Act on LLC Chapter 16 section 22(3)-(5)); Italy: Specify the exchange ratio and the criteria adopted to calculate it, plus the eventual difficulties of calculation. Moreover, they must specify the	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		eventual changes in assets and liabilities occurring after the CDTMs drafting (Article 2501-quinquies c.c.); In case of leveraged buy-outs, the rationale of the operation and the targets of it have to be specified (Article 2501-bis(3) c.c.); Lithuania: Report shall be also made available to creditors (Article 5 of Law on Cross-Border Mergers); Netherlands: Additional information in the written explanation is required (Article 2:313(1) and 2:327 DCC); Sweden: On demand copies of the report shall be sent to the shareholders for free (Chapter 23, 43 § ABL).	
Article 8		Ireland: There are some additional provisions in relation to the requirement of the merging companies to co-operate with the independent expert (Regulation7); Italy: In the case of a merger involving S.p.A. and S.A.A. the independent experts must be appointed by the Italian Tribunal (Article 9(2) Decree; Article 2501-sexies(3) c.c.); In case of leveraged buy-outs, the correctness of the analysis proposed is in the CTDMs (Article 2501-bis(4) c.c.).	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 8(1)		Belgium: The CDTM, the auditor's report and the management report are made available (Article 772/10 (2) BCC); Bulgaria: The expert has to be a registered auditor. The expert may not be a person who has, over the past two years, been an auditor of the company which is appointing them or which has produced an evaluation of an in-kind contribution. The appointed expert may not be an elected auditor of any of the companies participating in the transformation for two years following the date of the transformation (Article 262k (3) CA); Ireland: There are some additional restrictions upon eligibility to act as an independent expert which are designed to guard against conflicts of interest (Regulation 7(1),(2),(3),(4)); Lithuania: Report shall be available not later than 40 days before the GM (Article 4(1) and 4(6) of Law on Cross-Border Mergers); Netherlands: Auditor's opinion about the written explanation of the Board of Directors meant in Article 2:327 (Article 2:328 (2) DCC); Slovenia: The independent expert must	Spain: Only limited corporations and partnerships are required to obtain an Independent Expert Report (Article 34.1 of the SML).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
		be appointed by the court for each of the merging companies at the proposal of the supervisory board of the merging company concerned even if the expert report is drawn up for each merging company independently. If a company has no supervisory board, a merger expert is appointed at the proposal of the board of directors (Article 622.d(2) in connection with Article s 583, 586 and 599 of the Companies Act).	
Article 8(2)	Latvia	Germany: The experts are always appointed by a court, there's no option that the merging parties appoint the expert (122 f, 10 RA); Italy: The competent authority to appoint the expert is the Tribunal competent on the Italian company (Article 9(3) Decree); Italy: In the report, all the information required under each national law must be specified (Article 9(3) Decree).	Estonia: One or many joint auditor(s) can be appointed for the merging companies, whereas such joint auditor(s) must be appointed by a judicial or administrative authority of the Member State of one of the merging companies (Article 433'4 (2), (3) of the CC).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 8(3)		Finland: Finland goes further in its implementation of Article 8(3) CBMD by requiring that the report give an opinion on whether the merger will effect repayment of the company's debts (Act on LLC Chapter 16 section 4(1)).	
Article 8(4)		Finland: If all shareholders agree, an auditor's report may contain only information whether the arrangement is conducive to compromise payment of the company's debts (Act on LLC Chapter 16 section 4(2)); Sweden: An examination of the common draft terms of the cross-border merger by independent experts and the expert reports are required but can be narrowed down to cover the risks for the creditors and define the share capital in respect of the merging companies (Chapter 23, 11 § third subparagraph ABL).	Iceland: An examination of the CDTM is always required (Article 122(4) Act on Public Limited Companies; Article 97(4) Act on Private Limited Companies); Spain: The independent expert report shall continue being necessary even if there is an agreement of the all merging companies. In that case, the expert report would be a reduced version with less requirements (Article 34.4 of the SML).
Article 9		Malta: Approval not valid unless extraordinary resolution adopted at least 1 month after publication of CDTM and not later than 3 months; 7(4): more than one class of shares - extraordinary resolution subject to separate vote by at least each class of shareholders whose rights are affected; 7(5): extraordinary resolution shall cover both CDTM and any	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		alterations and additions to memorandum and articles necessitated by cross-border mergers; 7(6): previous provisions shall, as appropriate, apply to any alterations and additions to memorandums and articles necessitated by cross-border mergers.	
Article 9(1)		Greece: A reinforced quorum and majority is required for Greek companies (Article 7(1)); Iceland: Only in respect of the company being taken over (Article 123(2), 124(2) and 124(5) Act on Public Limited Companies / Article 98(2), 99(2) and 99(5) Act on Private Limited Companies); Ireland: A special resolution must be passed - 75% majority required. Members may also make approval conditional on certain specified circumstances as well as having an overall discretion to impose conditions on approval. Some additional disclosure requirements are also added in relation to changes in the value of assets and liabilities: Regulation 10(3).	Finland: Finland has implemented Article 9 CBMD. In the merging company the decision shall be made by a shareholders' meeting. In the receiving company the decision shall be made by the board unless shareholders who own at least 5% of the shares (and the transferee company own less than 90% of the shares of the transferring company) require the decision to be made in a shareholders' meeting (Finland LLC Act Part V, Chapter 16, Section 9); United Kingdom: It is unclear whether the UK Regulations require the meeting to take place where not ordered by the court (Rr. 11 and 13).
Article 9(2)	Bulgaria, Finland, Iceland		
Article 9(3)	Optional provision		

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 10			
Article 10(1)			Lithuania: There is no distinction between scrutiny on the level of merging parties and on the level of the company resulting from the merger (Article 8(1) of Law on Cross-Border Mergers and Regulations of the Register on Legal Entities).
Article 10(2)		Bulgaria: The national legislation goes further by establishing a minimum of a14 days waiting period as of the date of application before the certificate can be issued (Article 94e(1) Ordinance for maintaining, storing and access to the Commercial Registry); Italy: Specification of circumstances that have to be mentioned in the pre-merger certificate (Article 11(2) Decree).	France: National law provides that the clerk has eight days to deliver the certificate of conformity (Article L236-29 and R236-17 Commercial Code); Ireland: There is no reference to "without delay" (Regulation13).
Article 10(3)	Optional provision		
Article 11		Slovenia: All documents and acts referred to by the Companies Act applicable for domestic mergers must be also attached to the merger registration application (Article 622.I(2) in connection with 590(2) of the Companies Act).	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 11(1)		Ireland: Some additional procedural detail is provided including a right for creditors to be heard (Regulation14(2),(3)).	Lithuania: There is no distinction between scrutiny on the level of merging parties and on the level of the company resulting from the merger (Article 8(1) and 8(2) of Law on Cross-Border Mergers, Article 2.64(2)(4) of the Civil Code and Article 26(16) of the Law on Notary Office); Ireland: There is no express requirement to submit the certificate only a requirement that a certificate has been issued (Regulation14(2),(3)).
Article 11(2)	Bulgaria		
Article 12			
Article 13		Cyprus: Copy of merger resolution attached on each copy of incorporation of the new company (201K); Greece: National law requires that, after the general meetings have approved the merger and before registration of the latter, the merging companies have to enter into a merger contract drawn before a notary, in which they solemnly declare that they will merge. This additional step is provided for by Greek legislation, although not required by the EC texts (Article 11(1));	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
		Iceland: Only second sentence implemented (Article 133(f) Act on Public Limited Companies; Article 107(g) Act on Private Limited Companies); Slovenia: The notification shall be in its original language and in a certified translation (Article 622.k(6) of the Companies Act).	
Article 14		Italy: Specific accounting rules regulating the new company's first balance (Article 2504-bis(4) c.c.); Continuation of the liability of the shareholders previously not enjoying the limited liability (Article 2504-bis(5) c.c.).	Finland: The assets and liabilities of the non-surviving companies, including all rights and obligations, will be considered transferred to the surviving company, even without the liquidation of the non-surviving companies. The addition, however, does not apply to Finnish companies (Finland LLC Act Chapter 16 Section 27(2)).
Article 14(1)(a)		Slovenia: When at the time of merger the merging companies have pending bilateral agreements, and because of the legal consequences of the merger, such agreements result in the following mutual obligations: obligations of acquisition, supply or other similar incompatible obligations, the	

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Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		immediate fulfillment of which would represent an unfair burden for the acquiring company, the scope of such obligations shall undergo a fair modification by taking into consideration the interests of both parties (Article 591(3)(1) in connection with 622.b(3) of the Companies Act).	
Article 14(1)(b)		Iceland: Only in respect of shareholders (Article 127(2) Act on Public Limited Companies / Article 102(2) Act on Private Limited Companies). Slovenia: Except for the shares of the acquired company held by the acquiring company itself and for shares held by the acquired company. At the same time, the third party rights to shares of the acquired company shall be transferred to the shares of the acquiring company to be provided because of the merger, or to any rights to cash payment (Article 591(3)(3) in connection with 589 and 622.b(3) of the Companies Act).	
Article 14(1)(c)	Italy	Italy: Rather than declaring the extinction of the incorporated company, the law uses the expression continuation (Article 16(1) Decree; Article 2504-bis(1) c.c.).	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 14(2)(a)		Slovenia: When at the time of merger the merging companies have pending bilateral agreements, and because of the legal consequences of the merger, such agreements result in the following mutual obligations: obligations of acquisition, supply or other similar incompatible obligations, the immediate fulfillment of which would represent an unfair burden for the acquiring company, the scope of such obligations shall undergo a fair modification by taking into consideration the interests of both parties (Article 591(3)(1) in connection with 622.b(3) of the Companies Act).	
Article 14(2)(b)		Iceland: Only in respect of shareholders (Article 127(2) Act on Public Limited Companies; Article 102(2) Act on Private Limited Companies); Slovenia: Except for the shares of the acquired company held by the acquiring company itself and for shares held by the acquired company. At the same time, the third party rights to shares of the acquired company shall be transferred to the shares of the acquiring company to be provided because of the merger, or to any rights to cash payment (Article 591(3)(3) in connection with 589 and 622.b(3) of	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
		the Companies Act).	
Article 14(2)(c)			
Article 14(3)	Germany, Iceland, Liechtenstein, Norway, Portugal, Spain, Sweden, Netherlands,	Ireland: Also refers to transfer of legal proceedings and contracts (Regulation19(1)(d), (g) and (h)).	
Article 14(4)	Iceland, Liechtenstein, Netherlands		
Article 14(5)(a)	Iceland, Netherlands	Lithuania: "Acting on acquiring company behalf" is defined as acting in the interest of the acquiring company and with its funds (Article 10(6)(1) of Law on Cross-Border Mergers).	
Article 14(5)(b)	Iceland, Netherlands	Lithuania: "Acting on acquiring company behalf" is defined as acting in the interest of the acquiring company and with its funds (Article 10(6)(2) of Law on Cross-Border Mergers).	
Article 15			

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
Article 15(1)		Italy: The management report is not required (Article 2505(1) c.c.); Slovenia: The simplified procedure under Article 622.c of the Companies Act applies only for a merger with a wholly owned subsidiary and not for a cross-border merger is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired. An audit report is still required, but there are no content requirements and the management explanatory report does not need to explain the legal and economic grounds for the proposed share exchange ratio and the amount of additional cash payments, if any (Article 622.c(4) in connection with 582 and 583 of the Companies Act).	Finland: The domestic implementation of the deviation does not fully cover Article 8, as based on Chapter 16 Section 4(2), in subsidiary mergers the expert report concerning possible endangering of debt repayment by the receiving entity shall be obtained (Act on LLC Chapter 16 sections 23 and 4); France: National law (i) provides that shareholders holding at least 5% of the capital can convene a shareholders meeting, and (ii) does not expressly provide that shareholders of the acquired company become shareholders of the acquiring one (Article L236-11 Commercial Code).
Article 15(2)	Optional provision		
Article 16		Luxembourg: the employee participation rules are applicable to cross-border mergers of companies having their registered office outside the EEA. The negotiations do not only include the participation of employees but also cover the information and consultation of such employees (Articles L.426-13 to L.426-16 of	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		the Labor Code).	
Article 16(1)	Netherlands	Luxembourg: The employee participation rules are applicable to cross-border mergers of companies having their registered office outside the EEA. The negotiations do not only include the participation of employees but also cover the information and consultation of such employees (Articles L.426-13 to L.426-16 of the Labor Code).	
Article 16(2)			Bulgaria: Bulgaria introduced an exception mechanism for non-applicability of national rules, which is different from the ones in the CBMD, namely that national rules shall not be applicable only when at least one of the merging companies is operating under an employee participation system pursuant to Directive 2001/86/EC (Article 265 q, para. 3 of the Bulgarian Commerce Act). Finland: The national limitation is 150 employees (Act on Personnel Representation in the Administration of

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
			Undertakings sections 9 b); Sweden: No threshold, as laid down in Article 16(2), is proposed. The same rules should apply to all companies, no matter what size they are (government bill 2007/08:20 pp. 39). It is suggested that the new act should apply to cross-border mergers if any of the merging companies are subject to the application of provisions on employment participation.
Article 16(2)(a)	Iceland, Latvia, Lithuania, Poland, Romania		Bulgaria: Bulgaria introduced an exception mechanism for non-applicability of national rules, which is different from the ones in the CBMD, namely that national rules shall not be applicable only when at least one of the merging companies is operating under an employee participation system pursuant to Directive 2001/86/EC (Article 265 q, para. 3 of the Bulgarian Commerce Act).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
Article 16(2)(b)	Bulgaria, France, Iceland, Latvia, Lithuania, Poland, Romania, Netherlands		Bulgaria: Bulgaria introduced an exception mechanism for non-applicability of national rules, which is different from the ones in the CBMD, namely that national rules shall not be applicable only when at least one of the merging companies is operating under an employee participation system pursuant to Directive 2001/86/EC (Article 265 q, para. 3 of the Bulgarian Commerce Act). Luxembourg: Diverging rule from Article 16(2)(b): the employees participation regime shall apply to any public limited liability company resulting from the cross-border merger having at least 1,000 employees in Luxembourg, regardless of whether the employees from its establishments located in other countries are entitled or not to exercise the same participation rights as the Luxembourg employees (Article L.426-1 of the Labor Code).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
Article 16(3)		Germany: Employees of subsidiaries are part of the quorum (6, 7, 8, 9 EPA); Italy: The default regime offered by the EU Directive should be effective only when different procedures cannot be agreed upon by the relevant collective labor unions (Article 19(1) Decree).	Romania: Transposed only for the European Companies (Government Decision 187/2007).
Article 16(4)(a)		Lithuania: Decision should be taken by each of the merging companies and negotiations with the special negotiating body are not required (Article 20(1)(3) of the Law on Employee Participation).	
Article 16(4)(b)	Italy, Poland		Ireland: Rather than rules in Member States where the successor has a registered office it refers to rules in Member States where the successor company has employees (Regulation34(3)).
Article 16(4)(c)	Optional		
Article 16(5)	Optional		
Article 16(6)	Belgium, Iceland, Poland	Slovenia: the company resulting from the cross-border merger must allow for the exercise of employee participation rights by a change of its legal form or (additionally to Article 16 (6) CBMD requirement) by a change of the structure of its administrative organs (Article 5(2) of the Act	

Provision in the CBMD	Conformity Assessment		
	Non-transposition	**Gold-plating**	**Improper transposition**
		Regulating Employees Participation in Decision-Making in Cross-Border Mergers of Limited Liability Companies).	
Article 16(7)	Belgium	Austria: 5 years instead of 3 (Sec. 262 ArbVG); Greece: Upon completion of the cross-border merger, all merged companies residing in Greece, are obliged to notify in writing the Competent Labor Authority of the number of employees and employees' representatives as per paragraphs above (Article 14(7)).	United Kingdom: The rule does not apply to private companies (R. 40(1))
Article 17	Iceland	Slovenia: After a merger is registered, any possible shortcomings of the merger shall have no effect on the legal consequences of the merger. Any plaintiff who, prior to the registration of the merger, has initiated an action to declare null and void or challenge the resolution approving the merger may, without the agreement of the defendant, modify his/her action in such a way as to claim compensation for damage incurred to him/her by the registration of the merger (Article 598in connection with 622.b(3) of the Companies Act). Italy: Safeguard clause protecting the	United Kingdom: Although court approval is "conclusive evidence" that the merger has been sanctioned there is no provision stipulating that a cross-border merger cannot be rescinded (R. 16).

Provision in the CBMD	**Conformity Assessment**		
	Non-transposition	**Gold-plating**	**Improper transposition**
		shareholders and third party damage as a result of the merger (Article 17(2) Decree).	
Provision in Directive 2009/109/EC			
Article 4			
Article 4(1)	Bulgaria, Denmark, Portugal	Cyprus: Each of the merging Cypriot companies is exempted from the obligation to publish the CDTM in the Government Gazette if for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide the CDTM and ending not earlier than the conclusion of that meeting, it makes the common draft terms of such merger available on its website free of charge for the public. The provision continues further to impose an obligation on the company to maintain the information on its website for at least one month after the conducting of the general meeting and also that the specific period should be prolonged for such a time period that a possible interruption of access to	Finland: An option is to keep the documents at head office (Act on LLC Chapter 16, section 11); France: National law does not provide for publication via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC, nor for the requirements to maintain the information for a specific period after the general meeting (Article R236-15 Commercial Code).

Provision in the CBMD	Conformity Assessment		
	Non-transposition	Gold-plating	Improper transposition
		the website has occurred because of technical or other reasons. The Cyprus legislation does not impose an obligation for the publication to be effected via a central electronic platform or otherwise and if the publication is made on the website of the merging company it will be adequate for the provisions of the Cyprus legal provisions (201JC(1)).	
Article 4(2)	Bulgaria, Cyprus, Finland, Hungary, Iceland, Liechtenstein, Norway, Sweden	Cyprus: Merging company owns all shares (not 90% as per Directive), subject to exemptions of national law 201KB (201KB).	France:. National law (i) provides that shareholders holding at least 5% of the capital can convene a shareholders meeting, and (ii) no French law provisions provide that the documents necessary for scrutiny are not required (Article L236-11-1 Commercial Code).
Provision in Directive 2011/35/EU			
Article 8			
Article 8(a)	Optional provision		
Article 8(b)	Optional provision		
Article 8(c)	Optional provision		
Article 10(2)		Cyprus: The particulars contained in Article 10(2) of the Council Directive 78/855/EEC (now Directive 2011/35/EU) are adopted in the Cyprus	Finland: The expert shall assess whether a true and fair view has been provided of the grounds for setting the merger

Provision in the CBMD	**Conformity Assessment**		
	Non-transposition	**Gold-plating**	**Improper transposition**
		Companies Law by Article 201JE(3) (201JE(3)).	consideration, as well as on the distribution of the consideration (Finland LLC Act, Part V, Chapter 16, Sections 4 and 23).
Provision in Directive 2009/101/EC			
Article 3	France, Greece, Iceland, Italy, Romania, Slovenia		Hungary: All registration procedures are only concluded by electronic means since 2009 (Article 36 of Company Procedure Act).

Employee Participation in Europe

5. Employee Participation in Europe

Table 1 – Employee Participation in Europe

Data: Lexidale. Updated version of the table by A. Conchon, Board-level employee representation rights in Europe: Facts and trends, *ETUI Report* 121 (2011), p. 12-13.

Country	Regulation in the		Scope	Proportion/ Number of employee reps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public Sector	Private Sector *			Trade Union	WC			
Austria	X	X	Ltd>300 Plc	1/3		X	By WC	Only WC members	D E on S
Belgium	-	-	-	-	-	-	-	-	M
Bulgaria	-	-	-	-	-	-	-	-	M or D E on M or S
Cyprus	-	-	-	-	-	-	-	-	M
Czech Republic	X	X	Plc>50 SOE**	1/3 up to 1/2	Agreement management /TU-WC		Vote	Employees (external TU in Plc)	D
Denmark	X	X	C>500	1/3 up to 1/2	X	X	Vote	Employees and external TU	M+D
Estonia	X	-	Saving Banks SOE >1000	1 to 3 members	-	-	By TU in SOE, by worker group of the general assembly in savings banks	No restrictions	D
Finland	X	X[1]	PLC & Ltd>150[2]	The proportion/number of employee representatives is 1/4 (with a max. of 4 members) or based on agreement	Members are nominated by agreement between personnel groups.		Vote if no agreement	Only employees	M+D
France	X	X	SOE[3] Plc>1000	1-2[4]	X[5]		Vote	Only employees	Plc: M+D
Germany	X	X	C >500	1/3 up to 1/2[6]	X	X	Vote	Employees	D

[1] The regulation shall be applied to Finnish joint-stock companies, cooperatives and other economic societies, insurance companies, commercial banks, cooperative banks and savings banks.
[2] Only regular employees are calculated in Finland.
[3] State holds 25% of the capital or more
[4] The minimum is two employee representative where the total number of the members of the board exceed 12. The minimum is one employee representative where the total number of the members of the board is below 12. Article L.225-27 of the French Commercial Code.
[5] Trade unions or o 5% of the employees of the company. Article L.225-28, al.2 of the French Commercial Code.

Country	Regulation in the		Scope	Proportion/ Number of employee reps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public Sector	Private Sector *			Trade Union	WC			
								and employed TU	
Greece	X	-	SOE	Only 1 representative	De facto by TU fractions	-	Vote	Only employees	M
Hungary	X	X	Plc and Ltd>200	D: 1/3 M: by agreement	Consulted	X	By WC	Only employees	M+D
Ireland	-	-	-	-	-	-	-	-	M
Italy		-	-	-	-	-	-	-	M+D
Latvia	-	-	-	-	-		-	-	D
Lithuania	-	-	-	-	-	-	-	-	M (either management or supervisory) + D
Luxembourg	X	X	SOE 25% Plc>1000	Min. 3 members, max. 1/3	Vote by employee Representatives			Only employees (except in the iron and steel industry)	M+D
Malta	-	-	-	-	-	-	-	-	M
Netherlands	X	X	'structuur' Plc and Ltd>100	Max. 1/3	-	X	By AGM	No employee, nor TU	M*** +D
Poland	X	X	SOE Privatized C.	Min 2-4 members Max 2/5	-	-	Vote	No restrictions	D
Portugal	X	-	SOE[7]	Defined by C's articles of association	By 100 or 20% of employee		Vote	Only employees	M+D
Romania	-	-	-	-	-	-	-	-	M+D
Slovakia	X	X	SOE >50% capital Plc>50 employees	Min 1/3 Max 1/2	X	-	Vote	Only employees	M+D
Slovenia	X	X	Plc>50	D: 1/3 to 1/2[8] M: 1 to 3	-	X	By the WC	Person eligible to	M+D

[6] If the corporation has 500 to 2.000 employees: 2/3 of the Boards are shareholder representatives, 1/3 are employee representatives. If the corporation has more than 2.000 employees: 1/2 of the Boards are shareholder representatives, 1/2 are employee representatives.
[7] Does not apply to all state owned companies.
[8] Determined by articles of association.

Country	Regulation in the		Scope	Proportion/ Number of employee reps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public Sector	Private Sector *			Trade Union	WC			
				Members [9]				vote or to be elected in WC	
Spain	X[10]	-	Savings Banks	Between 5% and 15% of the voting right	-	-	By worker group of the general assembly in savings banks	Certain restrictions [11]	D
Sweden	X	X	Plc and Ltd>25	2 to 3 members	X	-	Several options	Only employees	X
United Kingdom	-	-	-	-	-	-	-	-	M
Iceland	-	X	No particular rules for SOE	Proportional system to the aggregate number of employees of merging companies[12]+representatives from each Member State added[13]	-[14]	-	Vote	Any representative nominated by employees of merging companies based on law or agreement	M
Lichtenstein	-	-	-	-	-	-	-	-	M
Norway	X	X	SOE>30 Ltd and Plc>30	Min 1 member Max 1/3	-	-	Vote	Only employee	M

** Including privatized companies as long as the legal provisions cover companies where the State holds less than 50% of the capital*
*** We specifically mention SOE in the case of countries that regulate them by a specific law*
C. = company
TU = trade unions
WC = works council
CG = Corporate Governance
Ltd = private limited company
Plc = public limited company
SOE = state-owned enterprises as long as the State holds more than 50% of capital

[9] Determined by articles of association.
[10] Does not apply to all public entities.
[11] See Art. 15 of the Law 31/1985.
[12] Allocation to each Member State one seat for each of the employee representing every ten employees (e.g. 11 employees would result in 2 representatives).Employees in subsidiaries, offices etc. are calculated.
[13] No more than 20 % of the representatives elected proportionally
[14] Members are not nominated by union representatives. Employees who do not have a union representative shall select a common representative that shall nominate a member

AGM = annual general meeting of shareholders
M = monistic structure (a single board of directors)
D = dualistic structure (a management board and a supervisory board)

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Stakeholders' Perspective

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6. Stakeholders' Perspective

To assess the impact of the Cross-Border Mergers Directive (CBMD), and in accordance with the official requirements set forth in the study's objectives, this document outlines the feedback received from the various stakeholders involved in cross-border mergers (CBMs) across the Member States.

This section of the study is designed as an annex, in which all the qualitative data is gathered together to identify benefits, obstacles, and trends regarding the application of the CBMD.

Based on our initial identification of stakeholders, The Team has conducted interviews with, sent questionnaires to, and invited more than 700 stakeholders to participate in the study.

6.1. Methodology

6.1.1. The Stakeholder Groups

To seek data from stakeholders, The Team approached legal advisors from prominent corporate M&A law firms in each Member State. The legal advisors selected for the study were chosen because of their experience with CBMs and the transposition of the CBMD in their Member State, and many of the findings discussed in this section reflect the feedback received from over 80 of those law firms.

A second important source of information was the companies that have carried out cross-border mergers. Even though their legal expertise is sometimes limited, such companies can give valuable insight into the motivation behind CBMs, the process of completing such mergers, and how the CBMD is perceived as a piece of legislation by European businesses in general.

Further groups of stakeholders were contacted when The Team turned its attention to particular issues that have arisen in the context of evaluating the application of the CBMD in the Member States, in order to give The Team more granularity in producing this study. For instance, The Team contacted national registries in each EU and EEA Member State to seek out more information regarding the communication between said registries. The Team also approached accountancy and tax firms throughout the EU/EEA to evaluate what difficulties arise in the context of cross-border mergers from an accounting perspective. The Team also sent out information requests to 80 related associations, including trade union confederations.

Participants and stakeholders in this study were, for the most part, busy high-profile individuals with demanding schedules and little incentive to participate in the study.

To overcome these problems, it was decided to combine in-depth interviews (which were only applicable on a smaller scale) with the large-scale use of questionnaires. In total, 100 replies by stakeholders have been received.

6.1.2. The Questionnaires

The first method The Team employed was the distribution of questionnaires among the stakeholders involved in CBMs. To make sure that the questionnaires were sufficiently detailed and yet not too unwieldy, different versions were put together to address the specific activities of different stakeholders. The questionnaires covered all the pertinent issues regarding the participant's involvement in a CBM. These included questions on the motive behind the decision to merge across borders, on the various difficulties encountered in the process, on the opinions they held on the various aspects of the process, on how much protection they felt was afforded to the rights of other stakeholders, and on the overall level of satisfaction with the new procedure.

6.1.3. Personal Interviews

The second method The Team employed was the use of one-on-one interviews with the stakeholders. These were conducted with high-profile individuals who provided deeper insight into cross-border mergers and the CBMD in particular.

6.1.4. Structure

This annex gathers the qualitative data that was used in the analytical section to draw conclusions. It therefore presents the data gathered by grouping it in accordance with specific parameters, such as by country.

Please note that the following section, therefore, does not reflect any analysis or significant editing, but rather repeats stakeholders' feedback as it was conveyed to the Team. For an edited version of the feedback, where analysis, conclusions and recommendations are also drawn, please see the main findings section.

6.2. Feedback from Stakeholders per EU/EEA Member State

6.2.1. Austria

The Directive 2005/56/EC on Cross-Border Mergers (CBMD) is seen in Austria as a cornerstone piece of legislation that brings the EU to a common understanding and a common legal basis when doing business across the Member States. It is also seen as a distinctive European product.

A stakeholder stressed that the Directive provides good guidance on how to implement a CBM because there had been no common rules before its enactment. After the transposition of the Directive, a new baseline for discourse has been created, an advantage that has been made especially with regards to the merger plan.

A difficulty identified in Austria is language and translation. The working language is reported to be English. Yet, in general, at least three languages are involved in merger proceedings (English and the two native languages of the Member States). This also applies to the preparation of the documents. If one small detail is changed in one language version, it also has to be changed in the others.

Another point raised has been the communication with the registries, where problems were reported in terms of communications. It was noted that in countries where the task is done by a notary, it is in general simpler because law firms can approach the notary beforehand and resolve unclear issues. That is in general not possible with courts.

An issue the parties coming to merge in Austria have found troubling was the notarization requirement, for example of the merger plan. From their point of view, the notarization requirement is nothing but an additional paperwork.

The retroactive effective date for accounting purposes and the ex-ante creditor and minority shareholder protection are also mentioned as problems. In Austria, the accounting effect is retroactive, which can create problems. However, so far, for the stakeholders interviewed, it has always eventually been successful. Regarding the ex-ante minority and creditor protections, it was mentioned that those can easily be abused in order to receive a monetary advantage. However, it was also noted that most mergers involve intergroup mergers (e.g., with holding companies), in which many requirements are waived. In such cases, creditor or employee issues do not arise. If those issues would have to be considered in bigger mergers, that would be a reason to not carry out the CBM. Thus, in general that also means that structures are cleared beforehand—e.g., paying out minority shareholders. Otherwise the merger will not be done because it involves too many uncertainties.

A provision of central importance is Article 16 CBMD in Austria. On its basis it is ensured that, if at least one of the merging corporations is operating under an employee participation system, an agreement has to be made to secure the participation of the employees in the future. However, it is also noted that the Directive, and thus the employee participation system, can be circumvented, such as when a company is dissolved and all of its assets are transferred to another one. Other alternatives to circumvent this requirement are joint ventures, (hostile)

takeovers, or "synthetic" mergers by pooling commercial interests (for example, in a common sales company). Another legal advisor mentioned that employee participation has never been an issue. In his practice involving CBMs with more than 10 Member States, a special negotiating body (SNB) has never been formed. If that would have had to be the case, it would be a "knock-out" criterion. Thus this might only be done for two large companies; if possible, however, it is avoided due to the costs, delays, complexities, and uncertainties involved.

Yet another stakeholder expressed that employee participation is a major issue in CBMs wherein the absorbing company is having its registered office in Austria. The requirement to set up a SNB and the required employee participation agreement are considered to be financially burdensome and time-consuming and can add several months to the timescale. In cases where employee participation is an issue, it is therefore very difficult to meet the deadline of filing the merger with the commercial register within nine months of the effective date of the merger. Further, the Austrian transposing legislation is so broadly interpreted that it is also applicable in cases where no employee participation rights existed in the absorbed company. The example was made that if a foreign special purpose vehicle (SPV) with no employees is merged into an Austrian company, a procedure similar to the procedure for SEs will be triggered. In such cases, the employee representatives from the Austrian company's European subsidiaries may be delegated to the Austrian company's supervisory board (*Aufsichtsrat*). The outcome is paradox, since there are no employees in the company being acquired (the SPV) and therefore no employee participation rights to be protected. At the same time, the Austria employee representatives already sitting on the supervisory board have no interest in being diluted by employee representatives from the company's European subsidiaries. Also, in cases where no supervisory board existed, it has to be established even though there would otherwise be no need for it.

With regard to the appointment of SNB members, an issue was reported for cases where the Austrian merging company does not have a works council. Problematic in this regard is the fact that local law rules on the appointment of SNB members are unclear or incomplete and Austrian law does not provide for any mechanism for the appointment of the SNB members.

As to the driving factors, most CBMs are done for group reorganizations, entity reductions, or for tax issues, and stakeholders reported no seat transfers. A legal adviser noted that the Directive could be used to transfer the seat, but there is one important difference: In a CBM the owner of the asset changes, whereas in a seat transfer the owner stays the same. This is an issue of importance also for creditors. In

general it is noted that cross-border seat transfers are not carried out because they involve too many uncertainties. Based on the case law, such as *Vale*, it is considered to be possible from a legal perspective, but then it is not clear which rules should be applied (e.g., by analogy, the CBMD rules).

As regards the duration of carrying out a cross-border merger, it was stated that it takes on average 4 to 7 months to carry out a merger, without employee participation. However, it can also take up to two years. Moreover, it was noted that this can vary between countries due to internal circumstances. For example, in Austria in an outbound merger, one has to wait for two months before obtaining the certificate. The pace also depends on how long courts take to handle the petition. Reports indicate that in Austria it takes around 10 working days until the certificate is issued. If it takes around the same time in the other Member State, then almost a month is spent on this issue alone.

In terms of costs, it is reported that these are increasingly reduced because parties become more familiar with CBMs. In a simple case, lawyer fees will be around 15.000 to 20.000 EUR covering correspondence, consultations, and so on. Registration is around 500 to 600 EUR. Publication is now for free due to the online database. Otherwise, publication costs around 1.000 EUR. This does not include tax or accountant fees. A further cost to be taken into account is the translation cost (merger plan, articles of association, and balance sheets). As an example, it stated that 10 pages can easily cost 700 EUR. Finally, there are notary costs that amount to 6.000 to 7.000 EUR.

Stakeholders in Austria have also expressed an interest in a de-merger directive.

6.2.2. Bulgaria

The issues that the stakeholders brought up were the lack of harmonization of methods for the valuation of assets, the duration of protection of creditors' rights, and the consequences for creditors' rights on completion of the merger.

On a general note, it has been pointed out by a Bulgarian law firm that the M&A market in the country has been negatively affected by the economic and financial crisis and the number of deals overall decreased by 35% in 2012 in comparison with 2011.

In this context, the M&A market in Bulgaria showed in 2012 tendencies (i) toward sales being performed within debt restructuring rather than within "genuine" mergers and acquisitions in general, (ii) a withdrawal of European investors that were replaced by local buyers, and (iii) therefore, none of the 10 benchmark M&A transactions in Bulgaria were within the scope of Directive 2005/56/EC.

A difficulty in carrying out cross-border mergers involving Bulgarian and Cypriot legal entities has been the creditor protection. Stakeholders reported that the Bulgarian Commerce Act provides that the assets of the merging companies be managed separately for six months from the date of the completion of the merger, as a measure to secure the creditors' rights. On the other hand, Cypriot Company Law does not provide any terms for separate management of the assets and liabilities of the merging companies. The stakeholders therefore proposed considering harmonization of the system protecting creditors.

A Bulgarian law firm also noted that a very important issue concerning the procedure of the CBM is the terms for submitting the common draft terms (CDTMs) and the date of the general meeting for approving the CDT.

The problem stems from the different procedures for publishing and announcing the CDT in the different Member States and by the different authorities within those Member States. In some countries, this takes only three or four days; in others, it may take up to two weeks. This results in uncertainty as to the date for the general meeting approving the CDT. According to this law firm, it should be discussed and resolved whether the publication of the CDT should be simultaneous in all Member States taking part in the CBM, if a common procedure will enable this, and whether the different timing will have any negative effect on the rest of the procedure. For instance, if there were five or six legal entities from three or four Member States and each State's legislation provided a different procedure for publishing or announcing the CDT, this would result in a very long, complicated, and cumbersome procedure for the setting of dates for the general meetings.

It should be specified whether a general meeting may be held only after all merging companies have published or announced the CDT, or if the publishing or announcing in the country of origin of the legal entity is considered enough.

While working on a CBM, the law firm experienced a predicament with the setting of a date for accounting purposes under Article 5(f) CBMD. For instance, Bulgarian legislation allows the date for accounting purposes to be set at a maximum of six months prior to the CDT date and Cypriot legislation does not transpose any limitation for such a date at all. The same issue will arise with the date of any provided financial documents used in the procedure. This leads to the reasonable question of whether there should be a harmonization of the requirements for the date for accounting purposes in the CBMD itself.

Last but not least, the issue with the completion of the CBM itself comes forward. The CBMD states that the registry of the acquiring company "shall notify, without delay,

the registry in which each of the companies was required to file documents." The practice showed that sometimes it is better to have the legal opportunity to provide the resolution of the respective authority in the Member State of the acquiring company before the respective authority of the acquired company has sent the official notification. The issue here is that there are no standards or time limitations for this step between all Member States, which leads to uncertainty regarding when exactly the procedure is expected to be completed. Keeping in mind that the CBMD is relatively new, the national authorities are still uncertain as to how to apply it correctly. Another setback is the regulation for obtaining an *apostil* for some documents and the further legalization of such documents before the respective authorities. According to one law firm, this leads to unresolved and unsustainable practice during the last stage of the CBM. The experience of this law firm showed that it was twice as fast and easier to obtain the official document from the acquiring company state's court and to present it before the acquired company registers for the purposes of ceasing the legal entity. It was even more effective for the public authorities in Bulgaria to receive the complete set of documents required for the completion of the CBM with a clear demand on behalf of the acquired company.

Connected to this issue, it is also worth noting that another law firm stated that in the case of in-bound mergers, it is impossible to discuss in advance the documentation and proceedings with the officials at the Bulgarian Commercial Register who are responsible for registration of the merger.

Finally, in connection to Bulgaria, it should be mentioned that the feedback shows that the Bulgarian Commercial Registry was not able to handle CBMs before June 3, 2012. Bulgaria transposed the provisions of the CBMD into the Law on Commerce and the Law on the Commercial Registry on December 11, 2007. The registration proceedings and the registration forms relating to the transposed provisions of the CBMD were introduced in Bulgarian legislation much later—January 2009—by amending the Regulation on Keeping, Maintaining and Access to the Commercial Register. Furthermore, the Bulgarian Commercial Registry (an electronic registry) did not develop the software modules supporting the CBM registration procedures until June 1, 2012, and, therefore, did not have the technical capacity to issue pre-merger certificates, pursuant to Article 10 CBMD, or to register CBMs into Bulgarian newly incorporated or existing companies until that date.

6.2.3. Croatia

Croatia only recently joined the European Union on July 1, 2013, and was therefore not part of the scope of the study. We have nevertheless contacted Croatian

stakeholders, who indicated that CBMs were virtually impossible prior to the transposition and an acquisition of all shares through a local SPV was preferred to effectuate the transaction. Further responses with regard to the advantages and difficulties arising out of the application of the Directive remain to be seen.

6.2.4. Cyprus

According to the stakeholders we contacted, the transposition of the CBMD was a significant improvement of the legal framework in Cyprus and made CBMs feasible for the first time. However, it was reported that in some cases, the competent court of one of the Member States involved requires companies from other jurisdictions participating in the CBM to implement certain measures in accordance with corporate law of the country of this court. The stakeholder also expressed that the transposing legislation is ambiguous as to whether the requirements set out for the merger between public companies in a domestic context should apply also in the context of a CBM.

As to the costs, the legal advisors stated that these are considered to be minimal.

6.2.5. Czech Republic

The major issue raised by our Czech stakeholders was the employee participation mechanism. The case concerned a merger of a Czech limited liability company with a German joint-stock company, which proved particularly difficult given the great number of branches and subsidiaries of the German surviving entity and the involvement of the employees of these subsidiaries in the negotiations, specifically the participation of employees in the supervisory board of the German successor company. While the merger was cancelled because of further financial ramifications, the intention was to apply the standard rules pursuant to German legislation, and the Act on the Employees' Right of Participation in a Cross-Border Merger would have been applied. The employee participation mechanism was regarded overall as financially demanding and time-intensive, and therefore burdensome for CBMs. In particular, the unintended influence on the composition of the supervisory board by employees of branches from other Member States was indicated as an obstacle to the successful execution of the CBM.

The possibility to reorganize a company group structure was regarded as beneficial by our contacts. Moreover, such reorganization was regarded as a possibility to reduce operational cost. With regard to the increased mobility of companies in Europe, it was indicated that the CBMD indeed increased the mobility by removing numerous administrative obstacles and dualisms in the procedure in comparison with the former

situation. The possibility to have joint documents on a merger for all shareholders was thereby seen as advantage.

The aspect of creditor and minority shareholder protection has not been raised to the knowledge of our contacts. Also, the CBMD has not been utilized for cross-border seat transfers of a company.

As to the administrative costs, these are varying, depending on the number of documents required. In cases where an expert's opinion is necessary or the financial statements have to be audited, the costs are higher. Apart from that, all documents have to be translated in the Czech language, because the Czech Commercial Register is not accepting documents drafted in foreign languages. In addition, notary fees and fees for the registration at the Commercial Register are applicable to CBMs. Finally, the time to complete a CBM is expected to be six to nine months.

6.2.6. Denmark

According to our Danish contacts, the Directive brought about the possibility of executing a CBM and provides a common framework regardless of the place of the registered office of the companies involved. The introduction of a common set of rules was regarded as positive aspect of the Directive.

The CBM as such did not pose obstacles, but regarding tax laws and VAT (Value Added Tax), some difficulties were indicated with regard to the exit taxation of the country of the ceasing company. This constitutes an additional economic burden.

As to the costs, it was stated that these are about twice as high as the costs of a domestic merger. Because of the involvement of multiple jurisdictions, which necessitates the involvement of lawyers and authorities in at least two Member States, our contacts regard this as unavoidable.

6.2.7. Estonia

Our stakeholders outlined two critical issues pursuant to carrying out CBMs. First, problems exist because the underlying national systems are different. One example that our source mentioned was that the balance sheet dates can be different in Member States. However, this was not regarded as a major problem.

A bigger problem regards the provisions detailing employee involvement. One reason is that this takes an unreasonable amount of time and is a cumbersome piece of legislation in jurisdictions where employee participation systems do not already exist. It is also logistically a difficult exercise to undertake. For example, all employees have to be gathered together for a meeting. Finally, it was mentioned that it is also prohibitively costly.

One law firm argued to put in place a post-merger creditor notification system, which already exists in Estonia for domestic mergers. Substantive creditor protections already exist outside of the CBMD, such as the European Insolvency Regulation, Regulation 44/2001 on judgments in civil and commercial matters, or Regulation 805/2004 on the European enforcement order. In accordance with the internal market, a post-notification system would improve the mobility of companies and help CBMs become easier to accomplish within a shorter timeframe.

One major advantage of the CBMD was seen as the possibility of transferring company seats on this basis. This is also possible by setting up an SE, but the SE is much less wieldy.

Another advantage indicated was the possibility of simplifying and unifying the company structure and thus saving organizational costs. The possibility of conciliating the company group by operating branches instead of running separate companies is less expensive and complicated. A branch has fewer mandatory bodies and much more flexible working arrangements. For instance, board meetings do not have to be convened in branches and, due to the obligation by law, group companies had to operate special departments or advisory bodies under the regime prior to the CBMD, which often duplicated the work of the bodies required by law, and may even conflict with the law as to competence issues.

A third advantage indicated was the greater involvement of the parent company in the decision-making. Many parent companies exercise thorough and active supervision over their subsidiaries. This is, however, possibly conflicting with local legal requirements applicable, such as the number of management bodies, membership, work procedure, and liability. This could lead to situations where official and unofficial corporate management procedures are applied. If the parent company may want to exert influence on decisions and transactions to be made, this may also conflict with the obligation of a managing body member to act in the best interests of the subsidiary company. Through the branch structure pursuant to the CBMD, the former parent company becomes liable for the business of the branch, which ensures greater creditor protection and allows the former parent company to exercise greater influence on the branch activities.

A fourth advantage concerns extra-organizational costs. As our contacts pointed out, a merged cross-border company is subject mainly to one supervisory authority instead of several local authorities, which significantly decreases unnecessary administrative work with regard to financial and other reporting requirements. For companies that

are subject to financial supervision and need to pay substantial supervision fees in each country of establishment, this is especially important.

A fifth benefit is the more efficient use of capital, because undertakings can more easily move capital from one country to another as needed and the settlement of accounts between branches is conducted differently from the ordinary procedure.

Furthermore, the mechanisms in place pursuant to the CBMD ensure a more efficient use of capital, as branches do not have to maintain share capital, reserve capital, and a net assets level. It was expressed that this is especially important for companies under financial supervision and for which high capital maintenance levels are obligatory. After the CBM, the maintenance levels are applying only to one company instead of separate requirements for the former parent and the subsidiaries.

Moreover, the CBMD eliminates the need for frequent intragroup transactions and covering of related costs such as consultancy and taxes. A parent company permanently backs its subsidiaries. Yet these internal transactions are subject to interest rates on loans for the subsidiaries, since these transactions should be made in a reasonable commercial setting wherein the subsidiary is at arm's length. For the subsidiary, significant parts of the interest rate might not be deductible for tax purposes due to thin capitalization rules, whereas the parent company has to pay profit taxes on the interest received. Various payments could also trigger negative withholding tax and VAT consequences. Once the merger is finalized, all this would be generally avoided if a foreign company operates through a branch. This way, internal contract costs can be minimized subject to certain restrictions, since the branch is no longer a separate legal entity and no VAT is applicable on service charges between the head office and the branches and permanent establishments.

A sixth advantage pointed out was the increased protection of cooperation partner and client interests. Through the combination of resources, a service is becoming overall simpler and faster for the client. A CBM thereby makes the company group bigger, stronger, and thus more reliable. This ensures better creditor protection and creates a clear competitive advantage.

Finally, a CBM saves administrative costs. Due to softer requirements for drafting and filing of reports applicable to branches, often accounting and financial reporting is only obligatory for the parent company level. Through the use of parent company facilities and databases, an elevated level of service quality to clients is facilitated.

As to costs, our contacts indicated that, apart from advisory costs, there is a state duty for the registration of a merger at EUR 18 and for publishing an official notice at EUR 16, and, when the registered capital of the Estonian merging company is for

instance EUR 25,000, the notary fee would be about EUR 90 (plus 20% VAT) (the fee is sliding depending on the registered capital). Significant additional costs are for auditing and legal assistance.

Finally, regarding the duration of completing a CBM, the minimum time required is at least 2 or 3 months. Yet if a merger permit is needed, for instance regarding financial institutions and/or if employee participation is involved (like in the case of SEs), there can be additional steps and the process will take longer, usually 9 or 10 months.

The national registry expressed that problems in the communication between the registries occur due to the small differences in the transposing legislation of the Member States.

Further, there have been some issues in practice where the Estonian register was not informed by the contracting party about the merger. Therefore, the register was not able to make an entry and delete the acquired company from the Commercial Register.

The merger certificate is issued by a special format, while the rest of the communication between the registries is in free format and is made by email. In this regard, language has been a problem in some cases and depends on the assistant judge assigned to the merger. Since no foreign language requirements are made for assistant judges as judicial proceedings are to be conducted in Estonian, English can prove to be problematic in some cases. It would be a burden to the registry, however, to contact the various national registries in a language of the contracting state due to the high translation costs. Therefore, English was suggested to be used throughout the EU for the communication between the registries.

Regarding the special format of the merger certificate, it has been noted that other Member States do not use a special format but rather sent letters or the registry card information proving the merger entry into the register, which also works.

6.2.8. Finland

Our stakeholders in Finland have indicated that the clearest advantage of the CBMD has been the increased level of neutrality between domestic mergers and CBMs. Currently the CBM may be seen as a true alternative by Finnish companies.

Yet, despite the relatively long existence of the CBMD, the number of Finnish-related CBMs has been limited.

Most reasons for the low usage of the Directive can be seen to relate to problems with the tax regime. Due to an exit tax, regulation, and the demand that assets be either treated as sold at their arm's length values or remain related to the domicile of the

merged entity, the number of CBMs has been naturally reduced, although this provision will be hard to abandon. Consequently, to the extent that the merging entity has untaxed reserves or the asset value in taxation does not equal the fair market value of said asset, due to, for example, depreciations or other deductions made through taxation, taxable income may be realized in Finland when the assets are assigned to the receiving entity in the merger, which would not happen in domestic tax-exempt mergers. Further, any confirmed losses in Finnish taxation suffered by the Finnish merging company cannot be utilized should no branch remain in Finland. However, the situation is the opposite in purely domestic mergers.

Additionally, in a very recent case, the Court of Justice of the European Union issued an advance ruling concerning Finnish treatment of tax losses in CBMs and within Finland (Finnish case number SAC 2011:21). The case concerned the deductibility of tax losses of a Swedish limited liability company with tax losses, which merged with a Finnish limited liability company and was not able to utilize the tax losses transferred in accordance with the merger based on domestic legislation in force. Based on the ruling, the deductibility of tax losses could be denied, should the receiving entity not be able to show that the losses of the merging entity would be forfeited to infinity, should the tax losses not be taken into account in the taxation of the receiving entity. Thus, the ruling set the burden of proof relating to the utilization of tax losses at a relatively high level.

Furthermore, the regulation is not purely neutral, as the permanent establishment created in the tax domicile of the merged company does not fully compare with a limited liability company within the Finnish tax system; therefore, for example, it cannot loan money from its foreign main office. On a technical aside, even small differences between the regulatory regimes of the countries involved cause substantive difficulties, although a full harmonization does not seem plausible. The problem possibly becomes more severe due to the accounting treatment of the varying items, especially if the treatment of some assets changes due to differences in regulation, even when the treatment ought to follow the principle of continuity. For smaller actors this may even preclude the possibility of undertaking CBMs.

As to employee participation, it was stated that naturally, in CBMs the timelines as well as the relatively detailed Finnish employment cooperation procedure may cause further difficulties, even though it does not specifically differ from the normal cooperation procedure applied between purely Finnish entities.

Regarding costs, our stakeholders stated that it is very hard to set aside a fixed amount, as is the case with domestic mergers, as there are several variants involved,

including general company law, tax, and employment matters. However, it is clear to our sources that administrative costs are ostensibly higher in cross-border cases, especially as the experience of such mergers is, relatively speaking, much more limited than that of domestic mergers.

Finally, on the topic of the communication between the registries, it was noted that the notification regarding the implementation of the merger is sent by letter to the second registry concerned. Instead of a letter, an email can also be sent instead if requested by the corresponding registry. Regarding the language used, the Finnish registry conducts all communication in English except for the communication with the Swedish registry, since Finland has two national languages, one being Swedish.

6.2.9. France

The stakeholders we contacted stated that the CBMD is beneficial insofar as it introduced the possibility to execute mergers in practice for the first time due to the absence of regulations on the particular process. Further, prior to the transposition of the CBMD, a unanimous shareholder approval was necessary in cases where the French company was the one ceasing to exist and a change of nationality of the entity would follow.

A further benefit of the CBMD was seen in the establishment of a clear legal framework for the execution of CBMs. Moreover, this decreased the legal uncertainties, which were a consequence of the recourse to national frameworks prior to the transposition of the CBMD. Also, the automatic transfer of assets and liabilities without necessary prior consent of the counter party was regarded as beneficial due to the increased legal certainty and the resulting decrease of administrative and financial burdens. Yet, this does not extend to certain rights and obligations under French corporate law, as *intuitu personae* agreements (i.e., agreements which have been entered into in reliance on the identity of the counter party) cannot be transferred without the consent of the corresponding counter party.

Lastly, shareholder protection has been ensured by the CBMD by generally offering shareholders the same level of protection in each Member State.

Nevertheless, others stated that while the CBM procedure was considered on several occasions, it was not followed because of the existence of an equivalent regime for intragroup mergers. The so-called dissolution "without liquidation" regime, or TUP, was preferred by our contacts' clients.

Obstacles were indicated in particular with regard to shareholder securities, such as stock warrants, convertible or mandatory redeemable bonds, or employee incentives, such as stock options or performance-restricted shares, due to difficulties to reproduce

these in the absorbing companies. The absence of certain legal institutions, such as the French system of double voting rights for loyal shareholders, in other jurisdictions can be a further issue. Moreover, in certain CBMs where the French dissolved corporation is a public corporation with a controlling shareholder, the French securities regulator has to make a detailed comparison of the rights, which can be problematic for the execution of the merger insofar as an offer to the shareholders has to be made.

A final problem is the time-consuming tax ruling, which is necessary to execute the merger tax-neutral in which the French company is the dissolving one. While the ruling is normally granted without constituting tax fraud, the procedure of the French tax administration is regarded as burdensome.

With regard to employee participation rights, the stakeholders stated that prior to the adoption of the CBMD, employees have not enjoyed participation rights in France. Therefore, employee participation rights were not an issue so far, but employee participation rights have now been introduced in French law on June 14, 2013. Delays by virtue of the employee participation procedure are expected to become problematic for the execution of CBMs in the future. So far, the procedure has not been applied to CBMs by our contacts since the law is very recent.

In the experience of our contacts, the process for completing an intra-group merger, wherein 100 percent of the share capital of the absorbed company is held by the absorbing company and no employee participation is in place, can be completed within 3 months. Yet, it was noted that such intra-group CBMs can sometimes be part of a wider and intricate reorganization and can therefore take longer.

As to costs, it was pointed out that CBMs are inherently complex transactions which require great attention to detail and are therefore relatively costly with regard to transaction costs. The administrative costs of the procedure as such were regarded as reasonable and comparable with domestic mergers except for the translation costs. The translation costs, however, were seen as difficult to reduce.

The national registry indicated that overall the procedure of implementing a CBM was regarded as unproblematic, with the exception of the notification of the effectiveness of the merger. Here, difficulties at the time of notification of the merger to the company having its registered office in another Member State proved difficult. Particularly language was regarded a problem in this regard, and the use of a single procedure throughout Europe was suggested as improvement. Further, there is no typical certificate for CBMs existing in France. It was therefore suggested to create

one certificate applicable for all countries in the various languages, which could be accessible on the site "e-justice."

Overall, the procedure is conducted in French, which proved unproblematic for the steps to be taken in the procedure. The documents are transmitted either electronically or by letter to the corresponding foreign registry.

6.2.10. Germany

Our contacts in Germany reported that in the majority of CBMs involving a German company, two issues arose. First was the necessity to coordinate and harmonize the legal prerequisites for the individual merger in detail. Second was an uncertainty with regard to the requirement to establish the SNB and conduct negotiations on employee participation inherent to the CBMs.

While the general legal framework for CBMs was harmonized pursuant to the Directive, the details for each individual CBM may differ due to the differences in the transposition of the CBMD in the national legal systems and the resulting difference in national prerequisites as well as national practices. Therefore, a considerable coordination effort is necessary for the execution of a CBM, which includes coordination with the competent authority, which is in Germany a judge at the competent Commercial Register at the relevant local court. Frequently, such coordination proves necessary with regard to the CDTMs, the publication requirements, the overall schedule of the merger, tax consequences, accounting treatment, the necessity to conduct a legal due diligence, and the translation of the required documentation.

Our contacts stated that in one case, such coordination was necessary with regard to the information on the evaluation of the transferred assets and liabilities to be provided in the terms of the CBMs. In comparison with domestic mergers, where such requirement is absent, and due to the fact that in some Member States companies may draw up different sets of accounts for accounting and tax purposes, a considerable coordination effort is therefore required. The contacts stated, however, that in areas where the CBMD stipulates prerequisites that are not entirely clear, the resulting legal uncertainties can be overcome in practice through such coordination efforts.

Further, it was expressed that the merger report requirement generally requires a substantial effort and is an obstacle in cases where it proves unnecessary. In cases where the merging companies have no employees and the shareholders resolve to waive the requirement, it appears unreasonable to require the preparation regardless. As a solution, the merger report requirement could be limited. In cases where the

companies involved in the CBM have no employees, there should be an express provision allowing for a waiver of the merger report requirement by a resolution of the shareholders of both parties.

The establishment of a legal framework for the first time that enables a reasonably practical and secure implementation of CBMs of limited liability companies is regarded as general benefit of the CBMD. However, it was suggested to broaden the scope of the framework to include cross-border splits, spinoffs, and hive-downs.

Concerning employee participation rights, the contacts stated on a general note that the matter is of importance in every CBM involving a German company. It was further noted that it is not untypical that the issue of employee participation is one of the most important issues in the entire transaction and may lead to the CBM not being pursued further. The matter is particularly regarded as burdensome with regard to the costs involved, the timing as well as securities, and especially the formation of the SNB is considered to be the greatest obstacle to efficient and practical cross-border reorganizations by way of a CBM.

Specifically the wording of the German national law transposing Article 16 CBMD, the law on the co-determination of the employees in a cross-border merger (*Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung, MgVG*), is ambiguous regarding cases in which none of the undertakings participating in the CBM are subject to employee participation prior to the merger have to negotiate employee participation during the CBM procedure. Further, it was stated that the provision is unclear to the question whether the organs of the merging undertakings may choose to apply the standard rules without prior negotiations.

According to the legal advisors we contacted, a clarification of the CBMD in this regard would be desirable. It was indicated that the ambiguity could be resolved by clarifying that a deviation from the general principle that the surviving company is subject to in the rules in the Member State where it has its registered office (as set forth in Article 16(1) Directive) is only possible in cases where employees are actually subject to an employee participation regime at the time when the CBM becomes effective. Moreover, it should be expressly stated in all language versions of the CBMD that the establishment of and negotiations with a SNB are only possible if two conditions are met. First, employees in the Member State where the surviving entity has its registered office are actually enjoying exercisable participation rights, rather than potentially enjoying these in the future. Second, the national legal framework applicable to the surviving entity does not provide for the same entitlement to

participation rights for employees in establishments in other Member States under the same prerequisites, except for the location of the employees.

In yet another case, the formation of the SNB was delayed due to the absence of local employee representatives. The negotiations as such did not prove problematic.

As to the administrative costs, it was indicated that these are typically significantly higher compared with domestic mergers due to the increased coordination requirements, including the costs for internal and external advisers and specialist capacities such as legal, tax, accounting, and finance expertise. The administrative costs will be limited and are one-time costs rather than continuing costs, even though the preparation of a merger report causes significant costs. A clarification in this regard was therefore desired by our contacts.

6.2.11. Greece

Our stakeholders in Greece have reported an interesting situation, which existed before the introduction of the CBMD. In 1953 the Supreme Court handed down an opinion that CBMs were to be prohibited. Nonetheless, in the 1970s, a second opinion was given by the court allowing the transfer of foreign seats to Greece. This made a two-step merger possible. Companies could first carry out a seat transfer to Greece and then merge under the provisions for domestic mergers. This method was used by the biggest bank in Greece to absorb a foreign subsidiary in France.

The CBMD and the Tax Merger Directive made things easier by providing a stable regime and providing a process for the authorities of the involved countries. A key advantage of the CBMD is the fact that on the one hand it allows for the application of national laws to govern the part of the process which is associated with every country, while on the other hand it provides for a common framework and background which permits the realization of the merger on a cross-border level. In other words, the value of the CBMD is the combination of principles with which the national authorities feel comfortable and pan-European regulations for those aspects of the cross-border mergers that require the coordination between the authorities of the two Member States. Other than that, the following advantages have been highlighted as in a CBM undertaken in accordance with the provisions of the CBMD.

Our contacts pointed out on a general note that CBMs are beneficial for boosting business activities in the international markets within the framework of a company group. In this context, the CBMD facilitates the restructuring and cooperation of European companies. This increases the overall competitiveness of Europe and enables businesses to benefit from the Single European Market to a greater extent.

The fact that the provisions of the CBMD can be used to achieve the migration of the seat of a company further increases flexibility and competitiveness.

A second benefit indicated was that the CBM process itself has more legal certainty, because once the merger is approved by the competent authority, which is in Greece the General Chamber of Commerce, it cannot be deemed null and void in another jurisdiction at a later point.

Finally, the CBMD entails administrative benefits, provided that the successor company complies with all filing requirements and any other special formalities required by law for the transfer of assets and liabilities to become effective. Significant cost savings can be realized since the transfer company will be automatically dissolved once the merger is effected and complete liquidation is avoided. Also, the assets and liabilities of the transferor undertaking are transferred automatically by operation of law, which eliminates the need for any additional documentation.

Yet, difficulties remain due to employee participation rights. This is particularly frustrating where none of the companies has such a system in place prior to the CBM. This has led to the situation that a proposed merger between a Greek listed company and a Spanish company had to be abandoned due to the employee participation issue.

Differences in the underlying corporate laws are not, however, regarded as a particular problem. It was noted, rather, that these can make for an advantage in CBMs. An example given was corporate transformation leading to indirect delisting. If that is difficult to carry out within a Member State, a way to get around this is to merge with a foreign company or to do a seat transfer.

The administrative costs are regarded as nominal and will not exceed 1.000 EUR.

The legal fees on the other side are very high. This is partially also due to the lack of experience when it comes to CBMs. Therefore, in the future, these costs are expected to fall. The legal fees were estimated to amount to approximately 3.000 to 3.500 EUR, excluding additional third-party fees, such as the drafting of required relevant expert reports.

Another point raised was the experience of national authorities in carrying out CBMs. A law firm reported that when, in 2010 and 2011, they tried to conduct the first-ever CBM in Greece, it had to work alongside the authorities and guide them through the process in an advisory-like capacity. It has to be said that, following this collaboration, the Greek authorities are now familiar with the process and are applying it.

6.2.12. Hungary

A problem mentioned for Hungary is that often the courts and the administrative bodies are not familiar with the regulations and hence they do not apply them evenly or apply them in an inconsistent and even incomprehensive manner.

The reason expressed by our contacts for the difficulties related to the application of the CBMD in practice is that the Directive was merely literally transposed in Hungarian law without an in-depth discussion as to its content and whether an adaption to Hungarian law would prove necessary. As a consequence, the terminology used for the transposing legislation is different and creates legal uncertainty whether parts of the general Hungarian law are still applicable to CBMs, such as the requirement for the feasibility study. The assumption is that it is not applicable, but certain general provisions are nevertheless applied in order to ensure that the CBM can be carried out. Yet, such requirements like the feasibility study are financially burdensome due to audit requirements.

As a further problem, it has been reported that often the courts and administrative bodies are not familiar with the regulations, and hence they do not apply them evenly or do apply them in an inconsistent and even incomprehensive manner.

It was further stated that problems emerge in a case where the merger documentation contains elements that are scrutinized by the competent authority of more than one Member State. Such an element might be the distinction between the legal and accounting effective dates. The Member States regulate differently regarding the possibility of having a distinct legal and accounting date and, furthermore, there are various rules as to whether the accounting effective date might precede the legal effective date and/or the date of the merger's registration.

A further issue reported was that if the regulation of creditor protection remains within the competency of the Member States, then the applicable rules accordingly might construct an obstacle to the carrying out of the merger. The problem is particularly present if the merger certificate is issued in one Member State when it is not yet issued in another (due to the differences in the applicable creditor protection rules), while the deadline of having the registration request filed within six months has already begun.

It was stated that these issues arise because the CBMD is tacit in the mentioned cases and does not provide a clear-cut rule on how to solve this legal uncertainty. Still, in these cases the applicable rules of private international law might be of a considerable use. Ultimately, however, it is up to the competent authority to apply the relevant EU

rules, the domestic corporate rules, and the rules of the private international law in a coherent and flexible manner.

A final issue specific to Hungary is that one CBM is dealt with by different judges within the competent authority. The reason for this issue is the software used by the competent court, which necessitates the division of the CBM into different packages by the counsel to the merging companies, such as one package for the merger documents and another package for the establishment of a branch office. The software then randomly distributes the packages to different judges, although these relate to the same CBM procedure.

As regards advantages of the CBMD, it was stated that it allows companies to have CBMs and it strengthens the common EU market. A stakeholder said: "I strongly believe that the Directive is a very useful one and I predict a great future if the application thereof will be unified." Moreover, the Directive facilitates the merger of companies from different Member States by setting forth a framework for conducting the merger. Moreover, a CBM allows for a cost- and time-efficient transfer of asset ownership between foreign entities. There were numerous factors and underlying reasons that made the adoption of the CBMD useful. Among these was the fact that a CBM provides a simplified way of accessing a foreign country's market, reduces the costs of having fundamentally different rules in various Member States, and, to a certain extent, reduces the related administrative costs as well. In connection with these reasons, it reduces the uncertainty caused by the not-always-clear-cut rules relating to the matters of jurisdiction, and the uncertainty as to the decision of the respective national authorities. It can be argued that the EU rules governing CBMs have ended the unreasonable scrutiny that was exercised by some Member States' authorities in the process of inter-state mergers.

The degree of involvement of the merging companies' employees in the merger process might, however, be of significant importance. Even in cases where no mandatory employee participation is required, the employees usually must be informed and/or consulted regarding any merger and its effects. The timeframes necessary for any such information/consultation procedures to be concluded may vary broadly. It should be examined whether the failure to comply with any mandatory information and/or consultation requirements might result in a financial penalty or the transaction not being registered. It was further noted that problems regarding the consultation of employees and prohibition of discrimination exist, even though the current legislation is fully in accordance with the TUPE Directive.

Issues relating to the transfer of employees and collective redundancies should be considered as well. It was stated that very often the employees' representation was only a formality, and the employees received only the information that was prescribed by law, but they did not have material influence over the merger itself since the employee participation mechanism was mentioned to be very complicated and thus disregarded.

Finally, it was also stressed that even though the CBMD unquestionably is a big step forward in creating the rules for as smooth as possible a merger between the companies of different Member States, it is important to bear in mind that it does not provide for a uniform set of rules governing the whole process of a CBM. The CBMD itself acknowledges that there is a need "to lay down community provisions to facilitate the carrying out of CBMs between various types of limited liability companies governed by the laws of different Member States." Accordingly, the CBMD provides for the possibility of the cross-border merger itself and for a framework of rules governing a cross-border merger. However, the respective rules and regulations of each and every Member State have to be complied with as well, which regulate certain issues that are of considerable importance in the case of a CBM in diverging ways. These issues include, among others, what exact documentation is necessary for the merger (interim and closing accounts, balance sheets), whether it is mandatory to have them audited, and subsequently filed, the accounts with the competent authorities, the possible obstructions to the merger (for example, creditor protection, human resources consultations), the question whether there are, or might be, distinct accounting and legal effective dates, and the possibility of assignment and novation of contracts.

Other issues that could arise have also been highlighted. These might be the various and differing national procedural rules (for example, who the competent authorities are, what are the deadlines to be complied with, what fines might be imposed in case of late filling or alike); monetary issues (for example, the costs of the notarization, the superlegalization, and the apostillisation of various documents, duty fees, publication fees and other fees to be paid, translation costs); timing issues (how many decisions are to be taken by the respective companies, what deadlines are applicable to the competent authority); issues relating to the transfer of employees, data transfer, whether ongoing litigation might impose further obstacles to the merger process, what are the rules relating to the settlement of the members of the companies participating in the merger (for example, issues pertaining to consideration shares, valuation requirements, share exchange ratio); and the various taxation consequences of the CBM (for example, if an exit tax is applicable).

As to the procedural costs of a CBM, 120 EUR has to be paid in connection with the Registry Court procedures. Apart from that, the fee for legal services has to be mentioned, which is at least 5.000 EUR but usually higher. Moreover, in the case of necessity, a fee of 44.000 EUR has to be paid for the approval of the Hungarian Competition Office.

6.2.13. Iceland

The main issue the stakeholders raised as problematic was the audit requirement. This issue arose in a cross-border merger, which was completed in June 2012 and involved companies from Iceland and France. The audit requirements were somewhat different between Iceland and France. According to the Icelandic law firm that carried out the merger, the Icelandic requirements were in conformity with the CBMD. Under French law, the courts appoint a specific merger auditor to review the merger documents. The merger auditor then issued a report, but this report did not include audited accounts. Accordingly, the issue arose whether the Icelandic authorities could approve the merger on the basis of the merger auditor's report but without audited merger accounts. This issue was resolved, but the law firm stated that the provision concerning audit requirements should be reviewed.

A further issue noted was uncertainty on how the process should be carried out by the Company Registry. However, it should be noted that the Company Registry did successfully finalize the CBM in the referred case. It was also noted that the CBMD is neither the cause of these difficulties with the registries nor did it affect them. This uncertainty will only be reduced by further practice by the Company Registry, as it will set certain standards and customs in relation to CBM processes. However, this is not the case at the moment, as according to the Company Registry it has handled very few CBMs.

Other stakeholders pointed out that so far the CBMD has not been fully transposed in practice due to conflicting provisions of Icelandic tax law. The tax provisions are currently construed in such manner that a CBM would have negative taxable consequences since CBMs are treated as if the surviving company would have purchased all assets and liabilities, which are then taxable. For this reason, the EFTA Surveillance Authority (ESA) issued a reasoned opinion on the grounds of a difference in treatment between domestic and CBMs. The ESA then decided to bring the matter before the EFTA court in May 2013 based on the fact that in cases of CBMs, taxes have to be paid on capital gains, whereas such taxes are not applicable to domestic mergers, and thus a restriction on the freedom of establishment and free movement of capital. So far, the application of the CBMD has been avoided by incorporating a

new entity in Iceland, which subsequently merges with the different Icelandic undertakings instead of a CBM. Moreover, stricter capital controls have been adopted after the banking crisis in 2008, which further dissuade foreign entities from executing a CBM.

The biggest advantage of the CBMD was reported to be the fact that it sets a clear framework and structure for the process of CBMs between companies located in EU and EEA countries. In other respects, the further practice of the process by the Company Registry will set certain standards and customs, which is important for the execution of the process in Iceland in the long term.

It was also noted that CBM processes incurs certain administrative costs at the Company Registry. In the beginning, a notification to the Company Registry of the merger will cost ISK 2.650. A notification from the Company Registry to the Icelandic legal gazette is included in this cost. If the acquired company is Icelandic, ISK 1.000 has to be paid for deregistration of the company. However, if the acquiring company is Icelandic, ISK 2.650 shall be paid for the necessary amendments of the articles of association. It was noted that this coverage does not include tax-related cost or legal fees incurred in relation to the CBM.

6.2.14. Ireland

The stakeholders in Ireland pointed out on a general note that Irish law had no provision regarding domestic mergers in place prior to the transposition of the CBMD. Moreover, the mechanism in place thereafter is only applicable to CBMs and not domestic mergers; thus, a foreign company has to be involved in a merger for the merger to take place. Moreover, a High Court application is a prerequisite for the CBM procedure, which makes it very costly. As a result of that, the CBM procedure has been applied rarely in Ireland. A consolidation of Irish company law is currently proposed to allow for domestic mergers to take place, but the contact expressed that until then the procedure is unlikely to be applied frequently.

Another contact further expressed that the requirement to engage a barrister for obtaining the pre-merger certificate as well as to confirm the merger before the High Court is creating difficulties with regard to the procedure.

The major advantage of the CBMD for the Irish stakeholders was the fact that due to the absence of a mechanism for mergers to take place in Ireland, the Directive permits for the consolidation of large company group structures via the removal of unnecessary subsidiary establishments. Moreover, the CBMD allows for a company to transfer its place of registration within the EEA.

The administrative costs are considered to be very high due to the mandatory court procedure, and are amounting to approximately 30.000 EUR to 40.000 EUR in case of an ordinary CBM.

As regards the communication between the registries, an Irish national register, the CRO, stated that there have not been any language problems while executing a CBM. The communication is a basic statement indicating that the merger has been completed and the company be dissolved and thus does not leave a lot of room for misunderstandings between the registries. The CRO communicates with other registries through letters without any special format of communication. With regard to electronic versions of the merger certificate, it was indicated that the CRO can only deregister a company as soon as a non-electronic letter has been received. The letters received are sent for translation to the internal translation service. Further, the translation costs are minimal. Since there are few CBMs in Ireland, no bottlenecks have been reported. Yet, it was indicated that in some cases the CRO has not been informed by the foreign register that the process has been completed, which created problems.

6.2.15. Italy

It was stated by stakeholders in Italy that the major advantage that the CBMD entails is that, for the first time, there is a set of rules aimed at facilitating CBMs between various types of limited liability companies governed by the laws of different EU Member States. Prior to the transposition of the CBMD in Italy, mergers between an Italian or a foreign company and a foreign company from a different Member State were considered admissible under Italian law, since Section 25, paragraph 3, of Law No. 218 of 31 May 1995 (the Private International Law Act) provided that these mergers could be given legal effect in Italy if carried out in compliance with the national laws of each merging company. Section 25, paragraph 3, of the Private International Law Act has been generally interpreted by Italian scholars as requiring that, to the extent they are applicable according to their own purpose and compatible with one another, all substantive rules of national laws involved in CBMs must be observed if these mergers are to be legally effective and enforceable in Italy. Now, for the first time, Member States could make reference to a common path while conducting CBMs. Therefore, the CBMD provides for enhanced mobility for corporations formed in accordance with the law of an EU or EEA Member State.

Yet, several difficulties were nevertheless reported in carrying out CBMs. These problems concerned timelines, the required content of the merger documentation on each side involved, and the fact that involved institutions (courts, notaries, companies

registrars) are not always familiar with the procedures and not used to working with one another on a cross-border basis. With respect to timelines, the steps and deadlines provided for in each jurisdiction involved are mostly similar, but do not coincide entirely. In particular, Member States have different waiting periods between, on the one hand, the date of filing of the merger documentation and/or the date on which relevant documentation is made available to the shareholders, and, on the other hand, the date of the shareholders' meeting to vote on the merger. Besides, the coordination and communication between company registries in different Member States, in respect of the final act of merger, may be hampered by different work practices and different languages. The lack of experience by professionals and/or involved institutions and the general unawareness of the CBM as an available merger option can cause long timetables and inevitably increase the costs of the deal.

A difficulty, reported by a different stakeholder, was the need to be aware of the legislation applicable to all the involved companies and the different formalities to be fulfilled in the different jurisdictions. The following example was given:

In Italy, the national merger procedure requires for its completion the execution of a merger deed, which is an agreement to be signed by all the involved companies after the expiration of a certain waiting period (60 days, or 30 days in the case of a merger between limited liabilities companies) after the shareholders' meeting. The same provision is set forth in the Italian Decree for the CBM. In this respect, the Italian Decree requires a check on whether this deed or a similar deed is compatible abroad, in case the absorbing company is the foreign company. Should the foreign legislation not be compatible with a deed similar to the "merger deed," the latter shall in any case be executed in Italy. This verification is not easily undertaken and, therefore, may cause some delays.

In addition, it is noted that the Italian Decree shall be constructed in accordance with the opinions of the National Notarial Council, which have been formalized in several "memoranda" (*Massime Commissione Società*). Such an opinion, in some cases, is not fully compliant with the EU Directive. For instance, with respect to the pre-merger certificate, the Italian Decree sets forth under Article 11 that "upon request of the Italian company, the Notary Public issues the pre-merger certificate." The Italian pre-merger certificate shall be submitted to the foreign authority for legal scrutiny and this will occur when the absorbing company is the foreign one. On the other hand, it seems that on the basis of the Italian Decree, no foreign pre-merger certificate is required for the Italian absorbed company, due to the fact that the scrutiny of legality will be performed abroad. Notwithstanding any of the above, the Notarial Council

requires a pre-merger certificate from the foreign authority also when the Italian company is the absorbed one, in order to execute the merger deed. The fact that this requirement is neither provided by the CBMD nor by the Italian Decree has been causing several difficulties in the implementation of the procedure, especially in some jurisdictions which seem not to allow the release of the pre-merger certificate in case the foreign company is the absorbing company (for example, in Germany).

One of the major problems and, from the perspective of an Italian legal advisor, the critical one, is the issue of the employees' participation rights, in the case of the application of the European co-determination procedure. This procedure, applicable in the case of CBMs involving at least one merging company with an average of more than 500 employees that operates under an employee co-determination scheme at board-level, is rather long and complicated in case various affiliates are concerned. The legal advisors faced this problem during a CBM with a German company.

The German law transposing the CBMD in this respect—*Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung* (MgVG)—provides for two alternative solutions; the first, the so-called "negotiation solution," may last for up to 6 months. Moreover, there is the need to appoint the SNB, whose members are elected/delegated by the employees of the participating companies in each of the Member States, their affected subsidiaries, or affected business operations. The term "affected subsidiaries" means a subsidiary or establishment of a participating company which is intended to become a subsidiary or establishment of the company emerging from the CBM. The application of this provision seems uncertain, in case the emerging company is an existing company with existing subsidiaries worldwide; indeed, this provision seems to require the involvement of the employees of all of those subsidiaries, which is unfeasible.

The second solution, called the fall-back solution, meaning without prior negotiation, seems to be more feasible but still complicated and uncertain. In the case reported by the law firm, due to time constraints, the law firm had been requested to find out an alternative corporate structure. In the opinion of the law firm, this procedure might be one of the biggest obstacles in CBMs, especially with regard to the appointment of the members of the SNB. A European-level legal amendment may be helpful in this regard.

As regards administrative costs, it was noted that they vary between jurisdictions. In Italy, the administration fees are not very high (EUR300 to 500), but the notarial costs might be as high as EUR 10.000 or, in some cases, even higher.

6.2.16. Latvia

According to the stakeholders, the biggest challenge related to the successful implementation of a CBM will be the engagement of all the involved parties (for example, merging companies, supervisory authorities, tax authorities, professional associations, and of course the local company registers) in the merger process and the mitigation of potential business interruption risks.

Therefore, when it comes to the implementation of the CBM, support is required from legal advisors, particularly because not all the related parties are familiar with the idea of a CBM. Also, the CBMD provides for the general steps, while the local laws contain provisions that might have an impact on the smooth completion of the CBM.

Examples that were given are as follows:

Irrespective to the objective of the CBMD, the local laws and the constitutional documents of local professional associations may not be fully harmonized. This creates the situation where the acquiring company has to perform additional steps to be admitted to the professional association in order to continue carrying on the business of the merged company. Thus, for example, when a CBM was implemented, additional steps were required for the acquiring company, which was located in Estonia, to become a member of the Latvian Motor Insurer's Bureau and take over the rights and obligations of the merged company. This issue, inter alia, concerned the payment of the membership fee to the Latvian Motor Insurer's Bureau that is usually asked from a new member. As a result of the negotiations, the Latvian Motor Insurer's Bureau agreed that in cases where membership is acquired through a merger, the membership fee is not payable.

There is no established system of cooperation between the local company registers when it comes to the notification of the registration of the merger to the company registers of the countries where the merged companies are registered. In practice, even if the merger is registered in the company register of the country of the acquiring company and thus becomes effective, the registration of the merger must also be notified to the company registers of the countries of the merged companies so that the company registers would have ground to de-register the merged companies. In practice, it is solved by the companies themselves requesting the extraction from the company register, where the acquiring company is registered certifying the registration of the merger. Then the merged companies submit the extraction together with the request to de-register the merged companies from the respective company registers.

Since documents submitted to the local company registers need to be translated into the state language of the respective country, the whole process of completion of the CBM, including de-registering the merged companies from the local company registers, takes approximately 5 to 7 days from the moment of the registration of the merger by the company register of the acquiring company (from the moment the merger becomes effective, it will take 5 to 7 days until the merged companies will be finally de-registered from the respective company registers).

Overall this was reported not to be a huge obstacle in the whole process of a CBM, yet creating a working and cooperative system between company registers to notify each other upon completion of the merger would save time and costs.

For example, during the CBMs of insurance companies, the law firm we spoke to had observed that a good cooperation level had been reached between the financial supervision authorities when it comes to coordinating the issue of permits for the merger and the multiple consents required for the transfer of the insurance portfolios from the merged companies to the acquiring company.

Most countries recognize that the merger is initiated by the companies signing the merger agreement. When it comes to Latvia, the first step is preparing a draft merger agreement that is submitted to the Latvian Company Register and which comes into effect later when the merger agreement is approved by the sole shareholder (or the general meeting of shareholders). When the merger of companies registered in Latvia, Lithuania, and Estonia is implemented, the merger is usually initiated with the signing of the merger agreement. Yet, in Latvia this requires filing an additional explanatory letter to the Latvian Company Register to ensure the compliance with the local law requiring the stage of "the draft merger agreement."

In the Baltic Member States, only Estonian law requires the merger agreement to be notarised.

The national laws also provide for different creditor protection procedures.

In Lithuania, the Law on CBMs permits cross-border mergers only of either private limited liability companies (*Uždaroji akcinė bendrovė*, or UAB), or public limited liability companies (*Akcinė bendrovė*, or AB). This means that it is not possible to have both public and private limited liability companies in the same CBM. Therefore, in some cases we have to transform a private limited liability company into a public one, or vice versa, before carrying out the merger. Naturally, this process costs both time and additional expenses for the companies undergoing the merger.

A final difficulty noted was that only CBMs are allowed, whereas, cross-border de-mergers are not. A number of our clients have wished to perform cross-border de-

mergers where the intention would be to de-merge the assets held by a Latvian branch of a foreign entity into a new limited liability company.

As regards advantages, the CBMD has made cross-border mobility more accessible to mid-size businesses and private limited liability companies, as prior to the passage of the Directive the only alternative was to form a European company (SE). In the Baltic Member States, prior to the transposition of the CBMD, a cross-border merger of a bank was carried out by forming an SE and referring back to the *SEVIC* case.

To some extent, the financial crisis also comes into play when the success of the transposition of the CBMD by the Baltic Member States is analyzed. All CBMs were performed within group companies with the goal of simplifying the corporate governance of the group companies and undertaking a review of the administrative structure of the companies in the Baltic Member States. These states are collectively quite often perceived as one market, and usually companies of the same group operating in Latvia, Lithuania, and Estonia are seen as one financial unit despite the fact that it is divided into three legal entities. Also, the CBMD allows the group companies to free additional capital, as after the merger the capital requirements only have to be complied with in one country. In some cases the cross-border merger has been used to achieve an additional level of integration by forming "a truly Baltic company" or regional company.

The opening up of CBMs under the CBMD has been very attractive to insurance companies operating in the Baltic Member States. By merging the companies within these states, the insurance companies can reduce the number of financial supervisory authorities it has to report to. As a result of the mergers, the licensing requirements only need to be fulfilled in one country.

The tax aspects resulting from a CBM are also important, according to stakeholders. Even though CBMs are tax-neutral, the choice of the country where the acquiring company will be located commensurately becomes an important issue. Except for Aon, which was merged in Lithuania, and Siemens, which was merged in Finland, in all other CBMs it was advised that the companies merge in Estonia. In general, a quite significant number of the CBMs involving Baltic companies end up with the merged company registering in Estonia. The decisive factor for this is the attractive corporate income tax (CIT) regime in Estonia, where CIT is not calculated as long as the company does not pay out dividends; the fact that there is less bureaucracy there than in other Baltic Member States is also attractive. Of course, the tax issue is not the only variable that determines the choice of where to register the acquiring company. The client base, the number of employees, and the location of the

management may also play significant roles in choosing the location for a merged company's headquarters.

In that regard, it was noted by our stakeholders that it might be interesting to see if the new holding regime (providing that the dividend income is tax-exempt) that was introduced in Latvia in the beginning of 2013 and the introduction of the EUR (planned in 2014) might motivate the Baltic companies to register CBMs in Latvia.

As regards employee participation, it was noted that the laws of Latvia, Lithuania, and Estonia do not recognize the employees' participation rights at the company's governance bodies as manifested through the co-determination rule, for example, in Germany. When the merger concerns Latvia, Lithuania, and Estonia, the law of the acquiring company determines the level of the employees' participation. In most of the CBM cases, the acquiring company was advised to register in Estonia. In none of these cases was the employees' participation brought up as an issue to be addressed as a separate step within the merger process. The only exception to this was one cross-border merger that resulted in the formation of an SE. In this case it involved calling and holding an employees' general meeting to elect a SNB.

As regards administrative costs, it was stated that they may vary from case to case and depend on the following factors. First, if the CBM involves companies operating in the regulated financial market, the process is longer and involves cooperation with the local financial supervisory authority and additional actions. Second, it depends on the existing shareholding structure, whereby within the group companies the CBM may be carried out either as an "up-stream" or "side-step" merger. Third, if an auditor is involved in the review of the merger agreement or the establishment of the share exchange ratio and if employees' participation is an issue for the particular CBM in question, the costs are higher. Lastly, if the direct costs related to the CBM, like the notary's fee, state duties, translation costs, or publication fees, are variable, the costs may vary. For example, Estonian law requires the merger agreement to be signed in the presence of a public notary. The notary's fee is calculated on the basis of the share capital of the acquiring company.

Part of the cost related to the implementation of the CBM will be the fees of the legal and tax advisors. The fees usually vary related to the type of the CBM and depend on the issues that need to be covered prior to the merger and those that need to be addressed after the CBM is registered (for example, assistance in registering all the assets into the name of the acquiring company on the public registers, where needed).

In specific, it was noted that the reorganization is added to the Commercial Register in two stages. The state fee for the first stage is equal to 25 EUR (including registration

and publication costs) and for the second stage is equal to 38 EUR (including registration and publication costs). Currently there are no requirements regarding the submission of notarized documents. The services of the State Revenue Service are free of charge. Additional costs may be incurred by the need to translate the reorganization documents into Latvian in order to be submitted to the Latvian Commercial Register. The costs of translation clearly depend on the size and number of the relevant documents.

6.2.17. Liechtenstein

The stakeholders in Liechtenstein gave the response that the CBMD is insofar problematic as it applies only to companies which were formed in a Member State and therefore is not applicable to companies that have transferred their seat from a non-Member State. Moreover, national tax laws are effectively inhibiting CBMs in practice.

Another stakeholder expressed that the seat transfer of a company to Liechtenstein or from Liechtenstein to another country without liquidation has been more attractive compared with CBMs because it is not limited to limited liability companies.

Yet the simplification of the legal framework applicable to CBMs due to the harmonizing effect of the CBMD was regarded as beneficial.

Moreover, in the context of the country’s new focus and commitment to tax compliance through the establishment of a double taxation agreement network with other countries, CBMs became a more attractive alternative over the course of the last month.

The national register expressed that problems are arising with regard to the different languages used in the communication to the register of Liechtenstein. Further, the different provisions of the respective national transposing laws prove difficult. Lastly, the application of such diverging provisions between the different countries is an issue. The communication itself is conducted by phone, letter, and email, and if all documents provided are in accordance with the legal provisions applicable, the registration process lasts in all cases between 48 and 72 hours.

6.2.18. Lithuania

In Lithuania, the CBMD was transposed in 2007; however, it was not completely transposed before 2008. Moreover, it was noted by stakeholders that outside of this framework, CBMs were already possible within Lithuania.

According to the stakeholder information we have received, since 2008, 17 CBMs have been carried out where the Lithuanian company was the acquired company and two where the Lithuanian company was the acquiring company. Notably, there have been

major mergers within the insurance industry. Moreover, the main motivation for the mergers has been to reorganize the legal structure of the companies. Companies often had subsidiaries in each Baltic Member State, but since the transposition of the CBMD, it has been considered prudent to merge them. Also cross-border seats have been transferred as a result of the CBMD. According to the legal advisors, this might have been part of the motivation for the notable number of mergers in the insurance sector.

The following problems were also mentioned as having been encountered as a result of the CBMD: the difference in the completion dates of mergers between the Member States and the difference in the date of the financial statement. As a final problem, the clauses relating to employee participation make the proceedings overly complex. The cases our contacts have been involved in generally concerned information procedures and therefore had been rather simple. It was pointed out that due to a lack of strong representation bodies, which is to be explained by the business culture in Lithuania, the procedure is only formally held without any problems arising. The procedure is thus a formality rather than an obstacle and decisions are adopted by consensus. However, if our contacts had to apply the full employee participation procedure, a lot of uncertainties would be expected.

Other difficulties encountered were related to the regulatory framework as such and procedural aspects. The greatest obstacle thereby was identified in relation to the interpretation of national laws alongside the EU provisions and the lack of comprehensive national regulation. The procedural problems due to the inexperience of the parties involved as well as the competent authorities are likely to decrease due to the fact that a greater number of CBMs is leading to more experience and less difficulties arising in the process.

The following advantages stemming from the CBMD have been mentioned to us: first of all, the share price difference is an advantage. The limitation of requiring 10 percent no longer exists. Another advantage is that only one merger plan has to be drawn up. A final advantage they mentioned is that this legislation was urgently required for business restructuring in the EU in general. Moreover, the CBMD was overall regarded to be a clear and concise legal instrument.

Regarding timeframes, to carry out a CBM takes between 2 and 7 months. The average is 2 to 4 months but it can take longer (this can be for internal reasons). Finally, regarding the costs, administrative costs amount to 200 to 250 EUR for the registration of the legal documents as well as notary fees. This can be higher if documents need to be translated. Moreover, the companies involved in the CBM are having additional costs related to the fact that meetings of the employee and

governing bodies of the companies have to be convened and financial accounts have to be prepared.

6.2.19. Luxembourg

Prior to the CBMD, the Luxembourgian law of 10 August 1915 on commercial companies did not foresee CBMs, which were nevertheless carried out on a case-by-case basis by determining the rules applicable to the case at hand. On the basis of that, CBMs were not used frequently due to a legal uncertainty especially with regard to creditor protection and the rights of third-parties. Moreover, a unanimous shareholder vote was necessary.

Our stakeholders in Luxembourg stated that the CBMD position regarding creditors and minority shareholders is a major problem, and added that the law on both issues is not adequately coordinated. As an example, we were told that the dates for creditor protection start differently in different countries. Stakeholders were moreover of the opinion that CBMs in every country should have a common timeline in order to coordinate anticipation of issues that can potentially arise. The Luxembourg transposing legislation in this regard does not foresee any specific minority protection.

Another major difficulty identified was seen in the procedural differences stemming from the differences of the transposing legislation of the CBMD. Moreover, the contacts pointed out that differences of the authorities competent in cases of CBMs are negatively affecting the procedure. The difficulties are thereby arising not in general, but only in certain cases depending on the Member States involved.

The major advantage identified was the fact that through the CBMD a common framework applicable to companies with share capital was transposed and substantially improved the procedure applicable to CBMs with regard to the costs of the merger and guaranteed legal certainty. The certainty that once a CBM has taken effect it cannot longer be challenged was identified as considerable benefit.

Moreover, by virtue of the harmonization of the rules applicable to CBMs, the legal certainty with regard to the procedural aspects of a CBM and its consequences has been improved. Another stakeholder expressed that the clear designation of a competent authority and the formal requirements for a CBM have led to a significant simplification of mergers. Moreover, the transposition of harmonized notification requirements and specification of the document requirements were regarded as beneficial.

Another advantage was pointed out in the context of the extension of rules applicable to domestic mergers to CBMs, whereby the CBM will be decided while subject to the national provisions. Under Luxembourgian law, this means that no unanimous consent

of all shareholders is necessary. CBMs outside a company group structure were enabled by this provision and allowed undertakings to consider the execution of a CBM.

A final benefit identified was that the Directive is a single document available in all official languages to which all parties can refer, rather than referring to domestic provisions.

As regards seat transfers, these have been notably recorded with the Netherlands. They have been done on the basis of the case law of the CJEU. Yet, these seat-transfer instances really only concerned holding companies.

The principal motivation behind carrying out CBMs was identified as being tax optimization by transferring headquarters. The duration of a CBM is said to take between 2 and 3 months at the least.

Finally, it was noted that the CBMD has made a real difference to the frequency of mergers, with a strong increase in the number of CBMs following the legislation.

As to the administrative costs of a CBM, it was pointed out that these are mostly related to the setting up of the merger plan, the required reports, as well as the publication of the merger. These costs are reduced in cases where the undertakings involved are from jurisdictions wherein the official languages are either French or German, and thus the costs for the translation of the documents are not applicable. Yet, it was expressed that the costs are still relatively high due to inefficiencies inherent to the procedure.

Regarding the communication between the registries, the national registry, the Luxembourg Trade and Companies Register (RCS), indicated that language poses a particular problem as the RCS receives notifications form foreign registries that the RCS does not necessarily understand. In such cases, the RCS tasks the foreign registry to provide a translation into any usual language of business or has to use translation services. The same applies for the other documents delivered together with the notification of the merger.

Further, no special format for the communication exists between the registries. The RCS uses a standardized notification which has been elaborated by the European Commerce Registers' Forum (ECRF), and it was suggested that all registries involved in CBM procedures should use the standardized form as elaborated by the ECRF.

6.2.20. Malta

The Maltese contacts stated that prior to the transpositionof the CBMD, CBMs were not possible under Maltese law. The Directive was therefore seen as substantial improvement.

Through the cooperative and helpful stance taken by the competent authority, the Maltese Registry of Companies, our contacts did not report any major difficulties.

Moreover, the framework transposed pursuant to the CBMD was regarded as allowing for CBMs to be executed in a straightforward manner and with reasonable and efficient timeframes.

As to the costs, it was indicated that these are relatively low and are not exceeding a few hundred EUR.

Concerning the communication between the registries, the national registry indicated that notifications submitted by foreign registries should be in English to be reviewed. The communication of the merger notification is thereby in no format. It was also noted that that the receipt of the pre-merger certificate issued by the foreign national authority of the acquiring company should be sufficient as scrutiny of legality. The review of the copy of the approving resolution of the foreign company, or of the CDTMs, as Article 11 Directive requires, is thereby regarded as unnecessary.

6.2.21. The Netherlands

The legal advisors stated that the general interest in the CBMD is gradually increasing, mainly because it is a highly functional instrument for the restructuring of financial institutions and group reorganizations in general. Tax issues were identified as a significant driving factor. Increasingly many CBMs involve Cyprus and Portugal. Moreover, the CBMD is regarded as an alternative to the SE. Overall, the main advantage was considered to be that the Directive creates a legal framework for CBMs and that it harmonizes, to a certain extent, the rules concerning CBMs.

As regards problems with the CBMD, it has been stated that the transposition by varying Member States has been the greatest obstacle to success. An important issue is the date of effectiveness. As an example, if a Dutch entity is being absorbed, in the Netherlands the date of effectiveness is the date of the notarial deed. In Germany it is the date of the filing with the Amtsgericht. As a consequence, from the Dutch perspective, the legal person can be non-existent while still existing in Germany. A fixed date of effectiveness was proposed as a future requirement.

Another common difficulty identified was the imperfect transposition of European legislation by the Dutch legislator, especially when taken in conjunction with the

existing rules applicable to domestic mergers. It is not uncommon for such rules to raise questions and complexities or even to be in conflict with the rules following from the CBMD. In this regard, the Dutch legislator has not taken these aspects sufficiently into account and has, in some cases, ignored criticism from the national parliament and legal scholars during the legislative process. As these difficulties and conflicts of law have arisen from the transposition of European legislation, our contacts regarded the CBMD as the cause, but pointed out that the part of the fault lies not with the European legislator, but with the domestic legislators.

Another difficulty identified was the objection period for creditors. In the Netherlands this period takes place before the shareholder meeting; in other countries it is after the shareholder meeting. Thus, both have to be added up instead of occurring simultaneously. Related to this is the process of creditor protection. In the Netherlands, the process of the merger is paused until sufficient guarantees can be given. In other countries with a similar period, the process continues regardless. However, it was acknowledged that there are very few mergers where creditors actually object, and even though our contacts have extensive experience in this field, they have not, as yet, advised on a merger where this has taken place. However, if it happens, serious delays can be expected. A further difficulty is the requirements for documents to be made available in different countries. Although the rules on CBMs and domestic mergers should be harmonized pursuant to the CBMD, it appears that differences between the Member States with regard to certain merger rules exist following their transposition and interpretation. This can be dealt with pragmatically. For example, the documents can be prepared with columns for the countries involved, translated and signed. This has been an effective solution but is not prescribed in the CBMD. Also regarding auditor statements, problems can occur because Member States look for different content. Board reports can also differ. In the Netherlands, they are one page long, but in Germany or France they are lengthy, even in a simplified procedure. In conclusion, the legal advisors we spoke to were in favor of additional rules being inserted into the CBMD.

Regarding employee participation, it was clearly stated that this frightens clients and is widely seen as a big disadvantage, even though most of the time it is not a practical issue and does not lead to any real delay in the merger. Moreover, it was stressed that clients tend to avoid this problem by structuring the CBM in such manner that the employee participation regime is not applicable. That being said, it was stressed that when working together with small law firms less experienced in CBMs, this becomes far more problematic and potentially prohibitively expensive.

Costs are regarded to be very low and are mainly limited to certain registration fees, such as 100 to 200 EUR for court fees, and advertisements in a newspaper might cost another 500 EUR; together costs should not exceed 1.000 EUR in the Netherlands. The operational costs of a CBM could be significant and depend to a great extent on the businesses of the merging companies, and are approximately amounting to 15.000 EUR. Also, the legal fees for executing a CBM equally depend on the facts and circumstances at hand and could differ between law firms.

Regarding the amount of time it takes to carry out a cross-border merger, it has been noted that if it is simplified it can be done in 2 to 3 months. However, if it becomes more complicated it can easily take a year (for example, if local regulators play a role). However, this has nothing to do with the CBMD provisions.

Another point that was stressed by our contacts was that a de-merger directive would be highly helpful. At the moment, this is prohibitively expensive and time-consuming.

Regarding seat transfers, it is mentioned that there is no continuity of the legal entity. Sometimes clients do not want this because of tax reasons, for example. It might be the case that it is required that it remains the same company. Based on *Vale*, it is possible to conclude that seat transfers could be carried out. However, practically, it is difficult if it is not a shell company. In our contacts' view, such a seat transfer could be challenged and notaries might be liable in the end. It has happened in the Netherlands no more than 10 times with shell companies. It was further noted that CBMs were completed on the basis of *Sevic* before the transposition of the CBMD, but they involved empty holding companies. A reason why the Dutch seem to be rather liberal in their approach regarding this topic might be that courts do not play a big role.

The national register, the *Kamer van Koophandel*, indicated on the matter of the communication between the registries several difficulties. First, it is difficult to obtain information to register the merger, such as the relevant legislation. A central point with all information available is missing where the applicable legislation is to be found.

Secondly, even if information is available, often a password is needed or a fee is to be paid to obtain the information. Thus, certain provisions are skipped which are checked in national mergers, such as the signatures of board members. Further, the publication in the *Official Journal of the European Union* is not mandatory, which was recommended as suggestion for improvement.

Thirdly, it is also stated that it is difficult to find the competent authority in the other Member States involved in a cross-border merger. In some countries it is the notary, but in others it's a different authority. Thus, an overview would help.

Finally, it was also noted that the communication with other registries is problematic. This is generally still done through letters. Often, the *Kamer van Koophandel* does not even know the address of the foreign registry and often they do not receive notifications from the foreign registries. A more efficient way would be to communicate via emails. However, for that it would be necessary to have a list with the email addresses for all the registries. What the stakeholder suggests is communication via email, plus the check in a formal register. If this is registered in an official register, the email could be regarded as authentic.

As regards the format of the letters sent between the registries, it was indicated that the Dutch register uses standard letters and that there are also standard letters that had been created by the Luxembourg registries in 2010. Lastly, language problems have not been occurring because the staff at the *Kamer van Koophandel* can communicate in many of the official European languages.

6.2.22. Norway

The stakeholders in Norway indicated that the CBMD was primarily used for group reorganizations. The main difficulties arising thereby were related to different local requirements in terms of time as well as document requirements. In one case involving the Finnish jurisdiction, the competent authority took three month to approve the transfer. Combined with a 2-month creditor notice period in Norway, this has resulted in delays with respect to completing the transactions.

With regard to the documentation requirements, the slight differences between the various national requirements are resulting in more coordination efforts and thus more work compared with domestic mergers. This was, however, regarded as a minor obstacle.

As to the benefits, the CBMD established for the first time a simple framework in which each merging company is governed by the provisions of its national law applicable to domestic mergers and the national authorities are competent to scrutinize the legality of and register the mergers. Since Norwegian law did not include provisions on CBMs prior to the transposition of the Directive, the established framework is a significant improvement with regard to transactions at a reduced cost level compared with the situation before. The Directive is seen as allowing for intra-group and post-acquisition restructuring and is thus beneficial, according to our contacts.

The employee participation mechanism has been an issue in CBMs in which our contacts were involved in; however, this has not significantly affected the merger process or has been worse compared with domestic mergers. Under Norwegian law,

the employee participation rights are quite extensive. As a consequence, in cases where the Norwegian company is the transferor company, the rules of the Member State to whose jurisdiction the acquiring company will be subject are likely to be set aside. Therefore, the employee participation mechanism under the Directive is not regarded to be an obstacle from the Norwegian perspective. The process of executing a CBM was indicated to take approximately one year, but is highly dependent on the case at hand. Similarly, the costs are varying depending on the degree of involvement and approvals required from local authorities and other additional documents that prove necessary.

The administrative costs as such amount to 890 to 1.055 EUR, which includes costs in relation to the required publication of the merger plan and the merger resolutions. Additional legal fees for the merger as such are further applicable. It was expressed that the costs related to a CBM will decrease, if the period of time in which the merger is completed is shortened.

The national registry, the Brønnøysund Registry Centre, indicated regarding the communication between the registries that it is usually conducted by regular letter to confirm that a merger has been registered as completed. A merger certificate for a Norwegian company is issued directly to the company, which means that the registry is usually not in direct contact with the foreign register concerning the certificate. Yet, in time-sensitive cases, the certificate has been sent directly to the foreign business register by email and the original certificate by regular mail. The confirmation of completion was received in the same way, again if the time of registration is important. In both cases the documents are scanned and the resulting PDF is attached to the email. However, it was stated that such a practical approach was only applied in Scandinavia and so far the registry has not received such electronic confirmations from registries outside Scandinavia, while having experience with CBMs with the Netherlands, Germany, Cyprus, and Luxembourg. In these cases, the Norwegian authorities generally only received letters. With regard to language problems, the registry indicated that this was not regarded as problem. With Denmark and Sweden, the communication is conducted in their native language, while for all other countries English documents or official translations are required.

6.2.23. Poland

The various difficulties encountered during CBMs in Poland were caused in particular by provisions laid down in Directive 2005/56/EC. Those difficulties were solved by a substantial amendment to the Polish Commercial Companies Code, which came into force on October 27, 2011. This was based on Directive 2009/109/EC of the European

Parliament and of the Council of 16 September 2009 allowing Member States to adopt more flexible rules for announcements, namely in the national gazette or on a website. The above amendment of the CBMD substantially improved the execution of CBMs in Poland and decreased administrative costs.

Yet, one such obstacle was the obligation to publish a merger plan in the Court and Commercial Gazette at least one month before the shareholders' meeting convened to adopt the common draft terms of the merger. The long waiting period for publication and the substantial cost of publishing hindered the coordination of already-complicated commercial, accounting, and legal factors involved in CBMs.

The above amendment of the Commercial Companies Code allowed the companies involved in the CBM to publish the merger plan at their own discretion, either in the Court and Commercial Gazette or on the company's website.

An important problem with CBMs is the restriction on commercial entities that may merge through a newly created SE company into joint stock companies. Since limited liability companies are the most popular vehicle for doing business in Poland and the most common participants of CBMs, the whole merger process is considerably delayed by the necessity to create a new SE company or to transform limited liability companies into joint stock companies before executing the CBM process.

The major benefit of the CBMD is the increase of the freedom of economic activity in the Member States, including Poland. It allows for the transformation of a business in line with changing markets and is in the best interest of market players. It was further noted that the Directive is mainly used as a mechanism for group reorganizations and asset transfers.

With regard to the employee participation procedure, it was seen as major obstacle for the completion of a CBM.

The contacts expressed that a Directive on cross-border de-mergers of companies would be a desirable future amendment of the existing framework.

As regards administrative costs, it was stated that there was a substantial decrease in administrative costs associated with CBMs after the legal amendment of the CBMD and following the provisions of Polish law. Under the current framework, associated obligatory fees, which include registration court fees, obligatory publishing of court entries in the Court and Commercial Gazette, stamp duties, and notarial fees, normally do not exceed 625 EUR per company.

6.2.24. Portugal

A difficulty noted by our stakeholders in Portugal concerned a specific CBM carried out with Ireland in 2008. In Ireland the CBMD had already been transposed, while in Portugal it had not. Also before 2008, CBMs had been carried out with both Spain and the UK. In those cases, both legislative regimes regarding mergers had been applied, resulting in a mess. Therefore, it can be said that the CBMD improved the procedure and simplified it. Another stakeholder noted, however, that despite a significant decrease of procedural differences between national laws applicable to CBMs, the transposing legislation remains not fully harmonized. Therefore, CBMs continue to require a significant coordination effort between the parties and jurisdictions involved. These differences particularly result from the applicable administrative procedures. Another contact expressed that the compliance with mandatory provisions of corporate laws while drafting the common draft terms is problematic, as is the need to ascertain which version of the common draft terms of merger is applicable. Moreover, it was pointed out that drafting of an accurate bilingual version of the common draft terms as well as translating all relevant documents can prove problematic. The administrative procedure for the issuance of the pre-merger certificate was regarded as time-consuming and left the legal advisor dependent on the public authority. Another problematic aspect is to ascertain the precise moment at which a CBM is considered to be effectuated considering the diversity of the various legal systems.

It was suggested that a disclosure of the entity responsible for the issuance of the pre-merger certificate is prescribed to decrease the dependency of the legal advisors. Further, the possibility of submitting the merger documents in English would be regarded as beneficial to overcome the time-consuming and burdensome translation necessary for the bilingual merger documents.

An advantage identified was that pursuant to the CBMD, the domestic laws applicable to CBMs have been harmonized. While the basic principle of mandatory compliance with the requirements of the involved jurisdictions remained, the harmonization of national provisions applicable to CBMs significantly decreased the complexity of the procedure through the elimination of many legislative and administrative differences. The contacts expressed that the CBMD clearly improved the procedure applicable to CBMs in comparison with the former situation. Particularly the determination of the common draft terms of the CBM, the pre-determination of the major steps to be taken within the procedure in each jurisdiction, the common procedure regarding the pre-merger certificate, and the settlement of a clear rule regarding the validity of a CBM have been identified as improvements of the regime applicable to CBMs.

A further positive aspect was that the adoption of the CBMD led to the adoption of national legislation in countries wherein merger rules were solely applicable to domestic mergers. Moreover, the CBMD provides an alternative for SMEs that are unwilling to incorporate a European company. The CBMD furthermore led to an equal level of transparency and legal certainty in all Member States and increased the overall competitiveness of undertakings in the EU.

As a further issue, it was noted that the regime does not apply to non-EU mergers. Particularly stressed was the complexity of employee participation under the CBMD. The problem was reported to be regarded as a problem by even the very top employment law experts in Portugal.

Cross-border seat transfers (CBT) are not carried out via the CBMD because there is a domestic regime regarding this. Administrative costs were reported not to be significant, consisting of the normal costs of registration plus costs for certification, which amount to approximately 500 EUR up to 650 EUR unless a CBM public deed has to be executed. In such cases, the costs amount to 2.000 EUR up to 2.500 EUR.

6.2.25. Romania

As regards difficulties in Romania, our stakeholders noted on a general level that major problems were encountered during the structuring and negotiation phase, when not only business matters had to be dealt with, but also a series of strictly technical legal and fiscal issues (we refer to commercially driven mergers rather than intra-group restructuring oriented mergers). When legal and tax teams involved in the process endeavoured to translate into contractual language the business arrangements of the parties concerned, it was not only the language barrier and cultural differences that made the process difficult. Despite the existence of a specific European regulatory framework meant to harmonize and mirror the procedure for all the companies involved, inevitably there were discrepancies between the national legislation regarding the concerned companies as to corporate governance, prior endorsements, merger's publicity (i.e., the official gazette), regulatory background, and so forth. Furthermore, sometimes the regulatory environment where the new company was to be established or the functioning of existing companies involved in the merger were not stable or predictable enough. This was especially prevalent in the case of mergers to be implemented under a tight schedule, where the discrepancies and instability referred to above sometimes triggered delays which were difficult to manage, hence the need for a more careful and detailed planning of the merger process.

Another problem identified was the need to secure various prior approvals, especially for regulated businesses such as insurance (in all involved Member States), which could also trigger serious procedural delays (bar the need to secure merger clearance from the EC or the competent NCA, as the case may be). Other technical issues (such as resulting shareholding structure, premiums, swaps, other rights conferred to the shareholders, and so forth) are all time-consuming from an operational point of view (when preparing the merger project and roadmap). CBMs are generally much lengthier than internal mergers (which can take up to 4 to 6 months).

Further issues noted by legal advisors were that there is no specific timeline for the completion of the operation and the procedure is usually substantially delayed, particularly when there are more than two jurisdictions involved. Further, it was noted that the merging companies have to face a series of administrative barriers, including, without being limited to, (i) the publication of the cross-border merger project with the national official journal, the incertitude regarding the effective date of publication negatively affecting the overall procedure. Also, there is the (ii) possibility of a procedure whereby the merging companies' shareholders withdraw from the relevant company in case they do not endorse the cross-border merger operation. Thereby, the operation is subject to the observance of different tables of requirements which are governed by several (at least two) sets of national procedures, several (at least two) national authorities, and, most importantly of all, several (at least two) sets of administrative practices and formalities (a fact which has a higher impact in cases where various permits and authorizations are required for the implementation of the operation). Due to the cross-border nature of the operation and the economic benefits "at stake," in most cases national authorities tend to be rather inflexible when interpreting and transposing the cross-border-related regulations and analyzing the cross-border documents submitted for their review and approval.

Furthermore, the CBMD leaves a large margin of discretion to Member States for establishing additional and, to some extent, different requirements with regards to the cross-border merger operation within the national jurisdiction. Firstly, there are different provisions at the national level with regards to the protection of minority shareholders opposing the cross-border operation. Secondly, the information to be further published in the national official journals, in accordance with Article 6, paragraph 2, letter (c), CBMD, may be supplemented with national legal provisions. Thirdly, the possibility of appointing legal entities as experts in the procedure has to be analyzed at the level of each national jurisdiction. Fourthly, the initial step relating to the provisional certificate may prove troublesome, as the success of the entire

procedure will depend on the implementation of this first step in each Member State. Considering the lack of any specific timelines, the CBM can be delayed due to the manner of cooperation with the administrative authorities in certain Member States. Fifthly, there is no correlation between the provisions of Articles 11 and 9 CBMD. Should the national legislation of one Member State allow for the cross-border merger project not to be approved by the general shareholders' meeting, then this approval cannot be attached to the certificate, as indicated in Article 11 CBMD. Various practical misunderstandings may be triggered by this inconsistency.

Finally, it was also noted that the CBMD requires the commercial/trade registers to cooperate across borders. However, it should be mentioned that there are no formal channels of communication which can accelerate the cross-border procedure regulated by the CBMD or any means to help overcome language barriers and to enhance legal certainty. However, to achieve such a purpose, the Directive No. 2012/17/EU was enacted by the European Parliament and the Council, amending the Council Directive No. 89/666/EC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers (the Directive 2012/17/EC). The Directive 2012/17/EC is grounded on the following principles. Firstly, the fact that official information on companies is not always readily available on a cross-border basis, and, secondly, the current voluntary cooperation between commercial registers, regulated by the Directive No. 2009/101/EC, has not proved to be sufficient. Third is the aim to foster the competitiveness of European business by reducing the administrative burdens and increasing legal certainty. The Member States are required to adopt the corresponding regulations necessary to comply with the Directive 2012/17/EC by July 7, 2014, together with the implementation of the necessary operational systems. To date, Romania is still in the process of harmonizing its legislation with the Directive 2012/17/EC.

The main advantage of the CBMD is the mere creation of a framework generally applicable across EU Member States. The CBMD provides a set of basic rules to be followed by the involved parties and harmonizes the procedure across the various jurisdictions (including the settling of potential conflicts between laws by clearly specifying the laws applicable to each stage of the process). A stakeholder stated to us: "The CBMD has clarified the availability of, and has provided the framework for, the CBM. Before the transposition of the CBMD under Romanian law, we had been involved in an operation aimed to achieve effects similar to a cross-border merger, which had taken 2 years to study, approve and prepare for implementation." The legal

advisor added that before the CBMD, it was hardly practicable to consider a cross-border merger involving companies active in the services industry or otherwise running a large portfolio of clients and other contractual relationships. The recognition of CBMs at an EU level has made it possible for companies with a presence in different EU jurisdictions to consider consolidation and optimization of operations. It is an option rather frequently considered for group companies—in Romania, in particular in insurance and financial services.

Further advantages that were noted were that the CBMD states a minimum content for common draft terms of CBMs, in order to establish the ground rules for the negotiations of the parties who intend to implement a CBM. Another beneficial aspect is that it delineates the competence of the national authorities designated to analyze the compliance within the law of the CBM. Further, the CBMD states alternative means for ensuring the publicity of the common draft terms of CBMs, besides the manner prescribed by the laws of each Member State (for example, in Romania, the terms are published in the official gazette, part IV). Consequently, in order to avoid the administrative costs associated with the publication of the common draft terms in all Member States for each of the concerned companies, the parties may choose to make the document publicly available on their website, free of charge, continuously, while ensuring the security of the website and the authenticity of the documents. Also, in order to reduce the costs of the CBMs, the CBMD regulates the possibility of appointing, at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the CBM or approved by such an authority, one or more independent experts to examine the common draft terms of the CBM and draw up a single written report to all involved. Lastly, in order to ensure the security of the commercial circuit and the economic stability, the CBMD stipulates that a CBM cannot be declared null and void.

As regards employee participation, legal advisors in Romania see the issue as rather cumbersome, since it may trigger long negotiation periods (anywhere from 6 to 12 months) which naturally translates to increased costs borne by the parties. This issue is generally referred back to the absorbing (resulting) entity for scrutiny.

National law provides a slightly different set of provisions governing employee’s participation rights. In a nutshell, if the resulting entity is a SE headquartered in Romania, such rights must be conveyed to all employees by the care of the management of the involved entities; if the resulting entity is a Romanian entity and in at least one other involved entity such rights are implemented, the resulting entity

must implement the same system. In the latter case, the management of the resulting entity will ensure the maintenance of such employee rights for 3 years as of the implementation of the CBM (including in case of in-border mergers).

In practice, however, its effectiveness has been partially affected by the rather cumbersome set of provisions on employees' participation rights, which very often trigger serious practical complications.

Moreover, it was noted that on the experience of one of the law firms and considering the reluctance of local management to involve the trade unions/representatives of the employees in the companies' management or control, the observance of participation rights (i.e., the right to elect or appoint members within the company's control or administrative body, or the right to recommend and/or oppose the appointment of some of the members of the company's into the control or administrative body) would prove rather difficult.

In accordance with this background, the advisors stated that they are recommending that the negotiations concerning the involvement of employees within the company's administrative activity be handled through a SNB set up in accordance with EU legislation. It is more likely that the parties will resort to applying the "reference provisions" directly, whereby companies are only bound to observe the participation rights which used to be observed by one or several of the merging companies, which has already implemented such a mechanism.

As regards administrative costs, these can only be estimated on a case-by-case basis, by reference to various factors such as: the nationality of the involved entities, the dimension of the entities (branches, subsidiaries, etc.), the need to secure merger clearance from the NCA or EC, and the number of employees. In any case, costs borne in relation to CBMs are substantially higher than the ones associated with in-border mergers.

More specifically relating to costs, the following information was provided. Firstly, costs associated with the publication of the common draft terms in a CBM in accordance with the publicity system of all of the merging companies and according to Romanian Law in the official gazette, part IV, varies between RON 550 and RON 3,700 (approximately EUR 125 and EUR 840). Secondly, administrative costs imposed by the competent authorities of the Member State of each of the merging companies to allow for the scrutiny of the legality of the CBM as regards the part of the procedure which concerns each merging company subject to its national law; in Romania, the relevant authority is the Trade Registry, and the legal charges could vary depending on the complexity of the merger between RON 1,000 and RON 2,500 (approximately EUR 250

and EUR 625). Costs associated with the expertise report may vary depending on the number of expertise reports undertaken (for example, by each of the merging companies or, respectively, by a commonly appointed independent expert) and by the exact tariff charged by each expert. According to the experience of our stakeholders and according to Romanian Law, the cost for each independent expert report is around EUR 1,000.

6.2.26. Slovakia

Overall, the CBMD has been used according to our stakeholders to reorganize the company group structure in order to increase the economic efficiency of the group without the need of complicated liquidation procedures in each jurisdiction or having to transfer assets and liabilities from one country to another.

The major issue raised in the responses of our Slovak contacts was the unclear and confusing transposition of the CBMD into Slovak law by amending and adjusting the existing Commercial Code rather than adopting new legislation to uniformly transpose the Directive. By doing so, the transposition is not done in a systematic manner and includes an unnecessary amount of cross-references to provisions applicable to domestic mergers. This causes problems in practice with regard to the interpretation and proper application of these rules to CBMs. Moreover, reference is made in the transposing legislation to joint stock corporations in general and thereby disregarding the differences to limited liability companies. Further, the lack of experience by the authorities involved with regard to the application and the construing of the current statutory regulations poses problems.

Other stakeholders stated that some difficulties arose with regard to a difference in time limits applicable to the date of effect of the merger in the concerned jurisdictions. Moreover, some problems related to accounting effects as well as a difference in the applicable rules for the expert valuation of assets and liabilities required were experienced. Further, it was stated that it proved to be difficult to work with different national registries in the context of a CBM. Yet another contact stated that differences with regard to the requirement to prepare interim statements and how to define the six-month deadline proved difficult. Also, some complications arose with regard to the steps to be taken concerning the approval of the common draft terms of merger, which can be executed in Slovakia only following shareholder approval.

A benefit of the transposition of the CBMD is the fact that CBMs of certain entities were not possible prior to the transposition or were not economically sustainable. The CBMD is thereby providing a common basis for CBMs, which was seen as very positive by our contacts.

Unlike the aforementioned transposing legislation, which has been transposed by reference to existing legislation, the provisions regarding the employee participation rights have been transposed by the Slovak legislator by creating specific rules governing the employee's participation rights. As a result of that, the employee's participation rights are dealt with quite comprehensively. One contact had executed several CBMs during which employee participation had to be dealt with, but it was not regarded as problematic by the stakeholder and was not seen as financially burdensome or time-consuming. Others, however, reported that in some cases the client preferred to change the structure of the project to avoid employee participation rights issues.

As to the costs, it was noted that the costs will depend on the particular type of the merger. Yet, in light of the numerous formal requirements pertinent to CBMs in Slovakia, and specifically the fact that most documents have to be executed in form of a notarial deed, a regular CBM is likely to cost approximately 2.500 EUR. The notary fees thereby may amount up to 1,500 to 2,000 EUR, also depending on the amount of the registered capital of the merging companies, while the registration fees amount to 150 to 200 EUR, which includes the fees for publication in the commercial bulletin. Further significant costs are to be expected for the translation of the required documents in the Slovak language with a standard price of 20 EUR per page, as well as fees for the expert documents necessary.

6.2.27. Slovenia

The stakeholders in Slovenia stated that until recently the CBMD was not transposed completely into Slovenian law. Particularly, certain exemptions and possibilities to waive the drafting of certain documentation were not foreseen in the Slovenian legislation until recently. Moreover, it was expressed that the competent courts are currently lacking practice with regard to the interpretation and application of the legal texts concerning CBMs.

The stakeholders, moreover, stated that clients eliminated the possibility of executing a CBM in the planning phase due to the complicated procedure. A major issue raised was that obtaining the consent of the creditors was seen as time-consuming and the possible re-registering of collaterals, such as mortgages, was seen as financially burdensome and time-consuming. Further, minority shareholders could prove to be a minor issue, but mostly their shares are acquired in advance to avoid the problem. Also, the valuation of assets and liabilities is in some cases leading to discrepancies, but are dealt with on a technical level during the merger process. Another issue indicated was that different taxation regimes applicable to the companies involved in

the transaction are preventing the execution of CBMs in some cases, since national tax authorities treat the asset transfer differently, which could result potentially in a capital gain tax.

Employee participation was also indicated as a major issue, especially when employees are to be transferred to a different jurisdiction or if the employees refuse to be transferred. Especially the differences of the applicable laws in each jurisdiction in this regard are regarded as obstacles. On this matter, more substantive guidelines, such as a standardized severance package regime, would be regarded as improvement by the contacts in Slovenia.

Another issue indicated was the fact that requirements posed by the national registries vary considerably among the jurisdictions. Yet, this issue was not regarded to affect the CBM procedure as such in its substance to deter the parties from implementing the merger.

Overall, it was indicated that the problems indicated by our contacts do not differ considerably from the problems encountered in domestic merger procedures.

As a beneficial aspect, it was indicated that prior to the transposition of the CBMD, no cases of CBMs were implemented and the Directive has given companies the opportunity to exit the market without having to complete the formal dissolution requirements under national law.

As to the costs, it was noted that no court fees are paid in the process before the court register. The overall costs vary on a case-by-case basis but should not exceed 10.000 EUR to 50.000 EUR in total, which includes the costs for notarial deeds, the audit procedure if applicable, and the translation of the required documents. It was indicated, however, that these costs are comparable with costs for purely domestic mergers.

The national registry indicated regarding the communication between the registries that there are no problems so far. The language problems are addressed by issuing a certified translated document which is sent by the Slovene registry to the foreign registry. Further, the communication is conducted without a special format by regular letter.

6.2.28. Spain

According to our stakeholders in Spain, while discussing the major difficulties which have been encountered while conducting CBMs according to the CBMD, it has been stressed that the current legislative regime is very positive when compared with what was there before. CBMs had been carried out with France and Belgium before this

regime was enacted, and according to their experiences, it was a "nightmare" due to the absence of a regime regulating the process. This situation can currently be observed when attempting to carry out CBMs outside of the EU, for example with Brazil. At least under the terms of the CBMD it was stated that the Member States "speak the same language" and the CBMD has made the process clearer and easier. However, a further effort of harmonization of the national applicable laws would be welcomed.

The following main difficulties were reported by our stakeholders:

While it is true that the legislative program of the different Member States regarding CBMs has been aligned, procedures undertaken during a CBM are still diverging and the merger always has to comply with the maximum requirements of the Member States involved. For example, the difference between a merger plan and a merger agreement is given as a divergent when it comes to a CBM between Spain and Germany, or, in general, there is little agreement as to what has to be published where. More consistency is desirable, particularly when it comes to CBMs with the UK.

There are numerous difficulties with the rights of appraisal for minority shareholders. These are costly and can lead to capital reductions, of between 20 to 30 percent. That means there have to be reserves for that. One case has been reported where these rights were not invoked but where this had been a major concern in whether to undertake a CBM.

The accounting date is not properly aligned between Member States, which has also tax implications. In Spain this date cannot be chosen.

The effect of mergers on contractual relations in terms of universal succession is problematic. If the law is different from that of the absorbing entity difficulties can arise.

A further issue expressed was the fact that although the rules applicable to CBMs are similar after the transposition of the Directive, they are not exactly identical. In Spain the problem is regarded to be particularly serious because the Spanish transposing legislation refers back to the general regime and applies to all companies involved in the merger. This leads to mandatory requirements imposed on the foreign entity in certain cases that were not imposed by the national legislation applicable to the foreign entity participating in the CBM. Further, this creates particular difficulties to reconcile the time limits applicable between the jurisdictions.

According to our contacts, the task of the national authorities, in the Spanish case the mercantile registries, should be limited. In cases where the registry is competent for the absorbed company, they impose and validate requirements specific to the merger,

such as resolutions, public disclosure, and opposition, with a view to issuing a certificate of compliance with acts and formalities by the company located in their jurisdiction. In cases where the registry is competent for the absorbing company, the registry should require the formalization and implementation of the merger as regards the company situated in their jurisdiction as well as compliance with national requirements and with regard to the foreign company only a duly authenticated document evidencing compliance with the requirements of its own jurisdiction. The CDTMs should be deposited and verified in any case by the competent registry. Thus, the registry should only verify that the formalities and rules applicable in the registry's jurisdiction are fulfilled by the company located within its jurisdiction and should not impose any obligation on, or require any information from, the other companies taking part in the CBM going beyond a document equivalent to Spain's pre-merger certificate. Such parallel track approach to CBMs would be regarded more feasible to execute the process in an efficient manner.

Employee participation has not been regarded as an issue from the Spanish perspective. It has only played a role in mergers with German companies (as an absorbing company). There it led to a particular delay, but even in this case it is more of a concern for their German colleagues.

In the experience of our contacts, the process for completing an intra-group merger, wherein 100 percent of the share capital of the absorbed company is held by the absorbing company and no employee participation is in place, can be completed within three month. Yet, it was noted that such intra-group CBMs can sometimes be part of a wider and intricate reorganization and therefore take longer.

On the subject of seat transfers, it was stated that the CBMD has been used in a particular case regarding tax planning with the Netherlands. Seat transfers can also be used for listing purposes. It was stated that a directive on seat transfers would particularly help, in order to institute a clear regime regarding the rights of minority shareholders.

Finally, the motivations for CBMs were given as banks absorbing subsidiaries for easier Basel II and Basel III compliance, capital requirements for insurance companies, or just for a simplification of the corporate structures. Tax-driven mergers also occur, as well as mergers with the intention of a takeover or for the creation of a joint venture.

The costs noted are translation costs, which can be significant; costs for announcements; costs for the registration process, which are not any more costly than in the case of domestic mergers; and the notification of employees. Overall, however, the costs are not seen as obstacle for the implementation of CBMs.

6.2.29. Sweden

On a general note, our contacts expressed that the Directive has been used very limitedly in Sweden. While the option of using a CBM for intra-group restructurings was considered, negative tax implications and uncertainties with regard to the duration of a CBM have discouraged the application of the Directive in practice.

Regarding the tax difficulties, it was reported that Swedish tax legislation contained or entailed certain unclear provisions for a long period after the transposition of the company law rules.

The objective of changing the seat of a company has not been indicated as a possible driving factor of possible CBMs.

Regarding the communication between the registries, the national registry, the Swedish Companies Registration Office, on this subject expressed that it would be desirable that the foreign authorities issue the merger certificate and notification of registered merger in English, or at least translate them into English to overcome language difficulties. The communication is thereby conducted by means of regular mail.

6.2.30. United Kingdom

It was indicated by our UK contacts on a general note that the CBMD introduced for the first time a mechanism for the transfer of all assets and liabilities and provides for a mechanism for the absorbed company to be dissolved without going into liquidation. Further, the previous regime was regarded as time-consuming and involving burdensome disclosure obligations. It was also noted that a CBM is tax-neutral in the UK for merging companies having the registered office in the UK, which is seen as beneficial.

Further, the automatic dissolution of the absorbed company with an automatic transfer of all assets and liabilities increases the legal certainty and reduces the administrative burden for the companies involved since no liquidator has to be appointed. This was particularly regarded as beneficial, also in terms of a decreased financial burden and a more time-efficient procedure. However, certain contractual rights and obligations cannot be transferred without consent of the contractual counter-party, such as agreements containing prohibitions or restrictions on a merger.

The first difficulty indicated by our contacts concerned universal succession, on which it was noted that in certain parts of continental Europe, for example Germany, there is the concept of "universal succession," or *in universum jus*, contained within their legislation, whereby the resulting successor is treated in the same way as the party to

which it succeeds, which means that there is no requirement to seek consent to the assignment of contracts or run the risk of such contracts being terminated in accordance with their terms by the relevant third parties. The UK is not familiar with this concept and due to a lack of clarity multimillion EUR deals have been dropped on this point alone. Particularly the first and second issue raised could also be solved on the EU level by changing the CBMD. In the case of universal succession this would mean that a CBM was binding on third-parties as it is at the moment in UK law. The lack of clarity on this point in the CBMD is a major obstacle to large-scale cross-border restructurings.

Regarding general meetings, it was stated that under UK law the approval of shareholders in a general meeting is not required in the case of a transferring company involved in a merger by way of a merger by absorption of a wholly owned subsidiary. However, because so many provisions in the CBMD relate to the pre-merger acts and formalities for the cross-border merger are pegged against the general meeting, and because the courts have no discretion in relation to the provisions relating to pre-merger acts and formalities and "must not make an order unless the requirements of regulations 7 to 10 and 12 to 15 (pre-merger requirements) have been complied with" (Regulation 6(2)), in practice, even in a merger by absorption of a wholly owned subsidiary, one has to hold a general meeting, which elongates the timetable for the pre-merger procedures.

To solve this, a different reference point is needed other than a general meeting. This could be done directly by adding to the CBMD.

Another issue was indicated regarding the absence of harmonized rules on creditor protection in the EU. This is also related to timing periods. The total timing periods are more or less the same in all the Member States. However, within the timing periods, there are differences and these should be harmonized. As of now, the UK transposing legislation which allows creditors to seek a meeting has not been used. Yet, the general possibility of creditors invoking this provision gives rise to significant uncertainties and thus affects the CBMs, since the merging companies have to consider which creditors might object to the CBM.

Another major obstacle indicated is the fact that there is no fast-track route to implement a CBM for group reorganizations in which the transferee and transferor are wholly owned subsidiaries and have no creditors. While the transposing legislation pursuant to the CBMD seem to permit the avoidance of the two-month waiting period where no members' or creditors' resolution is required in theory, in practice the competent authority cannot sanction the avoidance due to the lack of an express

exemption. As a solution, it was suggested to introduce such a fast-track route for implementing group reorganizations under the CBMD.

A further minor issue indicated was that due to the designation of the English High Court as the competent authority, the execution is slower and more expensive compared with other countries where the notary public was designated as competent authority, which is the case for instance in Italy. This stems from the fact that notaries public have historically viewed their role in effecting transactions as more limited in scope than the English courts, which treat the merger as akin to an English scheme of arrangement. As a solution to overcome the issue, it was suggested to hear the process by a registrar instead of a judge, safe for difficult circumstances.

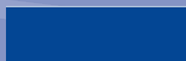
Another obstacle indicated was the fact that despite the intention of the Directive to allow for a transfer of all assets and liabilities, in CBMs involving financial institutions the domestic law (e.g., Part VII of the Financial Services and Markets Act 2000 in the UK) may require the transfer of insurance portfolios to be structured separately. This leads to a situation in which portfolio transfers have to be carried out alongside the CBM and thus impact the transaction process and timeline.

A final issue reported by our stakeholders in the United Kingdom related to the liability of independent experts. Independent experts are particularly nervous about the new liability risks that their opinions pose on them. This is particularly the case because documents are put into the public domain and are not just given to the board as an opinion. In Austria, independent experts even have to appear at the shareholders meeting, based on Austrian legislation, and the independent expert even has a liability towards people he does not have a contract with.

With regard to the timeframe, it was indicated that it takes less than a year to execute a CBM if the merging companies are unregulated entities. From experience, group reorganizations take from between 3 to 5 months.

The national registry, the Companies House, expressed that with regard to the communication between the registries, formal letters are the general mode of communication, although notifications by email are also accepted. Yet, letters from overseas registries often go astray and never arrive at Companies House, which prolongs the process. It was therefore suggested to improve the communication between the registries by means such as e-communication.

Detailed Country Reports



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1. Transposition of the Cross-Border Mergers Directive into Austrian Law

The CBMD was transposed into Austrian national law on December 15, 2007,[1] by the Corporate Law Amendment Act 2007 (*Gesellschaftsrechts-Änderungsgesetz* 2007, or *GesRÄG* 2007). This Act has introduced the new EU Merger Act (*EU-Verschmelzungsgesetz*, or EU-VerschG), which transposed most of the CBMD, and amended the Limited Liability Companies Act (*Gesetz über Gesellschaften mit beschränkter Haftung*, or *GmbH-Gesetz*), the Stock Corporation Act (*Aktiengesetz*, or AktG), and some other laws. Furthermore, the *77. Bundesgesetz, mit dem das Arbeitsverfassungsgesetz, das Bundesgesetz über die Post- Betriebsverfassung und das Arbeits- und Sozialgerichtsgesetz geändert werden*, amended among others the Labor Constitutional Act (*Arbeitsververfassungsgesetz*, or ArbVG), and has the purpose of transposing Article 16 CBMD. In its technique, the law mirrors the merger-specific provisions pertaining to European companies (SEs)[2].

The Austrian laws applying to cross-border mergers are not due to be replaced or modified, and there were no material reforms in respect to these laws after the transposition. Directive 2009/109/EC regarding certain reporting and documentation requirements in the case of mergers and divisions (*Spaltungen*) has been implemented in the Austrian law, though.

Prior to the transposition of the CBMD, domestic legislation did not govern cross-border mergers.[3] However, cross-border mergers (corporate restructurings with a similar effect) were possible to some extent on the basis of the Transformation Act (*Umwandlungsgesetz*, or UmwG) and by referring to the European principles of free movement, but only the CBMD has introduced a practical track and legal certainty.[4]

Cross-border mergers falling within the scope of the EU Merger Act are exclusively governed by this law and cannot be implemented on the basis of the UmwG.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first definition to which kind of mergers the Directive applies.

[1] G. Gassner, A. Hable and H. Lukanec, 'Austria', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 82.
[2] G. Gassner and A. Hable, *Kurzkommentar zum EU-Verschmelzungsgesetz* (Verlag Österreich, 2007).
[3] T. Talos and M. Winner (eds.), *EU-Verschmelzungsgesetz inkl Arbeitnehmermitbestimmung* (Verlag Österreich, 2002).
[4] See e.g. C. Mader, 'Die grenzüberschreitende Verschmelzung am Beispiel Deutschland – Österreich', 4 *RWZ* (2001).

The scope of the national law is in line with the CBMD and does not go any further.[5]

Cross-border mergers outside of the scope of the Directive are not expressly provided for by the EU Merger Act; the new rules, however, on cross-border mergers from an Austrian legal perspective also apply to existing European Companies (SEs).[6]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability companies'.

The national law contains a definition similar to that of the CBMD (Article 1§1(1) EU Merger Act).

b. List of companies that can carry out a cross-border merger under Austrian law

The EU Merger Act specifically addresses Austrian stock corporations (*Aktiengesellschaften*) and Austrian limited liability companies (*Gesellschaften mit beschränkter Haftung*), and also applies to European companies (SEs) that are already established. It does not apply to the formation of a (new) SE by means of a merger.[7] Austrian law does not restrict cross-border mergers to companies of the same legal form but permits, for instance, the merger of a stock corporation with a limited liability company and vice versa.

c. General transposition of Article 2(2) CBMD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Austrian national law in the essence follows the CBMD and is in line with its provisions. It does not have any diverging rules, although it does not have an express equivalent to the definition of an up-stream merger (Articles (2)(2)(c) CBMD). Further, it should be observed that under Austrian law a cross-border merger does under certain circumstances, for instance, in case of a merger of sister companies, not require the issuance of shares or securities. The definition of "merger" in the Directive seems to allow this only in case of an up-stream merger into the direct sole shareholder. The definition of "merger" in Austrian law is set forth in Section 219 Stock Corporation Act and Section 96 Limited Liability Companies Act.

[5] Sec. 1(1) EU Merger Act (Austria).
[6] G. Gassner, A. Hable and H. Lukanec, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 82.
[7] G. Eckert, in S. Kalss, *Verschmelzung – Spaltung – Umwandlung* (Manz'sche Verlags- und Universitätsbuchhandlung, Vienna 2010)

d. Rules on the cash payment

Austria does not follow the CBMD's rules on the cash payment and does not allow cash payments exceeding 10 percent of the nominal value.

Austria, pursuant to its legislator, is not obliged to allow cross-border mergers that include a cash payment of more than 10 percent of the nominal value; instead, an Austrian company should follow Austrian law (Articles 4(1)(b) and 4(2) CBMD). Hence, if an Austrian company results from a cross-border merger, an additional cash payment of more than 10 percent of the nominal capital equal to the shares granted by the company is not permitted. If a cross-border merger involves an Austrian transferring company and if the national law of the non-Austrian company resulting from the merger allows for a cash payment that is more than 10 percent, this should be permitted under Austrian law; however, the EU Merger Act is not distinct on this second aspect.[8]

e. CBMs and companies in liquidation

Austrian law does not expressly provide whether companies in liquidation may participate in (domestic or cross-border) mergers. It appears to be the prevailing view that a transferring company in liquidation may in principle participate in a merger,[9] but an acquiring company in liquidation may not.

f. Geographical scope

The EU Merger Act applies only to mergers with EU/EEA companies with limited liability (*Kapitalgesellschaften*).

Austrian law did allow before the implementation of the EU Merger Act, and still allows, cross-border mergers (corporate restructurings with similar effect) with companies formed outside of the EEA or formed within the EEA but having its registered office, central administration, or principal place of business outside of the EEA (in short, non-EEA companies) on the basis of the Transformation Act. Relevant case law in this context is provided by the Austrian Supreme Court (*6 Ob 283/02 i*). A conclusion in the legal literature, though, is that while cross-border mergers where legally possible already before the CBMD, they were practically difficult to put in practice.[10] Further, in legal writings an argument is made that in particular the rules for creditor protection pursuant to the EU Merger Act should be applied by analogy to cross-border transformations pursuant to the Transformation Act.

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[8] G. Gassner, A. Hable and H. Lukanec, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 83; See also the official commentary ("*Erläuterungen*") to the EU Merger Act.

[9] S. Frotz and A. Kaufmann (eds.), *Praxiskommentar Grenzüberschreitende Verschmelzungen* (LexisNexis ARD ORAC, 2013).

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

National law does not expressly govern seat transfers, be it transfers of the corporate and/or administrative seat to and from Austria,[11] but landmark EU case law applies (*Cartesio*, *Centros*, *Überseering*).

There is currently no legal basis for cross-border divisions and other cross-border restructurings of limited liability companies, other than the EU Merger Act and the Transformation Act. European Court of Justice case law regarding the freedom of movement (as, for instance, in *Cartesio*) has to be considered.

The Reorganization Tax Act (*Umgründungssteuergesetz*, or UmgrStG) provides rules for the tax treatment of cross-border mergers, divisions (*Spaltung*), and other restructurings.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) CBMD allows cash payments to exceed 10 percent. However, at the same time, according to Articles 4(1)(b) and 4(2) of the Directive, Austria can prohibit cash payments exceeding 10 percent for mergers where the resulting company is an Austrian company. In such case, the relevant section of Austrian national law is Section 224(5) Stock Corporation Act, which limits cash payments to a maximum of 10 percent of the nominal capital attributable to the shares granted by the Austrian company. By way of the reference in Section 3(2) EU Merger Act, this rule also applies to cross-border mergers.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Austrian national law is in line with Article 3(2) CBMD. The EU Merger Act does not apply to cooperative societies.[12]

[10] See e.g. H-C. Kepplinger, 'Grenzüberschreitende Verschmelzungen, zulässig – aber undurchführbar?', *wbl* (2000), p. 485.
[11] F. de Sousa, 'Company's Cross-border Transfer of Seat in the EU after Cartesio', *Jean Monnet Working Paper* 7 (2009).

c. General transposition of Article 3(3) CBMD

Article 3 (3) CBMD deals with the position of investment companies.

The EU Merger Act does not apply to cross-border mergers of collective investment companies and has adopted Article 3(3) CBMD almost on a word-for-word basis.[13]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) CBMD has no equivalent in the EU Merger Act.

b. Opposition by national authorities in Article 4(1)(b)

Article 4(1)(b) of the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) of the Directive has not been transposed into Austrian law; it should be observed, though, that the Companies' Register Court, which is a public authority, has to scrutinize and approve a cross-border merger.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member States with the option to adopt provisions in order to protect shareholders, creditors, debenture and security holders.

With respect to creditors of an Austrian transferring company, Section 13(1) EU Merger Act applies: The protection starts from the date of publication of the common draft terms.[14] A possible time limit for the procedure regarding the protection of creditors is two months.[15] The procedural step that may be taken by the company's creditors is that if the cross-border merger involves an Austrian transferring company, they may request security for already-existing claims not yet due as of the requesting date, which must take place within two months after the terms of the merger are published (Section 13(1) EU Merger Act). To do so, the creditors must prove that the merger may endanger the settlement of the already-existing claim or claims; this is, however, not required if the share capital and the designated reserves of the acquiring company are lower than share capital and the designated reserves of the transferring

[12] Official commentary ("*Erläuterungen*") to the EU Merger Act.
[13] Sec. 4 EU Merger Act.
[14] Sec. 13(1) EU Merger Act

company. The pre-merger certificate can only be issued if the creditors' claims were settled or if the creditors were granted security. Creditors can exert this right only if they prove that the merger threatens their claims.[16] This particular ex-ante protection of creditors only applies to cross-border mergers and not domestic mergers.

With cross-border mergers where the Austrian entity is the acquiring entity, the following applies (Section 3(2) EU Merger Act in conjunction with Section 226 Stock Corporation Act): Creditors shall be given security for their claims inasmuch as they cannot demand satisfaction, provided that they give written notice to this effect within six months following the publication of the registration of the merger. Creditors shall, however, be entitled to this right only if they can submit credible evidence that the fulfillment of their claims will be threatened by the merger. Creditors who, in the case of insolvency proceedings, have the right to preferential satisfaction from a covering fund established by law for their protection and supervised by the public authorities shall not have the right to demand such security. Special rules apply for the holders of debenture rights or bonds or similar rights.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Article 4(2) CBMD has been transposed into the national law.[17]

First, minority shareholders holding more than 25 percent of the share capital can normally block the cross-border merger by voting against it.

Further, in a nutshell, minority shareholders of an Austrian company, which is the transferring company in the cross-border merger, have an exit right against appropriate cash compensation. The cash compensation offered must be contained in the draft terms of cross-border merger (Section 5(3) EU Merger Act). In order for the procedure to start, a minority shareholder is required to expressly object to the approval of the shareholders on the cross-border merger and must have his or her objection recorded in the minutes of the respective shareholders' meeting (Section 10(1) EU Merger Act).[18] Within a period of one month, the objecting shareholder must declare in writing to accept the offered cash compensation. The procedural steps regarding the protection of minority shareholders begin with the objection of the minority shareholder and its recording in the minutes. Further, it is required that such shareholder is a shareholder of the Austrian transferring company from the point in

[15] Ibid.
[16] Sec. 226 AktG, Sec. 14(1) EU Merger Act.
[17] Sec. 10(1) EU Merger Act.

time when the shareholders' meeting approved the cross-border merger through to the point in time when the exit right is exercised (Section 10(1) EU Merger Act).[19] Within a period of one month, the shareholder shall declare to accept the offer. The pre-merger certificate of the Austrian court shall be issued only if it is ensured that there are sufficient funds to pay the cash compensation to the minority shareholders.

In addition, minority shareholders, who have their objection against the merger recorded in the minutes, may initiate court proceedings to have scrutinized the appropriateness of the offered cash compensation (Section 11 EU Merger Act).

With domestic mergers, a similar concept (i.e., exit right with cash compensation) exists in case of mergers between companies of different legal forms (Section 234b Stock Corporation Act).

With domestic mergers the concept is that shareholders may petition to the court to have the share-exchange ration scrutinized (and as the case may be amended) in court proceedings pursuant to the Stock Corporation Act. These proceedings require that the merger has become legally effective and, hence, provide (only) ex-post protection to the minority shareholders.

e. The protection of employees in Article 4(2)

Austria did not opt to provide specific rights to employees in the EU Merger Act that go beyond the scope of Article 16 CBMD.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the required documents, such as the management report. Article 5 CBMD provides for certain particulars that have to be included in the merger plan.

Articles 5(a) through (l) CBMD have been transposed into Austrian national law under Sections 5(1) and 5(2) EU Merger Act. Regarding Article 5(d), the CDTMs require "the likely repercussions on employment" (as in the CBMD) and, in addition, "specifically for the employees of the merging companies, the terms of employment and the general employment situation" (Section 5(2)(4) EU Merger Act).

[18] G. Gassner, A. Hable and H. Lukanec, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 96.
[19] Sec. 10(1).

The CDTMs have to include the cash compensation offered to minority shareholders, if any (Section 5(3) EU Merger Act).

The CDTMs shall be concluded as an (Austrian) notarial deed (Section 5(5) EU Merger Act).

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Austria has transposed Article 6(1) CBMD into national law and is in line with the CBMD.[20]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed into national law.[21] Companies can post the CDTMs on a central electronic platform maintained by the court system (*Ediktsdatei*). Posting them on the company website is not sufficient.

The address of the platform is edikte.justiz.gv.at. The relevant documents may be found under the subheading of "*Verschmelzungsverträge und Spaltungspläne*" ("Merger contracts and De-merger plans").

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the Member State.

Article 6(2) CBMD has been transposed into Austrian national law. A reference to the filing of CDTMs shall be published in the respective announcement bulletin(s) of the Austrian company. Such publication needs to include the information set forth in Article 6(2) CBMD. The announcement bulletin is normally the *Amtsblatt zur Wiener*

[20] Sec. 8(1), (2a) EU Merger Act; Sec. 221a para. 1 AktG.
[21] Sec. 221a(1a) for the amendment of Art. 6(1) and 231 AktG for amendment of Art. 15(2).

Zeitung.[22] Alternatively, the publication can be made in the *Ediktsdatei* (Section 8(2a) EU Merger Act).

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed into Section 6 EU Merger Act. In addition to the particulars provided in Article 7 CBMD, if the Austrian company is the transferring company, the report shall include a statement on the nominal capital (including restricted capital reserves) of the companies participating in the cross-border merger (Section 7(2) EU Merger Act).

The management report shall be provided to the employees' representation body, or if such is not existing, to each employee, at least one month prior to the shareholders' meeting deciding on the cross-border merger (Section 6 EU Merger Act).

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD has been transposed into Section 7 EU Merger Act (in conjunction with Section 220b Stock Corporation Act and Section 100(2) Limited Liability Company Act.) The report is not required if all shareholders waive it in writing.

b. The independent expert

Generally, certified auditors (*Wirtschaftsprüfer*) or audit firms (*Wirtschaftsprüfungsgesellschaften*) are qualified to serve as an independent expert. Strict rules apply regarding their independency and on certain other personal qualifications and exclusion reasons.

[22] Sec. 8(1) EU Merger Act.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD is addressed in Austrian law (Section 3(2) EU Merger Act in conjunction with Section 220b Stock Corporation Act).

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed into Austrian national law with no diverging rules.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Under Austrian national law, to prepare the report, the auditor may request from the merging companies any information deemed necessary.[23]

Companies are liable to cooperate with the auditor. The relevant provision is in particular Section 272 UGB (*Unternehmensgesetzbuch*, Business Code).

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed into Austrian national law. If all shareholders of all companies (i.e., including the non-Austrian company) participating in the cross-border merger waive, either in the shareholders' meetings (by declaring the waiver and having it recorded in the minutes) or in writing, the expert report, it is not required (Section 7 EU Merger Act and Section 232(2) of the Stock Corporation Act).

It shall be noted that despite the clear wording of the relevant sections of Austrian law, relevant legal writers argue that, from an Austrian perspective, the waiver of all shareholders of the participating Austrian company should be sufficient.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition

[23] G. Gassner, A. Hable and H. Lukanec, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 88.

of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

The expert report is not required when a company is absorbed by a wholly owned subsidiary (Section 3(2) EU Merger Act in conjunction with Section 232(1) Stock Corporation Act). However, Austrian national law is silent about the transposition of Article 15(2) CBMD regarding the holding of 90 percent or more of subsidiary shares.

h. Further exemptions in Austrian law

There are no further exemptions in Austrian law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed into the national law under Section 3(2) EU Merger Act in conjunction with Section 221(1) Stock Corporation Act and Section 9 EU Merger Act.[24]

a. Procedural requirements including majority, quorum, timing and notarization

Procedural requirements include that an Austrian company engaging in a cross-border merger must hold a shareholders' meeting; a notary must be present; and the minutes have to be taken as a notarial protocol. The decision requires a majority of votes (50 percent) (*Stimmenmehrheit*) and a majority of the nominal capital represented in the meeting (75 percent) (*Kapitalmehrheit*) at the time of the passing of the resolution. The articles of association may provide for higher majorities and further requirements (Section 3(2) EU Merger Act in conjunction with Section 221(2) Stock Corporation Act).[25]

b. Amendment of CDTMs by shareholders

The shareholders may in principle only accept or reject the CDTMs and the merger.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

[24] Ibid., p. 91.
[25] Ibid., p. 92.

The approval of the shareholders' meeting of the surviving company (if it is the Austrian company) may be omitted if (i) at least 90 percent of the nominal capital of the transferring company is held by the surviving company (own shares of the transferring company or other shares that belong to another party on account of the transferring company shall be deducted from the nominal capital), or (ii) if shares to be granted due to the merger do not exceed 10 percent of the nominal capital of the surviving company. In the event the nominal capital of the receiving company shall be increased in the course of the transposition of the merger, the increased amount of the nominal capital shall form the basis of such calculation (Section 231(1)(2) Stock Corporation Act).[26]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

The same applies under Austrian law; pursuant to Section 9(2) EU Merger Act, the approval of the shareholders' meeting of the transferring company is not required, if the acquiring company holds all shares in the transferring company.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) CBMD have been transposed into Austrian national law.

b. National authority has been designated to scrutinize the legality of the merger

The Companies' Register Court competent for the Austrian companies participating in the merger has been designated as the authority to scrutinize the legality of the merger.[27]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for

[26] Ibid., p. 91.
[27] G. Gassner, A. Hable and H. Lukanec, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 93.

such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD has been transposed into national law (i.e., Section 12 EU Merger Act) and applies only if all companies registered in another Member State agree.[28] The possibility of suing remains. Particularly in Austria and Germany, the procedure of scrutinizing the share exchange ratio takes place after the merger.[29]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed into Austrian national law under Section 15 EU Merger Act, which is in line with the CBMD.[30]

b. The national authority has been designated to scrutinize the legality of the merger

The Companies' Register Court competent for the Austrian acquiring company has been designated as the national authority to scrutinize the legality of the merger.[31]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed into Austrian national law in Section 3(3) EU Merger Act.

b. Date the cross-border merger takes effect

If the company resulting from the cross-border merger is an Austrian company, the cross-border merger becomes legally effective upon its registration in the Austrian Companies' Register (*Firmenbuch*).[32]

[28] Sec. 12 EU Merger Act.
[29] See also the commentary to the EU Merger Act and the Gesellschaftsrechtsänderungsgesetz 2004 transposing regulation 2157/2001/EC of 8 October 2011 on the Statute for European company (SE).
[30] G. Gassner, A. Hable and H. Lukanec, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 93.
[31] Ibid., p. 93.
[32] Ibid., p. 84.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

After having scrutinized whether all pre-merger formalities have been properly completed, the Companies' Register Court shall register (i) the intended cross-border merger (if the Austrian company is the transferring company) or (ii) the completion of the cross-border merger (if the Austrian company is the acquiring company).

If the Austrian company is the acquiring company, the competent Companies' Register Court shall notify the registry of the non-Austrian company that the cross-border merger has taken effect (Section 15(4) EU Merger Act).

The decisions of the court are also published in the *Ediktsdatei* (see before) and the official gazette, *Amtsblatt zur Wiener Zeitung* (Section 10 Business Code). [33]

b. Transposition of Article 13 second sentence

If the Austrian company is the acquiring company, the competent Companies' Register Court shall—in line with the CBMD—notify the registry of the non-Austrian company that the cross-border merger has taken effect (Section 15(4) EU Merger Act).

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Under the EU-Merger Act (in conjunction with the Limited Liability Companies Act and the Stock Corporation Act) the consequences of a cross-border merger are the same as the consequences of a domestic (Austrian) merger. Therefore,

(1) all assets and liabilities, including rights and obligations, of the transferring companies are transferred to the company resulting from the merger;

(2) the transferring companies are dissolved without liquidation;

(3) Austrian transferring companies are de-registered in the Austrian Companies' Register as a result of the merger, and in case of a merger by new incorporation, a new receiving company is established and registered;

(4) the shareholders of the companies that cease to exist normally become

shareholders of the company resulting from the merger.[34]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a wholly owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been transposed into Austrian national law with no diverging rules.[35]

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The provisions regarding the independent expert report and "necessary documents for scrutiny" have been transposed into Austrian national law.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Austria does have a system of employee participation. Employee participation is particularly relevant regarding the right of employees to appoint one-third of the company's supervisory board members, if a supervisory board is established.

In a nutshell, a work council (*Betriebsrat*) may be established at any business with five employees or more. Section 96 of the Labor Constitutional Act (*Arbeitsverfassungsgesetz*, or ArbVG) sets forth a list of certain very distinct

[33]Ibid., p. 95.
[34]Ibid., p. 83-84.
[35] Sec. 5(3) EU Merger Act.

management measures requiring approval of the *Betriebsrat*. Under certain circumstances, it also has to be heard before dismissing employees. It has the right to monitor the enforcement of legal rules pertaining to employee protection (Section 89 ArbVG) and generally to intervene in the interest of the employees (Section 90 ArbVG).

Another important cornerstone of the industrial relations system in Austria is the existence of collective bargaining. This bargaining is normally conducted between representatives of the industry (not the individual company) and labor unions (again, representing industries, not workers of a specific company), and are legally binding.[36] The legal basis for this framework is outlined in Sections 1 through 21 ArbVG.

National rules apply for a merger-formed company registered in Austria, unless:

(1) one or more of the merging companies have employed an average of more than 500 employees during the six months leading up to the merger terms' publication, and an employee participation system is already in place; or

(2) this level of employee participation is not mirrored in Austrian law; or

(3) employees of the merger-formed company in another Member State are not provided with the same employee participation rights as company employees in Austria.[37]

In such situations, Chapter VIII Labor Constitutional Act, which addresses employee participation, applies. If a merger is an absorption that creates a European company, the rules for employee participation in that company are relevant.[38]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) CBMD has been transposed into Austrian law. If the merger leads to a reduction of employee participation rights, and the exceptions of Article 16(2) CBMD do not apply, then the rules applicable to the company before the merger continue to apply for the duration of five years starting from the day of the merger (Section 262 ArbVG).

[36] R. Dittrich and H. Tades, *Arbeitsrecht* (Manz, Wien 2012).
[37] Art. 258 ArbVG.
[38] G. Gassner, A. Hable and H. Lukanec, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 99-100.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16 (1) CBMD.

These exemptions have all been transposed into Austrian national law.[39]

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

In Austrian national law's transposition of Article 16(3)(e) CBMD, the percentage required has been raised to one-third, in line with CBMD.[40]

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a), (b), and (c) have been transposed through an amendment of the Labor Constitutional Act.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has been transposed into national law and does not have diverging rules.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Austrian national law. The Limited Liability Companies Act was amended to allow for an employee participation system in line with the CBMD (Section 29(1)(5) GmbHG). Thereby, all legal forms subject to the CBMD allow for the exercise of participation rights.

[39] Sec. 258(1) ArbVG.
[40] Sec. 260 ArbVG.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation isprotected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into Austrian law, but Austrian national law goes beyond that by transposing a five-year rule (Section 262 ArbVG).

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Austrian national law. Pursuant to Section 230(2) Austrian Stock Corporation Act (which applies to cross-border mergers by way of conjunction with Section 3(2) EU Merger Act), as of the registration of the merger in the Austrian Companies' Register, potential defects of the merger do not have any effect on the merger. Further, after such registration, it is no longer possible to petition either for challenging the merger decision or declaring it null and void.[41] Legal commentators discuss whether there could be exemptions from this general rule, e.g., in case of very fundamental defects.

1.18. Additional

a. Valuation rules

In Austrian national law, there seems to be a right to choose the valuation rule. The valuation rule applicable will usually be the stock or market value. If this is not available, then net values are used.[42] The Austrian Supreme Court of Justice have made it clear that stock prices alone cannot be the sole factor in order to determine the value of a firm.[43]

b. National case-law on provisions transposing the CBMD

The CBMD (respectively, the EU Merger Act) plays a very minor role in the Supreme Court case *OGH 6 Ob 226/09t*, as the Supreme Court decided that the disputed merger was not a cross-border merger within the meaning of the EU Merger Act.

[41] Ibid., p. 84.
[42] R. Migglautsch, *Verlustbehandlung bei grenzüberschreitenden Verschmelzungen im Verhältnis Österreich/Deutschland* (Grin Verlag, Nordtersted 2010).
[43] See e.g. OGH 20.1.2009, 4 Ob 188/08p, OGH 9. 3. 1999, 4 Ob 353/98k.

c. Language requirements

Austria has no specified language requirements. The notification of merger (if the resulting company has its seat outside of Austria or a German-speaking country) has to be formally translated into German in order to be submitted to the register (Section 14(5) EU Merger Act). Generally, in practice, documents to be filed with the Companies' Register Court shall be prepared in the German language or be translated in order to allow the court to scrutiny the documents.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The procedure for a domestic merger in Austrian national law is, by and large, the same as the procedure followed in cross-border mergers.

b. Comparison

There are no major differences between domestic mergers and the procedure of cross-border mergers.

However, there are certain steps of the procedure that are not required for domestic mergers, such as the scrutiny of the legality of the merger by the commercial court or the management report in case of a merger with a wholly owned subsidiary. Also, some deadlines are different for cross-border mergers, leading inter alia, to more stringent creditor protection requirements.[44]

[44] See e.g. 'Checkliste Verschmelzung nach dem EU-VerschG', in *ecolex* 1/2009, p. 45.

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1. Transposition of the Cross-Border Mergers Directive into Belgian Law

The CBMD has been transposed in Belgium by the Omnibus Act of 8 June 2008, which was transposed approximately six months after the deadline imposed by the CBMD.[1] The amendment was made via introduction of a new Title V-*bis* on cross-border mergers to Book XI of the Belgian Company Code (BCC),[2] in Articles 772/1 through 772/14 of the BCC.

The bill is not due to be replaced, modified, or amended. After the transposition of the CBMD, Directive 2009/109/CE, regarding reporting and documentation requirements for mergers and divisions,[3] was transposed in Belgium by the Act of 8 January 2012. This slightly modified Article 772/7 of the BCC on the conditions of publication of the common draft terms of the merger[4].

Prior to the publication of the CBMD, domestic legislation did not refer to cross-border mergers.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

Regarding the general scope of the Directive, according to Belgian national law, all Belgian companies which are able to participate in a domestic merger are also able to participate in a cross-border merger, except for agricultural companies and (domestic) economic interest groupings.[5]

But if a Belgian company with a legal form not discussed in the CBMD wanted to become involved in a cross-border merger, then the Member State laws of the foreign companies involved must authorize it. If this is not the case, then a cross-border merger may only take place according to the principle of the freedom of establishment confirmed by *Sevic.*[6] This means the introductory provisions and definitions provided

[1] D. Van Gerven, 'Belgium', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 104; J. Vermeylen, S. Demeulemeester and I. Van de Velde, 'Cross-Border Reorganisations in Belgium', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), p. 144; Loi du 8 juin 2008 portant des dispositions diverses, *M.B.*, 16 juin 2008, p. 30529.

[2] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 104.

[3] Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions, [2009] OJ L 259.

[4] A. Tilleux and E. Weemaels, 'Les nouvelles obligations en matière de fusions et de scissions. Le droit des sociétés se prépare à entrer dans le XXIe siècle', *J.T.* (2013), liv. 6511, p.154.

[5] D. Willermain, 'Les fusions transfrontalières de sociétés', *J.T.* (2009), liv. 6363, p. 584.

[6] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* p. 144-145.

by Articles 670 to 672 and 676 BCC are applicable to cross-border mergers provisions (Title V-*bis* BCC).[7]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Belgian law follows the CBMD's definition of the term "limited liability companies."[8]

b. List of companies that can carry out a cross-border merger under Belgian law

Under Belgian law, the new cross-border merger provisions apply to all Belgian companies entitled to a domestic merger, i.e., all companies having legal personality except agricultural companies and (domestic) economic interest groupings. Therefore, public limited companies, private limited companies, partnerships limited by shares, ordinary limited partnerships, general partnerships, cooperative societies with or without limited liability, SEs,[9] and SCEs[10] (Article 670 BCC)[11] are all applicable.

In conformity with Article 3(3) CBMD, Belgian law excludes open-ended investment companies from cross-border mergers but not fixed-capital investment trusts (such as fixed-capital real estate investment companies) (Article 772/1(2) BCC). Cross-border mergers of open-ended investment companies must be conducted according to Articles 37 to 48 UCITS IV[12] and Articles 3 and 4 Commission Directive 2010/42/EU.[13]

Although Belgian law allows a company in the liquidation process to participate in a domestic merger as a company being acquired, as long as shareholder asset distribution has not begun,[14] such a company cannot become involved in a cross-border merger. Bankrupt companies may become involved in a cross-border merger as companies being acquired, if shareholder asset distribution has not begun. The

[7] Exposé des motifs, *Doc. Parl.*, Ch., 2007-2008, Doc. n°1012/001, p. 54-55.
[8] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 144-145.
[9] *Societas Europaea.*
[10] *Societas Cooperativa Europaea.*
[11] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* p. 144-145.
[12] Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), [2009] OJ L 302.
[13] Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure, [2010] OJ L 176/28.
[14] Article 681 BCC; Exposé des motifs, *Doc. Parl.*, Ch., 2007-2008, Doc. n°1012/001, p. 57.

bankruptcy receiver is responsible for the tasks routinely shouldered by the company's management organ during a cross-border merger.[15]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Regarding Article 2(2) CBMD's definition of the term "merger," domestic law addresses the term in Articles 671, 672, and 676, in conjunction with Article 772/1 BCC.

In Belgian law, a merger by acquisition is when one or more companies being acquired are dissolved without liquidation and transfer their assets and liabilities to the acquiring company. The acquiring company issues shares to the previous company's or companies' shareholders and, if necessary, a cash payment that cannot be greater than 10 percent of the nominal value or accounting par value of the issues shared.

A merger that creates a new company involves two or more companies that are dissolved without liquidation and transfer their assets and liabilities to a newly incorporated acquiring company, which then issues shares to the previous companies' shareholders and, if necessary, a cash payment that cannot be greater than 10 percent of the nominal value or accounting par value of the issues shared.

A "simplified merger" involves one or more companies that are dissolved without liquidation and which transfer their assets and liabilities to the acquiring company, which already owns the shares and other securities allowing them voting power at the general assembly of shareholders. There are no more issued shares. In Belgian law, this situation is referred to as "operations treated as cross-border mergers."

These definitions are fairly in line with Article 2(2) CBMD. In contrast, however, Belgian law extends the application of the simplified merger procedure to the situation where the securities and shares representing the capital of the company being acquired are wholly owned by the acquiring company and/or intermediaries of the acquiring company (Article 676(2) BCC).[16]

No diverging rules have been adopted in the national law.[17]

d. Rules on the cash payment

Belgian national law follows Article 3(1) CBMD regarding cash payment. A cross-border merger is possible even if the cash payment exceeds 10 percent of the nominal value or of the accounting par value of the surviving company's securities or shares, as long as one of the participating company's Member States allows so (Article 772/2 BCC).

[15] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* p. 145-146; Exposé des motifs, *Doc. Parl.*, Ch., 2007-2008, Doc. n°1012/001, p. 57; D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p.585.
[16] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* p. 147.

Additionally, under Belgian law, mergers involving such a cash payment cannot benefit from the rules applicable to cross-border mergers. Therefore, if a foreign company's national law allows a cash payment of greater than 10 percent, then a Belgian company may also participate in this practice; if a foreign company's national law does not allow this, the cross-border merger can only benefit from the CBMD rules if the cash payment is not greater than 10 percent of the nominal value or accounting par value of the surviving company's securities or shares.[18]

e. CBMs and companies in liquidation

Belgian law allows a company in liquidation to participate in a domestic merger as a company being acquired if shareholder asset distribution has not begun,[19] but this allowance is not extended to cross-border mergers. Companies declared bankrupt are entitled to participate in a cross-border merger as companies being acquired, provided the shareholder asset distribution has not begun. The bankruptcy receiver is responsible for the tasks routinely shouldered by the company's management organ during a cross-border merger.[20]

f. CBMs outside of the scope of the Directive

Belgian law extends the scope to all companies entitled to domestic mergers. Thus, ordinary limited partnerships, general partnerships, cooperative societies with or without limited liability, Belgian SEs, and Belgian SCEs are allowed to participate in cross-border mergers, as well as fixed-capital investment trusts[21] and companies that have declared bankruptcy as long as shareholder asset distribution has not begun.[22]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Regarding national legislation on cross-border divisions, seat transfers, and other cross-border restructurings, reorganizations are allowed under Belgian national law.[23] The national rules are based on the CBMD.[24]

Reorganizations include cross-border (inbound/outbound) mergers and demergers and cross-border (inbound/outbound) contributions of assets (lines of business/permanent establishment) and exchange of shares. The new rules also apply to the transfer of the

[17] Ibid.
[18] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 106.
[19] Article 681 BCC; Exposé des motifs, *Doc. Parl.*, Ch., 2007-2008, Doc. n°1012/001, p. 57.
[20] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 145-146; Exposé des motifs, *Doc. Parl.*, Ch., 2007-2008, Doc. n°1012/001, p. 57; D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p.585.
[21] Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure, [2010] OJ L 176/28.
[22] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 145-146; Exposé des motifs, *Doc. Parl.*, Ch., 2007-2008, Doc. n°1012/001, p. 57; D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p.585.
[23] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 117.

seat of a foreign company to Belgium. The transfer of the seat of a resident company to another Member State continues to be considered for tax purposes as a liquidation of the company, except if it concerns the transfer of a European company or a European cooperative company.[25]

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Belgian national law follows Article 3(1) CBMD. A cross-border merger is possible even if the cash payment is more than 10 percent of the nominal value or of the accounting par value of the surviving company's securities or shares, if the law of a Member State of one of the participating companies so allows (Article 772/2 BCC).

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Belgian law has not excluded cooperative companies. Cooperative societies can enter into a cross-border merger,[26] and Articles 687 (responsibility), 698 and 711 (resignation), and 772/11 (approval of shareholders) are applicable.[27]

However, if a Belgian cooperative society is willing to participate in a cross-border merger with a company whose national law excludes cooperative societies from its cross-border merger provisions, the cross-border merger cannot continue. Domestic laws of involved companies will be applicable and the most constraining provision will apply in the event of contradiction between the applicable provisions.[28]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

In conformity with Article 3(3) CBMD, Belgian law excludes open-ended investment companies from cross-border mergers but not fixed-capital investment trusts (such as fixed-capital real estate investment companies). Cross-border mergers of open-ended investment companies must be conducted according to Articles 37 through 48 UCITS

[24] Ibid.
[25] Ibid.
[26] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 145.
[27] Exposé des motifs, *Doc. Parl.*, Ch., 2007-2008, Doc. n°1012/001, p. 55.
[28] C. Verdure, 'La réglementation des fusions transfrontalières: une nouvelle étape dans la modernisation du droit européen des societies', *Rev. dr.intern. comp.*(2008), liv. 1, p. 110-111.

IV[29] and Articles 3 and 4 Commission Directive 2010/42/EU.[30] Under Belgian law, such companies are governed by the Act of 20 July 2004 on certain forms of collective management of investment portfolios. The companies so excluded are open-ended public institutions for collective investment, which can take the form of a publicly held limited liability company and limited partnerships with shares (Article 772/1 BCC).[31]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Belgian national law follows Article 4(1)(a) CBMD. A merger under the cross-border merger provisions transposing the CBMD involving a Belgian company with a legal form which is not expressly referred to in the CBMD would only be possible if the laws of all the foreign companies involved in the merger authorize cross-border mergers with companies having other legal forms than those referred to under the CBMD.[32]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) CBMD is a simple application of the general rules of International Private Law (Article 113 Belgian International Private Law Code). Such opposition right doesn't exist in Belgian law, except the opposition of the Minister of Economic Affairs in case of the formation by merger of a SE.[33]

The general exception of public interest is laid out in Article 21 Belgian International Private Law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

[29] Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), [2009] OJ L 302.

[30] Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure, [2010] OJ L 176/28.

[31] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 105.

[32] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 145.

[33] J.-A. Delcorde and T. Tilquin, 'La fusion transfrontalière de sociétés de capitaux en droit belge après la transposition de la Directive 2005/56/ CE', *Rev. Prat. Soc.* (2009) n°1, p. 99.

Belgian law has not adopted rules regarding creditor protection specific for cross-border mergers. Domestic mergers rules apply, outlined in Article 684 BCC.[34]

The protection provided focuses on the creditors of a Belgian merging company whose debts arose prior to the merger's publication in the Annexes to the Belgian state gazette but are not yet payable by the Belgian merging entities. These creditors may demand a security or guarantee within two months of such publication.[35]

The protection period starts with creditors of the merging companies whose claims existed prior to the publication of the certificate attesting to the completion of the cross-border merger and which are not yet due.[36]

For Belgian acquiring companies, the two-month period starts from the publication of the certificate. For a Belgian company being acquired, the period starts from the publication of the declaration of dissolution laid out in Article 74(4) BCC.[37]

The time limit is within two months from the publication date of the certificate.[38]

The total period of the duration of the procedure regarding the protection of creditors is two months.[39]

The acquiring company that has absorbed these debts or the company being acquired may pay these debts, less a discount; if an agreement cannot be reached or a payment not made to a creditor, then any parties involved may call the others to appear before the President of the Commercial Court of the judicial district where the Belgian merging company is registered. Summary proceedings are initiated, and the President of the Commercial Court will decide the outcome of the situation regarding securities and guarantees. If the merging entities fail to do what the President of the Commercial Court decrees by the specified deadline, the debts in question are deemed due immediately.[40]

This option is a domestic rule, which also applies to cross-border mergers.[41]

Creditors cannot block the merger; in case of a dispute, the matter shall be referred to the President of the Commercial Court.[42]

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

[34] Ibid., p. 93; D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 114.
[35] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 167.
[36] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 114.
[37] J.-A. Delcorde and T. Tilquin, 'La fusion transfrontalière de sociétés de capitaux en droit belge après la transposition de la Directive 2005/56/ CE', *Rev. Prat. Soc.* (2009), n°1, p. 93.
[38] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 114.
[39] Ibid.
[40] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 167.
[41] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 114.

Article 4(2) CBMD has not been transposed in Belgian national law. As a result, shareholders of a Belgian company who voted against a merger that was validly approved by the required majority do not have any specific remedies and must accept the consequences of the merger.[43]

Only the shareholders of a cooperative which proposes merging with a company that is not a Belgian cooperative are entitled to exit the company in the fiscal year of the merger as from the date of the notice of the general meeting scheduled to vote on the merger, provided the terms of merger are approved (Articles 698 and 711 BCC). This right does not exist if the company resulting from the merger is a cooperative governed by Belgian law.[44] The resignation must be notified to the company at least five days before the meeting of the general assembly and it will only enter into effect if the merger is approved. The convocation letter to the meeting must inform the shareholders of this right.[45]

The only possibility for shareholders who have suffered an infringement of their rights because of the merger is to rely on the common law of liability, discussed in Article 687 BCC (fault of the expert or company's leaders during the procedure of merger).[46]

e. The protection of employees in Article 4(2)

The protection of employees under Article 4(2) CBMD has been provided under Article 34 Collective Bargaining Agreement No. 94 (CBA No. 94) regarding employee participation in capital companies resulting from a cross-border merger.

Members of the SNB and of the representative body employed in Belgium, as well as employee representatives sitting on the administrative or supervisory board of a company resulting from a cross-border merger that are employed in Belgium, enjoy the same rights and protection as employee representatives on a Belgian works council, particularly concerning participation in meetings, salary payment, and the length of absences necessary to exercise their functions (Article 34 CBA No. 94).

Changes must still be made to national law in order to reinforce this provision, with a view to ensuring effective protection of the abovementioned employee representatives against dismissal.

The Law of 19 March 1991 on the dismissal of workers' representatives on Works Councils and on Health and Safety Committees is the applicable legislation on this matter and is applicable to employees acting as representative or to employees in the

[42] Ibid.
[43] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 166.
[44] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 113-114.
[45] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 166.
[46] D. Willermain, 'Les fusions transfrontalières de sociétés',liv. 6363, p. 592.

election process for the position as employee representative. The procedure is initiated 19 days prior to the appointment of the representatives.

Article 9 of the Law of 19 June 2009 extended the protection to members of the SNB as well as to representatives participating in the information and consultation procedure.

The protection of employee representatives lasts until the end of their appointment after having been applicable from 19 days prior to the appointment. Thus, the total period lasts as long as the mandate does, with an additional 19 days prior to the mandate. However, it was criticized by the Council of State that the period for which the mandate of the employee representatives lasts is not sufficiently clear and leaves room for discretion.

The employee protection applies to employees of the absorbing company from the cross-border merger, as well as to all subsidiaries or any other establishments being representatives in the management and supervisory organs of the absorbing company and to the representatives participating in the general meeting.

It has to be noted that in their capacity as members of the management, administrative, or supervisory organ, the employee representatives will not enjoy the limitation of liability in place under Belgian law for employees.

With regard to directorships of employees in SEs established under Belgian law or in a public or private limited liability company, Article 508(3) BCC stipulates that such directorship is not automatically affected by a dismissal of the employee.

These rights are also applicable to domestic situations. Under Belgian law, the protection of the employee representatives against dismissal is regulated by the Law of 19 March 1991.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called ‘CDTMs’. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

All the particulars of Article 5 CBMD have been addressed in Belgian national law. However, there is an exception regarding whether each merging company should state its corporate purpose (Article 772/6(a) BCC).

Additionally, the merging companies’ management may provide extra information. Because the requirements regarding the content of the CDTMs are cumulative, any

extra information required under the lex societatis governing other merging companies must be included.

In Belgium, this document may be, but does not have to be, notarized under Article 772/6 BBC.[47] However, if a notarized deed is required by the lex societatis of one or several foreign companies taking part in the merger, the CDTMs must be notarized. This may be done before a foreign notary.[48]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Article 6(1) CBMD has been transposed in Belgian national law, but with a change: According to Article 772/7 BCC, the CDTMs must be filed with the Office of the Clerk of the Commercial Court of the merging Belgian company's judicial district at least six weeks before the shareholders' general assembly.

This timeline is different than Article 6(1) CBMD, which states the CDTMs must be published one month before the general assembly. But because publication in the Annexes to the Belgian state gazette must occur within 15 days of the filing of a deed with the Office of the Clerk of the Commercial Court (Article 73 BCC), the one-month period may not be feasible. Therefore the company concerned should file the CDTMs more than six weeks before the shareholders meeting, or at least make sure that the publication complies with the CBMD's required one-month period.[49]

Moreover, since the Act of 8 January 2012, the CDTMs must be published by extract, according to Article 74 BCC, or by a note, according to Article 75 BCC, containing a link to an Internet website (Article 772/7 BCC, modified by Act of 8 January 2012).

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

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[47] In the context of purely domestic mergers, a private deed is almost always the preferred form.
[48] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 148-150.
[49] Ibid., p. 150.

Article 4(1) has been transposed by the Act of 8 January 2012, which slightly modified article 772/7 BCC. The exception has been transposed but not as an exception itself. Article 772/7 BCC provides that CDTM must be filed with the Office of the clerk of the Commercial Court of the judicial district where the registered office of the merging Belgian company is located, and that CDTM must be published either by extract according to article 74 BCC, or by a note according to article 75 BCC containing a link to an Internet website.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed in Belgian national law. An extract of the CDTMs, including at least the information provided by the CBMD, must be published in the Annexes to the Belgian state gazette (Article 772/7 BCC).[50]

The shareholders of the merging Belgian companies must also have access to the CDTMs at their registered offices at least one month before their general assembly (Article 772/10(2) BCC). The agenda of the meeting of the general assembly must state the availability of the CDTMs, as well as the possibility of receiving a free copy (Article 772/10(1) BCC).[51]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Article 772/8(1) BBC, which is similar.[52] The management report must not otherwise be made public.[53] There are no additional or diverging requirements.[54]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

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[50] Ibid.
[51] Ibid., p. 151.
[52] Ibid., p. 152.
[53] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 108.
[54] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 152.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Belgian national law follows Article 8(1) CBMD. The auditor's report must be made available to the shareholders of the merging companies at the latest one month before the general meeting called to approve the draft terms of the cross-border merger (Article 772/10(2) BCC). It must not otherwise be made public.[55]

b. The independent expert

Under Belgian national law, an auditor is selected as an independent expert. If a Belgian company does not have an auditor, it must appoint one from among the members of the Institute of Certified Auditors (*Institut des réviseurs d'entreprise/Instituut der bedrijfsrevisoren*) or an external accountant who belongs to the Institute of Accountants and Tax Consultants, appointed by the management body of the company (Article 772/9(1) BCC).[56]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Regarding Article 8(2) CBMD, the management bodies of the merging companies may jointly petition the court to appoint one or more auditors or accountants. To this end, a written petition must be submitted to the president of the competent commercial court (in accordance with Article 588(17) Judicial Code). The auditor(s) so appointed shall prepare a report on the draft terms of cross-border merger (Article 772/9(2) BCC).[57]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed in Belgian national law; Article 772/9(1) BCC provides the content of the independent expert report, which is in line with the content imposed by Article 8(3) in conjunction with the Article 10(2) Domestic Merger Directive.[58,59]

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[55] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 109.
[56] Ibid., p. 108.
[57] Ibid., p. 109.
[58] Directive 78/855/CEE of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, [1978] OJ L 295.
[59] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 153.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) CBMD has been transposed in Belgian law. In order to prepare its report, the auditor may request from the merging companies any information deemed necessary (Article 772/9(1) BCC).[60]

According to Article 773 BCC, if the auditor's report is not prepared following compulsory particulars of Article 772/9, the members of the management body may be fined. This criminal sanction is also applicable for failure to prepare and submit management report and the CDTMs.[61]

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Belgian national law. The report does not need to be prepared if all shareholders of all companies participating in the cross-border merger unanimously decide that no report need be drafted and the draft terms of the cross-border merger need not be examined by an auditor or accountant (Article 772/9(3) BCC).[62]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Regarding further exemptions to provide the expert report in Articles 15(1) and 15(2), an auditor's report is also not required in the event of a merger by absorption of a wholly owned subsidiary (Article 772/9(4) BCC). However, an auditor's report is required for a cross-border merger of a subsidiary if the parent company holds 90 percent or more, but not 100 percent, of the shares of the subsidiary.[63]

h. Further exemptions in Belgian law

There are no further exemptions in Belgian law.[64]

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[60] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 109.
[61] Ibid., p. 107-109.
[62] Ibid., p. 109.
[63] Ibid., p. 109; J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 155.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Belgian law in Article 772/11(1) BCC.[65]

a. Procedural requirements including majority, quorum, timing and notarization

In order to approve the cross-border merger, at least 50 percent of the capital must be present or represented. If this quorum is not met, a second meeting can be called, which can make decisions regardless of the number of shares present or represented (Article 772/11(1)(1) BCC).

The merger must be approved by a special majority of three-quarters of the votes present or represented, but a larger majority may be stipulated (Article 772/11(1)(2) BCC). Non-voting shares are exceptionally entitled to vote on the merger (Article 481(3) BCC). In a silent partnership (*société en commandite simple/gewone commanditaire vennootschap*) or a cooperative company (*société cooperative/coöperatieve vennootschap*), including an SCE, votes are allocated in proportion to the shareholder's share in the capital and attendance is calculated based on the company's assets (Article 772/11(1) BCC).

In certain cases, the unanimous approval of all shareholders is required to proceed with a cross-border merger, specifically in general partnerships (*société en nom collectif/vennootschap onder firma*) regardless of whether the partnership is the surviving company or the company that ceases to exist; and in Belgian companies which shall cease to exist if the surviving company is a general partnership, a silent partnership or a cooperative with unlimited liability (Article 772/11(3) BCC). The consent of all holders of securities which do not represent the capital is also required.

In a silent partnership or a limited partnership with shares (*société en commandite par actions/commanditaire vennootschap op aandelen*), the approval of the general partners is in any event required (Article 772/11(4) BCC).

The general meeting of each Belgian participating company must be held before a notary, and the minutes must be prepared in notarized form. The notarial instrument should contain the conclusion of the auditor's report (Article 772/11(7) BCC).[66]

b. Amendment of CDTMs by shareholders

Belgian legislation does not directly address amendment of the CDTMs by shareholders. However, as provisions on cross-border mergers refer to the approval of

[64] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 109.
[65] Ibid., p. 110.

the CDTMs while provisions on domestic mergers refer to the approval of the merger, it doesn't exclude that the CDTMs can be amended by the general assembly as long as the amendments are the same in the CDTMs of all companies concerned by the merger.[67]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

This provision has been transposed in Belgian national law; for the absorption of a wholly owned subsidiary by its parent company, shareholder approval is not required at the level of the subsidiary (Article 772/11(1) BCC).[68]

Belgian national law has not made use of the option not to require the approval of the general assembly of the acquiring company if the conditions laid out in Article 8 Domestic Merger Directive are fulfilled (Article 9(3) CBMD).

In relation to public limited liability companies (and other companies to which the Belgian rules transposing the Domestic Merger Directive apply), Belgium is no longer entitled to require the approval of the merger by the general assembly of the acquiring company if (almost) identical conditions of those laid out in Article 8 Domestic Merger Directive are fulfilled. However, this has not yet been transposed.[69]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

This exemption has been transposed in Belgian national law; in the case of a simplified merger, the approval by the general assembly of the company being acquired is not required (Article 772/11(1) BCC).

The issue of necessary prior consent of the absorbed company to the cross-border merger was not directly addressed by the BCC. Legal commentators argue that the management organ's earlier consent is required, but a notary is not necessary,[70] while others state earlier consent is not needed.[71] For wholly owned subsidiaries, the consent would be a formality because of the absorbing entity's complete control. The logic behind the consent of the general meeting of the acquired group is that it will not

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[66] Ibid., p. 110-111; J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 157-159.
[67] D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p. 588.
[68] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 110-111.
[69] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 158-159.
[70] G. Palmaers and A. Gubbels, 'De Grensoverschrijdende fusie' , *Tijdschrift Financieel Recht* (2008), n°4, p. 274-275.

allow undermining of the process. Therefore, the Belgian notary always must decide whether formal consent is necessary, and in what form, before providing the pre-merger certificate. The form of consent preferred by some Belgian notaries is a statement from the directors of the absorbed group.[72]

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Belgian national law in Article 772/12 BCC.[73]

b. National authority has been designated to scrutinize the legality of the merger

The notary who prepares the notarial instrument containing the minutes of the meeting approving the cross-border merger has been designated by the Belgian legislator as the competent authority to scrutinize the legality of the Belgian aspects of the cross-border mergers.[74]

The authority does a formal check.

If the Belgian company is being acquired and its pre-merger acts are fully performed, the notary will issue a pre-merger certificate, which is a separate document than the notarized deed approving the merger by the shareholders. Within six months, this certificate must be sent to the authorities of the Member State housing the surviving company. If the pre-merger activities have not been successfully completed, the notary is allowed to not issue a certificate.

If the Belgian company is doing the acquiring, the notary will verify the legality of all pre-merger acts on the same day when the shareholders meet to approve the merger and sign a notarized deed affirming such. The notary does not issue a pre-merger certificate.[75]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority

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[71] J.-A. Delcorde and T. Tilquin, 'La fusion transfrontalière de sociétés de capitaux en droit belge après la transposition de la Directive 2005/56/ CE', *Rev. Prat. Soc.*, 2009, n°1, p. 84.

[72] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 158.

[73] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 112.

[74] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* p. 160.

shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Regarding Article 10(3) CBMD, Belgian law does not provide for a procedure to verify and amend the ratio applicable to the exchange of securities or shares or compensate minority shareholders.[76]

Despite the fact that that Article 10(3) CBMD was not expressly transposed, the national provisions must be interpreted as giving an equivalent effect to the provisions of the Directive. Due to the absence of a provision prohibiting the applicability of Article 10(3) CBMD, Belgian law can be regarded as being in conformity with the CBMD.

The procedure pursuant to Article 10(3) CBMD only applies if all companies agree on the recourse to the procedure by its shareholders, which then can be initiated before the court in the jurisdiction where the procedure was specified. Where this is the case, the Belgian notary may issue the pre-merger certificate regardless of the initiation of such procedure, but has to specify that a decision pursuant to such procedure is forthcoming. The outcome of the procedure, thereby, is binding on all entities involved in the merger and to its shareholders.

With regard to the timing of the merger, it has to be noted that a refusal to approve the result of such procedure by the general assembly of the Belgian entity participating in the merger can have considerable consequences. As a result, the pre-merger certificate in the foreign country is likely to be withheld by the competent authority in the Member State in question as long as the procedure is pending.[77]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed in Belgian national law in Article 772/13 of the BCC.[78]

b. The national authority has been designated to scrutinize the legality of the merger

The Belgian legislator has designated the notary as the competent authority to scrutinize the legality of the completion of cross-border mergers.[79]

[75] Ibid.
[76] Ibid., p. 161.
[77] Ibid.

The authority performs a formal check.[80]

For a Belgian acquiring company, after the pre-merger activities are completed by the other companies involved in the merger and they have all been issued certificates verifying such, then the Belgian notary continues with their verification. The notary considers the legality of the merger and whether all companies involved have approved the CDTMs in the same way and addressed employee participation from Article 16 CBMD in the same way.[81] The notary then issues a notarized deed verifying their completion of this process, and this is separate from the notarized deed signifying the acquiring company's general assembly's approval of the merger.[82]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Belgian national law in Article 772/14(1) BCC.[83]

b. Date the cross-border merger takes effect

If the company surviving the merger is Belgian, the merger takes legal effect on the day when the notary issues a deed verifying the merger's completion and when the company is incorporated, which will depend on when the deed is filed with the Office of the Clerk of the Commercial Court. If the surviving company is not Belgian, then the date is determined by the other Member State's national law.

The merger becomes effective against third-parties when it is published in the Annexes to the Belgian state gazette, but special formalities must be completed before certain assets or rights become effective against them, according to Belgian national law.[84]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall

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[78] Ibid.
[79] Ibid.
[80] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 112-113.
[81] D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p. 589.
[82] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 161-162.
[83] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 113.
[84] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 163.

determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence has been transposed in Belgian national law in Articles 772/14(2) and (3) BCC. A cross-border merger is enforceable against third-parties as from the publication date of the cross-border merger instrument in the Annexes to the Belgian state gazette, unless the company can prove that the third-parties in question knew of the merger earlier. The creation of a newly formed company is only enforceable as from the filing of its articles of association with the Clerk of the Competent Commercial Court (Article 2 BCC). Notification of the abovementioned attestation to the registries where the foreign companies participating in the merger are recorded shall be organized by royal decree.[85]

According to Article 13(1) CBMD, each Member State is responsible for the merger's filing and publication, as discussed in Article 3 Publicity Directive. Belgian national law has not directly addressed this process if the Belgian company is not the acquiring company.

b. Transposition of Article 13 second sentence

Article 13 second sentence has not been transposed in Belgian national law.[86]

According to Article 13(2) CBMD, the registry of the Member State where the acquiring company is located must notify the registry of the acquired company of the merger's completion, and the old registration will then be deleted. But the CBMD does not specify that the acquiring company should tell the acquired company's authority assigned to analyze the merger's legality of the merger's completion, and a clarification in Belgian national law concerning this matter may be necessary.[87]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 CBMD has been transposed in Belgian national law. Articles 14(1) and (2) CBMD have been transposed under national law, in Article 772/3 BCC in conjunction with Article 682 BCC.

Articles 14(3) and (4) CBMD have been transposed under national law by Article 772/4 BCC. [88]

[85] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 106 and 113.
[86] Ibid., p. 106.
[87] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 165.
[88] D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p. 591.

Article 14(5) CBMD has been transposed under national provisions of domestic mergers: Articles 703 (merger by acquisition) and 717 BCC (merger by the formation of a new company).[89]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

The first part of Article 15(1) CBMD has been transposed in Belgian national law in the following ways:

(1) In the event of a parent company merging with its wholly owned subsidiary, some information (Articles 5(b), (c), and (e) CBMD) required for the CDTMs can be omitted, according to Article 772/6 BCC.

(2) An auditor's report (Article 8 CBMD) is also not required in the event of a merger by absorption of a wholly owned subsidiary, according to Article 772/9(4) BCC.

(3) Unless in the context of a merger with a wholly owned subsidiary, the shareholders of the company being acquired become shareholders of the acquiring company (Article 14(1)(b) CBMD), according to Article 682(3) BCC.[90]

The second part of Article 15(1) of the CBMD has been transposed in the following way: For the absorption of a wholly owned subsidiary by its parent company, shareholder approval (Article 9(1) CBMD) is not required at the level of the subsidiary, according to Article 772/11(1), subparagraph 2, BCC.[91]

Article 15 (1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

[89] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* p. 165.
[90] D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p. 591.
[91] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 107, 109, 110-111.

These provisions have been transposed in Belgian national law, with no other documents exempted.[92]

The independent expert report is not required, according to Article 772/9(4) BCC.

The issuance of the certificates and the notarized deed raises some issues. For a Belgian company being acquired, Article 772/12 BCC provides that the pre-merger certificate is issued by the notary who prepares the notarial instrument, which supposes it exists, which is not the case for a being-acquired company. The obligation to issue a certificate forces to designate an ad hoc notary in case of a simplified merger because the being-acquired company, whose general assembly doesn't need to give an approval on the merger, needs to have the certificate in order to comply with formalities with the foreign acquiring company for the control of legality of the completion of cross-border merger.

For a Belgian acquiring company, Article 772/13(2) BCC provides that the notary verifying the legality of the completion of cross-border merger relies on the previous certificates issued by each company involved in the merger.

For these reasons and depending on the national law of the being acquired company, this provision might need some changes. Otherwise, it would be possible to hold a meeting of the general assembly of the being-acquired company on a voluntary basis if the foreign law doesn't allow an ad hoc notary's certificate.[93]

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The employee participation rules laid out in the CBMD have been transposed into Belgian law through CBA No. 94, which was ratified by the Royal Decree issued on June 12, 2008, and came into effect on July 2, 2008.[94]

Belgian law currently does not provide for employee participation rights or the right for employees to sit on the management bodies of limited liability companies. Consequently, for companies resulting from a cross-border merger that are

[92] J.-A. Delcorde and T. Tilquin, 'La fusion transfrontalière de sociétés de capitaux en droit belge après la transposition de la Directive 2005/56/ CE', *Rev. Prat. Soc.* 1 (2009), p. 84-85.
[93] Ibid.
[94] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 179; See also European Labour Law Network, 'Collective Agreement No. 94 (02-07-2008)',

established in Belgium, the Belgian rules will be set aside and participation will be possible if (1) at least one of the participating companies has an employee participation regime in the sense of the CBMD; and (2) this company has either more than 500 employees or employee representation (Article 16(2) CBMD and Article 2 CBA No. 94). If none of the participating companies was previously subject to employee participation rules, then the company resulting from the cross-border merger does not have to introduce employee participation rules (Article 27 CBA No. 94).[95]

Moreover, Article 2 CBA No. 94 refers to the joint application of the SE Directive 2001/86/CE as transposed by the CBA 84 of 6 October 2004 regarding the employee participation in SE and the SE Regulation (CE) 2157/2001 of the Council of October 8, 2001.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Employee participation in cross-border merger transactions has been addressed in Belgian national law in Article 2 CBA No. 94.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16 (1) CBMD.

The exemptions of Article 16(2) CBMD are addressed in Belgian national law in Article 2 CBA No. 94.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

CBA No. 94 has transposed Article 16(3)(e) of the CBMD in conjunction with Articles 7(1) and (2) Directive 2001/86/EC. The percentage has been increased to 33.33 percent.[96]

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

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http://www.labourlawnetwork.eu/national_labour_law_latest_country_reports/national_legislation/legislative_developments/prm/109/v__detail/id__925/category__4/index.html (last visited 21 August 2013).

[95] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 114; J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 180.

[96] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 186.

Article 16(4) CBMD has been transposed in CBA No. 94, except for Article 16(4)(c) CBMD.

f. Transposition of Article 16(5)

Article 16 (5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) CBMD has been transposed in CBA No. 94.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) CBMD has not been transposed.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has not been transposed.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Belgian national law in Article 772/5 BCC. As from completion of the cross-border merger, it is no longer possible to petition the competent court to avoid the merger.[97]

1.18. Additional

a. Valuation rules

Belgian literature is silent regarding valuation rules.

b. National case-law on provisions transposing the CBMD

At present, there is no national case law concerning cross-border mergers in Belgium except one about the faculty of Article 772/9(2) BCC and Article 8(2) CBMD. It gives the possibility to the merging companies to submit to the President of the Commercial

[97] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 106.

Court a written petition in order to designate and approve the external auditor(s) who will be in charge of drafting a unique report for all merging companies.[98]

On the European level, Belgium was condemned by the European Court of Justice for not having transposed the CBMD in time.[99]

c. Language requirements

The CBMD and its Belgian transposition do not impose any specific rules regarding the use of language in the context of a cross-border merger. Consequently, the general rules regarding the use of language imposed by Belgian law apply.

In Belgium, official documents must be drafted in French, Dutch, or German. Corporate documents issued by Belgian companies are generally considered as official documents to which these language requirements apply. The language in which these corporate documents must be drafted depends on the location of the registered office of the Belgian company concerned. In most cases, failure to comply with Belgian language requirements will result in the invalidity and/or the unenforceability of the decision evidenced by the document concerned.

However, these rules may cause difficulties in relation to the CDTMs, whose content must be identical for all companies concerned. Multilingual documents may be prepared, but in the case of doubt or contradiction with a version in another language, the applicable official language will prevail under Belgian law.

Even though multilingual CDTMs may be approved by the management organ of a Belgian company, in principle the filing with the Office of the Clerk of the Commercial Court and the publication in the Annexes to the Belgian state gazette of multilingual corporate documents is not authorized (Article 11(2)(4) Royal Decree of 30 January 2001 transposing the BCC). However, the filing, for information purposes, of a separate translation in one or several official languages of the EU with the Office of the Clerk of the Commercial Court is authorized (Article 67(1) BCC).[100]

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The provisions applicable to domestic mergers are same as those applied to cross-border mergers. [101]

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[98] Prés. comm. Berchem-Sainte-Agathe (4 octobre 2012), *T.R.V.*, 2013, liv. 3, p. 270, note F. Dobbelaere.

[99] Case C-575/08 *Commission v. Belgium* [2009] ECR I-00163.

[100] J. Vermeylen, S. Demeulemeester and I. Van de Velde, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 162.

[101] D. Van Gerven, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 104.

b. Comparison

Two main differences between domestic and cross-border procedures exist in Belgian national law.

First, the management report must be made available at the meeting company's registered office to the shareholders and the representatives of the employees of the merging Belgian company or, if there are no such employee representatives, to the employees themselves, not less than one month before the date of the meeting of the general assembly convened to approve the merger (Article 772/10(1) BCC).

Second, the shareholders of all merging companies may unanimously decide that independent expert reports are not required, which is not (yet) possible in domestic mergers (Article 772/9(3) BCC). [102]

[102] D. Willermain, 'Les fusions transfrontalières de sociétés', liv. 6363, p. 585.

Transposition of the Cross-Border Mergers Directive into Bulgarian Law

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1. Transposition of the Cross-Border Mergers Directive into Bulgarian Law

The CBMD was transposed in Bulgarian national law in December 2007.[1] Amendments to Bulgaria's Commerce Act were approved in December 2007, and added information on cross-border mergers with companies from Member States either in the EU or European Economic Area.[2]

The bill is not due to be replaced, modified, or amended.[3] No reforms with respect to cross-border mergers were performed after the transposition of the CBMD.[4] No laws regarding cross-border mergers existed in Bulgarian national law before the transposition of the CBMD.[5]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope of the Bulgarian national law is similar to the definition of merger found in Article 1 CBMD.[6]

Further to the provisions of the CBMD, the Commerce Act provides that a cross-border merger may not be effected where a merging company, which has its registered office in the Republic of Bulgaria, owns land, and the newly formed or surviving company has its registered office outside the Republic of Bulgaria. This prohibition shall apply conforming to the conditions ensuing from the accession of the Republic of Bulgaria to the European Union and shall expire on January 1, 2014.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'. Bulgarian national law regarding the definition of the term "limited liability companies" is similar to the definition provided under Article 2(1) CBMD.[7]

[1] A. Tatarova, R. Dimitrova and Y. Naydenov, 'Bulgaria', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 118.
[2] Ibid., p. 118-119.
[3] Ibid., p. 118.
[4] Ibid.
[5] Ibid.
[6] Ibid., p. 119.
[7] Ibid., p. 119.

b. List of companies that can carry out a cross-border merger under Bulgarian law

The new rules on cross-border mergers apply to the following types of companies governed by the Commerce Act and generally categorized as ones with share capital: limited liability company and single member limited liability company; joint-stock company and single member joint-stock company; partnership limited by shares; and European companies (SE).[8]

The Bulgarian Commerce Act further strictly follows the provision set in Article 2(1)a CBMD and therefore does not apply to legal entities outside of the scope of the CBMD.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

The definition of the term "merger" in Bulgarian national law is the same as the one found in Article 2(2) CBMD. Bulgaria has not transposed any additional or diverging rules.[9]

d. Rules on the cash payment

Bulgarian national law does not allow cash payments in favor of the shareholders to exceed 10 percent of the whole nominal value of the securities or shares acquired in the share capital of the newly formed or surviving company when the latter has its registered office in Bulgaria (Article 261b(2) Commerce Act) in case of a cross-border merger.[10] The national legislation does not specifically regulate the hypothesis where the acquired company has its registered office in Bulgaria and the surviving or newly formed company's registered office is in another Member State that has transposed Article 3(1) CBMD.

e. CBMs and companies in liquidation

In Bulgarian national law, the Commerce Act does not specifically dictate whether a local company in liquidation or in insolvency procedures can participate in a cross-border merger. The national law, which includes when a domestic merger occurs within its scope, does not uniformly apply to cross-border mergers.[11] However, pursuant to Articles 261a(1) and (2) Commerce Act, Bulgarian companies in liquidation and companies in insolvency can be a part of a transformation under Chapter XVI Transformation of the Companies Commerce Act. Section V Transformation involving companies from Member States of the European Union or from another contracting party to the Agreement on the European Economic Area is

[8] Ibid.
[9] Ibid., p. 120.
[10] Ibid., p. 119-120.
[11] Ibid., p. 119.

an integral part of Chapter XVI of the Commerce Act. Therefore the general provision of Chapter XVI shall apply by analogy to Section V, and the general rules of Section I shall apply both for domestic and cross-border mergers.

f. Geographical scope

Under Bulgarian law, cross-border mergers with companies formed outside of the EEA or formed within the EEA but having its registered office, central administration, or principal place of business outside of the EEA (in short, non-EEA companies) are not allowed.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Bulgarian law, based on European Regulation (EC) 2157/2001, makes some allowances for cross-border restructurings, specifically focusing on the seat transfer of a SE that does not possess land and the tax treatment of cross-border divisions by the Corporate Income Tax Act, even though the cross-border division is not regulated at all.

Bulgarian legislation does not provide any regulation for cross-border divisions involving a Bulgarian company.

The Bulgarian Corporate Income Tax Act (CITA) transposes the provisions of Directive 2005/19/EC regarding the taxation applicable to mergers, divisions, transfers assets, and exchange of shares concerning companies of different Member States.

The provisions of CITA aim to regulate and control any cross-border transformation with a tax effect resulting from and in Bulgaria. Further, a company from another Member State shall be considered as a taxable person (a non-resident legal person that carries out economic activity in the Republic of Bulgaria through a permanent establishment, which effect disposition of property of any such permanent establishment, or which receive income from a source inside the Republic of Bulgaria) under CITA. The definition of permanent establishment is provided in Section 1, point 5, Supplementary Provisions of Tax and Social Insurance Procedure Code.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) CBMD has not been transposed in the Commerce Act. Bulgaria follows the rules on the cash payment as laid down in Articles 2(2)(a) and (b) CBMD. Article 261b(2) CA implements those provisions.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Bulgaria has excluded cooperative societies from the cross-border purview.[12]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

Bulgaria's transposition of Article 3(3) CBMD shall not apply to cross-border mergers with a company who practices the collective investment of public capital and whose company assets can be used for units that can be indirectly or directly purchased or redeemed.[13]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) CBMD has been transposed in Article 265d(2) Commerce Act. Bulgaria is entitled to impose control on the type of local companies only.[14]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

The option outlined in Article 4(1)(b) CBMD existed in Bulgarian law prior to the transposition of the CBMD, and also exists for domestic mergers.

Three national authorities can oppose the merger by exercising their duties pursuant to national law: the Privatization and Post-Privatization Control Agency (PPPCA) and the Financial Supervision Commission (FSC) and Commission for Protection of Competition (CPC). In addition, publicizing of the merger papers is also a type of protection of public interest.

There is no specific timeframe for this process.

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[12] Ibid., p. 119.
[13] Ibid.
[14] F.A. Behrens, *Die grenzüberschreitende Verschmelzung nach der Richtlinie 2005/56/EG (Verschmelzungslinie)* (Cuvillier Verlag, Göttingen 2007), p. 254 -260; J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012).

The FSC can suspend a merger by not issuing its clearance, pursuant to Article 13 Financial Supervision Commission Act.

The PPPCA has the power to suspend a merger if the state owns more than 50 percent of the share capital in one of the merging companies. Like the FSC, the PPPCA has to issue a clearance for the merger procedure. The FSC can refuse to grant approval to the merger if the materials submitted do not meet the requirements of the law, contain information not presented in an accessible way for the shareholders, or do not disclose true and complete information about essential facts, which can help the shareholders making an informed decision regarding the proposed merger. The FSC may refuse to grant approval only if the merging company or companies fail to remove the inconsistencies and submit the documents required. The FSC must issue its decision within 10 days as of the day of submission of the application by the merging company.

The procedure before the PPPCA begins with the submission of an application by the management body of the state-owned merging company. The PPPCA performs an in-depth analysis of the merging company and whether this merger will violate the provisions of the national law. The practice shows that these procedures are very rare and always highly individualized from one company to another. Although not specifically stated in the legislation, negotiations are made between the merging company and the PPCA.

In addition, the CPC is entitled to suspend a merger by not issuing its clearance, pursuant to Articles 21 through 26 Protection of Competition Act, in case the merger envisaged is considered detrimental to the fair competition rules of Bulgarian legislation and this act in particular.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Although the cross-border mergers section of the Commerce Act in Bulgarian national law does not specifically discuss Article 4(2) CBMD, it is probable that the creditor protection rules, as discussed in the Commerce Act's general merger section, would be applicable.[15]

The protection period starts as of the effective merger date, without any further notification to the creditors needed. The time limit is six months as of the effective merger date.

[15] A. Tatarova, R. Dimitrova and Y. Naydenov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 127.

There are several procedural steps that need to be taken. The newly formed or surviving local entity must separately address each participating entity's acquired property once the merger is effective. This will be handled by the members of the management body of the resulting company.

Each creditor holding an unsecured receivable that arose before the merger went into effect may receive either security or receipt of such a receivable. Otherwise, the creditor is entitled to receive the preferable performance of the rights owned by its debtor.[16]

This option also exists for domestic mergers in Bulgaria.

The creditors cannot block the merger.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Bulgarian law does not provide for any special rights for minority shareholders in the case of cross-border mergers.[17] However, pursuant to Article 265o(2) Commerce Act, in connection with Article 263o(3), any of the shareholders has the right to lodge a claim with the court in the jurisdiction where the seat of the transforming company is located, in order to ascertain that none of the following violations have been committed as a result of the transformation, no matter by which of the companies participating in the transformation.

Another method for protection of minority shareholders may arise from the option of raising the majority threshold above the statutory three-fourths. In such case it may be transposed by the articles of association of the company that a resolution for approving a merger procedure shall be valid only if approved by 100 percent of the share capital.

Finally, Article 263r, paragraphs 1 and 2, Commercial Act may be construed as minority shareholder protection because they cannot apply to majority shareholders who would have logically approved the merger. The Commerce Act transposes on option for right of leave of a shareholder in a limited liability company or a stakeholder in a joint stock company on the grounds he or she has voted against the merger in the general meeting of the company. The termination of participation is performed via a notary certified notification to the company in three months since the date of the merger. The shareholder who has left shall have the right to receive the counter value of its shares held prior to the merger, according to the exchange ratio provided for in the transformation agreement or plan. The shareholder who has left may lodge a

[16] Ibid., p. 127 - 128.
[17] Ibid., p. 127.

claim for cash settlement within a period of three months as of the date of the notice. The shares of the shareholder (limited liability company) who has left shall be taken over by the remaining shareholders, offered to a third party, or the capital shall be reduced by their amount. The shares of a shareholder (joint stock company) who has left shall be taken over by the company, and the rules for the acquisition of own shares shall apply, except for Article 187a, paragraph 4, Commerce Act.

The procedure begins with lodging a claim, pursuant to Article 263o Commerce Act, with the court in the jurisdiction of which the seat of the transforming company is located. Any of the shareholders has the right to lodge a claim under Article 263o Commerce Act. The grounds for shareholders' protections are the violations set in Article 263o(1), points 1 through 3, Commerce Act. A non-equivalent exchange ratio is not grounds for lodging a claim pursuant to Article 263o CA.

Regarding the time limit, where the surviving or newly formed company has its registered office in another Member State, the claim shall be lodged not later than the issuance of the certificate of legality (Article 10 CBMD).

Where the surviving or newly formed company has its registered office in Bulgaria, the claim shall be lodged no later than the registration of the merger with the Commercial Register.

The procedural steps are determined according to the rules set out in Chapter 32, Proceedings on Commercial Disputes, Code of Civil Procedure. The shareholder/s responsible for lodging the claim shall notify the Commercial Register for the undertaken actions.

Bulgarian law does not provide for any special rights for minority shareholders, but Article 263r, paragraphs 1 and 2, Commercial Act applies to domestic mergers as well.

e. The protection of employees in Article 4(2)

Article 4(2) CBMD has been transposed into Bulgarian national law.[18]

Members of the special negotiating body and of the representative body of the employees enjoy additional rights under the labor code, namely additional leave (if they have to be absent from work due to commitments related to their membership of the special negotiating body or representative functions) as well as a defence mechanism with respect to the termination of their labor agreements. As a general rule, the company has to obtain the prior approval of the Bulgarian labor inspectorate in case of dismissal of such employees.[19]

This option also exists for mergers within Bulgaria.[20]

[18] Ibid., p. 131.
[19] Ibid.
[20] Ibid.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) CBMD have been transposed in Bulgarian national law in Article 265e Commerce Act. In addition, Article 265e(3), point 2, Commerce Act stipulates: "the exchange ratio of the shares or participating interests as determined at a specific date." Article 265e(3), point 3, Commerce Act stipulates: "the amount of cash payments, if any have been provided for according to Article 261b(2), as well as the time limit for effecting such payments." Both underlined texts are not prescribed by the CBMD, but are set by the Commerce Act for both domestic and cross-border mergers.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Bulgaria has transposed Article 6(1) CBMD. In Bulgaria, the management report of each local participating company and the merger's CDTMs must be filed with the Commercial Register one month before the general meetings during which the merger will be discussed.[21]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

No such exemption exists in national law.[22]

[21] Ibid., p. 121.
[22] Ibid.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Bulgarian national law generally follows Article 6(2) CBMD, but with two differences. First, a different channel for publication is required, namely the Commercial Register that is publicly available; according to Article 265g(2) Commerce Act, the specificities have to be published in the Commercial Register together with the common draft terms. Second, the national law provides for narrower number of specificities that have to be published in the Commercial Register and omits the type and the number of the entry in the respective register. The practice shows that this difference is insignificant since both particularities mentioned above are usually included in the publication.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Article 265f Commerce Act of the national law.[23] Bulgaria has added the requirement, according to Article 265g(1) Commerce Act, that the management report shall be submitted to the Commercial Register not less than one month prior to the date of the resolution of the general meeting of the merging companies. The publication of the report in the Commercial Register will make it available to creditors and stakeholders.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD has been exactly transposed into Bulgarian national law.[24] However, the national legislation goes further by requiring a second expert report to be drafted in case of increasing of the capital of the surviving company or establishment of a new company (with registered office in Bulgaria). The second expert report is common for

[23] Ibid., p. 122.

all merging companies. Its aim is to confirm whether the requirement of Articles 262q(3) and 262s(1) Commerce Act are fulfilled.[25]

b. The independent expert

A certified/chartered auditor only should be selected to serve as an independent expert.[26]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Bulgarian national law has transposed the possibility to provide one expert for all companies. Parties involved in the cross-border merger may together request that the an auditor be appointed by the registry agency to consider all participating companies, even those outside of Bulgaria. A report on the cross-border merger's common draft terms will then be prepared by that auditor.[27]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed in Bulgarian national law, in Article 262m Commerce Act.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) CBMD has been transposed in Bulgarian law. The auditor, regardless of whether appointed by local legislation or by legislation outside of Bulgaria, is able to request any information or documentation from any participating company in the cross-border merger in order to complete the report.[28]

There are no regulations concerning the consequence in Bulgarian law if the independent experts do not get access to the information which they require.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Bulgarian national law. The auditor's report shall not be prepared if all shareholders of all companies (the merging companies and

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[24] Ibid., p. 122.
[25] Article 265i (2) Commerce Act in connection with Article 262t (1) Commerce Act.
[26] A. Tatarova, R. Dimitrova and Y. Naydenov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 122.
[27] Ibid.

the surviving company) participating in the cross-border merger unanimously decide in writing that no audit of the common draft terms shall be made (Article 265h(5) Commerce Act).[29]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15 (1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Further exemptions to provide the expert report in Articles 15(1) and (2) CBMD are partially transposed in Bulgarian national law. An auditor's report is not required in the event of a simplified merger of a wholly owned subsidiary. It does not go further to discuss 90 percent holding; i.e., this possibility is not provided under the national law.[30]

h. Further exemptions in Bulgarian law

There are no further exemptions in Bulgarian law.[31]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Only paragraph 1 of Article 9 CBMD has been transposed in Bulgarian national law; paragraphs 2 and 3 have not been transposed.

a. Procedural requirements including majority, quorum, timing and notarization

If the general meetings of the limited liability company and a partnership limited by shares are to approve the cross-border merger, at least 50 percent of the capital should be represented. To do this, a second meeting may be called not more than 14 days after the first meeting and will address all agenda issues, no matter how many shares are represented.

A special majority will approve the merger:

(1) three-quarters of the share capital for a limited liability company;

(2) three-quarters of the voting shares represented for a joint stock company;

(3) three-quarters of the voting shares represented for a partnership limited by shares. Also required is a unanimous resolution from shareholders with unlimited

[28] Ibid., p. 123.
[29] Ibid., p. 122.
[30] Ibid.

liability, presented in written form and with notary certification. If different classes of shares exist, each class may have special majority requirements.[32]

In addition to the above, it is important to mention the provision of Article 265j(3) Commerce Act, which refers to Article 262p Commerce Act. The latter stipulates a specific regime for obtaining consent on change of the liability of a shareholder from limited liability to unlimited liability. The consent shall be considered to be given if the shareholder in question has voted in favor of the resolution. In this case the general meeting shall be attended by a notary public, who shall draw up a memorandum establishing facts as referred to in Article 488a Civil Procedure Code, a transcript of which shall be attached to the minutes from the general meeting.

If a shareholder has not taken part in the vote, his consent may be given in writing with a notarization of the signature.

b. Amendment of CDTMs by shareholders

Shareholders are only entitled to reject or accept the CDTMs. No changes could be made.[33]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

This provision has not been transposed in Bulgarian national law.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15 (1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

The absorption of a wholly owned subsidiary by its parent company shall be approved through a resolution of the sole owner (Article 265p Commerce Act).[34]

National law does not provide any further exemptions to shareholder approval.[35]

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Bulgarian national law,[36] but Bulgarian national law goes further, to the extent of prescribing a specific term for the issuance

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[31] Ibid.
[32] Ibid., p. 124-125.
[33] Ibid., p. 124.
[34] Ibid., p. 124.
[35] Ibid.

of the certificate under Article 10 CBMD, namely not fewer than 14 days as of the date of the application for issuance. The validity of the certificate is not limited by term.

b. National authority has been designated to scrutinize the legality of the merger

The Commercial Register is the authority designated for this purpose,[37] and performs a formal check.[38]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD has not been transposed.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been partially transposed in Bulgarian national law. Article 11(1) CBMD has been transposed,[39] but Article 11(2) has not.

b. The national authority has been designated to scrutinize the legality of the merger

The Commercial Register is the designated authority,[40] and conducts a formal check.[41]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Bulgarian national law. A cross-border merger (and any related issues subject to registration with the Commercial Register) shall be considered effective, including being enforceable against third-parties, as from the date of registration with the Commercial Register.[42]

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[36] Ibid., p. 125.
[37] Ibid.
[38] Ibid.
[39] Ibid., p. 125.
[40] Ibid.
[41] Ibid.
[42] Ibid., p. 120.

b. Date the cross-border merger takes effect

The date when the cross-border merger takes effect is the date of registration with the Commercial Register.[43]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence has been exactly transposed in Bulgarian national law, which does not go any further.[44]

b. Transposition of Article 13 second sentence

Bulgarian national law has transposed Article 13 second sentence. Pursuant to Article 94e(2) Ordinance No. 1 dated February 14, 2007, for maintaining, storing, and access to the Commercial Register, the deregistration of the ceasing company is made official by a state official to the Commercial Register after receiving notification for registration of the merger with the relevant register of the surviving or newly formed company. Bulgarian legislation does not comment as to whether the notification itself should be official or if it can be submitted by the management body of the ceasing company (for example, the managing director receives an official document by the register of the surviving company for verifying the merger, and then the managing director submits this document with the Commercial Register).

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 CBMD has been fully transposed in national law without any diverging rules. A cross-border merger shall have the same legal consequences as an internal (domestic) merger, i.e.:

(1) the participating entities (with the exception of the surviving company if no new company is established) shall cease to exist;

(2) the shareholders of the companies that cease to exist shall become shareholders in the new or surviving entity; and

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[43] Ibid.
[44] Ibid., p. 126.

(3) all rights and obligations of the merging companies that cease to exist shall be transferred to the new or surviving company by operation of law without liquidation of the participating companies.[45]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been transposed in Bulgarian national law.[46]

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

These further provisions of Article 15(1) CBMD have been transposed in Bulgarian national law.[47]

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Bulgaria has a system of employee participation. The Commerce Act addresses employee participation rules regarding a cross-border merger, and the rules depend on where the seat of the merger-formed company is and the structure of employee rights in that location. The Commerce Act defers stipulations regarding the special negotiating body to the Information and Consultation with Employees in Multinational Undertakings, Groups of Undertakings and European Companies Act (LICE), transposing Directive 2001/86 of October 8, 2001, which addresses how employees

[45] Ibid., p. 120.
[46] Ibid., p. 121.
[47] Ibid., p. 122.

may be involved in managing an SE.[48] The national legislation does not provide explicitly for employees' participation system as envisaged in the provisions of the CBMD for companies, other than the SE.

However, the Commerce Act provides for the right of employees' representatives to participate in the general meeting of the shareholders of a joint stock company with a consultative vote, provided that the company has more than 50 employees. The representatives of the employees are chosen by a general meeting of the employees pursuant to Article 7 Labor Code, State Gazette No. 15/15.02.2013, as amended and supplemented.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

The stipulations of Article 16(1) CBMD on employee participation in cross-border merger transactions have been transposed into Bulgarian law. The Commerce Act sets out the general rules of employees' protection in the case of cross-border merger depending on the seat of the new/surviving company and the existence of rights of employees in the legislation of the accepting country.[49]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

The exemptions of Article 16(2) CBMD have been partially transposed into Bulgarian law, and only in regard to the employee participation system pursuant to Article 2(k) Directive 2001/86/EC. The national law imposes a less stringent regime than the CBMD by not transposing the requirement for minimum number of employees and stating that national rules in force shall not be applicable when at least one of the merging companies is operating under an employee participation system pursuant to Directive 2001/86/EC.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The percentage has been increased from 25 percent to 33 1/3 percent.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

[48] Ibid., p. 128.
[49] Ibid., p. 128.

Articles 16(4)(a), (b), and (c) have been transposed, but the national law goes further only in relation to Article 16(4)(c) by stipulating that the proportion of the employee involvement in the administrative body of the company resulting from the cross-border merger has to be at the same level as before the merger.[50]

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has been transposed into national law. The Commerce Act allows employee representatives to participate in the shareholders' general meeting of a company with more than 50 employees through a consultative vote.[51,52]

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Bulgarian national law.[53,54]

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into Bulgarian national law.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Bulgarian national law. After the cross-border merger is registered, a court cannot declare it null and void, and it is also forbidden to file a claim attempting to do so.[55]

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[50] Article 265q (1) Commerce Act in connection to Article 15 (5) Act on Information and Consultation of Factory and Office Workers in Community-Scale Undertakings, Groups of Undertakings and European Companies.

[51] A. Tatarova, R. Dimitrova and Y. Naydenov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 128.

[52] Please refer to Article 220 Commerce Act.

[53] A. Tatarova, R. Dimitrova and Y. Naydenov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 128.

[54] Please refer to 265q (3) Commerce Act.

[55] A. Tatarova, R. Dimitrova and Y. Naydenov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 126.

1.18. Additional

a. Valuation rules

In the case of public legal entity, the valuation method is transposed in Ordinance on the Content Requirements on the Justification of the Share Price of a Public Company, as well as the application of valuation methods in cases of restructuring, joint venture agreements, and tender.

The issue that raises difficulties in practice is the unregulated legal matter of how to proceed with the valuation of the exchange ratio if none or one of the merging companies is private.

The national legislation does not specifically provide rules that govern the choice of valuation methods to be used in cross-border mergers.

According to scholars and legal professionals, this stems out of the fundamental rule of civil and commercial law, namely the right of the autonomy and freedom of choice. The valuation rules applicable to mergers can be divided in two separate groups depending on the public or private nature of the legal entity. In the absence of consent between the merging companies on the valuation method to be used in the merger, the prevailing opinion is that the net value method should be applied.[56]

Pursuant to Article 6(1) Ordinance on the Content Requirements on the Justification of the Share Price of a Public Company, the fair value of shares that are not actively traded on regulated stock market, the following three valuation methods shall apply:

(1) method of discounted cash flow (DSF),

(2) method of net book value of assets, and

(3) price to earnings ratio method (P/E).

Of the above three, the method of net book value of assets is the most commonly applied due to the fairness of the outcome of the valuation. Moreover, applying the method of net book value of assets allows for the correct, fair, and justified determination of the exchange ratio.[57]

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

Pursuant to Article 18(1) Commercial Register Act, application and the attachments thereto shall be submitted in Bulgarian. The documents referred to in Article 18(1) may also be presented in any of the official languages of the European Union. In this

[56] N.Shterev, 'Business – Valuation of Enterprise', www.weblawg.deysot.com (last visited 26 May 2013).
[57] F. Filipova, 'National Problems on the Fair Evaluation and its Applicability to Mergers of Commercial Enterprises', http://ue-varna.bg/uploads/bibl/tom2/Sb_tom%202_FF_VG.pdf (last visited 26 May 2013).

case, the documents shall be presented together with an attested translation in Bulgarian.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The Domestic Merger procedure

The procedure for domestic merger in Bulgarian national law is the same as the one followed for a cross-border merger.

b. Comparison

The provisions applicable to both domestic and cross-border mergers but provided by the Commerce Act only are as follows:

(1) Creditor protection is provided under the domestic merger rules:

(a) The creditors are considered to be informed of their rights as of the effective merger date without any further notification being needed.

(b) The newly formed or surviving local company should manage separately the property acquired by each participating entity for six months as of the merger registration date. Members of the management body of the resulting company shall be jointly responsible for the separate management of the property.

(c) Each creditor holding a receivable that has not been secured and has arisen prior to the effective date shall be entitled to require either security or receipt of its receivable. In case the respective request is not fulfilled, this creditor shall be entitled to preferable performance of the rights that have been the property of its debtor (i.e., the respective former participating company).[58]

(2) The newly formed company may be declared null and void pursuant to Article 263p Commerce Act.

(3) The Commerce Act transposes an option for a cash settlement claim on behalf of a shareholder in three months terms as of the registration of the merger on the grounds of a not-equivalent exchange ratio.

(4) There is no restriction for owning land by the acquired company.

[58] A. Tatarova, R. Dimitrova and Y. Naydenov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 127- 128.

Transposition of the Cross-Border Mergers Directive into Cyprus Law

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1. Transposition of the Cross-Border Mergers Directive into Cyprus Law

The CBMD was transposed into the Cypriot legal order by Law 186(I)/2007, which was published in the Government Gazette on December 31, 2007.

The transposition was made by means of an amendment of the Cyprus Companies Law Cap. 113 (or the Cyprus Companies Law) through the amending Law 186(I)/2007, which introduced a new sub-chapter to the Companies Law called Cross-border Mergers of Companies with Share Capital, which was placed under Chapter IV (Management and Administration). The new articles of the Cyprus Companies Law that relate to cross-border mergers and were introduced by the amending law are numbered from 201I to 201KD, both inclusive.

The bill is not due to be replaced, modified, or amended.

After the transposition of the CBMD, the Companies Law was amended by The Law Amending the Companies Law, 64(I)/2012, published in the Government Gazette on May 31, 2012, which transposed the provisions of Directive 2009/109/EC in relation to cross-border mergers.

Prior to the publication of the CBMD, when Cyprus joined the European Union in May 2004, its national legislation began to become harmonized with European legislation by transposing in the national legislation the European Union Directives. Before incorporating European Directive 2005/56/EC in the national legislation at the end of 2007, the Companies Law Cap. 113 did not provide for cross-border mergers, but "re-organization" of Cypriot companies was allowed and a specific procedure for local mergers is still provided for in the Companies Law.

In 2007, the Cyprus Companies Law Cap. 113 was amended by Law 186(I)/2007 so as to transpose the European Directive 2005/56/EC in relation to cross-border mergers; cross-border mergers between Cyprus and companies incorporated in other European jurisdictions are now allowed.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first definition to which kind of mergers the Directive applies.

Article 1 CBMD provides for the general scope of the Directive and gives a first definition to which kind of mergers the Directive applies.

The scope of Cypriot national law, discussed in Article 201I of the Companies Law, is consistent with the provisions of the CBMD. The scope provided in the Companies Law specifies that the cross-border merger may only take effect between two companies

with share capital. It is noted that in the CMBD, this is only stated in the definition of the term "limited liability company."

Regarding companies outside of the scope of the Directive, Cypriot national law does not specifically exclude the application of the cross-border merger provisions to cooperative societies falling within the definition of "limited liability companies," as per the option given by Article 3(2) of the CBMD. The result is therefore that the cross-border merger rules transposed in the Companies Law are applicable to cooperative societies as long as these fall within the definition of "limited liability company" in Article 201I of the Cyprus Companies Law.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability companies'.

Regarding Article 2(1) of the CBMD, Article 201I of the Cyprus Companies Law provides a definition for the term "companies having share capital" instead of using the exact term used in the CBMD being "limited liability company." However, the definition provided is very similar to the one in the CBMD for "limited liability company," and thus the Companies Law suggests that the same rules would apply to limited liability companies.

b. List of companies that can carry out a cross-border merger under Cypriot law

Under Cypriot law, the companies that can take part in cross-border merger are the following:

(1) Applicability to Cyprus companies:

Article 201J(1) of the Cyprus Companies Law, under the heading Scope of Transposition, allows for the cross-border merger of companies with share capital as long as at least one of the merging companies with share capital is a Cypriot company or the merger-formed limited liability company is also a Cypriot company.

Article 201JA(1) of the Cyprus Companies Law under the heading Requirements, for cross-border mergers, specifies that (a) limited liability companies by guarantee as well as (b) companies under liquidation may not take part in a cross-border merger.

The Cyprus legislature chose not to specifically exclude the application of the cross-border merger provisions to cooperative societies, as discussed in Article 3(2) of the CBMD. The result is that the merger rules transposed in the Companies Law are applicable to cooperative societies as long as these fall within the definition of "limited

liability company" as laid down in Article 201I of the Cyprus Companies Law.

Specifically, Article 201I of the Cyprus Companies Law provides a definition for "companies having share capital" as follows: (a) company of a member state of the European Union and a Cyprus company, or (b) a company of share capital that possesses a legal personality, possesses separate assets — which are the only assets that may cover possible obligations of the company — and is subject to the national legislation and the terms of guarantee as those are prescribed in Directive 68/151/EEC for the protection of the interests of shareholders and third-parties.

(2) Applicability to Non-Cyprus companies:

In the definition of "cross-border merger of share capital companies" in Article 201I of the Cyprus Companies Law, it is specified that the cross-border merger is allowed to be carried out by share capital companies incorporated in accordance with the provisions of a Member State with their registered office, central administration, or main premises within the European community, under the requirement that at least two of these companies are regulated by the laws of two different Member States.

It is provided, of course, that the cross-border merger may only be carried out as long as the share capital companies intending to take part are allowed to do so by the national legislation of the countries in which they are registered.

The expression "European Union Member State Company," which is used in the definition of a "share capital company" in Article 201I of the Companies Law, is defined in Article 2 of the Companies Law (Definitions) and includes the following forms of legal entities:

(i) in Germany: *die Aktiengesellschaft, die Komanditgesellschaft auf Aktien, die Gesellschaft mit beschränkter Haftung*;

(ii) in Belgium: *la société anonyme/de naamloze vennootschap, la société en commandite par actions / de commanditaire vennootchap op aandelen, la société à responsabilité limitée/de personenvennootschap met beperkte aansprakelijkheid*;

(iii) in Denmark: *aktieselskab, kommandifaktieselskab, anpartsselskab*,

(iv) in France: *la société anonyme, la société en commandite par actions, la société à responsabilité limitée, la société par actions simplifiée*,

(v) in Ireland: public companies limited by shares or by guarantee, private companies limited by shares or by guarantee;

(vi) in Italy: *la societa per azioni, la societa in accomandita per azioni, la societa a responsabilita limitata*;

(vii) in Luxembourg: *la société anonyme, la société en commandite par actions, la société à responsabilité limitée*;

(viii) in Netherlands: *de naamloze vennootschap, de besloten vennootschap met beperkte aansprakelijkheid*,

(ix) in the United Kingdom: public companies limited by shares or by guarantee, private companies limited by shares or by guarantee;

(x) in Greece: την ανώνυμη εταιρεία, την εταιρεία περιορισμένης ευθύνης, την ετερόρρυθμη κατά μετοχάς εταιρεία;

(xi) in Spain: la *sociedad anonima, la sociedad commanditaria por acciones, la sociedad de responsabilidad limitada*;

(xii) in Portugal: *la sociedad anonima, de responsabilidade limitada, a sociedadde em comandita por accões, a sociedade por quotas de responsabilidada limitada*;

(xiii) in Austria: *die Aktiengesellschaft, die Gesellschaft mit beschränkter Haftung*;

(xiv) in Finland: *yksityinen osakeyhtio/privat aktiebolag, julkinen osakeyhtiö/publikt aktiebolag*;

(xv) in Sweden: *aktiebolag*;

(xvi) in Czech Republic: *společnost s ručením omezeným, akciová společnost*;

(xvii) in Estonia: *aktsiaselts, osaühing*;

(xviii) in Latvia: *akciju sabiedrība, sabiedrība ar ierobežotu atbildību*;

(xix) in Lithuania: *akcinės bendrovės, uždarosios akcinės bendrovės*;

(xx) in Hungary: *nyilvánosan múködó részvénytársaság*·

(xxi) in Malta: *kumpanija pubblika/public limited liability company, kumpanija privata/private limited liability company, soċjeta in akkomandita bil-kapital maqsum f'azzjonijiet/partnership en commandite with the capital divided into shares*;

(xxii) in Poland: *spółka akcyjna, spółka z ograniczoną odpowiedzialnością, spółka komandytowo-akcyjna*;

(xxiii) in Slovenia: *delniška družba, družba z omejeno odgovornostjo, komanditna delniška družba*;

(xxiv) in Slovakia: *akciová spoločnosť, spoločnosť s ručením obmedzeným*,

(xxv) in Bulgaria: акционерно дружество, дружество с ограничена отговорност, командитно дружество с акции, събирателно дружество,

(xxvi) in Romania: *societate pe acţiuni, societate cu răspundere limitată, societate în comandită pe acţiuni,asocietate în nume colectiv, societate în comandită simplă*.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Cypriot national law in Article 201l of the Cyprus Companies Law contains the same definition of "merger" as found in the CBMD, without any diverging rules.

d. Rules on the cash payment

The Cyprus Companies Law adopts the provisions on the cash payment requirement in Article 201I and proceeds in Article 201J(2) to clarify that notwithstanding the definition given to the term "merger," the rules for cross-border mergers also apply when the projected cash payment is greater than 10% of the nominal value or accounting par value of the company's securities or shares. This provision results from what is stated in Article 3(1) of CBMD, however Article 201J(2) also imposes a requirement that recourse to this provision would be allowed if a larger cash payment is allowed by one of the merging company's other Member States.

e. CBMs and companies in liquidation

Cypriot national law follows the CBMD regarding companies in liquidation; Article 201JA(1) of the Cyprus Companies Law states that companies under liquidation are not allowed to take part in a cross-border merger.

f. Geographical scope

In the definition of "cross-border merger of share capital companies" in Article 201I of the Cyprus Companies Law, it is specified that the cross-border merger is allowed to be carried out by share capital companies incorporated in accordance with the provisions of a Member State and they have their registered office, their central administration, or their main premises within the European Community, under the requirement that at least two of these companies are regulated by the laws of two different Member States.

It is noted that there is no court or other legal precedent as to the interpretation of the above definition and therefore it is not clear if a company formed within the EEA but having its registered office, central administration, or principal place of business outside of the EEA would be allowed to take part in a cross-border merger according to the provisions of the Cyprus legislation.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Regarding national legislation on cross-border divisions, seat transfers, and other cross-border restructurings, cross-border divisions would be allowed if the specific restructuring would fall under the scope of the mergers; there is no specific provision in the Companies Law for divisions.

Seat transfers to and from Cyprus are allowed under Articles 354A through 354R as long as the incorporation documents of such company and the national legislation of the other country allows for such a procedure to take place. Seat transfers are not limited to within the European Union.

The cross border regulations included in the Cyprus Companies Law follow the provisions of the EU Directives.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3 (1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Regulating Article 3(1) of the CBMD, Article 201J(2) of the Cyprus Companies Law also imposes a requirement that recourse to this provision is allowed if a larger cash payment is allowed by one of the merging company's other Member States.

b. General transposition of Article 3 (2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Cypriot law has not excluded cooperative societies from participating in cross-border mergers. The cross-border merger rules transposed in the Companies Law are applicable to cooperative societies as long as these fall within the definition of "limited liability company" as presented in Article 201I of the Cyprus Companies Law.

c. General transposition of Article 3 (3) CBMD

Article 3 (3) CBMD deals with the position of investment companies. Article 201J(3) of the Cyprus Companies Law under the heading "Scope of Transposition" provides that the provisions of CBMD transposed in the Companies Law do not apply to collective investment companies in Cyprus.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) has been transposed in Cypriot national law in Article 201JA (1) of the Cyprus Companies Law. The provision states that a cross-border merger is possible to be carried out only between types of share capital companies, for which a merger is possible under the local provisions of the national legislation of the involved Member States. Essentially what is provided is that in order for Cyprus to accept the carrying out of a cross-border merger, each interested company must show that the provisions

of the national laws of the Member State under which it operates allow it to carry out such a transaction.

b. Opposition by national authorities in Article 4(1)(b)

Article 4(1)(b) of the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) has not been transposed in Cypriot national law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member States with the option to adopt protections for creditors, debenture and security holders.

Cypriot law has transposed creditor protection regulations specific for cross-border mergers in Article 201JA(2) of the Cyprus Companies Law. A merger-involved Cypriot company must follow the provisions of the Companies Law relating to decision-making, creditors' protection, bond holders, and title bearers and shareholders. The court responsible for scrutinizing the cross-border merger must confirm that participating companies are offering creditors with protection if it is necessary and provide relevant safeguards in the court order to be issued if such are not already present.

The procedural steps to be taken are the ones provided for local mergers and are provided under Article 201D of the Cyprus Companies Law.

In comparison, according to Article 201D of the Cyprus Companies Law referring to local mergers, the court order issued should make a provision about the obligation of the companies involved to provide suitable guarantees to their creditors when:

(i) It is deemed that such protection is necessary if the financial situation of the merging companies (in the situation of a merging by acquisition or by the creation of a new company) or of the de-merging company as well as of the company, which according the de-merging plan will undertake the obligation against the creditors (in the situation of a de-merger), directs so; and

(ii) as long as the said creditors do not already have such guarantees.

The creditors are allowed to apply to the District Court with a claim for undertaking adequate measures of protection, under the requirement that they can reliably prove that due to the intended merger, the satisfaction of their demands is in danger and that no adequate measure of protection has been undertaken by the debtor company.

If in the situation of a de-merger a creditor of the company to which the corresponding obligation is transferred according to the de-merging scheme is not satisfied, each of the benefiting companies shall be responsible for such an obligation jointly and severally. Such obligation shall be limited for each benefiting company

except the one to which the obligation was transferred, up to the amount of the net asset value distributed to it through the merger.

Creditors do not have the possibility to block the merger.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member States with the option to adopt provisions for the protection for minority shareholders.

Cypriot law has set rules regarding minority shareholder protection specifically for cross-border mergers. Article 201JA(2) of the Cyprus Companies Law states that a Cypriot company participating in a cross-border merger must comply with the provisions of the Companies Law, including those relating to decisions about the merger, the protection of creditors of the merging companies, the holders of bonds, and the bearers of titles or shares.

The interests of minority shareholders are protected in the following two procedural ways:

(1) Article 201 of the Cyprus Companies Law focuses on shareholders dissenting from schemes approved by the majority. If, during a merger, a company is transferring its shares to another company, the transferee company may contact dissenting shareholders about acquiring their shares. The transferee company may be bound to acquire those shares if the approving shareholders' shares will be transferred over.

(2) Article 202 of the Cyprus Companies Law focuses on winding up in cases of minority oppression, but also provides an alternative. in that any company member who considers that their company's behaviour is oppressive can petition a Cyprus court which may grant an order either to regulate the company or to allow company members to purchase others' shares, or for the exit of the oppressed shareholder and the corresponding reduction of the company's capital.

In comparison to domestic mergers, Article 201JA(3) of the Cyprus Companies Law provides that the provisions of Article 201 apply proportionately to protect the minority shareholders who disagree with the cross-border merger.

e. The protection of employees in Article 4(2)

Cyprus National Legislation provides for employees' rights regarding cross-border mergers in Section 27, Clause 3 (Protection of Employee Representatives), where the employee representatives involved in a cross-border merger are allowed the same amount of protection as if a European company were being established. This protection includes: (1) attending special negotiating body (SNB) and company management meetings; (2) their wages; (3) their absence so they can perform their responsibilities; and (4) their dismissal.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) of the CBMD have been transposed in Article 201JB of the Cyprus Companies Law. However, Cypriot national law imposes the obligation of compiling the CDTMs specifically on the directors of each of the Cyprus companies taking part in the cross-border merger.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Article 201JC of the Cyprus Companies Law imposes an obligation on the directors of each of the merging Cyprus companies to file the CDTMs with the Registrar of Companies who is responsible for proceeding with its publication in the Government Gazette at least one month prior to the intended general meeting of the shareholders during which the CDTMs will be adopted.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6 (1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The Law Amending the Companies Law, 64(I)/2012, adopted the provisions of Article 4(1) of the Directive 2009/109/EC, and by amending Article 201JC(1) of the Cyprus Companies Law, it now provides that each of the merging Cyprus companies is exempted from the obligation to publish the CDTMs in the Government Gazette if, for a continuous period beginning at least one month before the day fixed for the general meeting during which a decision regarding the CDTMs will be made and ending not earlier than the conclusion of that meeting, it makes the CDTMs of such merger

available on its website free of charge for the public.

The provision continues further to impose an obligation on the company to maintain the information on its website for at least one month after the general meeting and also that the specific period should be prolonged for such a time period if a possible interruption of access to the website has occurred because of technical or other reasons.

However, according to the Cyprus Companies Law the public does not need to be notified of the publication, and if the publication is made on the website of the merging company it will be adequate.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 201JC(2) of the Cyprus Companies Law imposes an obligation on the directors of each of the merging Cyprus companies to file certain specificities (corresponding to the exact specificities required by Article 6(2) of the CBMD) with the Registrar of Companies, who is responsible to proceed with its publication in the Government Gazette.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 of the CBMD has been transposed in Cypriot national law in Article 201JD of the Cyprus Companies Law. The law provides that the report should be made available to the shareholders and to the representatives of the employees and, in the absence of representatives, directly to the employees.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 201JE(1) of the Cyprus Companies Law provides that an independent expert report must be prepared for each merging Cyprus company and addressed to and

delivered to the members of each of the merging Cyprus companies at least one month before the general meeting.

b. The independent expert

According to Article 201JE(1) of the Cyprus Companies Law, the independent experts may be either natural or legal persons.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

According to Article 201JE(2) of the Cyprus Companies Law, it is possible for one or more independent experts who are appointed upon a joint application of the merging companies by the applicable judicial or administrative authority of the Member State whose legislation governs one of the merging companies or the company which emerges from the cross-border merger, or if such independent experts are already approved by such authority, to proceed with the examination of the CDTMs and compile one common written report which shall be addressed to all the members of the merging companies.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

The particulars contained in Article 10(2) of the Council Directive 78/855/EEC (now Directive 2011/35/EU) are transposed in the Companies Law in Article 201JE(3).

e. Access to information

Article 8 (3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) of the CBMD has been transposed in Cypriot national law; Article 201JE(4) of the Cyprus Companies Law provides that the independent experts have the right to request from each of the merging companies every information they consider necessary for the execution of their duties.

According to Article 201Z of the Cyprus Companies Law, the directors and the independent experts involved in a merger are personally liable for any damage caused by their negligent conduct. Its further provided that if a director and or an independent expert execute documents that contain false information, they conduct a criminal act.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 201JE(5) of the Cyprus Companies Law provides that if all the members of each of the merging companies agree, then it is not necessary to have the CMDTs examined by independent experts, neither is the compilation of a report necessary.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Article 201KB(2) of the Cyprus Companies Law provides that when a cross-border merger by acquisition is carried out by a Cypriot company that holds all the shares and voting rights at the acquired company's general meeting, the provisions of Article 201JE of the Cyprus Companies Law, which refer to the necessity of a report by independent experts, do not apply. Furthermore, Article KB(3) of the Cyprus Companies Law provides that when a cross-border merger by acquisition is carried out by a non-Cypriot company of another Member State that holds all the shares and voting rights at the acquired company's general meeting, the provisions of Article 8 of the CBMD, which refer to the necessity of a report by independent experts, do not apply.

h. Further exemptions in Cypriot law

There are no further exemptions in Cypriot national law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed in Cypriot law in Article 201JF(1) of the Cyprus Companies Law.

a. Procedural requirements including majority, quorum, timing and notarization

Article 201JF of the Cyprus Companies Law, which relates to the approval of the merger terms by the general meeting, does not specify any special majority for such approval. However, Article 198, which relates to local mergers, requires a special majority of three-fourths of the holders of the shares of the company, therefore, unless there is a specific requirement that dictates otherwise in the Articles of Association of the concerned company, it is interpreted that the approval of the terms of a cross-border merger shall also require a three-fourths majority.

The merger terms must be published in the Government Gazette at least one month before the holding of the extraordinary general meeting.

No notarization is required by the Cyprus Companies Law.

b. Amendment of CDTMs by shareholders

According to Article 201JF(2) of the Cyprus Companies Law, the general meeting of each of the merging companies may decide to make transposition of the cross-border merger conditional upon a decision regarding employee participation in the merger-formed company.

According to Article 201JF(3) of the Cyprus Companies Law, once the merger plan is approved, the general meeting will decide to allow members of any other merging Member State companies to use their governance procedures, such as modifying the exchange of bonds or shares or the compensation to members of minority without precluding the merger's filing.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

According to Articles 201KB(1) and (2) of the Cyprus Companies Law, there is no need for a general meeting to be held by the company being absorbed:

(1) when the cross-border merger by acquisition takes place by a Cyprus company that holds all the shares and securities granting a voting right in the general meeting of the company or companies being acquired (and dissolved without going into liquidation); and

(2) when the cross-border merger by acquisition takes place by a non-Cypriot company of another Member State, which holds all the shares and securities granting a voting right in the general meeting of the company or companies being acquired (and dissolved without going into liquidation).

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15 (1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

The exemption to shareholder approval under Article 15(1) of the CBMD is essentially covered in Articles 201KB(1) and (2) of the Cyprus Companies Law. In the case of absorption of a wholly owned subsidiary by a parent company, the approval of shareholders is required for the parent company but not for the subsidiary.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Article 201JG of the Cyprus Companies Law.

b. National authority has been designated to scrutinize the legality of the merger

The District Court of the district where the registered office of each merging Cypriot company is located must scrutinize the legality of the merger. According to Article 201JG(1) of the Cyprus Companies Law, the court reviews the documents filed at the court, the application of each merging company, and the sworn affidavit of one of each company's officials accompanying the application. The court does not proceed to a substantive check.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) of the CBMD has been transposed in Article 201JF(3) of the Cyprus Companies Law. In addition, according to Article 201JG(4), it is possible for the pre-merger certificate to be issued by the appropriate District Court regardless of such procedure being pending as long as the court mentions on the order that such procedure is pending.

If in such a situation the general meetings of other involved companies do not agree, Article 201JA(3) of the Cyprus Companies Law provides that the interests of minority shareholders shall be protected in the same way as the interests of the minority shareholders in local mergers.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed in Cypriot national law in

Article 201JH of the Cyprus Companies Law.

b. The national authority has been designated to scrutinize the legality of the merger

According to Article 201JH(1) of the Cyprus Companies law the District Court of the district where the registered office of each merging Cypriot company is located must scrutinize the legality of the cross- border merger as regards the part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross- merger. Also, according to 201JH(2) the District Court shall in particular ensure that the merging companies have approved the common draft terms of cross-–border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined, for each merging Cypriot company, in accordance with Article 201KC and, for each other–merging non Cypriot Company, in accordance with Article 16 of the Directive 2005/56/EC.

In accordance to Article 201JH(3), each of the merging Cyprus companies shall submit to the District Court the certificate referred to in Article 201IZ(2), and any other merging non Cyprus company, the certificate issued by the competent authority in accordance to the Article 10(2) of the Directive 2005/56/EC, within 6 months of its issue and the common draft terms of the cross-–border merger approved by the general meeting for each merging –Cypriot companies, in accordance to Article 201 JF and for each other merging non Cypriot companies, in accordance to Article 9 of the Directive 2005/56/EC.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed in Cypriot national law in Article 201KA of the Cyprus Companies Law; however, the transposition does not contain the limitation stipulated in the CBMD that the effective date must be after the scrutiny referred to in Article 11 of the CBMD. Therefore, in practice if requested by the applicant companies, the effective date may be prior to the scrutiny taking place by the Cyprus District Court which is the competent authority to issue the certificate.

b. Date the cross-border merger takes effect

The cross-border merger produces legal effects as from the date specified on the order issued by the District Court on the basis of Article 201JI of the Cyprus Companies Law or, where the authority competent to approve the completion of the cross-border

merger is that of another Member State, from the date determined by the relevant national legislation as per Article 12 of the CBMD.
Under Cypriot law, a cross-border merger is enforceable by the resulting company against third-parties as from the date on which a copy of the court order approving completion of the merger is published in the official Government Gazette, according to Article 365A of the Companies Law.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.
National law has transposed the first sentence of Article 13 in Article 201K of the Cyprus Companies Law, which refers to Article 365A that provides for the procedure that must be carried out for the publication of documents filed with the Registrar of Companies in the Government Gazette. The copy of the court order approving the completion of the cross-border merger is published in the Government Gazette and notified directly by the Registrar of Companies to the registry of the Member State in which the non-Cypriot participating company was required to file documents proving that the cross-border merger has taken effect.

b. Transposition of Article 13 second sentence

Cypriot national law has also transposed Article 13 second sentence; Article 201K(4) of the Cyprus Companies Law provides that upon the filing of the court order and its publication in accordance with the applicable provisions, the Registrar of Companies proceeds with the de-registration from the Companies Registry of the acquired companies by mentioning the effective date of the cross-border merger results.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Articles 201KA(1) through (5) of the Cyprus Companies Law mirror Article 14 of the CBMD.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: 1)

where a cross-border merger with a wholly owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15 (1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

According to Articles 201KB(1) and (2) of the Cyprus Companies Law, there is no need for a general meeting to be held by the company being absorbed:

(1) when the cross-border merger by acquisition takes place by a Cyprus company that holds all the shares and securities granting a voting right in the general meeting of the company or companies being acquired (and dissolved without going into liquidation); and

(2) when the cross-border merger by acquisition takes place by a non-Cypriot company of another Member State, which holds all the shares and securities granting a voting right in the general meeting of the company or companies being acquired (and dissolved without going into liquidation).

Article 15 (1) further provides that in a merger with a wholly owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

These further provisions of Article 15(1) of the CBMD have not been transposed in Cypriot national law.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Article 201KC(1) of the Cyprus Companies Law provides that in relation to the possible participation of the employees, the company resulting from the cross-border merger shall be subject to the national legislation of the Member State where its registered office is located.

Articles 201KC (2) through (7) of the Cyprus Companies Law provide for the situations where the national legislation would not apply in the exact same manner as Article 1

of the CMBD, and in such cases it follows the same procedure as the CBMD.

The national legislation of Cyprus that would apply in such a case would be the Law Providing for the Maintenance and Safeguard of the Employees Rights during the Transfer of the Business, of Establishment or Parts of the Business or Establishment, 104(I)/2000 and 39(i)/2003.

The transferor and transferee companies have an obligation to inform the employees or their representatives, before the conclusion of the transfer and before the commencement of any effects on the employees, in relation to the following:

(1) the proposed effective date of the transfer;

(2) the reasons of the transfer;

(3) the legal, economic and social consequences of the transfer for the employees; and

(4) the proposed measures which shall be taken in relation to the employees.

When the transferee or transferor companies intend to make changes in the employment status of their employees, they are obliged to enter into a prior and timely negotiation with the employees or their representatives. If no agreement can be reached, the appropriate authority to deal with such disputes is the Labor Court.

When during the transfer the transferee retains its autonomy, the status, the representation, and the exercise of the representation procedure by the representatives of the employees who are affected by the transfer shall be maintained with the same terms and shall be under the same conditions as those which applied previously. When during the transfer the transferee does not retain its autonomy, the transferor and transferee are obliged to undertake any necessary measures so as to safeguard the rights of the employees who were represented prior to the transfer so that they can continue to be adequately represented during the period until the reconstruction or the appointment of the employees' representative.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) of the CBMD has been transposed in Article 201KC(1) of the Cyprus Companies Law, which states that the norms regulating employee participation in the resulting company are those of the Member State where its registered office is located.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) of the CBMD has been transposed in Article 201KC(2) of the Cyprus

Companies Law.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3) has been transposed in Article 201 KC(3) of the Cyprus Companies Law, but Cypriot national law does not refer to an increase in the percentage to 33 1/3 %.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4) of the CBMD has been transposed in Article 201KC(4) of the Cyprus Companies Law.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) of the CBMD has been transposed in Article 201KC(5) of the Cyprus Companies Law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) of the CBMD has been transposed in Article 201KC(6) of the Cyprus Companies Law.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed in Article 201KC(7) of the Cyprus Companies Law.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 of the CBMD has been transposed into Cypriot national law. Article 201KD of the Cyprus Companies Law provides that a cross-border merger that has begun to produce results in accordance with Article 201JI (commencement of results of the cross-border merger) of the Cyprus Companies Law cannot be declared null and void.

1.18. Additional

a. Valuation rules

No specific requirements for valuation rules exist in Cypriot national law. Cyprus follows the International Financial Reporting Standards.

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

The court will accept filing of documents in Greek and English, and the Registrar of Companies will only accept documents translated in Greek.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

In Cypriot national law, it is possible to propose a compromise or arrangement between a company and its creditors or any class of them, or between a company and its shareholders or any class of them, and according to Article 198 (1) of the Cyprus Companies Law, the court may, upon a petition by the company itself, any of the creditors or the shareholders or the liquidator if such company is under liquidation, provide directions for any meetings of the creditors and or the shareholders as may be deemed necessary.

Article 198(2) provides that any such compromise or arrangement must be approved by three quarters of the affected persons (i.e. creditors, members or any class thereof) and thereafter if approved by the court it will be binding on all such persons as well as the liquidator if the company is under liquidation.

According to Article 198(3) any court order issued relating to such a compromise or arrangement must be filed with the Registrar of Companies within 7 days from its issue and a copy of such order must be attached to the Memorandum of Association of the company from then onwards.

It is further clearly specified that the term ''company'' includes companies which are under liquidation and that the term ''arrangement'' includes the readjustment of the share capital of the company by way of consolidation of classes of different shares

and/or with the division of shares of different classes.

According to Article 199 any notice for a meeting which will be convened under Article 198 must be accompanied by a report specifying the consequences of such a compromise or arrangement and especially to lay out any substantial interests of the directors of the company either in their capacity as members, or as creditors of the company or otherwise and the results in the extent which are different from the interest of other persons.

When a petition is filed to Court for the ratification of the compromise or arrangement between the company and any such persons as these are described in Article 198, and is shown to the Court that such compromise or arrangement was proposed for the purpose or in the terms of a re-organization or merger scheme of two or more companies and that when in accordance with such scheme the whole or a part of the business or the property of the company affected by the scheme ("the transferor company") is intended to be transferred to another company ("the transferee company"), the Court may direct as it deems fit for all the below issues:

(a) the transfer to the transferee company the whole or part of the transferor company' business, property and or liabilities;

(b) the allotment or appropriation by the transferee company of any shares, debentures, policies or other similar interests to any person;

(c) the continuation of any pending legal proceedings by or against the transferor company by or against the transferee company;

(d) the dissolution without liquidation of any transferor company;

(e) any provision which needs to be made for persons who dissent from the decision to proceed with the compromise or arrangement;

(f) any such relevant, consequential and complementary matters which are deemed necessary.

When a court order provides for the transfer of assets and or liabilities by the transferor company, such assets shall be considered to belong to and the liabilities shall be considered to be undertaken by the transferee company.

Article 201 provides for the procedure to be followed for acquiring the shares of persons who disagree with the re-organization or the compromise.

The Cyprus Companies Law, further provides for the merger of public companies as follows:

(a) The merger by absorption of one or more public companies by another public company is considered to be:

(i) the act by which one or more companies are dissolved without liquidation

and they transfer to another existing company all their assets and liabilities, allotting shares to the shareholders of the acquiring company as well as any settling amount in cash;

(ii) the absorption of a company by another which possesses at least 90% but not all the shares of the first company;

(iii) the act by which one or more public companies are dissolved without liquidation and they transfer all their assets and liabilities to another company which holds all their shares and any other titles which grant voting rights;

(b) The merger of public companies by the incorporation of a new public company. Such a merger consists of the dissolution without liquidation of one or more companies and the transfer to one newly incorporated company their assets and liabilities by allotting to their shareholders shares of the new company and any settling amount in cash.

(c) The demerger of public companies. This entails:

(i) the demerger through absorption, i.e. the act by which a company is dissolved without liquidation and transfers to more existing companies (the benefiting companies) all their assets and liabilities through the distribution to the shareholders of the first company, shares as well as any settling amount is cash;

(ii) the demerger through the incorporation of new companies, i.e. the act by which a company is dissolved without liquidation and transfers to more new companies (benefitting companies) their assets and liabilities through the distribution to the shareholders of the first company, shares as well as any settling amount in cash.

It is provided that all the above procedures described in paragraphs (a) to (c) may be effected even if one or more companies are under liquidation as long as the distribution of assets has not yet commenced.

The procedure to be followed is similar to the one described for private companies however the directors of the participating public companies are also required to prepare a merger plan which should include the name, form, and registered office of the company, the relationship of the transfer and exchange of the shares and the total of the merged amount in cash, the method in which the shares will be distributed, the date after which the shares provide the right of participation in profits, the date after which the acts of the absorbed or divided company are considered to have been done on behalf of the absorbing or the benefited company, the rights that are guaranteed by the absorbed or the benefiting company and all the special privileges that are provided to the experts.

In both the procedure referring to the private companies and the procedure referring to the public companies the law provides for a number of petitions to the court for step by step approvals of the different stages involved, however in practice it is possible to have all the steps approved (if unanimous consent is acquired) and proceed with a summary petition to the court with a request to provide one final court order.

b. Comparison

The procedure-followed in Cyprus which relates to cross-border mergers is as follows:
A Common Draft Terms (CDT) must be prepared by the corresponding directors of each of the merging companies and should include the provisions contained in clause 201JB.
The directors of the Cyprus company file the final draft of the CDT with the Registrar of Companies (clause 201JC(1)) for publication in the Cyprus Government Gazette. The publication must be done at least one month prior to the convening of the General Meeting of the shareholders which will adopt the merger.
The directors of the Cyprus company must thereafter file in a timely manner with the Registrar of Companies certain particulars with regards to the merging companies for publication in the Government Gazette and should include the provisions contained in clause 201JC(2).
The exact point in time as to when these particulars should be filed is not specified in the Law, except for the requirement that they must be filed in a "timely manner". In practice this is done simultaneously or shortly after the filing of the CDT with the Registrar of Companies. In order to be in a position to file the specified particulars under this section the following information is also required from the rest of the Non-Cyprus companies:

(i) the type, name and registered office of the Non-Cyprus company;

(ii) the filed documents referred to in the national legislation transporting the provisions of Article 3 (2) of Directive 68/151/EEC and the number of the entry in that register;

(iii) an indication for each of the merging companies, of the arrangements made for the exercise of the rights of creditors.

In accordance with the provisions of section 201JD the directors of the Cyprus company, must draw up a report (the Directors' Report on the Merger) and make it available to the members, where the legal and economic aspects of the merger are being explained and justified.
This report should be circulated to the members, at least one month prior to the convening of the General Meeting of the Shareholders.

The General Meeting of the Shareholders will be convened taking into consideration the time frames provided in the Law, where the decision of the merger must be adopted in accordance with the provisions of section 201JF of the Law.

Thereafter, and upon receiving by the Non-Cyprus companies a copy of the pre-merging certificate by the corresponding authority in their country of registration issued within 6 months of presenting it, (corresponding to section 10, paragraph 2 of the Directive 2005/56/EEC) and a copy of the resolution passed by the General Meeting of each of the Non–Cyprus companies, an application is filed to court to request the issue of a certificate attesting that the pre-merger requirements have been correctly completed. Upon the issuing of the respective certificate, the court will allow itself time to study all the documentation provided to it and will fix the application for a second appearance.

Upon the satisfaction of the court that all the above mentioned documents have been submitted and that both merging companies have approved the CDT upon the same terms, the court, at the second appearance shall issue a decision where the effective date of the commencement of the cross-border merger shall be specified.

Upon the issuing by the court of the final court decision, this is filed with the ROC for publication in the Government Gazette. Any Cyprus company which has been absorbed by way of the cross-border merger shall be removed from the Registry of Companies.

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1. Transposition of the Cross-Border Mergers Directive into Czech Law

The CBMD was transposed in the Czech Republic when the relevant law became effective, on July 1, 2008.[1] The Act on Transformation of Commercial Companies and Cooperatives (Act No. 125/2008 Coll.) (the Transformation Act), adopted on March 19, 2008,[2] became effective on July 1, 2008.[3] The Act governs both domestic and cross-border mergers.[4]

The Transformation Act was extensively amended on November 11, 2011, and the amendment became effective on January 1, 2012.[5] The main purpose of the amendment was to better synthesize Czech law with EU law.[6]

The amendment to the Transformation Act is a substantial "revision" of the current wording, which applies in following areas:

(1) rules governing the date on which the cross-border merge takes effect; according to the new legislation, it can be set in the future as well;

(2) admissibility of the completion of the merger and the current change in the legal form of the company (not required in two successive steps, as before);

(3) expansion of cross-border forms of transformations, the possibility to transfer the registered office abroad, and vice versa;

(4) in some cases it will be possible to publish the required information on the transformation only on the website of the company and it will be enough to publish a link to this website in the commercial gazette;

(5) expansion and strengthening of the rights of shareholders and creditors. Under some circumstances such shares or shares of those who disagreed with the transformation will have to be purchased according to the new amendment.[7][8]

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[1] L. Štorek and L. Vožehová, 'Czech Republic: Transformations Of Commercial Companies And Cooperatives', http://www.mondaq.com/x/65832/Corporate+Commercial+Law/Transformations+Of+Commercial+Companies+And+Cooperatives (last visited 19 August 2013).

[2] A. Jirousek and J. Lasák, 'Czech Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 147.

[3] L. Štorek and L. Vožehová, 'Czech Republic: Transformations Of Commercial Companies And Cooperatives'.

[4] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 147-48.

[5] I. Fára and V. Chrobok, '2012: Fresh look for Transformation Act', http://www.lexology.com/library/detail.aspx?g=24d890e1-546a-4557-8abd-4ab21cd8bea6 (last visited 19 August 2013); C'M'S, 'CMS Restructuring and Insolvency in Europe Newsletter: Autumn 2011', http://www.cms-dsb.com/Hubbard.FileSystem/files/Publication/f3162619-105e-464a-aae0-5bc5ac49fc9a/Presentation/PublicationAttachment/c6f5c418-488e-43a1-9baa-6254f85a1025/CMS_Newsletter_Restructuring_and_Insolvency_autumn_2011.pdf (last visited 19 August 2013), p. 11.

[6] Czech Marketplace, 'Amendment to the Act on Transformations of Business Companies', http://www.czechmarketplace.cz/en/3366.amendment-to-the-act-on-transformations-of-business-companies (last visited 19 August 2013).

The bill is not currently due to be modified or amended. There was an amendment regarding the electronic signature in the provision of Section 33b Transformation Act effective since July 1, 2012, but that change does not apply to this report.

Prior to the publication of CBMD, neither Czech legislation nor its case law dealt with cross-border mergers.[9] Prior to the CBMD, there was only a regulation of the domestic mergers of the LLC in the Commercial Code (Act. No 513/1991 Coll.), and it appears that no cross-border mergers took place in the Czech Republic (other than those effectuated through the formation of SEs and SCEs).[10] Czech companies had refrained from engaging in cross-border mergers, due in large part to this ambiguity in Czech law.[11]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The cross-border merger laws of the Transformation Act include all Czech companies that qualify for domestic mergers.[12] Except where specified, the following applies to both domestic mergers and cross-border mergers. This includes all companies that would be considered LLCs under Article 2(1) CBMD—including both private and public LLCs, and cooperatives—as well as general commercial partnerships and limited partnerships.[13] The Transformation Act also includes cooperative societies, as long as they were formed to perform business operations.[14] The Transformation Act further includes companies and cooperatives that have entered into liquidation, in which case, the liquidation ends when the shareholders or other relevant body approves the merger.[15]

The Transformation Act also includes companies and cooperatives with pending insolvency proceedings or that have been the subject of a court decision declaring them insolvent.[16] In such cases, however, certain provisions of the Czech Insolvency

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[7] K. Sebesta and L. Čechová, 'Zjednodušená přeshraniční fúze sloučením po novele zákona o přeměnách', *eLaw.cz* (2012), http://www.elaw.cz/cs/obchodni-pravo/713-zjednodusena-preshranicni-fuze-sloucenim-po-novele-zakona-o-premenach-.html (last visited 19 August 2013).

[8] KŠB, 'Nová úprava fúzí a dalších přeměn obchodních společností a družstev', http://www.ksb.cz/cs/novinky-publikace/569/nova-uprava-fuzi-a-dalsich-premen-obchodnich-spolecnosti-a-druzstev (last visited 19 August 2013).

[9] D. Neveselý et al., 'Cross-Border Reorganizations in the Czech Republic', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), p. 205 (6.01).

[10] Ibid.

[11] Ibid.

[12] Ibid., p. 206 (6.08).

[13] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 148.

[14] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 206 (6.07).

[15] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 149.

[16] Ibid.

Act (Act No. 182/2006 Coll.) must be complied with.[17] Among other issues, these provisions address who is authorized to act on behalf of the company and required special approval by others, such as the committee of creditors of the company.[18]

Furthermore, the Transformation Act goes beyond the CBMD and allows the cross-border dissolution of a commercial company without the CBMD's requirement[19] that the assets and liabilities of the company are transferred to a sole shareholder.[20] The relevant provisions are ambiguous, however, and it would therefore be practically difficult to rely upon this inclusion.[21]

The Transformation Act excludes from its scope companies whose main business is "risk-spreading" by way of investing money collected from the public, where the holders of the units can repurchase or redeem those units from the company's assets.[22] Non-profit organizations also are excluded.[23]

The Transformation Act also prohibits the merger of two limited partnerships into a company without limited liability or the merger of two companies without limited liability into a limited partnership.[24] Furthermore, cooperative societies may be merged only with each other.[25]

Under Czech law, funds that engage in collective investment are called investment funds or investment companies, and they necessarily have the form of a public LLC.[26] Some of these are explicitly excluded, while others are only practically excluded, as will presently be explained. An investment fund is excluded only if it: (1) invests capital collected from the public; (2) issues securities on the regulated market; and (3) ensures that the stock exchange value of those securities does not vary considerably from their actual value.[27] Otherwise, investment funds and investment companies can participate in a cross-border merger, but only with the consent of the Czech National Bank.[28] While the Transformation Act does not explicitly exclude investment funds and investment companies, however, they are all practically excluded because, under Czech law, they exist only in forms that deem them outside of the definition of Article 3(3) CBMD.[29] [30]

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[17] Ibid.
[18] Ibid., p. 149–50.
[19] See Article 2(2)(c) CBMD.
[20] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 150.
[21] Ibid.
[22] Ibid., p. 149.
[23] Ibid.
[24] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 207 (6.09).
[25] Ibid.
[26] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 149.
[27] Ibid.
[28] Ibid.
[29] Ibid.

For a cross-border merger to be subject to Czech law, the merger must involve a "foreign company," defined strictly as a company (1) with a legal personality; (2) possessing separate assets, (3) subject to the law of a foreign Member State; and (4) capable of participating in a cross-border merger under EEA law and the relevant national law.[31] Foreign companies are included in the scope as long as the relevant EEA country allows the company in question to participate in a cross-border merger.[32] The Transformation Act explicitly includes within its scope a foreign limited partnership with capital divided in shares (such a corporate form does not exist under Czech law but does exist in countries such as Germany).[33] An SE falls within the scope, and is attributed the status of a public LLC.[34]

The 2012 amendment to the Act extended the scope to include other kinds of foreign legal entities, where the common draft terms provide that the acquiring company will be a new Czech-incorporated company.[35] The Act as generally interpreted also includes situations in which Czech companies merge to create an acquiring company that is a foreign company.[36]

Before the amendment, the text of the Act explicitly regulated only the cross-border merger. Other forms of transformations were codified only for domestic situations. However, the decision of the Court of Justice of the European Union (i.e., the decision of the Court of Justice of the European Union regarding *SEVIC Systems AG (C-411/03)*) shows that the law under which some forms of transformations are permissible only to domestic situations is contrary to the fundamental freedoms enshrined in the Treaty on the Functioning of the European Union. Therefore the Act, since January 1, 2012, takes into account the case law of the Court of Justice of the European Union, i.e., in addition to the cross-border mergers newly and explicitly regulating other forms of cross-border transformations, i.e., the distribution of cross-border and cross-border transfer of assets. Besides the above-mentioned forms of cross-border transformation, the cross-border transfer of registered office is also introduced, for transfer to the Czech Republic or transfer abroad.

[30] The new Act on investing companies and investing funds is in the legislation process (at this moment in the parliament). The proposal of the Act in Section 354 and 355 includes the provision on the merger of the investing funds.
[31] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 208 (6.16).
[32] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 148.
[33] Ibid.
[34] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 206 (6.06).
[35] Ibid., p. 207–08 (6.15).
[36] Ibid., p. 208 (6.15).

When transferring to the Czech Republic from another Member State, a foreign company headquarters will move to the Czech Republic and will also change its legal form in accordance to the Czech Commercial Code.

As to the transfer abroad, the Czech company transfers its headquarters to another Member State and at the same time:

(1) changes the legal form to the one that is recognized by the law of the Member State to which transfers its headquarter or

(2) retains its legal status, i.e., will continue to be managed under the Czech Commercial Code,[37] if the law of the Member State does not stipulate something else, i.e., the law of the Member State must approve that it retains its legal statutes (Section 384f(1) of the Act).

Article 1 CBMD has been originally transposed in Sections 68, 69, 1 and 3(1) Transportation Act. After the amendment of the Act, the Article was transposed in Sections 180 and 181 Act.

The Act goes beyond the CBMD and allows the cross-border dissolution of a commercial company without the CBMD's requirement[38] that the assets and liabilities of the company are transferred to a sole shareholder.[39] The relevant provisions are ambiguous, however, and it would therefore be practically difficult to rely upon this inclusion.[40]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General Transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Regarding Article 2(1) CBMD, the first paragraph of the Transformation Act only refers to the term "commercial company" and introduces a legislative abbreviation "company," similar to the Commercial Code, which will help to simplify the text. Legislative abbreviation "company" will not be used where there will be a presentation regarding a particular legal form of the company (such as a public company).[41]

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[37] BusinessInfo.cz, 'Přeměny obchodních společností - průběh přeměny', http://www.businessinfo.cz/cs/clanky/premeny-obchod-spolecnosti-prubeh-opu-4599.html (last visited 20 August 2013).

[38] *See* CBMD Article 2(2)(c).

[39] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 150.

[40] Ibid.

[41] DŮVODOVÁ ZPRÁVA (Explanatory memorandum to the Amendment proposal), http://www.komora.cz/download.aspx?dontparse=true&FileID=4057 (last visited 20 August 2013).

Definition of the LLC for a purpose of the Act is within a general definition of the companies in the Commercial Code (Act. No 513/1999 Coll.).[42]

b. List of companies that can carry out a cross-border merger under Czech law

All types of commercial companies established under the Czech law can be involved in the cross-border merger. Those are general partnerships, limited partnerships, private limited liability companies, public limited liability companies, European companies, the European cooperative societies and cooperatives.

Definition of a company in Article 2(1)(a) CBMD is set in Section 154(1) Commercial Code, regulating the public limited liability company. Section 56 Commercial Code includes the definition of the company. Definition of a company with share capital is set in Section 105(1) Commercial Code. Definition of cooperative societies is in Sections 221(1) and 222 Commercial Code.[43]

c. General Transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

The Transformation Act follows the same definitions as the CBMD. Article 2(2)(a) has been transposed in Sections 61(1), 63(1), and 64(1) Act; Article 2(2)(b) in Sections 62, 64(1), 63(2) and 65 Act; and Article 2(2)(c) in Sections 61(2), 63(1) and 64(1) Act.

d. Rules on the cash payment

The Transformation Act follows the rules on the cash payment as laid down in Articles 2(2)(a) and (b) CBMD in Section 88a Act. However, Article 3(1) CBMD has not been transposed.

e. CBMs and companies in liquidation

The Transformation Act includes companies and cooperatives that have entered into liquidation, in which case, the liquidation ends when the shareholders or other relevant body approves the merger.[44]

f. Geographical scope

The Czech Republic also allows cross-border mergers with foreign entities capable of participating in a cross-border merger under EEA law and the relevant national law.

[42] The Commercial Code No. 513/1999 Coll. is to be replaced by the Act on Commercial Corporations No. 90/2011 which is already approved and shall be effective from January 1, 2014.

[43] Effective from January 1, 2014, Section 1 (2) of the Act on Commercial Corporations includes the definition of the company and Section 243 of the Act includes definition of the public limited liability company. Definition of cooperative societies will be included in Section 552 of the Act.

[44] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 149.

Foreign companies are included in the scope as long as the relevant EEA country allows the company in question to participate in a cross-border merger.[45]

Based on Section 59b Transformation Act, a foreign natural person for the purposes of this Act means any natural person resident outside the Czech Republic and a national of a Member State, a family member of such a person, a third-country national who has granted long-term residency in a Member State, or a family member of such a person who was issued a term resident permit in the Czech Republic. For the purposes of this Act, a foreign legal person means other than a natural person whose internal relations are governed by the law of a Member State other than the Czech Republic and which has its registered office, its head office, or principal place of business in a Member State other than the Czech Republic.

According to this provision, "foreign person" is an entity from the Member State; therefore transformation with a non-EU company is not possible.

However, as soon as the acquiring company is governed by other Member State law which allows it, then it may be possible.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Czech law allows cross-border mergers through the formation of an SE or SCE, non-harmonized mergers, divisions and partial divisions, seat transfers, global transfers of assets and liabilities.[46]

The national rules are based on the CBMD, based on the 10th Directive, with most of its provisions generalized so they could be applicable to all cross-border transformation (or at least cross-border mergers and divisions); certain provisions were also adjusted to take into account the legal system of the Czech Republic. Moreover, the Court of Justice of the European Union's *C-387/10 Vale Epistesi kft* decision was reflected when preparing the provision of national law. [47]

Although the original legislation transposing the CBMD did not address cross-border divisions, "legal scholars unanimously" agreed that these were possible as of the transposition of the Transformation Act in 2008, based on relevant case law.[48]

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[45] Ibid., p. 148.
[46] See generally Ibid., p. 226-32.
[47] T. Dvorak, 'Promeny a cezhranicny promeny obchodnich spolecnosti a druzstev', *Wolter Kluwerr* (2013).
[48] Ibid., p. 227 (6.123).

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) CBMD has not been explicitly transposed into Czech national law however, it can be argued, that this provision has been implemented. Pursuant to the Czech legislation the amount of the cash payment cannot exceed 10% of nominal/accounting par value of the shares.[49] For foreign companies, it is possible to exceed this amount if it is allowed by the legislation of the concerned Member State.[50]

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. The Czech Republic has included cooperative societies.[51] However, they may be merged only with other cooperative societies.[52]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

Article 3(3) CBMD has been transposed in Czech national law in Section 96(5) Act on Collective Investment (189/2004 Coll.).[53] The Transformation Act excludes from its scope companies whose main business is "risk-spreading" by way of investing money collected from the public, where the unit holders decide whether to repurchase or redeem those units from the company's assets.[54] Nonprofit organizations also are excluded.[55]

Under Czech law, funds that engage in collective investment are called investment funds or investment companies, and they necessarily have the form of a public LLC.[56] Some of these are explicitly excluded, while others are only practically excluded, as will presently be explained. An investment fund is excluded only if it: (1) invests capital collected from the public; (2) issues securities on the regulated market; and (3) ensures that the stock exchange value of those securities does not vary

[49] See Article 106, Act No 125/2008 Coll.
[50] See Article 59a(1) in connection with Article 59e(1), (2) Act No 125/2008 Coll.
[51] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 148.
[52] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 207 (6.09).
[53] New Act on investing companies and investing funds is in the legislation process (at this moment in the parliament). This new Act in Section 354 and 355 includes the provision on the merger of the investing funds.
[54] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 149.
[55] Ibid.
[56] Ibid.

considerably from their actual value.[57] Otherwise, investment funds and investment companies can participate in a cross-border merger, but only with the consent of the Czech National Bank.[58] While the Transformation Act does not explicitly exclude investment funds and investment companies, however, they are all practically excluded because, under Czech law, they exist only in forms that deem them outside of the definition of Article 3(3) CBMD.[59]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

The Czech Republic allows cross-border mergers with foreign entities only if the relevant EEA country allows the company in question to participate in a cross-border merger,[60] according to Section 182 Transformation Act.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

A common ground for national authorities (the court) to oppose a cross-border merger is when a company is going into liquidation, unless this liquation is voluntary and a liquidation distribution has not commenced yet.

In a case of involuntary liquidation, based on the court decision, the court shall revoke its decision to dissolve the company based on the petition of the person that takes part in the conversion, if:

(1) the reason for which the company was supposed be cancelled had passed,

(2) a company has not yet been deleted from the Commercial Register, and

(3) a transformation project executed by persons involved in the transformation was submitted to the court.

In the case of criminal prosecution of the legal person according to the provision of Section 32 Act 418/2011 Coll., on the criminal liability of legal persons and proceedings against them, the court has to be informed about transformation, or transformation is invalid. Moreover, until the end of the criminal proceedings, the transformation cannot occur.

[57] Ibid.
[58] Ibid.
[59] Ibid.

The consent of public authorities is required in following cases:

According to Section 122(1) Act No. 277/2009 Coll. on insurance, the consent of the Czech national bank regarding merger of the insurance companies, banks, pension insurance companies, pension funds and trading securities corporations mergers is required.

According to Section 21(8) Act No. 231/2001 Coll. on radio and television broadcasting, the consent of the Council for Radio and Television Broadcasting regarding the mergers of the radio and broadcasting companies is required.

According to Section 20(10) Act No. 477/2001 Coll. on covers, the consent of the Ministry of Environment with the mergers of the authorized companies is required.[61]

c. The protection of creditors in Article 4(2)

The Czech Republic has set rules regarding creditor protection.[62]

At least one month prior to the approval of the merger by the merging companies, a notice must be published in the Czech commercial bulletin, advising creditors of their rights.[63] Specifically, the notice of publication of the CDTMs in the Czech commercial bulletin must include the address at which creditors can obtain free information about their rights.[64] Creditors whose claims would be unrecoverable after the merger may demand security for their claims by filing a claim with the appropriate Czech regional court, in which the creditor asks the company to provide such security within six months of the merger's registration in the Commercial Register.[65] If the creditor and the company cannot agree on an amount or method of delivery, the court decides the appropriate amount.[66]

The laws are the same in this regard for both cross-border and domestic mergers.[67]

The creditors cannot block the merger.[68]

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

The Czech Republic has set rules to protect minority shareholders.[69]

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[60] Ibid., p. 148.
[61] J. Dedic, 'Promeny obchodnich spolecnosti a druzstev pro podnikatelskou praxi', *BOVA* (2012).
[62] See D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 225 (6.110–11).
[63] Ibid., (6.111).
[64] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 163.
[65] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 225 (6.111).
[66] Ibid.
[67] Ibid., (6.110).
[68] Ibid., (6.111).
[69] *See* A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 160-62.

The protection period starts, when the minority shareholders have voted against the draft terms of cross-border merger or when they state their opposition to the share-exchange ratio or amount of cash payment.

e. The protection of employees in Article 4(2)

Regarding the protection of employees in Article 4(2) CBMD, the Czech Republic has transposed employment protections that expand on Article 16 CBMD.[70]

Direct or indirect benefit or discrimination of a special negotiation body (SNB) representative is prohibited, and legal acts performed in violation of this rule shall be nullified.[71] There is no provision for mandatory vacation days or refund of wages for SNB representatives (this is contrary to EU law and is possibly due to a scrivener's error).[72]

This option exists also for domestic mergers.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

The Czech Republic has incorporated Article 5 CBMD, but with several changes:[73]

(1) identification numbers of all companies and same data of the members of the acquiring company's organs;

(2) where so stipulated, the terms for shareholders of the old companies give them the right to sell their shares in the acquiring company to the acquiring company;

(3) the rights conferred on debenture holders, or measures proposed;

(4) any amendments made to the companies' statutes.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

[70] See Ibid., p. 166-67.
[71] Ibid., p. 166.
[72] Ibid.

Regarding Article 6(1) CBMD, Czech law sets a similar but slightly different procedure. The CDTMs must be filed with the Commercial Register of the judicial district in which the company's registered office is located.[74] A notice (not the actual CDTMs) must be published in the Czech official gazette, advising that the CDTMs are available at the Commercial Register.[75] If any changes are made to the CDTMs, such changes must likewise be filed with the Commercial Register and such amendment must be acknowledged as a notice in the Czech official gazette one month prior to general meeting.[76]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The amendment of Article 6(1) CBMD by Article 4(1) Directive 2009/109/EC has been transposed in Czech national law in Section 33(a)(1) Act, which states that the provisions of Section 33 (regarding the common publication requirement) shall not apply if the person involved in the transformation publishes the transformation project and notice to creditors on their rights in a manner allowing remote access, which is free to the public, so that the information is easily accessible after entering the electronic addresses of persons involved in the conversion, for at least one month before the date on which the conversion is to be approved by the manner provided by this Act, until one month after its approval or disapproval.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD has been originally transposed in in Sections 197(2)(a), (b), and (c) and Section 198 Transformation Act. Currently, the obligation on publication is regulated in Sections 59l(1)(a), (b), (c), and 59l(2), 59m, and 197 Act. Czech law follows Article 6(2) CBMD in a slightly different way and adds that the merger announcement must include the companies' identification numbers in addition to the

[73] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 210 (6.30); A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 152, 13–14.
[74] Ibid., p. 212 (6.39); A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 153.
[75] Ibid., p. 212 (6.39).
[76] Ibid., p. 212–13 (6.39).

details provided in Article 6(2) CBMD.[77] Also, Czech law provides an exception to Article 6(2)(c) CBMD: for private LLCs, the shareholders are notified by way of the relevant documents being sent directly to them, in lieu of publication of the arrangements made for them in the announcement.[78] These rules have been simplified through a recent amendment.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

The Czech Republic has been originally transposed Article 7 CBMD[79] in Sections 193 and 194 Transformation Act (currently Section 59p), with additional requirements: A trade union, in addition to employees, affiliated with the merging company may submit an opinion to be attached to the management report.[80] Failure by the company to submit a management report deems it liable to third-parties for damages resulting from this failure, and can result in a decision by the notary to decline issuing a pre-merger certificate.[81]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD has been originally transposed in Czech national law in Sections 195 and 114 Transformation Act (currently the information on the independent expert report is regulated in Section 59q and Sections 113 through 116 Act).[82]

b. The independent expert

The court appoints an expert for each Czech company.[83]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

[77] Ibid., p. 213 (6.40).
[78] Ibid.
[79] *See* A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 153.
[80] Ibid.
[81] Ibid., p. 154.
[82] See D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 154–55.
[83] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 154.

Article 8(2) CBMD has been originally transposed in Czech national law in Section 195(1) Transformation Act.[84] Currently is a possibility to provide one expert report regulated in Section 113 (2) Act.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed in Czech national law.[85]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Czech law has transposed Article 8(3) CBMD as is.[86] The Act does not include a consequence for those who deny information to the independent expert because the report is a compulsory requirement. Section 32a Act sets the duty for a relevant person to provide all necessary information and documents to the expert.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

The Czech Republic has transposed Article 8(4) CBMD in Sections 196(2) and (3) Transformation Act.[87] Currently the possibility to waive the experts report is in Section 59q(2) Act.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Regarding the exemptions in Articles 15(1) and (2) CBMD, in Czech national law, a report is only exempted in the case of a wholly owned subsidiary.[88]

h. Further exemptions in Czech law

There are no other exemptions in Czech national law.[89]

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[84] Ibid.
[85] Ibid.
[86] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 215 (6.57).
[87] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 154.
[88] Ibid., p. 155.
[89] See Ibid.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Czech national law in Sections 201 through 203 Transformation Act.[90]

a. Procedural requirements including majority, quorum, timing and notarization

For companies governed by Czech law, the general meeting has a quorum (can make a decision) if 50 percent of all shareholders are present, unless the company's statutes require a higher quorum.[91] The quorum of three-fourths of the shareholders present at the general meeting is required to reach a decision. For general and limited partnerships, all shareholders must grant approval.[92] For private and public LLCs, 75 percent of shareholders present at the general meeting must approve.[93] For cooperative societies, two-thirds of shareholders present must approve.[94]

The general assembly of shareholders of the company being acquired must adopt a resolution approving the merger, which must include: (1) an agreement to end the company without liquidation; (2) approval of the CDTMs; (3) approval of the final financial statement, or, where applicable, the interim accounting statement; and (4) the acquiring company's (successor company) opening financial statement.[95]

The general assembly of shareholders of the acquiring company must adopt a resolution approving the merger, which must include: (1) an agreement to acquire the assets and liabilities of the company it is acquiring; (2) approval of the CDTM; (3) approval of the final financial statement, or, where applicable, the interim accounting statement; (4) the acquiring company's opening financial statement; and (5) where applicable, the agreement to issue new shares.[96]

Each company must present all relevant documentation to a notary, who then certifies that the merger complies with Czech law.[97] The notary issues both a notary deed—in which the merger decision is recorded—and a pre-merger certificate.[98] The latter is forwarded by the company being acquired to the acquiring company.[99]

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[90] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 218 (6.70).
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid., p. 218 (6.72).
[96] Ibid., p. 218–19 (6.73).
[97] Ibid., p. 220 (6.82).
[98] Ibid.
[99] Ibid.

b. Amendment of CDTMs by shareholders

The CDTMs approved by each merging company must be the exact same version as the published draft.[100] If any changes are necessary, the draft must be published again and approved at least one month later at general meetings for each company.[101]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

According to Section 211 Act, if the cross-border merger joins the dissolving public limited liability company or private limited liability company to an acquiring corporation that owns all of the voting power in the company being dissolved, the expert report on the cross-border merger is not required and the cross-border merger does not need be approved by the general meeting, the shareholders or the sole member of the dissolved corporation involved.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

The Czech Republic has transposed Article 15(1) CBMD.[102] In the case of absorption of a wholly owned subsidiary by its parent, approval by the managing bodies of the companies can replace shareholder approval at the general meeting.[103] In such a case, however, shareholders may opt to call a general meeting to approve the merger.[104]

e. Other exemptions for shareholder approval under Czech law

Czech law does provide another exemption for shareholder approval: Shareholders of a private LLC may vote on the merger outside of the general meeting within two weeks of the meeting.[105]

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Czech law has transposed Articles 10(1) and (2) CBMD.[106] The certificate is valid for six months.[107]

[100] Ibid., p. 219 (6.74).
[101] Ibid.
[102] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 157.
[103] Ibid.
[104] Ibid.
[105] Ibid., p. 158.
[106] Ibid., p. 159.

b. National authority has been designated to scrutinize the legality of the merger

A notary must be used to scrutinize the legality of the merger.[108] The notary performs a formal check. If a notary takes record of the resolution of the general meeting or meeting of members approving the cross-border conversion, or applies the transformation project in the form of a notary deed, the notary is not responsible for the compliance of the project with legislation of another Member State than the Czech Republic, by which the internal legal relations of the legal person involved in the cross-border conversion after the efficiency of conversion shall be managed (Section 59(z)(a) Act).[109]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD has been originally transposed in Sections 206, 207, and 209 Act.

Moreover, according to the provision of Section 59y Act, the notary shall issue a certificate for cross-border conversion even if any of the partners or members of the Czech legal person involved in cross-border conversion files a claim for compensation, or if the cross-border conversion project contains rights of the shareholders of the participating Czech joint-stock company to repurchase shares in a case if:

(1) state law governing the internal legal relations of foreign legal persons involved in the conversion does not provide the right of members to compensate or their approved project cross-border conversion includes the right to purchase the shares of minority or dissenting shareholders in cross-conversion, and

(2) this foreign legal entity in approving the cross-border transformation explicitly decides that the members of the Czech legal entities involved in the cross-conversion have the right to compensate or the right to purchase shares after registration in the Commercial Register or foreign commercial register.

In the certificate for cross-border transformation in the cases discussed, the notary shall specify that the draft for compensation has been submitted or that the cross-conversion project includes the right to purchase shares.

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[107] Ibid.
[108] Ibid.
[109] T. Dvorak, 'Promeny a cezhranicny promeny obchodnich spolecnosti a druzstev', *Wolter Kluwerr* (2013).

If a document on the decision of some foreign legal persons involved in cross-border conversion is submitted to the notary, a notary certificate for cross-border conversion indicate that such person has so decided.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) have been transposed in Section 210 Act.[110]

b. The national authority has been designated to scrutinize the legality of the merger

A Czech notary must scrutinize the legality of the merger,[111] and performs a formal check. The notary will not perform a full investigation but will build upon the past pre-merger certificates from all interested parties.[112]

The notary certifies compliance with statutory requirements for writing cross-conversion in the Commercial Register upon the request of the person to be registered in the Commercial Register or persons involved in cross-conversion, if the person to be registered in the Commercial Register will start to exist by an entry in the Commercial Register. Certificate for registration in the Commercial Register is a public document (Section 59z Act).

A notary shall issue a certificate of registration in the Commercial Register upon submitted documents. Transposing legislation stipulates which documents shall be submitted.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Czech national law, except for the provision that the date must be after the scrutiny has been completed (Section 59k Act).[113]

b. Date the cross-border merger takes effect

The merger takes effect on the date when the merger is registered in the Czech Commercial Register or, if the acquiring company has a corporate seat in a foreign

[110] See D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 221 (6.84-85).
[111] See Ibid.
[112] T. Dvorak, 'Promeny a cezhranicny promeny obchodnich spolecnosti a druzstev', *Wolter Kluwerr* (2013).
[113] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 151.

country, the merger in the Czech Republic is effective on the same day as the foreign country (Section 213 Transformation Act).[114]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Regarding the first sentence of Article 13, if the acquiring company is Czech, the final information must be registered in the Czech Commercial Register and published in the Czech official gazette.[115] If the acquiring company is foreign, the foreign authority must immediately notify the relevant court of the merger.[116]

b. Transposition of Article 13 second sentence

The second sentence of Article 13 has been transposed, but without explicit transposition of the third sentence of Article 13.[117]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14(1)(a) CBMD has been transposed in Czech national law in Section 61 Act, with the explicit inclusion that rights and obligations of the acquired companies are transferred to the acquiring company.[118]

Article 14(1)(b) has been transposed in Sections 63(1) and 64(1) Act, with exclusion for wholly owned subsidiaries.[119]

Article 14(1)(c) has been transposed as is in Section 61 Act.[120]

Article 14(2)(a) has been transposed in Section 62, Article 14(2)(b) in Sections 63(2) and 64(1), and Article 14(2)(c) in Section 62 Act.

Article 14(3) has been transposed in Sections 61 and 62 Act, with exclusion for wholly owned subsidiaries.[121]

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[114] Ibid.
[115] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 222 (6.92-94).
[116] Ibid.
[117] Ibid.
[118] Ibid., p. 222 (6.91).
[119] Ibid.
[120] Ibid.
[121] Ibid.

Article 14(4) has been transposed in Sections 61 and 62 Act, with exclusion for wholly owned subsidiaries.[122]

Article 14(5) has been originally transposed in Section 205 Act.

A stipulation under Czech law is that when a Czech company is acquired, a Czech branch of the surviving company will likely result.[123]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

The Czech Republic has transposed Article 15(1) CBMD.[124] A provision for a simplified procedure in cases of certain other kinds of concentrations was introduced into Czech law on September 1, 2009.[125]

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The Czech Republic has a system of employee participation.[126] Czech law refers to the "right of employee influence" (effectively employee participation), which applies to employees of the merging companies as well as those of the companies' subsidiaries, as long as they work within the EU.[127] Notably, if any of the merging companies is located in an EU country whose laws require more employee participation than is

[122] Ibid.
[123] Ibid.
[124] D. Campbell, *Mergers and Acquisitions in Europe: Selected Issues and Jurisdictions: Volume I* (Kluwer Law International 2011), p. 113.
[125] L. Štorek and L. Vožehová, 'Czech Republic: Transformations Of Commercial Companies And Cooperatives'.
[126] See D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 232–242 (6.147–208).
[127] Ibid., p. 232 (6.151).

required by Czech law, that country's laws will apply, even if the acquiring company is a Czech company.[128]

For public LLCs, where at least one of three specified conditions is met,[129] one-third of the members of the supervisory board must be elected by employees, as long as the company has more than 50 employees who work at least half of the weekly working hours.[130,131]

As for private LLCs, cooperatives, SEs, and SCEs, employees may elect board members if one of several conditions is met for at least one of the merging companies (the conditions relate to the number of employees in the company and its own employee participation policy).[132]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) has been transposed.[133]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) CBMD has been transposed.[134]

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The Czech Republic has raised the percentages to 33.3 percent, as discussed in Article 16(3)(e) CBMD.[135]

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a), (b), and (c) have been transposed, except for the optional limit referred to at the beginning of 16(4)(c).[136]

[128] Ibid., p. 233 (6.153).
[129] See Ibid., p. 234 (6.159).
[130] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 164.
[131] New rules are set up in the new Act on Commercial Corporations, which is effective from 1 January 2014.
[132] D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 233–34 (6.154).
[133] See Ibid., p. 232 (6.150).
[134] Ibid., p. 233-34 (6.154).
[135] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 164.
[136] Ibid., p. 164-66; D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 232-36.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed, but according to Section 215(4) Act, in order to determine the average number of employees, incorporation shall in the total number of its employees include employees of a participating corporation, its subsidiaries, employees, and employees of organizational units involved business corporations located in all Member States.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed in Section 215(3) Act, but at least one of the following requirements has to be met:

(1) at least one of the participating corporations had, six months before the date of publication of draft terms of merger, on average more than 500 employees and an employee participation system;

(2) at least one of the participating corporations had, before writing the cross-border merger in the Commercial Register or in the commercial register of foreign influence, a right of its employees in the higher range than this or the special law for companies established in the Czech Republic; or

(3) if employees of the subsidiaries and employees working in the affected organizational components of the company in the other Member States than in the Czech Republic do not have the right to impact to at least to the extent that employees of the acquiring company have, or should have under a special law.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) has been transposed in Section 242 Act, with a mandatory three-year time period.[137]

[137] See D. Neveselý et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 234 (6.155); ibid., n. 124.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Regarding Article 17 CBMD, under Czech law, not only can the cross-border merger not be nullified after it has taken legal effect, neither the validity of the CDTMs nor the resolution of the general meeting may be challenged, and the CDTMs may not be amended.[138]

1.18. Additional

a. Valuation rules

In Czech national law, par value is used for the valuation rules.[139]

b. National case-law on provisions transposing the CBMD

Relevant case-law regarding the transposition of the CBMD includes:

(1) Decision of the European Court of Human Rights: The applicant was a German national who was a minority shareholder of a joint stock company incorporated under Czech law until a resolution was adopted at a general meeting in June 2002 on the winding up of the company and the division of its assets between two new companies, thus depriving him of his shares. Relying in particular on Article 6(1) (right to a fair trial), he complained that the Czech courts had not considered the merits of his action challenging that resolution.

(2) Decision of the Czech Superior Court *29 Cdo 2085/2010*: The court generally does not specify what additional payment is adequate, but if it finds that the proposal of the shareholders´ fixed payment is not adequate, it may acknowledge to the applicant the right to charge a different amount, respectively. The acquiring company undertakes to pay the difference between paid and reasonable additional fee.

(3) Decision of the Czech Superior Court *29 Cdo 419/2012*: Unless it is a transformation of a company or cooperative, then the revocation of the court's decision to cancel the company or cooperative other than through ordinary or extraordinary remedies is not regulated by law, and thus not allowed.

c. Language requirements

Under Czech national law, the documents submitted to the notary have to be in Czech or Slovak, or if they are in other language, must be accompanied by the certified translation.

[138] A. Jirousek and J. Lasák, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 151-52.
[139] Ibid., p. 209 (6.22).

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The same laws generally apply to both domestic and cross-border mergers.

b. Comparison

Between cross-border and domestic mergers are differences both in the outcome and national regulations that apply to the merger. The internal relations of the acquiring corporation in the cross-border merger can be governed by the laws of a Member State other than the Czech Republic.

In the cross-border merger, the publication procedure is slightly different and relevant subjects are required to publish some additional information (Section 59l).

Employees of the Czech entity involved in the cross-border merger have the right to get acquainted with the project and reports of cross-border merger and he right to comment in writing. They have to be notified of this right (Section 59(n)(1)).

If, within the Czech corporation involved in the cross-border merger, operates a labor union, it has the right to comment in writing to the project and report of the cross-border merger, if requires. The same right belongs to other employee representatives (Section 59(o)(1)).

A report on the cross-border merger, if the Czech legal entity is involved, must always be prepared (Section 59(p)(1)). For the domestic mergers there is an exemption from this duty in Section 27 Act. Moreover, another extra requirement governs the cross-border mergers. Reports of cross-border mergers have to be prepared always separately for each legal entity participating in the merger, and preparing reports for some or for all participating legal entities is prohibited.

If the acquiring corporation has a domicile abroad, or has to be domiciled abroad, the creditors can submit their collateral receivables only, within three months from the publication of the cross-border merger (Section 59u).

Compliance with statutory requirements of the Czech corporation participating in the cross-border merger is certified by the notary. A notary shall issue a certificate for a cross-border merger on the request of the Czech entity involved in the merger and based on the documents submitted to him. Transposing legislation stipulates which documents demonstrating compliance with the required formalities, execution of prescribed operations and compliance with prescribed procedures is the Czech entity involved in the cross-border conversion required to submit to notary for the issue of this certificate (Section 59x).

Transposition of the Cross-Border Mergers Directive into Danish Law

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1. Transposition of the Cross-Border Mergers Directive into Danish Law

The CBMD was transposed into Danish law on July 1, 2007,[1] as Chapter 15a of the Companies Act, which only applies to public limited companies (*aktieselskaber*). However, in connection with the introduction of Chapter 15a in the Companies Act, identical rules were introduced in the Private Limited Companies Act governing private limited companies (*anpartsselskaber*).[2]

The transposition was made via new enactment in the Danish Public Limited Companies Act and in the Private Limited Companies Act.[3]

Prior to the enactment, the laws in Denmark were silent about cross-border mergers.[4]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The definition of the national law is similar to the CBMD, with a minor change. The Danish Minister of Commerce has been authorized in the Danish Act on Trusts Carrying on Business for Profit to lay down rules on trusts and cross-border mergers covered by the Act. This part of the definition is not found under Article 1 of the CBMD.[5]

The issue of cross-border mergers outside of the scope of the Directive has been regulated in Ministerial Directive No. 681, dated June 21, 2011, which sets out detailed provisions concerning both domestic and cross-border mergers of collective investment companies.

1.2. Article 2 – Definition of Limited Liability Company and Mergers

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term ‘limited liability companies’.

The definition found in Article 5 of the Danish Companies Act is similar to Article 2(1) of CBMD.[6]

[1] V. Thorup and J. Buskov, ‘Denmark’, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 170.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Page 2 of the Companies Act.

b. List of companies that can carry out a cross-border merger under Danish law

Public limited companies are only applicable for cross-border mergers, as discussed in Chapter 15a of the Companies Act, but identical rules were introduced for private limited companies in the Private Limited Companies Act.

The Danish Act on Undertakings Carrying on Business for Profit also incorporated rules on cross-border mergers, which are similar to Chapter 15a of the Companies Act and allow limited liability companies to engage in a merger with similar EU or EEA companies. The Danish Minister of Commerce is also allowed, under the Danish Act on Trusts Carrying on Business for Profit, to create rules on trusts and cross-border mergers, but has not yet done so.[7]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term "merger" which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

A cross-border merger is defined as a merger where the merging companies are governed by the laws of at least two different Member States of the European Union or the European Economic Area (Norway, Iceland and Liechtenstein).[8]

National law follows Articles 2(2)(a) and (b), but does not follow clause (c) of the CBMD. Further information is available in Section 271 of the Companies Act.[9]

d. Rules on the cash payment

No restrictions on cash payment to the shareholders in the merging company exist in Danish national law.[10]

e. CBMs and companies in liquidation

Danish law allows companies in liquidation to carry out CBMs, but provides for a number of requirements that must be met in order for a company in liquidation to do so.

f. Geographical scope

A cross-border merger is defined as a merger where the merging companies are governed by the laws of at least two different Member States of the European Union or the European Economic Area (Norway, Iceland, and Liechtenstein).[11]

[7] V. Thorup and J. Buskov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 170.
[8] V. Thorup and J. Buskov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 170.
[9] Page 82 of the Companies Act.
[10] V. Thorup and J. Buskov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 170.
[11] Ibid.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

There are no particular rules in the Company Act on these issues. A transfer of the seat of the company would trigger fiscal implications.

Information is not available on cross-border mergers with companies formed outside of the EEA or formed within the EEA but with their registered office, central administration, or principal place of business outside of the EEA.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

This provision is covered by the DCA § 5 and § 271 and the general definition of a merger in DCA § 236.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Cooperative societies (A.M.B.As) fall within the scope of the rules.[12]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. This issue has been regulated in Ministerial Directive No. 681, dated June 21, 2011, which sets out detailed provisions concerning domestic and cross-border mergers of collective investment companies. This provision is not applicable in Denmark as such companies don’t exist in Denmark. Also it is not possible according to DCA to register such companies in Denmark.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article (4)(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

[12] A. Wissing, ‘Artikel om grænseoverskridende fusioner og spaltninger - de selskabsretlige regler’, http://www.eogs.dk/graphics/_ny%20eogs/Love%20og%20Regler/Selskaber/Aktieselskaber/Vejledninger/A

The provision has been transposed as is in the Companies Act, which only allows mergers between companies that are identical to the types of companies that fall within the scope of the act, i.e. the A/S (*aktieselskab*) and ApS (*anpartsselskab*).

b. Opposition by national authorities in Article 4(1)(b)

In Article 4 (1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers. National law did not transpose this option.

c. The protection of creditors in Article 4(2)

Denmark set rules regarding creditor protection; more information is available in Section 298.[13]

The start of the procedure depends on several factors: If it is presumed in the valuation experts' statement that the creditors' claims will not be sufficiently secured following the merger, creditors whose claims have occurred prior to the announcement of the merger plan and for whom no separate security has been provided may prove their claims within 4 weeks from when the decision to merge was made by all the merging companies. A creditor may not, through the agreement on which the claim is based, renounce his right to demand security with binding effect.[14] The time limit is 4 weeks.[15]

In comparison with domestic mergers it should be noted that in connection with a CBM, creditors of the Danish merging companies enjoy the same protection as in connection with domestic mergers. The rules in the Companies Act will not apply to any non-Danish participating companies, as the protection of creditors is not harmonized within the EU/EEA.[16]

Creditors cannot block the merger.[17] Their rights are safeguarded under the rules set out in Sections 137 and 138 regarding the expert appraisal of the rights of the creditors. The report by the expert must be approved by the authorities in order for the merger to be approved.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member States with the option to adopt protections for minority shareholders.

rtikel%20om%20gr%E6nseoverskridende%20fusioner%20og%20spaltninger%20ENDELIG.pdf (last visited 23 August 2013), p. 1.

[13] V. Thorup and J. Buskov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 178.

[14] Ibid.

[15] Ibid.

[16] V. Thorup and J. Buskov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 178.

[17] A. Wissing, 'Artikel om grænseoverskridende fusioner og spaltninger - de selskabsretlige regler', p. 9-11.

Denmark did set rules to protect minority shareholders; more information is available in Sections 285 and 286 of the Companies Act.[18]

In order for the procedure to start, shareholders of a discontinuing company in a CBM who have objected to the merger at the general meeting may demand that the company redeems their shares. If an objecting shareholder wishes to exercise this right, notice must be delivered to the company within 4 weeks of the general meeting.[19] The applicable time limit is 4 weeks after the general meeting.[20]

If the shareholders have been asked to declare before the voting any wish that they may have to avail themselves of their right of redemption, this right is conditional upon the shareholders in question having made the declaration of their wish known at the general meeting.[21]

This option also exists for national mergers.[22]

e. The protection of employees in Article 4(2)

Denmark did not transpose this option.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Denmark has incorporated Article 5 of the CBMD, but with several changes. The list of information to be included is similar to the section of the Companies Act regarding requirements for domestic mergers, and according to the Companies Act, only the merger-formed company's articles of association are required for inclusion in the merger plan, unlike Article 5 of the CBMD.[23] However, the Companies Act may be amended in the future to be more closely aligned with Article 5 and in order to be similar to legislation in other Member States.

[18] V. Thorup and J. Buskov, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 177.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid., p. 171.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

National law has transposed Article 6(1) of the CBMD, but the merger plan must be filed with the Danish Commerce and Companies Agency before 4 weeks have passed since it was signed. The Commerce and Companies Agency announces in its online information system that the merging companies have filed a merger plan, but does not release all the information to the public.[24]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC has not been transposed.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

The requirements in litra (a) and litra (c) are included in the DCA § 272, section 1, numbers 1 and 7. The information required according to litra (b) is included in the publication made by the Business Authority according to DCA § 279, section 2. The information is required according to § 23, section 1, No. 2, in the executive order no. 675 of 26 June 2012, which requires that information is provided concerning the register in which the participating companies are registered and the number of the entry in that register.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

[24] Ibid.

National law has transposed Article 7 of the CBMD,[25] without any additional or diverging requirements.[26]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

National law has transposed Article 8(1) CBMD in Section 277 of the Companies Act.

b. The independent expert

One or more impartial valuation experts must prepare a written opinion on the merger plan for each of the companies involved, according to Section 277 of the Companies Act.[27]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) has been transposed, but if the merging companies agree to use joint valuation experts, they must be appointed by the insolvency court of the jurisdiction where the merger-formed company will locate its registered office.[28]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed into Danish national law.

e. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) of the CBMD has not been transposed, but if all shareholders involved in the cross-border agree, the valuation experts' opinion can be limited to discuss whether the merging companies' creditors' claims will be sufficiently secured after the merger is complete.[29]

f. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition

[25] Ibid., p. 173.
[26] Ibid., p. 171.
[27] Ibid., p. 173.
[28] Ibid.
[29] Ibid., p. 174.

carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have not been transposed, but if a parent company merges with its fully owned subsidiary and is the surviving entity, the valuation experts' opinion only needs to address whether the merging companies' creditors' claims will be sufficiently secured after the merger is complete.[30]

g. Further exemptions in Danish law

No further exemptions exist.[31]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

This article has been transposed into Danish national law.

a. Procedural requirements including majority, quorum, timing and notarization

If a Danish merging company is a discontinuing entity, two-thirds of the votes cast as well as of the voting share capital represented at the general meeting must approve the decision. An exception is if the discontinuing company is fully owned by the continuing entity; in that situation, the board of directors decides whether to approve the merger.

If a Danish merging company is the continuing entity, the board of directors may decide on the cross-border merger, except if: (1) the articles of association will be changed; or (2) shareholders holding 5% or more of the share capital request a general meeting within two weeks from when the Danish Commerce and Companies Agency announces receiving the merger plan. If approval of the merger occurs at the general meeting, it must be done by two-thirds of the vote cast and of the voting share capital present.

Danish national law has no quorum requirements, but the articles of association have them, as well as other requirements regarding majority approval (Section 280 of the Companies Act).[32]

b. Amendment of CDTMs by shareholders

In practice, shareholders can approve the CDTMs with reservations or conditions (Section 37f of the Act).

[30] Ibid.
[31] Ibid.
[32] Ibid., p. 175-176.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

National law does not waive the need for a general meeting approval under such circumstances.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) of the CBMD has been transposed in Section 290 of the Danish Company Act.

e. Other exemptions for shareholder approval under Danish law

There are no other exemptions for shareholder approval under Danish law.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed; more information is available in Section 288 of the Companies Act.[33]

b. National authority has been designated to scrutinize the legality of the merger

The Commerce and Companies Agency is responsible for issuing a pre-merger certificate once all actions and formalities to be complied with prior to the merger have been completed.[34] A formal check must be completed.[35]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

This provision has not been transposed.

[33] Ibid., p. 176.
[34] Ibid.
[35] Ibid.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) have been transposed; more information is available in Sections 288 and 289 of the Companies Act.[36]

b. The national authority has been designated to scrutinize the legality of the merger

The Commerce and Companies Agency has been designated.[37] The authority must perform a formal check.[38]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 has been transposed into Danish national law.[39]

b. Date the cross-border merger takes effect

If the merger-formed company will be purview to Danish national law, a cross-border merger takes effect when it is registered with the Commerce and Companies Agency. The Commerce and Companies Agency's online information system then makes the registration public.[40]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

This provision has been transposed into Danish national law.[41]

b. Transposition of Article 13 second sentence

This provision has not been transposed.

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[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid., p. 177.
[40] Ibid.
[41] Ibid.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 of the CBMD has been fully transposed into Danish national law.[42]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) has been transposed.[43]

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and "documents necessary for scrutiny" shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

With reference to the independent expert report, if a parent company merges with its fully owned subsidiary and the parent company is the surviving entity, the valuation experts' opinion only needs to include a statement as to whether the claims of the creditors in each merging company are expected to be sufficiently secured after the merger.[44]

Danish law does not exempt any documents other than the independent expert report.[45]

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The Danish rules regarding employees' right to representation in connection with a cross-border merger follow from Chapter 15a of the Danish Companies Act and the

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[42] Ibid., p. 170-171.
[43] Ibid., p. 173.
[44] Ibid.

rules on employees' right to involvement as set out in the Danish Act on employees' right to representation in the SE companies.

The employees' right to transnational representation in connection with a cross-border merger should be defined primarily by means of an agreement between the parties concerned, or, in the absence thereof, through the application of a set of subsidiary rules. This implies, among other things, that the Danish rules on employees' right to representation on the board of directors can continue or, alternatively, other agreements can be made.

In order to reach an agreement, a special negotiations body (SNB) is usually established with the participation of employees from the companies participating in the cross-border merger and concerned subsidiaries or establishments.

It follows from Section 139c of the Act that the primary task of the SNB is to conclude an agreement regarding the employees' right to representation, such as how the seats in the SNB should be distributed among the employees in the participating companies and concerned subsidiaries or establishments.

The negotiation procedure can be described as follows:

1) According to Section 139d, the SNB can decide not to open or to terminate negotiations. The majority required to decide not to open or to terminate negotiations shall be the votes of two-thirds of the members representing at least two-thirds of the employees, including the votes of members representing employees employed in at least two Member States. If this is decided, the ordinary rules of Section 49 of the Danish Companies Act are applicable. This would imply that only employees in Denmark would be eligible to seats on the Danish board of directors.
2) The management and the SNB negotiate an agreement for the involvement of the employees. The agreement should include the scope of the agreement and the composition and allocation of seats on the board of directors, among other things. The parties may also agree that Section 49 of the Danish Companies Act is applicable.
3) To the extent that the agreement mentioned above, under point 2, leads to a reduction of participation rights for some employees, a qualified majority is required, as discussed in point 1.
4) If no agreement can be concluded, the reference rules in Chapter 4 of the Act on employees' right to representation in the SE companies will apply.

[45] Ibid.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) has been transposed into Danish national law.[46]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

All three exceptions have been transposed in Section 311(1). National law does not go further than the CBMD.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Denmark has raised the fraction to one-third, as discussed in Section 313(2).

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a), (b), and (c) have been transposed.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed, but Section 8 in Act. No. 281, dated 26 April 2004, on employee participation in SE companies provides that employees in participating companies, including their subsidiaries, shall be included when calculating the workforce.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Danish national law under Section 312(4).

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the

[46] Ibid., p. 179.

company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) has been transposed into Danish national law under Section 139f of the Act.[47]

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 has not been transposed.

1.18. Additional

a. Valuation rules

The valuation rules applicable to mergers in Denmark are market value, but literature is silent on the issue in regards to cross-border mergers.

b. National case-law on provisions transposing the CBMD

There are no published court cases yet regarding provisions transposing the CBMD.

c. Language requirements

Denmark has not imposed any language requirements.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The rules are same as the rules followed for cross-border mergers; more information is available in Sections 236 to 270 of the Companies Act.

b. Comparison

There are no major differences in the procedure for domestic mergers in comparison with the procedure for cross-border mergers.

[47] See also p. 37 in the Guideline on Employee Participation, http://www.erhvervsstyrelsen.dk/file/237239/Mini-guide_graenseoverskridende.pdf (last visited 23 August 2013).

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1. Transposition of the Cross-Border Mergers Directive into Estonian Law

The CBMD was transposed into Estonian law on December 15, 2007. In Estonian national law, cross-border mergers are regulated mainly by Part IX, Chapter 6 (Sections 433(1) through (9)) Estonian Commercial Code (the CC).[1] The CBMD was also transposed in amendments to the Community-scale Involvement of Employees Act and legislations regulating mergers of financial institutions (amendments to Credit Institutions Act, Securities Market Act, Investment Funds Act, Insurance Activities Act, and Electronic Money Institutions Act allowing cross-border mergers).

These bills are not due to be replaced or modified. In 2011, reforms to the transposition mainly specified publication and disclosure requirements, such as submission of documents to Estonian Commercial Register, and introduced simplified procedures for not drafting merger reports, auditor's reports, and merger decisions upon full or more than 90 percent ownership of the shares of the company being merged.

Before transposition of the CBMD, there were no cross-border merger rules in force in Estonia.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope of Article 1 CBMD is incorporated similarly under Article 433(1)(1) CC. Further, the national law specifies that the cross-border merger is allowed also to regulate financial companies that are also limited liability companies.

Estonian national law does not allow for cross-border mergers outside of the scope of Directive.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'. Estonian national law's definition of the term "limited liability companies" is similar to the definition provided in the CBMD (Article 4331(1)(1) of the CC).

[1] Online English translation of the Commercial Code, http://www.legaltext.ee/en/andmebaas/ava.asp?m=022 (last visited 26 May 2013).

b. List of companies that can carry out a cross-border merger under Estonian law

Under Estonian law, the rules on cross-border mergers apply to public limited companies (*aktsiaselts* or AS) and private limited companies (*osaühing* or OÜ) registered with the Estonian Commercial Register (Article 433(1)(1) CC). Therefore the applicable provisions may also be pertinent to European companies (SEs) registered in Estonia because these entities are often governed by the rules for public limited companies.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Estonian law follows the same definitions for all three situations described under Articles 2(2)(a), (b), and (c) in Articles 391, 392, and 403 CC.

d. Rules on the cash payment

Estonian national law follows the CBMD's rules on the cash payment. In Estonia, cash payments to shareholders of the acquired company may not be greater than 10 percent of the sum of the nominal values of their exchanged shares (Article 392(2) CC). During a cross-border merger, the payments greater than 10 percent will be allowed if this is the case for the law of the Member State of the company resulting from the merger (Article 433(2)(4) CC). In that situation the Estonian company shareholders are allowed to benefit from a higher payment.

e. CBMs and companies in liquidation

Estonian law does not take a clear position on excluding companies in liquidation from carrying out a cross-border merger. However, considering the nature of the liquidation and statutory process foreseen for the liquidation process, it can be claimed that companies under liquidation must first decide continuation of the economic activities (which will stop statutory liquidation process) and continue with the merger.

f. Geographical scope

No cross-border mergers are applicable for companies formed outside of the EEA (Article 433(1)(1) CC).

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Apart from rules pertinent to SEs and SCEs, Estonian law does not address cross-border restructurings.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) CBMD is transposed into Estonian law under Article 433(2)(4) CC. Cash payments to shareholders of the acquired company may be greater than 10 percent of the sum of the nominal values of their exchanged shares if this is the case for the law of the Member State of the company resulting from the merger (Art. 433(2)(4) CC).

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Estonian law has excluded cooperative companies through Article 433(1)(3) CC.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Cross-border merger regulations do not apply to the investment vehicles described under the Article 3(3) CBMD. Closed-end non-public investment funds formed as public limited companies can still merge under the CBMD regulations (Article 211 Investment Fund Acts).

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

According to Article 433(1) CC, a public limited company or private limited company registered in the Estonian Commercial Register may merge with another limited liability company founded on the basis of the law of another Member State that is a Contracting Party to the EEA Agreement, which conforms to the requirements provided in Article 2(1) Directive 2005/56/EC of the European Parliament and of the council of on cross-border mergers of limited liability companies, and whose registered office, location of the management board, or principal place of business is in a Member State.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4 (1) (b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Estonia has transposed this provision. The Financial Supervision Authority may oppose both domestic and cross-border mergers (Article 69(1) Credit Institutions Act, Article 118(2) Securities Market Act, Articles 65 and 214 Investment Funds Act, Article 101(2) Insurance Activities Act, and Article 57 Payment Institutions and E-money Institutions Act).

The Financial Supervision Authority makes a decision regarding permission of the merger of the regulated companies within one to two months after receiving all relevant documents dependent on specific laws applicable to a specific type of a regulated financial institution.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Estonian law has adopted rules regarding creditor protection specific for cross-border mergers. Creditor protection rules are set forth under Article 433(8) CC.

The protection period starts after the official public notification of CDTMs (Article 433(8)(2) CC). Time limits are two months after the notification of the CDTMs (Article 433(8)(2) CC).

The procedural steps include filing a claim against the company.

The protective measures for national mergers are the same as the procedure for cross-border mergers, but with the following derogations: Creditors can file a claim for securing their claims against the company after public notice of the registration of a merger. The time limit is six months from the publication of the notice on registration of a merger (Article 399(1) CC).

There are no explicit statutory regulations regarding the possibility for creditors to block the merger. However, creditors may challenge the validity of the merger plan due to it being contrary to good morals, violating the provision of law established for the protection of the creditors, or due to other public interest.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Estonian law has adopted rules regarding minority shareholder protection specifically for cross-border mergers. Protective measures are set forth under Articles 433(6)(1) and (2) and 433(7) CC.

Two kinds of protection are included.

The first is compensation of damages deriving from a low exchange rate ratio. According to Articles 433(6)(1) and (2) CC, if the share exchange ratio is fixed too low, a shareholder may demand a refund from the acquiring company in case the laws of another Member State sets forth similar rights and in case such right is not set forth with the law of another Member State, only on the condition that the general meetings of all merging companies consent to this. In addition, according to Article 433(6)(3) CC, if the acquiring company is located in another Member State, merger resolution of a company being acquired registered in the Estonian Commercial Register may also be declared invalid for the reason that the share exchange ratio established is too low.

The section protection is compensation upon shareholder's dissent to the merger resolution. According to Article 433(7) CC, if the acquiring company falls under the jurisdiction of another Member State, the shareholder of a company being acquired entered in the Estonian Commercial Register who does not agree to the merger resolution has the right to transfer the shares or to demand that the acquiring company acquire the exchanged shares of the shareholder for the monetary compensation.

For compensation of damages deriving from a low exchange rate ratio, the procedure can start after adoption of the merger resolution by the general meeting (Article 398(3) CC).

For compensation upon shareholder's dissent to the merger resolution, the procedure can start after registration of a merger (Article 404(1) CC).

The time limit depends on the type of compensation sought. For compensation of damages deriving from a low exchange rate ratio, the general time limit for monetary claims is three years (Article 146(1) General Part of the Civil Code Act).

For compensation upon shareholder's dissent to the merger resolution, the time limit is two months (Article 404(1) CC).

The procedural steps include the conversion rate of the shares. For compensation of damages deriving from a low exchange rate ratio, the steps are filing a claim against acquiring company.

For compensation upon shareholder's dissent to the merger resolution, the opposition of the dissenting shareholders is recorded in the minutes of the general meeting, which is approved with the signature of the dissenting shareholder (Article 404(3) CC).

The protective measures for national mergers are the same as for cross-border mergers, but with the following derogations: The merger resolution of a company being acquired cannot be declared invalid on the basis that the share exchange ratio is fixed too low (Article 398(2) CC).

e. The protection of employees in Article 4(2)

Regarding the protection of employees in Article (4)2 CBMD, according to Article 113 Employment Contracts Act, the employees must be informed and consulted regarding transfer of the business and transfer of the employment contracts at least one month in advance.

The merging companies inform the employees on: the planned date of transfer of the business; the reasons for the transfer of the business; the legal, economic, and social consequences of the transfer of the business for the employees; and the measures planned with regard to the employees. If there will be changes affecting the situation of the employees, such changes will be consulted with employees or their representatives with the goal of reaching to an agreement on the measures planned (Article 113 Employment Contracts Act).

This option also exists for mergers within Estonia.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) CBMD have been transposed in Estonian national law under Article 392(1)(1) through (8) and Article 433(2)(1)(1) through (5) and (3) CC without any diverging rules. A notable specific under Estonian law is that the CDTMs must be notarized in Estonia (Article 392(4) CC).

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Estonia has transposed Article 6(1) CBMD in the national law under Articles 419(4) and 433(5)(1) CC. According to Article 433(2)(5) CC, if the company registered in the Estonian Commercial Register is being acquired by another company from another Member State, the merger agreement must be available to the public free of charge

on the company's website or in the central recording system for at least two months as from publishing the notice regarding the CDTMs.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed; similar rules exist under Article 419(4) CC.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed in Estonian law under Article 433(2)(5). Article 6(2)(c) CBMD has been incorporated in a way that the publication must include a reference stating that information regarding minority shareholder and creditor protection can be obtained from the CDTMs. The reasoning is that the statutory protection regulation does not need to be included in the publication and any specific protective measures are set forth in the CDTMs (explanatory report to the Act on Amendment of the Commercial Code and Related Acts, explanations under Article 433(2)).

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 of the CBMD has been transposed in Articles 393(1), 433(3)(1), and 433(5)(1) CC.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD has been transposed in Estonian national law in Articles 433(4) and 433(1)(1) CC, with no diverging rules.

b. The independent expert

According to Article 433(4)(1) CC, an auditor is qualified to be an independent expert in the meaning of the CBMD. Under Estonian law, auditors can be physical persons or a judicial auditing company (Articles 3 and 7 Authorized Public Accountants Act).

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD has been transposed in Estonian national law with a slight addition under Articles 433(4)(2) and (3) CC. One or many joint auditor(s) can be appointed for the merging companies, whereas such a joint auditor must be appointed by a judicial or administrative authority of the Member State of one of the merging companies.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed in Estonian national law in Article 396(2) and (2)(1) CC, with no diverging rules.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) CBMD has been transposed in Estonian law in Article 396(4) CC, which states the auditor is entitled to obtain information necessary for auditing from the merging company and other companies belonging to the group of the merging company.

If the independent experts do not receive the information they require for the report, this may lead to a criminal liability of the management board (Article 381 Penal Code). Furthermore, without the audit of the CDTMs, it is not possible to register the merger.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Estonian national law in Article 394(2) CC, with no diverging rules.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Article 15(1) CBMD is governed with Article 394(2) CC. Article 15(2) CBMD is not incorporated into Estonian law (explanatory note, under Article 433(4) CC).

h. Further exemptions in Estonian law

There are no further exemptions in Estonian law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Estonian law in Articles 397(1), 412, and 421 CC, with no diverging rules.

a. Procedural requirements including majority, quorum, timing and notarization

The rights and obligations of the CDTM become effective upon approval of the CDTMs by the general meeting(s) of the merging companies (Article 397(1) CC). The resolution is deemed adopted if a qualified majority of at least two-thirds of the votes represented at the general meeting (or represented with all shares in case of voting in absentia) are in favor, provided that the articles of association do not prescribe a higher requirement (Articles 412 and 421 CC). If the company has different classes of shares, the additional approval of at least two-thirds of the holders of each class of shares is required. As a prerequisite for passing the resolution, at least 50 percent of the total share capital of the company must be represented at the meeting. If this quorum is not met, a new meeting can be called that can take decisions regardless of the number of votes present (Articles 297(1) and (2) and 421(1) and (2) CC).

Resolution of the general meeting must be drawn in a written form (Article 397(1) CC). However, under general rules of the CC, the notarization of the resolution of the general meeting may be requested by the management board, supervisory board, or shareholders representing at least 10 percent of the share capital of the company (Article 304(6) CC).

b. Amendment of CDTMs by shareholders

According to Article 397(1) CC, the rights and obligations of the CDTMs become effective upon approval of the CDTMs by the general meeting(s) of the merging

companies. General meetings can approve or disapprove the CDTMs and they cannot approve the merger on other terms than provided in the CDTMs. This is in line with other rules applicable to CDTMs, such as procedural timings and prior public disclosures of the CDTMs.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Approval of the shareholders is not required at the level of the acquiring company if at least 90 percent of the share capital of the company being acquired is held by the acquiring company and the management board of the acquiring company has (1) at least one month before deciding on approval of the merger agreement by the company being acquired, published a notice concerning the CDTMs, and (2) presented the CDTMs, management report, and annual reports of the merging companies for the previous three financial years to the shareholders for examination at the seat of the company. A shareholder vote is, however, mandatory if it is requested by shareholders whose shares represent at least 1/20 of the share capital (Articles 421(4) and 433(5)(3) CC).

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) CBMD has been transposed in Article 433(5)(2) CC.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Estonian national law with no diverging rules (Articles 22(1) and 433(9) CC).

b. National authority has been designated to scrutinize the legality of the merger

The designated national authority is the Estonian Commercial Register (Article 22(1) CC). The authority performs a formal check (Articles 33(5) and (6) and 433(9) CC).

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority

shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD has been transposed in Articles 433(6)(1), 433(9)(2), and (6) CC. If in such a situation the general meetings of other companies do not agree, and if the acquiring company falls under the jurisdiction of another Contracting State, the merger resolution of a company being acquired registered in the Estonian Commercial Register may be declared invalid for the reason that the share exchange ratio established is too low (Article 433(6)(3) CC).

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed in Articles 433(9)(6) and 22 and 33 CC, with no diverging rules.

b. The national authority has been designated to scrutinize the legality of the merger

The registrar of the Commercial Register is the designated authority (Article 22 CC), and must perform a formal check (Articles 33(5) and (6) and 433(9) CC).

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed in Estonian national law in Article 433(9)(4) CC, with no diverging rules.

b. Date the cross-border merger takes effect

In Estonia, the cross-border merger takes effect after entry of the merger in the Commercial Register of the seat of the acquiring company (Articles 34(1), 402(1), 403(1) through (4), and 433(9)(4) CC).

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall

determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence of the CBMD has been transposed in Estonian national law, and all entries in the Estonian Commercial Register are made public by the Commercial Register (Article 28 CC). In addition, immediately after the merger has been entered in the Commercial Register, the acquiring company shall publish in official publication a merger notice to the creditors of the acquired companies informing them of the possibility to submit, within six months after the publication of the notice, their claims to the acquiring company in order to receive a security (Article 399(1) CC).

b. Transposition of Article 13 second sentence

Estonian national law has transposed Article 13 second sentence in Articles 433(9)(4) and (7) CC. If the company being acquired is registered in Estonia, the Commercial Register will submit after the registration of a merger all relevant documents concerning that company electronically to the competent authority of another Member States where the acquiring company is registered (Article 433(9)(5) CC).

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 of the CBMD has been transposed in Estonian national law. After a cross-border merger, the acquired company's assets and obligations transfer to the merger-formed company; the acquired company's shareholders fill that role for the merger-formed company; and the acquired companies are dissolved without liquidation (Articles 34(1), 391(1) through (5), 403(1) through (4), and 405(2) CC). These legal consequences also exist for Estonian domestic mergers, and the employment contracts valid at the merger's date will also transfer to the surviving company (Article 112 Employment Contracts Act).

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been transposed in Estonian national law in Articles 433(2)(2), 394(2), 433(5)(2), and 403(4) CC, with no diverging rules.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The provision has been transposed in Estonian national law. The law sets forth that the following documents are not required upon merging of a wholly owned subsidiary: the independent expert report (Article 394(2) CC); approval of the general meeting of the company being acquired (Article 433(5)(2) CC); and approval of the general meeting of the acquiring company (Article 421(4) CC).

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Apart from rules pertinent to SEs and SCEs, Estonian law does not address employee participation requirements. Therefore, employee participation in the acquiring company located in Estonia will only be applicable if such rights existed in other participating companies and if the additional conditions of Article 16(2) CBMD are met (explanatory note, under Article 41(2) Community-scale Involvement of Employees Act).

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Employee participation in the acquiring company located in Estonia will only be applicable if such rights existed in other participating companies and if the additional conditions of Article 16(2) CBMD are met (explanatory note, under Article 41(2) Community-scale Involvement of Employees Act).

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

The exceptions of Article 16(2) CBMD are set forth in Estonian national law in Articles 41(2)(1), (2), and 46 Community-scale Involvement of Employees Act.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3)(e) has been transposed in Article 41(2)(1) and (3) Community-scale Involvement of Employees Act.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a) and (b) have been transposed in Articles 41(2)(4) and (5) Community-scale Involvement of Employees Act. Article 16(4)(c) does not apply in Estonian national law.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Because there are no special employee participation rules in Estonia, Article 16(5) CBMD is not applicable to Estonia (explanatory note, under Article 41(2) Community-scale Involvement of Employees Act).

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

There are no specific rules regarding Article 16(6) CBMD in Estonian law. The CC does not set forth restrictions to nominate employees to the governing organs of the company, thus the company forms that can be subject to cross-border merger (private and public limited companies) may be suitable for employee participation (explanatory note, under Article 41(2) Community-scale Involvement of Employees Act).

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into Estonian national law in Article 41(2)(6) Community-scale Involvement of Employees Act.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Estonian national law in Article 403(5) CC.

1.18. Additional

a. Valuation rules

Estonian laws do not prescribe the valuation methods upon cross-border mergers or domestic mergers. The general principle is that the management boards of the companies involved must choose a suitable evaluation method (taking into account the nature of the assets), which must be thereof controlled by the auditor.

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

According to Articles 27(1) and (2) CC, the documents must be submitted to the Estonian Commercial Register in Estonian. In addition, according to the Language Act (Article 10, among others) the official language in Estonia is Estonian and communication with public authorities (including documentation) is presented in Estonian.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The procedure for domestic mergers in Estonian national law is the same as described for cross-border mergers, with the exceptions discussed. In addition, domestic mergers are allowed for all types of company forms with respective specifics (general partnership, limited partnership, private limited company, public limited company, commercial association).

b. Comparison

If an acquiring company is a public limited company that owns more than 9/10 of the shares of the company being merged, the general meeting may decide in accordance with the rules of the CC a takeover of the shares of the minority shareholders within three months after signing of the merger agreement. More than 90 percent of the shares represented at the general meeting must be in favor of such a decision (Article

421(1)(1) CC). These rules could be applicable also in cross-border mergers, if the Estonian company is a company being acquired and the acquiring company is a company of another Member State.

There are no other major differences between cross-border mergers and domestic mergers, except differences deriving from the cross-border nature of the merger (such as certifications on completion of pre-merger actions issued by competent authorities of other Member States and other specific aspects as discussed previously).

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1. Transposition of the Cross-Border Mergers Directive into Finnish Law

The amendments transposing the CBMD into Finnish law were confirmed by the president on December 27, 2007, and came into force on December 31, 2007.[1]

The CBMD was transposed through amendments to existing laws: the Companies; the Act on Cooperatives; and the Act on Commercial Banks and Other Credit Institutions in the Form of a Limited Company.[2]

Prior to the transposition of the CBMD, Finnish national company law did not include any provisions on cross-border mergers. On the contrary, the matter was covered by tax legislation (although from the company law point of view, it was not possible to execute cross-border mergers).

The cross-border mergers are now available for companies and cooperatives. Since the creation of the amendments that transposed the CBMD, companies and co-operatives can participate in cross-border mergers in all ways previously allowed for national mergers.[3]

The domestic tax legislation governing cross-border mergers is still in force.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope of the Finnish law is defined slightly broader then the CBMD.[4]

The following companies are included: private and public limited companies; cooperatives; credit institutions that exist as limited companies, cooperatives, or savings banks; and mutual real estate limited companies that fall under the Finnish Housing Companies Act.[5]

Finnish LLCs cannot participate in a cross-border merger unless one of the companies involved fits the CBMD definition of an LLC.[6] An exception to this rule is that, with a parent-subsidiary merger, a Finnish LLC can merge into a foreign entity if it is similar to a Finnish cooperative, cooperative bank, savings bank, or mutual insurance

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[1] Ministry of Justice, Finland, *Facilitations in Cross-Border Restructuring Operations*, http://www.om.fi/en/Etusivu/Ajankohtaista/Uutiset/Uutisarkisto/Uutiset2007/1198084587280 (last visited 26 May 2013).

[2] O. Raitasuo and J. Haltia-Tapio, 'Finland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 3.

[3] Ministry of Justice, Finland, *Facilitations in Cross-Border Restructuring Operations.*

[4] Ibid., p. 4.

[5] Ibid.

[6] Unofficial Translation, Ministry of Justice, 'Limited Liability Companies Act—Finland (2012)', http://www.finlex.fi/en/laki/kaannokset/2006/en20060624.pdf (last visited 26 May 2013), Part V, Chapter 16, Section 19(2).

company; and if that entity owns 100 percent of the Finnish subsidiary's shares already.[7]

Finnish law goes further than the CBMD by allowing cross-border divisions.[8]

Furthermore, the national provisions implementing the CBMD do not apply to legal entities outside the scope of the CBMD. In practice, the legal entities outside of the CBMD cannot use other national cross-border legislation.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

The Finland LLC Act specifies that to be considered a Finnish LLC, "A limited liability company shall be a legal person distinct from its shareholders, established through registration. The shareholders shall have no personal liability for the obligations of the company. However, provisions may be included in the Articles of Association on the liability of a shareholder to make specific payments to the company … The minimum share capital of a private company shall be EUR 2,500 and that of a public company EUR 80,000."[9]

b. List of companies that can carry out a cross-border merger under Finnish law

Under Finnish law, the following companies are included: private LLCs and cooperatives; public LLCs and cooperatives; credit institutions that exist as limited companies, cooperatives, or savings banks; and mutual real estate limited companies that fall under the Finnish Housing Companies Act.[10]

Finnish LLCs cannot participate in a cross-border merger unless one of the companies involved fits the CBMD definition of an LLC.[11] An exception to this rule is that, with a parent-subsidiary merger, a Finnish LLC can merge into a foreign entity if the foreign entity is similar to a Finnish cooperative, cooperative bank, savings bank, or mutual insurance company; and the foreign entity already owns all shares of the Finnish subsidiary.[12]

Finnish law goes further than the CBMD by allowing cross-border divisions.[13]

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[7] Finland LLC Act, Part V, Chapter 16, Section 20.
[8] Ministry of Justice, Finland, *Facilitations in Cross-Border Restructuring Operations.*
[9] Finland LLC Act, Part I, Chapter 1, Sections 2-3.
[10] O. Raitasuo and J. Haltia-Tapio, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 4.
[11] Ibid.
[12] Ibid.
[13] Ministry of Justice, Finland, *Facilitations in Cross-Border Restructuring Operations.*

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Finland provides all three situations described in Article 2(2) CBMD, but without a payment limit.[14] However, in practice tax legislation often limits the application of the company law provisions so that mergers where the payment limit provided by the CBMD is exceeded are not executed. It also provides a "triangular merger," defined as "an absorption merger whereby a company other than the acquiring company provides the consideration for the merger."[15]

d. Rules on the cash payment

Finland does not follow the rules on cash payment as laid down in Articles 2(2)(a) and (b) CBMD.[16] Article 3(1) CBMD, however, does apply in Finland.

e. CBMs and companies in liquidation

Finland includes companies in liquidation in cross-border mergers, unless the distribution of assets to shareholders has already begun.[17] This applies without question to the transferor company, whereas with respect to the transferee company, the matter is unresolved.

f. Geographical scope

Finnish law provides that cross-border mergers are possible only with respect of EEA companies.[18] Finnish national law does not provide information regarding cross-border mergers outside of the scope of the CBMD.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Finland allows cross-border divisions.[19] The possibility to such divisions became part of legislation simultaneously with cross-border mergers. However, currently no other cross-border restructurings are allowed.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal

[14] Finland LLC Act, Part V, Chapter 16, Sections 1-2.
[15] Ibid., Section 2.
[16] Ibid.
[17] Finland LLC Act, Part V, Chapter 16, Section 15(3).
[18] Ibid., Section 19.
[19] Ministry of Justice, Finland, *Facilitations in Cross-Border Restructuring Operations.*

value (or accounting par value) of the capital of the company resulting from the cross-border merger.

In the Finnish national law the merger consideration may also consist of cash, other assets, and future undertakings.[20] As there is no limit to the cash payment, Finland does not follow the rules laid down in Article 2(2)(a) and (b) CBMD. However, Finland has implemented Article 3(1), and the rules laid down in the CMBD shall apply to cross-border mergers regardless of the amount of cash consideration.[21]

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Finland has not excluded cooperative societies.[22]

c. General transposition of Article 3(3) CBMD

Article 3 (3) CBMD deals with the position of investment companies. Finland has followed Article 3(3) CBMD. A separate act (based on the UCITS Directive) regulates mergers of collective investment companies.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) has been transposed in Finland and does not diverge from the CBMD.[23]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4 (1) (b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Based on preliminary works (pages 14 and 15) of Finland's Companies Act, the option provided in Article 4(1)(b) CBMD was acknowledged and the power of the Finnish authorities in cross-border mergers was deemed to be arranged similarly to the power in domestic mergers.

Competition authorities may oppose the merger based on competition regulation. The merger can be opposed by Financial Supervisory Authority if the question is about certain qualified companies (e.g., banks, insurance companies) subject to the surveillance of the said authority.

[20] Finland LLC Act, Part V, Chapter 16, Section 1.
[21] Ibid., Sections 1, 19 and 21.
[22] Ministry of Justice, Finland, *Facilitations in Cross-Border Restructuring Operations.*
[23] Finland LLC Act, Part V, Chapter 16, Section 19.

Finnish law does neither provide further information on the exact procedure to be taken, nor is the term “public interest” defined in the law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Regarding Article 4(2) CBMD, Finland has transposed creditor protection rules.[24]

The procedure starts when the merging company requests that the registration authority issue a public summons to the company’s creditors. With regard to the time limit, the request to the registration authority shall be made before four months have passed since the merger plan is registered, or the merger lapses. The creditors may oppose the merger by sending a written notice to the registration authority under the due date.

The procedural steps to be taken are the following: Within four months of the registration of the merger plan, the merging company must request that the registration authority issue a public summons to the company’s creditors for any loans that predate the registration of the draft terms.[25] The company must then send the written notification of the public summons to creditors whose receivable has been created prior to the registration of the merger plan, at least a month before the due date specified in the summons.[26] The creditors may oppose the merger by sending a written notice to the registration authority under the due date.[27] If the company does not file for the public summons within four months of the registration of the merger, the merger lapses.[28]

Once the creditor objects to the merger, the registration authority must notify the company immediately after the due date, and the merger lapses a month after the due date.[29] If, however, within a month of the due date, the company moves to have the court affirm that the creditor has been paid, or if both the company and the creditor request that the proceedings be suspended, the registration authority will suspend the proceedings.[30]

This option also applies for domestic mergers.[31]

The creditors can block the merger, unless, in the time period referenced, the company moves to have the court affirm that the creditor has been paid.[32]

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[24] See Ibid. p. 10.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Finland LLC Act, Part V, Sections 6(1) and 24 (2).
[32] Ibid.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Finland has transposed Article 4(2) of the CBMD and has set rules to protect minority shareholders.[33]

At the general meeting making the decision concerning the merger, any shareholder can insist that his or her shares be redeemed, provided that he or she votes against the merger decision.[34] One who holds options or other special rights entitling to shares can insist redemption of the rights either at the general meeting or by submitting a written demand to the company before the general meeting.[35] Once someone demands redemption, the merging company must immediately notify the acquiring company of the demand.[36] The acquiring company must pay the redemption price, which is the market price of the share at the time of the merger decision.[37] If there is a controversy over redemption or its terms, the matter goes to arbitration.[38]

This option exists for mergers within Finland.

e. The protection of employees in Article 4(2)

Finland has implemented employee protection rules.[39] The compulsory protection applies to both members of a special negotiation and other employee representatives.[40] An employee who is a member of the qualified special negotiation body cannot be fired due to individual reasons without the specific consent of a majority of the employees whom that employee represents.[41] Such in employee can be terminated as part of a collective termination only if: the work in which the employee is involved ceases entirely; and the employer cannot arrange appropriate work for the employee, or to train the employee for another position.[42]

The law is applied similarly to employees subject to Finnish Employment Contracts Act.

Regarding the start of the procedure, it has to be noted that if the Finnish Act on Cooperations within Undertakings applies, procedures including informing the employees should be completed before the merger is executed. The applicable time limit, in case the Finnish Act on Cooperations within Undertakings is applied to the receiving entity, is that the informing duty must be complete by one week after the

[33] Ibid. p. 9.
[34] Ibid. p. 9-10.
[35] Ibid. p. 10.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid., p. 12.
[40] Ibid.
[41] Ibid.

execution, unless it is stipulated by the act that the duty is complete before the merger.

Procedural steps include that the representative of the merging or receiving entity that has Finnish employees shall present to the employee representatives related to the entities merging the expected time, reasons, and legal, economic, and social consequences involved, as well as what was planned for employees. If the negotiation duty under the act shall be fulfilled, the procedure becomes more complicated.

This duty exists similarly for mergers within Finland in case the Finnish Act on Cooperations within Undertakings shall be applied.[43]

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) CBMD have been transposed in Finnish national law.[44] Finland has required certain additional particulars, as follows:[45]

(1) Proposal for all consideration, including, where applicable, the terms of options or other special rights; proposal for method and terms by which the consideration will be allocated, including distribution date and the grounds for the consideration;

(2) Breakdown of share classes; where relevant, account of new shares issued; amount of shares of each company held by each resulting company; right of companies to decide on arrangements (other than normal business dealings) that might affect equity or the amount of outstanding shares;

(3) The form "of the possible provider of merger consideration"; information (including contact information) of the foreign companies' registers; reasons for the merger; where necessary, a proposal for an amendment to the articles of association;

(4) Corporate mortgages on the companies' assets; any capital loan debtors who can oppose the merger;

(5) Proposed date of registration of the merger's transposition;

(6) Special rights and benefits conferred on supervisory board members, board members, and managing directors;

[42] Ibid.
[43] Finland LLC Act, Part V, Chapter 16, Sections 13(1) and 24(4).
[44] O. Raitasuo and J. Haltia-Tapio, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 5.

(7) Special rights and benefits conferred on the auditor (independent expert) issuing the merger proposal;

(8) Information on the valuation of the company's equity; description of accounting methods applicable to the merger; expected effect of the merger on the surviving company's balance sheet;

(9) Any other terms.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Finland has transposed Article 6(1) CBMD, and national law states that the CDTMs must be kept available to shareholders either on the website or at the head office for at least a month before the meeting.[46] The gazette publication procedure is replaced by a registration procedure where the CDTMs are registered in the Trade Register within a month from its signing, and which is then announced by the Trade Register authorities together with a public notice for creditors.[47]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6 (1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed in Finnish national law. A rule diverging from the provision in the Directive, though, allows keeping the documents at the head office.[48]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

The Trade Register authorities publish a public notice to the creditors on application.[49]

[45] Finland LLC Act, Part V, Chapter 16, Sections 3 and 22.
[46] Ibid., Sections 11 and 22(5).
[47] Ibid., Section 5 and Act on Trade Register, Section 25.
[48] Ibid., Act on LLC Chapter 16, Section 11.
[49] Finland LLC Act, Part V, Chapter 16, Section 6(2).

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Finnish national law,[50] with additional requirements. The management report must address the implications for shareholders, creditors, and employees.[51] In the absence of employee representatives, it must be made available to employees themselves at least one month before the general meeting.[52] Any opinion issued by an employee representative in accordance with national law must be included in the report.[53]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD has been transposed in Finnish national law, and the equivalent of the "expert report" is referred to as the "auditor's report."[54]

b. The independent expert

An auditor must be a chartered public accountant, and there can be several auditors. The auditor(s) is/are appointed by the boards of directors of the merging companies.[55]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD has been transposed in Finnish national law, and there can be one or more auditors.[56]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

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[50] Ibid., Section 22(3).
[51] Ibid.
[52] Finland LLC Act, Part V, Chapter 16, Section 22(4).
[53] Ibid., Section 22(5)
[54] Finland LLC Act, Part V, Chapter 16, Sections 23(1) and 4.
[55] Ibid., Section 4.
[56] Ibid.

Finland goes further in its transposition of Article 8(3) CBMD by requiring that the report opine on whether the merger will effect repayment of the company's debts.[57]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) CBMD has been transposed in Finnish national law.[58] The auditor shall notify in the report whether a true and fair view has been provided.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Finnish national law, but it slightly differs from the CBMD. If all shareholders agree, an auditor's report may contain only information regarding whether the arrangement is conducive to compromise payment of the company's debts.[59]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Further exemptions to provide the expert report in Articles 15(1) and (2) CBMD have been transposed, but Finnish national law differs slightly. In the case of a "subsidiary merger," an auditor's report may contain only information regarding whether the arrangement is conducive to compromise payment of the company's debts.[60] (The Finland LLC Act defines a subsidiary merger as "an absorption merger where the companies involved in the merger own all of the shares of the merging company and, where appropriate, all option rights and other special rights entitling to shares in the company."[61])

h. Further exemptions in Finnish law

Finnish national law does not provide further exemptions.[62]

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[57] Ibid.
[58] Ibid., Section 23.
Finland LLC Act, Part V, Chapter 16, Section 4 Finland LLC Act Part V, Chapter 16, Section 4[61] Finland LLC Act, Part V, Chapter 16, Section 2(2).
Finland LLC Act Part V, Chapter 16, Section 4[61] Finland LLC Act, Part V, Chapter 16, Section 2(2).
[61] Finland LLC Act, Part V, Chapter 16, Section 2(2).
[62] O. Raitasuo and J. Haltia-Tapio, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 6-7.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Finnish national law. In the merging company, the decision shall be made by a shareholders' meeting. In the receiving company, the decision shall be made by the board unless shareholders who own at least 5 percent of the shares (and the transferee company own less than 90 percent of the shares of the transferring company) require the decision to be made in a shareholders' meeting.[63]

a. Procedural requirements including majority, quorum, timing and notarization

Procedural requirements state that if the decision shall be made by a shareholders' meeting, a qualified majority must approve the merger; specifically, at least two-thirds of cast votes and the shares represented at the meeting must approve.[64] In the case of several share classes, such a qualified majority is required within each class represented at the meeting.[65]

b. Amendment of CDTMs by shareholders

According to domestic principles on limited liability companies, the general meeting may amend propositions from the board of directors made either before the general meeting or during the general meeting.[66] The CDTMs can be conditionally accepted during the general meeting, while the matter of employee participation is to be decided in a further general meeting.

The CDTMs can be conditionally accepted during the general meeting, while the matter of employee participation is to be decided in a later general meeting.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Finland waives the need for a general meeting approval under the conditions specified in Article 8 Directive 2011/35/EU.[67] The board shall make the decision in the receiving company.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15 (1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

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[63] Finland LLC Act, Part V, Chapter 16, Section 9.
[64] Finland LLC Act, Part II, Chapter 5, Section 27(1)-(2).
[65] Ibid., Chapter 5, Section 27(3).
[66] Government Bill 3/2007, p. 29.
[67] Finland LLC Act, Part V, Chapter 16, Sections 9 and 11.

Article 15(1) CBMD has been transposed in Finnish national law, and in such a case, the boards of directors of the merging companies must make the merger decision.[68] Finland does not provide for any other exemptions to the shareholder approval.[69]

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Finnish national law.[70] The merging companies need to apply an authorization (or a registration, if the surviving company is registered in Finland) from the Trade Register within six months from the date of the decision concerning the merger. The Trade Register shall grant the authorization (or register the merger) if the legal requirements have been fulfilled. A pre-merger certificate concerning the authorization is issued only when a Finnish company merges into an acquiring company in another Member State.

The requirements of the authorization and issuing the certificate are as follows:

(1) No creditor has objected the merger or if a court has affirmed the merger (same applies for national mergers[71]).

(2) The foreign companies involved in the merger must accept the "right of redemption" discussed in Section 13 of Chapter 16 Finland LLC Act.[72]

(3) Further, evidence of employee participation in the surviving company in a way that satisfies Article 16 CBMD shall be presented to the Trade Register.[73]

(4) If a Finnish company involved in the merger owns assets that are subject to a business mortgage (as provided in the Act of Business Mortgages), a registerable petition must be pending for: (1) the mortgage to be cancelled; or (2) the mortgage to be transferred to become a liability of a Finnish branch.[74]

(5) The pre-merger certificate is valid for six months, and the companies must send it to the authority designated by the local laws of the acquiring company.[75]

(6) The certificate must further indicate whether there are pending "redemption proceedings."[76]

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[68] Ibid., Section 9.
[69] O. Raitasuo and J. Haltia-Tapio, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 8.
[70] Finland LLC Act, Part V, Chapter 16, Section 25-26.
[71] Ibid., Section 15.
[72] Ibid., Section 26.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.

b. National authority has been designated to scrutinize the legality of the merger

The registration authority (the Trade Register) has been designated to scrutinize the legality of the merger. The Trade Register must check and certify whether all measures for merger have been taken and whether all formalities required by the law have been fulfilled.[77]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

This provision has been transposed in the Finnish law (foreign companies must accept the right of redemption and the certificate must indicate whether there are pending redemption procedures).[78] The Trade Register shall not issue the certificate if the other companies do not accept "the right of redemption" in which case the merger cannot be executed.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) have been transposed in Finnish national law as they are in the CBMD.

b. The national authority has been designated to scrutinize the legality of the merger

The registration authority (the Trade Register) has been designated to scrutinize the legality of the merger.[79] The Trade Register has to check whether all measures for merger have been taken and whether all formalities required by the law have been fulfilled. The check can be characterized to be rather of a formal than of a substantive nature.

[77] Ibid., Section 26(4).
[78] Ibid., Sections 25(2) and 26(2).
[79] Ibid., Sections 25 and 26.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Finnish national law, which does not go further.[80]

b. Date the cross-border merger takes effect

The merger takes effect when the registration authority (National Board of Patents and Registration and the Trade Register) registers the transposition of the merger.[81]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence of the CBMD has been transposed in Finnish national law, which does not go further.[82]

b. Transposition of Article 13 second sentence

Finnish national law has transposed Article 13 second sentence.[83]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Finland has transposed Article 14 CBMD with the following additions: the assets and liabilities of the non-surviving companies, including all rights and obligations, will be considered transferred to the surviving company, even without the liquidation of the non-surviving companies.[84] The addition, however, does not apply to Finnish companies (Finland LLC Act, Chapter 16, Section 27(2)).

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more

[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Finland LLC Act, Part V, Chapter 16, Section 26(5).
[84] Ibid., p. 4.

but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15 (1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been transposed in Finland, but national law does not fully cover Article 8. As based on Chapter 16, Section 4(2) Finland LLC Act, in subsidiary mergers the expert report concerning possible endangering of debt repayment by the receiving entity shall be obtained.

Article 15 (1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

With a wholly owned subsidiary, in lieu of an auditor's report (equivalent of the "independent expert report"), the companies may issue its own statement on whether the merger poses a danger to the payment of the debts of the resulting company.[85] However, the statement issued by a Finnish entity can only be issued by an auditor (Chapter 16, Section 4(2), Finland LLC Act).

Only the statement of whether the merger poses a danger to the payment of the debts of the resulting company is required.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Finland has a system of employee participation (Act on Personnel Representation in the Administration of Undertakings).[86] It applies to LLCs, cooperatives and other economic societies, insurance companies, commercial banks, cooperative banks and savings banks, with a regular staff of no fewer than 150 working in Finland.[87] Under the relevant statute, employees have the right to participate in decisions when dealing

[85] O. Raitasuo and J. Haltia-Tapio, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 7.
[86] Ibid., p. 11.
[87] Ibid.

with issues relevant to business operations, finances, and the employees' position in an undertaking.[88]

If none of the companies involved in the merger are either required to have or have voluntary existing employee participation systems, none need be transposed following the merger.[89]

If at least one of the involved companies has a personnel representation system as specified in Finland's SE Employee Involvement Act (13.8.2004/758) (EIA), a special negotiation body must be designated to negotiate employee participation with the organs of the companies.[90] Pursuant to the EIA, the personnel representation system qualifies if (1) representatives have a right to appoint or elect people to the company's supervisory, administrative organ, or management group or equivalent organ that cover the company's profit units; or (2) the representatives have a right to recommend or oppose the appointment of at least some members of the company's supervisory or administrative organ.[91] In such a case, the companies must begin to make arrange for negotiations immediately after publishing the merger proposal.[92]

However, the companies may transpose the secondary employee participation rules (as specified in the EIA) without negotiating with the employees.[93]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

The stipulations of Article 16(1) CBMD on employee participation in cross-border merger transactions have been transposed into Finnish law, in the Finland LLC Act, supra n. 9, Part V, Chapter 16, Section 25(2).[94]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

The exemptions of Article 16(2) CBMD have been transposed into Finnish law (Act on Personnel Representation in the Administration of Undertakings, Sections 9a through 9e).

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

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[88] Ibid.
[89] Ibid., p. 11-12.
[90] Ibid., p. 11.
[91] Ibid.
[92] Ibid., p. 12.
[93] Ibid., p. 11.
[94] Labor Code, Art. L.2371-1 to L.2375-1 as completed by two decrees of 31 October 2008.

Article 16(3) CBMD has not been transposed in Finnish national law because Finland has not transposed detailed guidelines for the election process. In practice, the election process is typically handled similarly to the process for appointing other employees within the company.[95]

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(b) has been transposed in Finnish national law.[96]

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into national law. The matter has not been specifically addressed in rules concerning the determination of national minimum levels.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Finnish national law (Act on Personnel Representation in the Administration of Undertakings, Section 9b(3)).[97]

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed into Finnish national law (Act on Personnel Representation in the Administration of Undertakings, Section 9e). However, the section refers to denying the weakening of participation rights, not ensuring them.

[95] Ibid., p. 12.
[96] Ibid.
[97] Ibid., p. 11.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Finland has transposed Article 17 CBMD with the specification that the cross-border merger cannot be amended, either.[98]

1.18. Additional

a. Valuation rules

Finland specifies the valuation as the market price of the shares at the time of the merger decision.[99] The principles shall be determined in the merger plan. Should the merger be executed as a tax-exempt transaction, the consideration provided to the shareholders of the merging entity shall be shares of the receiving entity pro rata to their ownership, as well as money. However, the monetary compensation must not exceed 10 percent the nominal value or amount of share capital paid corresponding with the shares. If both sides cannot agree on valuation, the case goes to arbitration.[100]

b. National case-law on provisions transposing the CBMD

No published case law on provisions transposing the CBMD exists. The existing precedents mostly relate to the tax treatment of the cross-border mergers.

c. Language requirements

The documents to be filed to Finnish trade register shall be either in Finnish or in Swedish. In practice, the National Board of Patents and Registration has not, however, required the articles of association of a foreign entity engaged in the merger to be translated.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The domestic merger procedure is rather similar to the cross-border merger procedure.

b. Comparison

Key differences between the domestic merger procedure and cross-border merger procedure exist, e.g., in requirements concerning including effects of the merger in the merger plan (codified in the Finland LLC Act, supra n. 9, Part V, Chapter 16, Section 22); independent expert (not necessarily an auditor in cross-border mergers, unlike in

[98] Finland LLC Act, Part V, Chapter 17, Section 27.
[99] Ibid., p. 10.
[100] Ibid.

domestic mergers); and differences concerning registration duties of the merger (the Finland LLC Act, supra n. 9, Part V, Chapter 16, Sections 26 and 27).

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1. Transposition of the Cross-Border Mergers Directive into French Law

The CBMD was transposed into French law by Law No. 2008-649 on July 3, 2008. Further specific transposing measures of Law 2008-649 were adopted pursuant to the Decree 2009-11 of January 5, 2009 (the Act).

The transposition was made via an updating of existing laws codified within several codes (Commercial Code (FCC or Com. Code), Financial and Monetary Code, Labor Code, and so forth). For example, the Commercial Code was updated with the creation of a new Section IV entitled Special Provisions for Cross-Borders Mergers (Articles L. 236-25 to L. 236-32 Com. Code), and the Labor Code was updated with the creation of Articles L. 2371-1 et seq.

There is no upcoming replacement, modification, or amendment scheduled.

Prior to the publication of the CBMD, there was no clear legal framework in place regarding cross-borders mergers.[1] Cross-border mergers were nonetheless possible via the application of private international law and the juxtaposition of the procedures of each company's national laws. In France, unanimous consent of the shareholders of the merged company was necessary, as the merger of a French company by a foreign company was considered as a change of nationality.[2] As an example, in 1993, Barclays Bank SA (a French company) was merged within Barclays Bank Plc (a British company).[3]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope of the French national law is similar to that found in Article 1 CBMD, and applies to mergers (1) of French limited liability companies (i.e., SA, SAS, SARL, SCA, SE) with (2) one or more limited liability companies, as defined in Article 2(1) CBMD, incorporated in other Member State(s).[4]

French national law does not provide for general provisions on cross-border mergers outside of the scope of the Directive.

[1] M. Loy, 'Les fusions transfrontalières : entre présent et avenir', *La Semaine Juridique Entreprise et Affaires* 31 (2007), p. 1987.
[2] J.-M. Moulin, 'Fusion, scission et apport partiel d'actif', *Dalloz* 6, Répertoire de droit des sociétés.
[3] C. Cathiard and A.-S. Poirier, 'Fusion transfrontalière', *Dalloz* 3, Répertoire de droit des sociétés.
[4] Com. Code, Art. L.236-25.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

French law does not directly refer to the term "limited liability company" (*société de capitaux*); instead, national law refers to it by transposition of the CBMD. Article L.236-25 provides that it applies to French companies (SA, SARL, SCA, SAS, SE) participating in a merger operation with a company incorporated in another EU Member State, that complies with Article 2(1) CBMD (i.e., a company as referred to in Article 1 Directive 68/151/EEC(2), or a company with share capital and having legal personality, possessing separate assets that alone serve to cover its debts, and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC).

b. List of companies that can carry out a cross-border merger under French law

Under French law, a cross-border merger applies to corporations (SA), limited liability partnerships (SCA), European companies (SE), simplified limited liability companies (SAS), and limited liability companies (SARL)[5].

There is no specific provisions regarding cross-border merger of partnerships (*société en nom collectif* and *société en commandite simple*), unincorporated entities, agricultural companies, or economic interest groups.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

French law only provides that the cross-border mergers legislation applies to a "merger," (*fusion*) without any definition.[6]

However, the definition of "merger" by the CBMD, which includes three types of mergers, can be found by French law, through incorporation of domestic merger legislation:

(1) The *fusion-absorption*: One or more companies are wound up without liquidation. Their assets and liabilities are transferred to an existing company, which then issues new shares or securities, which may be transferred to shareholders of the absorbed company or companies. These new shares or securities could be paid in cash.[7]

[5] Ibid.
[6] Ibid.
[7] Ibid., L.236-1.

(2) The *fusion par création d'une société nouvelle*: Similar to the *fusion-absorption*, but with two or more companies wound up without liquidation instead of one or more. After the companies transfer their assets and liabilities to a new company, they receive new shares or securities, which may be transferred to shareholders of the wound-up companies. These new shares or securities could be paid in cash.[8]

(3) The *fusion simplifiée*, in which a wholly owned subsidiary is wound up without liquidation. It transfers its assets and liabilities to its parent company, which owns all securities and share capital.[9]

The merger with a company whose capital is 90%held by the absorbing company is also provided.[10]

d. Rules on the cash payment

France's domestic merger law provides that cash consideration cannot exceed 10 percent of the par value of the shares. With respect to cross-border mergers, the FCC provides, in accordance with Article 3(1) CBMD, that the merger may be accompanied by the payment in cash of a balance of more than 10 percent of the par value or accounting par value of the transferred equity of the acquiring company, when the legislation of at least one of the involved Member States permits it.[11] The FCC also states the accounting par value should correspond to the fraction of the company's capital represented by one share.

e. CBMs and companies in liquidation

The FCC does not expressly provide for the participation of a company in liquidation in a cross-border merger. However, it does refer to the rules applicable to domestic mergers, and therefore companies in voluntary liquidation may participate in a merger, including a cross-border merger,[12] provided that the distribution of the company's assets to its shareholders has not started.[13]

f. Geographical scope

French law does not forbid cross-border mergers with non-EEA companies, but does not provide for specific rules regarding cross-border mergers with non-EEA companies. Note that French law explicitly excludes the application of the French law provisions of cross-border mergers (transposing CBMD) to operations involving non-EEA companies.[14]

[8] Ibid., L.236-1.
[9] Ibid., L.236-11.
[10] Ibid., L.236-11-1.
[11] Ibid., L.236-26.
[12] J. Mestre et al., *Lamy Sociétés Commerciales* (2012), n° 1925.
[13] Com. Code, Art. L.236-1.
[14] Ibid., L.236-25

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

No specific French rules apply to cross-border restructuring, so such operations must comply with domestic merger rules. With that in mind, the following can be construed:

(1) French law does not forbid cross-border divisions, but does not provide for specific rules regarding them (relevant factors are the application of each company's national law and unanimous consent of the shareholders if the division entails a change of nationality).[15]

(2) French law allows cross-border seat transfers explicitly for some companies (SARL, SA, SCS, SCA, SNC), but such transfer, at least in the EU, is admitted, based, notably on the European Court of Justice's decision. For corporations (SAs and SCAs), the transfer is decided by an extraordinary general meeting of shareholders, provided that the host country has concluded with France an international convention allowing the company to acquire its nationality and move its seat on its territory[16] (practically, there are no such international conventions—only one with Ethiopia); the decision can therefore only be taken by unanimous consent of the shareholders[17]). For companies incorporated under a legal form other than a corporation (SAs and SCAs), the Commercial Code does provide for unanimous consent.[18]

(3) French law does not provide specific rules regarding other cross-border restructurings. For example, a French case law held that corporate restructuring can be organized between a French company and a Dutch company, provided that the foreign law recognizes the validity of such operation and the operation complies with each company's legislations.[19]

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

[15] J. Mestre et al., *Lamy Sociétés Commerciales* (2013), n° 1935.
[16] Com. Code, Art. L. 225-97 and Art. L. 226-1 for SCA.
[17] Letter of the Chancellery of 3 July 1973, Communication ANSA, No. 1600.
[18] Com. Code, Art. L. 221-6; L. 222-9; L. 223-30.
[19] CA Versailles, 12e ch., 3 October 1996, Sté Pier Import of Huston c/Sté Esders, RJDA 1997, no 60, Bull. Joly Sociétés 1997, p. 116, note Tilquin, JCP E 1997, I, no 676, obs. Viandier et Caussain.

With respect to domestic mergers, French law provides that cash consideration cannot exceed 10 percent of the par value of the shares.[20] However, with respect to cross-border mergers, France has transposed Article 3(1) CBMD. The FCC provides, in accordance with Article 3(1), that the merger may be accompanied by the payment in cash of more than 10 percent of the par value or accounting par value of the transferred equity of the acquiring company, when the legislation of at least one of the Member State concerned permits it.[21] The FCC also states that the accounting par value should correspond to the fraction of the company's capital represented by one share.

Therefore, under French law, for cross-border mergers, cash payment can exceed 10 percent of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger, whether the French company is the surviving or the disappearing company.

Please note, however, that the French favorable tax treatment does not apply if the cash consideration exceeds 10 percent, as the French tax code provides that such favorable merger tax treatment implies that the cash consideration cannot exceed 10 percent.[22]

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. French law has not excluded cooperative companies. French cooperative entities incorporated under Act N° 47-1775 of September 10, 1947, pertaining to cooperative status may take part in cross-border mergers governed by Articles L.236-25 to L.236-32 of the Commercial Code, if such cooperative entities are formed under a corporate form eligible under the CBMD to take part in such a cross-border merger.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. French law provides entities for collective investment, such as the *société d'investissement à capital variable* (SICAV) and the *société de placement à prépondérance immobilière à capital variable* (SPICAV), which are excluded from the scope of French cross-border merger legislation.[23]

[20] Com. Code, Art. L. 236-1.
[21] Com. Code, Art. L. 236-26.
[22] CGI, art. 210-0 A.
[23] C. Cathiard and A.-S. Poirier, 'Fusion transfrontalière', *Dalloz* 16, Répertoire de droit des sociétés.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

The FCC does not conform to Article 4(1)(a)'s stipulation that "cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States." Under Article L.236-25 of the FCC, French companies qualifying for cross-border mergers may merge with companies defined under Article 2(1) CBMD.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

With the exception of EU and French competition law,[24] regulatory restrictions (applicable to the specific industries of defense, media, press, banking, and insurance), and in the case where a French company's participation in a merger would create an SE or an SCE,[25] French law does not provide for the possibility for the national authorities to oppose a cross-border merger on public interest grounds. Public authorities can also not oppose the merger.

No further information are provided concerning which public authorities may oppose the merger. There is at least no possibility to oppose to a cross-border merger grounded on French rules implementing the CBMD. Consequently, no insights can be provided concerning the procedure or the definition of "public interest."

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

French law has not adopted rules regarding creditor protection specific for cross-border mergers. Domestic mergers rules apply, and creditors can oppose the proposed merger before the Commercial Court.[26]

The protection period starts within 30 days from the last publication of the merger or the advertising of the proposed merger on the website of the company, provided that

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[24] Council Regulation No 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] OJ L 24/1; Com. Code, Art. L.430-1 et seq.
[25] Com. Code, Art. L.229-4.
[26] Ibid., L.236-14 ; R.236-8.

the creditors' claim is prior to such publication[27] (i.e., 30 days prior to the shareholders meeting[28]).

The procedural steps include that the opposition does not prevent the merger operation; the Commercial Court may reject the opposition, order payment of the debt, or order the grand of collateral to secure the debt of the creditors; and if the company fails to pay as ordered by the court, the merger has no effect to the creditor. This option is a domestic rule, which also applies to cross-border mergers.

Creditors can disturb the merger in a way that opposes it; however, such opposition does not prevent the merger, but rather may, upon a court decision, receive an anticipated refund and additional guarantees.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

French law has not adopted rules regarding minority shareholder protection specifically for cross-border mergers. Domestic merger rules apply.

Applicable protection pertains to information rights and the abuse of majority. Regarding information rights, any company involved in a merger shall make available to its shareholders at the registered office (except if it is on the company's website), at least 30 days prior to shareholders meeting called to approve the project, documents[29] including the proposed merger, board of directors' and auditors' reports (if applicable), annual accounts approved by the general meetings and the management reports of the last three years of the companies participating in the operation, and financial statements. Regarding abuse of majority, minority can seek before a court the nullity of the shareholders meeting on the grounds of abuse of majority; the outcome of such legal action, however, is random.[30]

e. The protection of employees in Article 4(2)

Next to its applicable domestic rules, French law has adopted rules regarding employee protection specific for cross-border mergers. These rules are mandatory, and the protection they provide differs between two situations.

Rules for domestic mergers are:

(1) In case of merger; the works council (*délégués du personnel*) is informed and consulted on the changes in the economic or legal organization of the business.

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[27] Ibid.
[28] Ibid., R.236-2.
[29] Ibid., R.236-3 et seq.; Other provisions are applicable to companies which shares are traded in a regulated market.
[30] Cass. com., 7 July. 1980, no 79-10.543, JCP G 1980, IV, p. 364 ; CA Paris, 19 March 1981, JCP G 1982, II, no 19720.

(2) The employer (management body) shall explain of the proposed changes and consult the works council on the proposed measures that affects employees.[31]

Rules for cross-border mergers are:

(1) The management reports must be given to the works council (or, in the absence of such council, to the *délégués du personnel*)[32]. The report must be available to the works council (or employees) at least one month prior to the shareholders meeting.

(2) Where the opinion of the works council is sent one month prior to the shareholders meeting, such opinion is attached to the management report.[33]

These rights (information rights and legal action grounded on abuse of majority) are domestic rules, which also apply to cross-border mergers.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) CBMD have been transposed in the FCC.[34]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

France has transposed Article 6(1) CBMD; the deadlines for the publication of the CDTMs under the FCC are identical to those provided in the CBMD.[35]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from

[31] Labor Code, Art. L.2323-19.
[32] Com. Code, Art. L.236-27.
[33] Ibid., R.236-16
[34] Ibid., R.236-14.
[35] Ibid., R.236-15; R. 236-8; R. 236-2.

certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed; French law provides that the publication of the CDTMs is not necessary if the company make them available on its website for a continuing period starting at least 30 days prior to the general meeting.[36]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed in the FCC, which provides that publication is made in a local (department) gazette. In addition, the FCC requires another publication in the official civil and commercial bulletin.[37] (Under French law, whenever publication is required, it is required through those two means.) The FCC also follows the CBMD's specifics about the publication,[38] but requires the following: the acronym form, the office address of each of the companies where the CDTMs can be seen, the share capital or the amount of the capital increase of the existing companies, the valuation of the assets and liabilities of each participating company which will contribute to the surviving or new company, the exchange ratio of securities within each participating company, the anticipated amount of the merger premium for each participating company, the date of the CDTMs, and, for the participating companies registered in France, date and place of the deposit to the Commercial and Companies Register.[39]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed,[40] and the wording is identical in the FCC. Thus, the management report must be made available to shareholders and employees and it is required to explain, as provided by Article 7 CBMD, the legal and economic aspects of the merger. In addition the report must explain the share exchanges ratio and valuation methods used, which must be consistent for the companies concerned.

[36] Ibid., R. 236-2-1.
[37] Ibid., R.236-15.
[38] Ibid., R.236-15.
[39] Ibid., R.236-15.
[40] Ibid., L.236-27; R.236-16.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Prior to the CBMD, the FCC already provided for cases where an independent expert report was necessary, such as in Article 8(1) CBMD.[41] The FCC has been updated to transpose CBMD rules not already in place, such as the possibility for the shareholders to unanimously decide to waive the requirement of expert report.

b. The independent expert

In the absence of specific provisions stipulated by the Act, the provisions relating to domestic mergers are applicable. Under French law, with respect to mergers, auditors are required only for mergers between limited companies (SA, SCA, SAS) and limited liability companies (SARL).[42] Statutory auditors of merging companies may not be appointed as independent experts for the merger.[43] Each merging French company must, subject to exceptions cited below, request the appointment of one or more auditors to the president of the Commercial Court.[44] Auditors qualified as independent experts are defined by Article R.236-6 FCC, which refers to Article R.225-7 FCC, which itself refers to Article L.822-1 FCC; in short, auditors registered on the auditors list. Precise requirements as to who qualifies as "listed auditors" are discussed in Articles L.822-1-1 FCC et seq.[45]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

French Law has transposed the possibility to provide one expert for all companies, as allowed in Article 8(2) CBMD. The common independent expert is appointed by the president of the Commercial Court, by a special motion by all the involved companies, for this purpose.[46]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

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[41] Ibid., L.236-10.
[42] J. Mestre et al., *Lamy Sociétés Commerciales* (2013), n° 1951.
[43] Com. Code, Art. L.236-10; Com. Code, L.822-11; J. Mestre et al., *Lamy Sociétés Commerciales* (2013), n° 1953.
[44] Com. Code, Art. L.236-10.
[45] French nationals or EU resident, guaranties as to good moral character, absence of criminal or administrative convictions, academic degrees.

Article 8(3) CBMD has been transposed in French national law. The report must include: the method(s) used to determine the proposed exchange ratio; whether this (or these) method(s) of valuation of the shares of the merging companies is (are) appropriate and relevant in the case in question; and the values given by the application of each method. The report will also critique the methods used to assign values to the shares of the merging companies for defining the exchange ratio, and the particular valuation difficulties, if any.[47]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) CBMD has been transposed in French law. The independent experts are authorized to request from the merging companies all the information and documents they deem useful for their assignment.[48] The FCC does not provide a consequence in national law if independent experts do not receive the information they require. But there is, under French law, a general principle of liability that may be applicable.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in French national law. The shareholders of the merging companies can, by a unanimous decision, waive the right to the intervention of an independent expert.[49]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have been transposed. The intervention of any independent expert is excluded:

(1) in a merger by acquisition of a wholly owned subsidiary;[50]

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[46] Com. Code, Art. R.236-6.
[47] Ibid., L.236-10.
[48] Ibid.
[49] Ibid.
[50] Ibid., L.236-11.

(2) in a merger by acquisition carried out by a company holding 90 percent or more of its subsidiary shares. In this case, there is no need for the establishment of the expert report when the minority shareholders of the acquired company were offered, prior to the merger, the redemption of their shares by the acquiring company at a price equal to the value thereof determined, as appropriate:
(2a) in accordance with Article 1843-4 of the Civil Code, if the shares of the acquired company are not admitted to trading on a regulated market;
(2b) on the context of a tender offer made under the conditions and in the manner determined by the regulations of the French Financial Services Authority, if the shares of the acquired company are admitted to trading on a regulated market;
(2c) as part of an offer that meets the requirements of (2a) or (2b), if the shares of the acquired company are admitted to trading on a multilateral trading system that abides by laws or regulations to protect investors against insider trading, price manipulation, and the dissemination of false information.[51]

h. Further exemptions in French law

There are no further exemptions in French law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD did not require transposal into French law because national law already provided for such shareholder approval.[52] Shareholder decision rules for cross-borders mergers are the same as those of domestic mergers.

a. Procedural requirements including majority, quorum, timing and notarization

Procedural requirements depend on the company's corporate form.[53]
In a SA, the shareholder approval procedure is the one provided for by shareholders' extraordinary general meeting:[54]
(1) Majority: the shareholders present or represented must approve the merger by a special majority of two-thirds.[55]

[51] Ibid.
[52] Ibid., L.236-2.
[53] See also section 4.4.5 below for rules applicable to merger with wholly owned subsidiary.
[54] Com. Code, Art. L.236-9 and L.225-96.
[55] Note that if the company is merging within a SAS, unanimous consent of the disappearing company is required (Cass. com., 19 December 2006, no 05-17.802, Bull. civ. IV, no 268, D. 2007, p. 92, obs. A. Lienhard, D. 2007, p. 630, note L. Godon, JCP E 2007, 1192, note A. Viandier, RJDA 2007, no 264, Dr. sociétés March 2007, comm. 51, note H. Hovasse, RLDA 2007/14, no 788, note H. Guyader, Bull. Joly Sociétés 2007, p. 506, note A. Couret, Rev. sociétés 2007, p. 93, note P. Le Cannu, RTD com. 2007, p. 180, obs. D. Danet et C. Champaud, JCP E 2007, I, 1877, chr. J.-J. Caussain, F. Deboissy et G. Wicker, D. 2008, p. 379, obs. J.-Cl. Hallouin et E. Lamazerolles).

(2) Quorum: a meeting of shareholders can only be legitimately convened if present or represented shareholders possess one-quarter of the voting rights when first called, or one-fifth at the second call (except otherwise provided for in the articles of association in non-listed companies).

(3) Timing: shareholders are called to the meeting 15 days prior to the meeting when first convened, and 10 days upon the second convening (in non-listed companies).[56]

(4) No notarization requirement with respect to the shareholders meeting.

In the case of a SARL, the shareholder approval procedure is the one provided for by amendment of the articles of association of the company (shareholders' special meeting):[57]

SARL incorporated prior to 4 August 2005:

(1) no quorum requirement.

(2) Majority: three-fourths of shareholders' shares. Any provisions of the articles of association requiring a higher majority is void.

SARL incorporated after 4 August 2005:

(1) Majority: two-thirds of the shares held by present or represented shareholders.

(2) Quorum: only if the shareholders present or represented possess one-quarter of the shares when the meeting is first called, or one-fifth upon the second calling, may the deliberation be legitimate (they must follow the same conditions as a SA). Slightly higher quorum and majority rules may be laid out in the articles of association, but a clause providing for a unanimous vote is void.

(3) Timing: shareholders are called to the meeting by registered letter 15 days prior to the meeting.[58]

(4) No notarization requirement with respect to the shareholders meeting.

In a partnership limited by shares (SCA), the shareholder approval procedure is the one provided for by amendment of the articles of association of the company. Unless otherwise specified in the articles of association, the unanimous vote of the general partners is mandatory.[59]

In simplified limited liability companies (SAS), the shareholder approval procedure is the one provided by the articles of association.[60]

b. Amendment of CDTMs by shareholders

Shareholders can approve all of the CDTMs, reject all of the CDTMs, or amend some provisions of the CDTMs, including the ratio of exchange of shares.[61]

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[56] Com. Code, Art. R.225-69.
[57] Ibid., L.236-2 and L.223-30.
[58] Ibid., R.223-20.
[59] Ibid., L.236-2 and L.226-11.
[60] Ibid., L.236-2 and L. 227-9; see also footnote No 39.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

This provision has been transposed since Law 2011-525 of 17 May 2011, as follows: when the acquiring company (SA, SCA, or SAS) has at least 90 percent of voting rights of the acquired company, there is no need for approval of the merger by the meeting of the acquiring company. However, one or more shareholders of the acquiring company holding at least 5 percent of the share capital may request the convening of an extraordinary general meeting of the acquiring company for a ruling on the approval of the merger.[62]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) CBMD has been transposed in Law 2011-525 of 17 May 2011, as follows: When the acquiring company (SA, SCA, or SAS) owns all the shares representing the entire share capital of the acquired company, the merger is subject to a simplified scheme. The merger is approved by the boards of directors or management boards of companies participating in the operation, and there is no need for the shareholders of the acquired company and the acquiring company to approve the merger. However, one or more shareholders of the acquiring company holding at least 5 percent of the share capital may request the convening of an extraordinary general meeting of the acquiring company for a ruling on the approval of the merger.[63]

French law does not provide that the merger has to be approved or formalized in a different way. Where this exemption applies, the management body of the companies involved must still approve the merger, and the CDTMs are simplified and do not need to state:[64]

(1) the date from when the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement; and

(2) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of merger premium.

National law does not provide for any other exemptions to the shareholder approval.

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[61] Communication ANSA, May- June 1994, no 2708.
[62] Com. Code, L.236-11-1; Note: such rule is not applicable to SARL (Com. Code, Art. L. 236-2 and L. 236-23).
[63] Ibid., L.236-11; Ibid.
[64] Com. Code, Art R.236-1.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in French national law. French law already provided that all companies involved in the merger are required to file with the Court of Commerce offices a declaration of conformity, in which they assert that the operations were conducted in accordance with applicable rules and regulations. The Clerk of the Commercial Court ensures, under its responsibility, the compliance of this statement.[65] In addition, with respect to cross-border mergers, all the companies involved must obtain, from the Clerk of the Commercial Court, a certificate of conformity of the acts and formalities prior to the merger.[66] The clerk has a period of eight days from the filing of the declaration of conformity for issuing the certificate of conformity.

b. National authority has been designated to scrutinize the legality of the merger

The Clerk of the Commercial Court has been designated as the authority to scrutinize the legality of the merger. With respect to domestic merger provisions, the mission of the clerk is not to check the veracity of statements of the declaration of conformity, but only that the CDTMs were established, filed to the Registry, published, and contain the particulars provided for by Article L. 236-6 FCC.[67] With respect to the certificate of conformity established for cross-border mergers, French law provides that the clerk gives the certificate of conformity after the check of Article L.236-6 FCC, which can be assumed to be the same kind of check.

c. Transposition of Article 10 (3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

French law does not provide for a procedure to verify and amend the ratio applicable to the exchange of securities or shares or compensate minority shareholders as referred to under Article 10(3) CBMD, with respect to domestic mergers. However,

[65] Ibid., L. 236-6.
[66] Ibid., L.236-29 and R.236-17.
[67] J. Mestre et al., *Lamy Sociétés Commerciales* (2013), n° 1948.

with respect to cross-border mergers, where the applicable law of one of the companies involved in the merger provides for such rights (possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders), then the shareholders can decide, by special resolution, the transposition of such procedures.[68] In this case, the declaration of conformity from the Clerk of the Commercial Court specifies whether there is such a procedure pending.[69] French law does not provide for a consequence if the general meetings of other companies do not agree.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed as follows:[70] A notary or the Clerk of the Commercial Court controls the legality of the merger and the formation of the new company resulting from the merger. They must ensure that the merging companies have approved the merger in the same terms and that arrangements for employee participation have been determined pursuant to the Labor Code's Title VII, Book III, Part II.[71]

Particularly, each company participating in the cross-border merger must provide to the notary or clerk in charge of legality review a file containing the certificate of conformity issued by the Clerk of the Commercial Court, not older than six months; the CDTMs; the articles of association of the company resulting from the merger; a copy of publications; a copy of the minutes of the meetings referred to in Articles L. 236-9 and L. 236-13; and a document certifying that the merging companies have approved the merger in the same terms and that employee participation has been determined pursuant to the Labor Code's Title VII, Book III, Part II.

b. The national authority has been designated to scrutinize the legality of the merger

The Clerk of the Commercial Court or a notary has been designated. In addition, French law provides that the notary in charge of the scrutiny cannot be one (or a

[68] Com. Code, Art. L.236-28.
[69] Ibid., L.236-29.
[70] Ibid., R.236-19.
[71] Ibid., L.236-30.

member of a firm) that has drafted or advised one of the parties to the operation.[72] The authority does a formal check.[73]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in French national law.[74]

b. Date the cross-border merger takes effect

If a new company is created because of the merger, the merger enters into effect when the company is incorporated to the Company Register.[75]

In the other cases, the merger enters into effect as provided in the merger agreement. It cannot be prior to the scrutiny of the legality and not after the end of the financial year during which such scrutiny for the acquiring company has occurred.[76]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

National law transposing the CBMD does not refer to Article 13 first sentence; domestic rules already provided for such registration—filings to the Company Register.[77]

Regarding a cross-border merger, French law provides that the clerk of the court where the company is registered notifies the date of effect of the cross-border merger to the registry or the competent authority of each company involved in the operation.

b. Transposition of Article 13 second sentence

French national law has transposed Article 13 second sentence. Upon receipt of the notification from the foreign authority of the date of effect of the merger, the Clerk of

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[72] Ibid., R.236-18.
[73] Ibid., L.236-30.
[74] Ibid., L.236-31.
[75] Ibid., L.236-31 and L.236-4.
[76] The documents that must be filed to the Company Register are listed on the website of the Paris Company Register, http://www.greffe-tc-paris.fr/fr/registre-du-commerce/formalites-de-modification/formulaire_modification/fusion_transfrontaliere_sa_absorbante_sa.html (last visited 21 August 2013).
[77] Com. Code, Art. R.123-74-1.

the Commercial Court must de-register the French company. De-registration of the French company cannot be completed before this notification is received.[78]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 CBMD has not been transposed in French national law because domestic rules already provided for such consequences.

In French law:

(1) all the assets, rights, obligations, and liabilities of the companies being acquired are transferred to the acquiring company;[79]

(2) the shareholders of the merged company become shareholders of the acquiring company;[80]

(3) the merged company is wound up without liquidation;[81]

(4) some formalities are required under French law for the transmission of, among others:

(4a) administrative contracts[82]

(4b) Intitui personae contracts[83]

(4c) conveyance of real property

(4d) brands[84]

(5) Employment agreement are transferred;[85]

(6) There is no exchange of the shares of the merged company with the acquiring company where:[86]

(6a) The acquiring company holds directly shares in the acquired company,

(6b) The acquired company holds directly some of its own shares.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more

[78] Ibid.
[79] Ibid., L.236-3.
[80] Ibid.
[81] Ibid., L. 236-3, I.
[82] C. Cathiard and A.-S. Poirier, 'Fusion transfrontalière', *Dalloz* no 134, Répertoire de droit des sociétés.
[83] Houin, *RTD com.* (1975), p. 136; C. Prieto, 'La société contractante', *Presses Aix* (1994), no 695; X. Jaspar and N. Metais, 'Les limites à la transmission universelle du patrimoine : les contrats intuitu personae et les contraintes afférentes à certains biens', *Bull. Joly Sociétés* (1998), p. 447; M.-L. Coquelet, 'La transmission universelle du patrimoine en droit des sociétés à l'épreuve du principe d'intransmissibilité des contrats intuitu personae', *Dr. sociétés, Actes pratiques* (2000), no 49.
[84] Intellectual Property Code, Art. L. 714-7.
[85] Labor Code, Art. L. 1224-1.
[86] Com. Code, Art. L.236-3, II.

but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been transposed in French national law and concerns the peculiarities of the CDTMs,[87] as well as the independent expert report, approval of the shareholders of the acquired company and acquiring company, and the management report. However, one or more shareholders of the acquiring company holding at least 5 percent of the share capital may request the convening of an extraordinary general meeting of the acquiring company for a ruling on the approval of the merger.[88] Regarding addressing the consequences of the merger, there is no specific rule for the simplified procedure; rather, general rule applies.[89]

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The provision regarding the independent expert report does not apply,[90] and neither does shareholders' approval of the acquired company or the management report. However, one or more shareholders of the acquiring company holding at least 5 percent of the share capital may request the convening of an extraordinary general meeting of the acquiring company for a ruling on the approval of the merger.

French law does not provide that the documents necessary for scrutiny are not required in case of merger with a 90 percent subsidiary.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

[87] Ibid., L.236-11 and Art. R.236-1.
[88] Ibid., L.236-11.
[89] Ibid., L.236-3.
[90] Ibid., L.236-11-1.

a. The system of employee participation applicable in the Member State

French law provides that the articles of association of a corporation (SA) only may provide for employee participation, i.e., election by employees of employees as member of the management body of the company.[91]

Other provisions are applicable to companies for which shares are traded in a regulated market.[92]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) CBMD's stipulations on employee participation in cross-border merger transactions have been transposed into French law.[93]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Two exemptions of Article 16(2) CBMD have been transposed into French law[94]—fewer than 500 employees and that the company resulting from the cross-border merger must provide at least the same level of employee participation as the level of employee participation applied to the companies involved in the cross-border merger.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The increase of the percentage from 25 percent to 33 1/3 percent has not been found in any French law provision transposing the CBMD.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a), (b), and (c) have been transposed.[95]

f. Transposition of Article 16(5)

Article 16 (5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

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[91] Ibid., L.225-28 to L.225-56 and L.225-79 to L.225-93.
[92] Ibid., L.225-23 and L.225-71.
[93] Labor Code, Art. L.2371-1 to L.2375-1 as completed by two decrees of 31 October 2008.
[94] Labor Code, Art. L.2372-1.
[95] Com. Code, Art L.225-27 and L.225-79; Labor Code, Art. L.2372-4.

Article 16(5) has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into French national law.[96]

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into French national law.[97]

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into French national law. The nullity of a cross-border merger cannot be declared after it has taken effect.[98]

1.18. Additional

a. Valuation rules

In France, the valuation rules applicable to mergers are: operations with common control (netbook value); operations without common control, reverse merger (netbook value); and regular merger (market value).[99]

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

Corporate documents that are filed to the Company Register must be accompanied by a French translation, which is the binding version.[100]

[96] Com. Code, Art. L.236-32.
[97] Labor Code, Art. L.2374-2.
[98] Com. Code, Art. L.236-31.
[99] CRC 2004-01 of 4 May.
[100] Com. Code, Art. R.123-20-1.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The procedure for domestic merger in French national law can be summarized as: draft of the merger plan; signature of the merger plan; merger plan must be filed to the Company Register; merger plan must be published to a local gazette and official civil and commercial bulletin; creditors have 30 days to oppose the merger; shareholders approve the merger, with their meeting held under the requirements of amendments of the articles of association, after managements reports have been made available; a statement of conformity relating to all the operations of the merger must be established; and publication of the merger and performance of legal formalities.

b. Comparison

There are no differences between domestic and cross-border procedures in French national law. Rather, cross-border mergers add an additional layer of procedure that must be complied with for such operations. For example, the scrutiny of legality must be performed for cross-border mergers, but is not required for domestic mergers.

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1. Transposition of the Cross-Border Mergers Directive into German Law

The CBMD was transposed into German national law by the Second Act on the Amendment of the German Merger and Reorganisation Act[1] (RA) dated April 19, 2007,[2] which came into force on April 25, 2007.[3]

Prior to the transposition of the CBMD into German national law, there were no provisions under German national law relating to cross-border mergers.[4]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and provides a first definition to which kind of mergers the Directive applies.

Cross-border mergers are defined in the RA in Section 122a, whereas Section 3 RA defines which German companies can generally merge pursuant to German law. Those are: general partnerships (*offene Handelsgesellschaft*), limited partnerships (*Kommanditgesellschaft*), limited liability companies (*Gesellschaft mit beschränkter Haftung*), stock corporations (*Aktiengesellschaft*), partnerships limited by shares (*Kommanditgesellschaft auf Aktien*), registered cooperatives (*eingetragene Genossenschaft*), registered associations (*eingetragener Verein*), cooperative audit associations (*genossenschaftlicher Prüfungsverband*) and mutual insurance associations (*Versicherungsverein auf Gegenseitigkeit*). However, not all of such entities listed in Section 3 RA are actually capable to merge cross-border, as the regime set forth by the CBMD and Sections 122a et seq. RA are only applicable to corporations (or, in the terminology of the CBMD, to limited liability companies). If one of the involved entities (domestic or foreign) involved in the merger is not a corporation, the merger cannot be consummated in accordance with Sections 122a et seq. RA (but it may be, in theory, treated as a non-harmonized merger).[5]

[1] *Umwandlungsgesetz*, in the following abbreviated as RA.
[2] A. Wuesthoff, 'Germany', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 198; Federal Law Gazette 2007 I (*Bundesgesetzblatt*), p. 542, http://npl.ly.gov.tw/pdf/5883.pdf (last visited 26 May 2013); J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz* (C.H. Beck, Munich 2009), Einführung zum Umwandlungsgesetz, margin note 28; D. Weyde and J. Hafemann, 'Praxisrelevante gesellschaftsrechtliche und steuerrechtliche Aspekte bei grenzüberschreitenden Verschmelzungen', in A. Herlinghaus, et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 782.
[3] Ibid.
[4] J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, Vorbemerkungen zu §§ 122a–122l, margin note 1-2.
[5] S. Simon et al., *Cross-Border Reorganizations in Germany* (Oxford University Press, Oxford 2012), p. 3, p. 318, margin note 8.16; A non-harmonized merger is a cross-border merger that is not governed by the CBMD and is outside the scope of other harmonized law, such as the SE Regulation, the SCE Regulation, and the UCITS Directive, Ibid., margin note 2.198; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, Einleitung C, margin notes 24-28.

Section 122a also clarifies that a cross-border merger involves at least one corporation that is subject to the law of a Member State other than Germany.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability company'. Pursuant to Section 122b(1) RA and Article 2(1) CBMD, limited liability companies are companies in the sense of Article 1 Directive 68/151/EEC.

b. List of companies that can carry out a cross-border merger under German law

Article 2(1) CBMD is transposed by Section 122b RA. For Germany, the eligible companies are the German stock corporation (AG), the partnership limited by shares (KGaA), the limited liability company (GmbH), and a European company (SE) that has its seat in Germany.[6] All companies involved in the cross-border merger must have been formed in accordance with the laws of a Member State and must have their registered office, central administration, or principal place of business in a Member State (Section 122b(1) RA).

Sections 122a et seq. RA are not applicable to partnerships, cooperatives, and certain investment vehicles.[7]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger'.

German national law follows the provisions of Article 2(2) CBMD in Section 122a(2) and Section 2 RA. Certain provisions of the RA address the simplified merger procedure in the case of an upstream merger to the sole shareholder (e.g., Section 122c(3) RA).[8]

d. Rules on the cash payment

German national law follows the CBMD's rules on the cash payment (Sections 122a(2), 54(4), and 68(3) RA). A higher cash payment is authorized if the law applicable to a foreign company involved in the merger allows a higher limit for the cash payment in accordance with Article 3(1) CBMD.[9]

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[6] S. Simon et al., *Cross-Border Reorganizations in Germany,* p. 3, p. 316, margin note 8.09.

[7] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I,* p. 198; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122b, margin note 6; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122b, margin note 6.

[8] S. Simon et al., *Cross-Border Reorganizations in Germany,* p. 5, p. 320, margin note 8.26; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122a, margin note 6.

[9] Simon et al., *Cross-Border Reorganizations in Germany*, p. 5, p. 320, margin note 8.27.

e. CBMs and companies in liquidation

The RA also generally allows dissolved German companies that are in the course of liquidation to participate in a merger if a resolution for their continuation can be adopted (Sections 122a(2), 3(3) RA). This also applies to insolvent companies, if the insolvency proceedings are discontinued upon the application of the creditor or are lifted after the confirmation of an insolvency that provides for a continuation of the company.[10]

f. Geographical scope

Regarding cross-border mergers with companies formed outside the EEA or formed within the EEA but with its registered office, central administration, or principal place of business outside of the EEA, if only one company involved in the merger does not belong to a Member State based on the aforementioned criteria, Section 122a RA does not apply to the merger. Certain solutions may be available, obviously depending on the particular fact pattern at hand. For example, a chain of mergers could be carried out so the non-EEA company is first merged with an EEA company (outside of Germany). A merger pursuant to Section 122a RA could then be carried out.[11]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

The only provisions applicable to cross-border restructurings are the provisions on cross-border mergers set forth in Sections 122a through 122l RA (which largely operate by cross-referencing to the other sections of the RA governing purely national German mergers). With the exception of the SE Regulation, including its Article 8 (governing the transfer of the registered office of an SE), there are no statutory rules that enable other types of cross-border restructurings, such as the transfer of the registered office or cross-border split-ups (*Aufspaltung*), spin-offs (*Abspaltung*), or hive-downs (*Ausgliederung*).[12]

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal

[10] Ibid., p. 4, p. 319, margin note 8.20; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 3, margin note 44; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §3, margin note 57.
[11] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 5, p. 320, margin note 8.24.
[12] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122a, margin note 6; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122a, margin note 5.

value (or accounting par value) of the capital of the company resulting from the cross-border merger.

German national law follows the CBMD's rules on the cash payment (Sections 122a(2), 54(4), and 68(3) RA). A higher cash payment is authorized if the law applicable to a foreign company involved in the merger allows a higher limit for the cash payment in accordance with Article 3(1) CBMD.[13]

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. German national law has transposed Article 3(2) CBMD, and the law's new rules are applicable neither to partnerships nor to cooperatives (Section 122b(2) No. 1 RA).[14]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. The new rules of German national law are also not applicable to cross-border mergers with a company who practices the collective investment of public capital and whose company assets can be used for units that can be indirectly or directly purchased or redeemed (Section 122b(2) of the RA).[15]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) CBMD has not been explicitly transposed in German national law. However, the merger is governed by generally applicable national law if there are no specific rules in Sections 122a through 122l RA (122a(2) RA). Thus, national law governs which corporation can merge, therefore effectively transposing Article 4(1)(a) CBMD.[16]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

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[13] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 5, p. 320, margin note 8.27.

[14] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 198; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122b, margin note 14; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122b, margin note 10.

[15] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 198; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122b, margin note 15; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122b, margin note 12.

[16] M. Henssler and L. Strohn (eds.), *Gesellschaftsrecht* (C.H. Beck, Munich 2011), UmwG § 122a, margin note 4.

Article 4(1)(b) CBMD is not explicitly transposed in German national law. Under the German law focusing on unfair competition and antitrust, the competition authority controls national mergers that qualify for such control. There are no specific rules for cross-border mergers. Also, there is no specific rule providing that an authority can oppose a merger for "public interest" reasons.[17]

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides the Member State with the option to adopt protections for creditors, debenture and security holders.

Article 4(2) CBMD has been transposed into German national law,[18] in Section 122j(1) RA. Regarding the start of the procedure, the creditors are entitled to demand to be secured within two months after the day on which the CDTMs were publicly announced (Section 122d RA).[19] The possible time limit for this procedure is two months.[20]

With a view to the procedural steps, it has to be noted that after the day the CDTMs are publicly announced, creditors can register the basis and amount of their claim in writing and claim—reasonably—that the fulfillment of their claim is endangered as a consequence of the merger (Section 122j(1) RA).[21]

A comparable option also exists for domestic mergers.[22] However, under Section 22 RA, which is applicable to domestic mergers and cross-border mergers when the resulting entity is subject to German law, the time limit is six months starting after the day on which the registration of the national merger is publicly announced.[23] It has to be noted that in this case, the creditor protection only applies after the merger has already been consummated (which occurs by registration).

Once the merger has taken place, it cannot be reversed or declared ineffective.[24]

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

[17] S. Simon et. al., *Cross-Border Reorganizations in Germany,* p. 320, margin note 8.28.
[18] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I,* p. 205; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122j, margin note 3; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122j, margin note 1.
[19] S. Simon et al., *Cross-Border Reorganizations in Germany,* p. 20, p. 337, margin note 8.115; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122j, margin note 6; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122j, margin note 7.
[20] Ibid.
[21] Ibid.
[22] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 20, p. 337, margin note 8.116; The difference between § 22 and § 122j of the RA is that under § 22 creditors can only claim protection after the merger is final and binding whereas under § 122j the creditors can claim protection before the merger is final; See J. Semler and A. Stengel (eds.), *Umwandlungsgesetz,* § 122j, margin note 1; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122j. margin note 1.
[23] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122j, margin notes 1, 4-5.
[24] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 20, p. 338, margin note 8.120-8.121; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122l, margin note 14.

Article 4(2) CBMD has been transposed in German national law,[25] in Sections 122h and 122i RA.

The RA offers three remedies to minority shareholders opposing the merger. First, minority shareholders of the transferring company can demand an additional cash payment through a special award proceeding. In a domestic merger, such an award proceeding is the only remedy available to the shareholders of the transferring company if the merger is challenged on the grounds that the share exchange ratio is too low, that becoming a shareholder of the acquiring company is not an adequate consideration for the shares in the transferring company, or that the offered cash compensation is not adequate. If, in the case of a cross-border merger, the merging companies are governed by jurisdictions that do not offer legal proceedings comparable to the German award proceeding, the German award proceeding will only be available to shareholders if the shareholders explicitly declare their consent to the award proceeding (Section 122h(1) RA). If the award proceeding is not available, the exchange ratio and the adequacy of a cash compensation can be challenged by general voidance actions against the shareholder resolution approving the merger. This can be a potentially significant threat to the merging companies as the cross-border merger cannot be effected until all voidance actions have been finally dismissed or a release order has been obtained (which may take a significant amount of time). This situation may give undue levy to aggressive minority shareholders.[26]

Second, if the acquiring entity is not subject to German law, the German transferring company must, in the merger terms, offer to acquire the shares of its shareholders objecting the merger resolution in exchange for an adequate cash compensation (Section 122i(1)s.1 RA). Upon effectiveness of the merger, the obligation to pay the cash compensation is assumed by the receiving company by operation of law. The adequacy of the cash compensation can be reviewed in a special award proceeding, if either all jurisdictions that are involved provide for such a proceeding, or the shareholders of the merging companies, which are subject to jurisdictions that do not offer an award proceeding, explicitly declare their consent to the award proceeding (Section 122i(2) RA).[27]

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[25] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 19, p. 336-337, margin notes 8.113-8.114; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122i, margin note 1; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122i, margin note 1.

[26] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 204-205; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122h, margin notes 1-10; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122h, margin notes 1-12.

[27] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 204-205; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122i, margin notes 1-12; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122i, margin notes 1-17.

Finally, shareholders of a German company that participates in a merger may challenge the resolution to approve the merger terms in accordance with general rules on shareholder resolutions. According to such general rules, shareholder resolutions can, for example, be challenged if the shareholders' meeting was not duly convened or if information requirements have not been observed. Until all such actions have been finally dismissed, the merger cannot take effect (Sections 122a(2) and 16(2) RA), unless the company obtains a court release order (Sections 122a(2) and 16(3) RA). The court will issue such a release order if the shareholder action is inadmissible or unfounded or, if in the court's opinion, the merging companies' interest in completing the merger prevails, taking into account the severity of the alleged violation of the law.[28]

This process also exists for domestic mergers.[29]

e. The protection of employees in Article 4(2)

Member States can protect employees as regards rights other than those governed by Article 16.

Although German national law transposed Article 16 CBMD, special rules under the option provided by Article 4(2) CBMD were not transposed.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called common (draft) terms of cross-border merger (CDTMs). These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CBMD provides for certain particulars that have to be included in the CDTMs.

Articles 5(a) through (l) CBMD have been transposed into German national law in Section 122c RA with no additions.[30]

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[28] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 204-205; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 14, margin notes 5-6.

[29] Ibid.

[30] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 6, pp. 316-324, margin notes 8.32 – 8.45; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122c, margin note 1; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 798-804.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

In transposing Article 6(1) CBMD, German national law stipulates that the merger terms must be filed with the competent Trade Register at least one month before the shareholders meeting convened to approve the merger (Section 122d(1)s.1 RA). The Trade Register must publish the filing without undue delay (Section 122d(1)s.2 RA).

In contrast to Article 6(1), which requires that the merger terms are published at least one month before the date of the shareholders meeting, the German rules require the filing with the Trade Register to be made at least one month before the date of the meeting. This can result in a period of less than one month between publication of the merger terms and the meeting if the merger terms are filed with the Trade Register at the end of the one-month period, because usually a couple of days lapse between filing with the Trade Register and publication. [31]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment was not specifically transposed for cross-border mergers,[32] but it exists in Section 62(3) RA.[33]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed in Section 122d RA.

[31] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 200; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122d, margin notes 1, 7, 12; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122d, margin notes 1, 5, 8; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 810-11.

[32] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 200.

[33] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 62, margin notes 25a-d; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §62, margin note 13.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to draw up a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Section 122e RA.[34] Although Article 7 CBMD requires that the implications on the members are laid out, Sections 122e and 8 RA do not expressly contain this requirement.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD is transposed into German national law (Sections 122f, Sections 9 et seq. RA), which do not go any further.[35]

b. The independent expert

The expert will be appointed by the court upon a respective request by the management (Sections 122f, 10 RA). Certified auditors and audit firms are eligible to act as experts under the RA.[36]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one joint expert report for all companies under certain conditions.

German law has transposed the possibility to provide one joint expert for all companies, as allowed in Article 8(2) CBMD. The independent experts can also be appointed for several or all companies involved upon joint request of the management or administrative organs (Sections 122f, 10 RA).[37]

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[34] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 200; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122e, margin note 1; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122e, margin note 1.

[35] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 11, p. 326, margin notes 8.54-8.55; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 815-16.

[36] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 201; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 815-16; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 11, margin notes 2-5; see also Sections 122f, 9 (I), 10 and 11 RA.

[37] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 11, p. 327, margin note 8.61; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 815-16; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122f, margin note 5.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed into German national law[38] in Sections 122f, 12(2) RA, with no additional or diverging rules.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Regarding the transposition of Article 8(3) CBMD, according to Sections 122f, 11 RA, the right to secure information is governed by Section 320 German Commercial Code,[39] a general provision pertaining to yearly audits.

Under Section 320(2) German Commercial Code, the expert can require the management board members or other statutory representatives to provide all information and proof that are necessary for a diligent performance of their duties.

If the independent experts do not receive access to the information they require, there is no legal action, neither a complaint nor a preliminary injunction, which the expert could file to get the necessary information.[40]

The Commercial Code provides for legal consequences in case the agents do not provide the auditor with sufficient information (Section 320 Commercial Code). It is conceivable, if unlikely, that the agents could be liable for damages under Section 320 Commercial Code if the report is unduly delayed because of their actions.[41] In practice, the independent expert will most likely limit the endorsement (which can bear significant consequences).

Finally, the merging companies are required under Section 313(1) No. 2 RA, which imposes criminal liability, to answer questions truthfully and only proved true facts.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed into German national law, Sections 122f, 9(3), and 8(3), requiring notarization of the waivers.[42]

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[38] S. Simon et al., *Cross-Border Reorganizations in Germany,* p. 11, p. 327, margin note 8.56; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 12, margin note 4.

[39] *Handelsgesetzbuch.*

[40] W.F. Ebke, *Münchner Kommentar zum Handelsgesetzbuch* (C.H. Beck, Munich 2013), § 320, margin note 24.

[41] Ibid.

[42] S. Simon et al., *Cross-Border Reorganizations in Germany,* p. 11, p. 328, margin note 8.63; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly-owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

A report is not required if a wholly owned subsidiary is merged into its parent company (Sections 122f, 9(2) RA),[43] but there is no such exemption for a 90-percent holding.[44]

h. Further exemptions under German law

There are no further exemptions under German law.[45]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed into German law in Section 122g RA (Sections 122a(2), 13 RA).[46]

a. Procedural requirements including majority, quorum, timing and notarization

For German companies participating in a cross-border merger, it is required that the shareholders of such companies approve the merger terms—and thereby the merger—by virtue of a shareholders' resolution. If a wholly owned subsidiary is merged into its parent company, no shareholder resolution is required on the subsidiary level under Section 122g(2) RA.[47]

In the case of a German stock corporation, the merger resolution requires a majority of three-quarters of the share capital represented at the shareholders' meeting. The articles may provide for a larger majority or additional requirements, such as a quorum requirement. In the event that different classes of shares exist, each class of

Baden 2010), p. 815-16; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122f, margin note 7; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122f, margin notes 7-8.

[43] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 201; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122f, margin note 8; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122f, margin note 8.

[44] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 11, p. 327 – 328, margin note 8.62.

[45] Ibid., p. 11.

[46] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 202; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122g, margin note 1; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122g, margin note 1.

[47] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122g, margin note 14; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122g, margin notes 11-14; D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 202-203.

shares must approve the merger by a special resolution, to which the preceding majority requirement applies (Sections 122a(2), 65 RA).[48]

In the case of a German limited liability company, the merger resolution requires a majority of three-quarters of the votes cast in the shareholders' meeting. The articles may provide for a larger majority or additional requirements, such as a quorum requirement (Sections 122a(2), 50(1) RA). If, according to the articles, individual shareholders are entitled to minority rights or have been granted the right to conduct the business of the company or to appoint the managing directors of the company, and such rights are impaired as a result of the merger, such shareholders must grant their individual consent to the merger (Sections 122a(2), 50(2) RA).[49]

The shareholders' meeting may decide to make its decision on the merger subject to confirmation of the arrangements with respect to the participation of employees in the acquiring company (Section 122g(1) RA).[50]

The shareholder resolution of a German company participating in the merger, approving the merger, as well as any individual consents by shareholders, if required, must be notarized by a notary public.[51]

b. Amendment of CDTMs by shareholders

Shareholders cannot change the terms of the CDTMs by voting on them.[52] If the shareholders only approve some parts of the CDTMs—i.e., they do not adopt a resolution approving the CDTMs presented to them—the management or administrative organ has to agree on new CDTMs first or provide a new draft of the CDTMs.[53] Under German law, the shareholders have to provide final approval and this requirement also includes the notion that the shareholders cannot change the terms; they can only approve or reject them in whole.[54]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

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[48] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 65, margin notes 11-17; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §65, margin notes 1-13; A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 202-203.

[49] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 50, margin notes 8-13; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §50, margin notes 7-14; A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 202-203.

[50] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, §122g, margin notes 8-13; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122g, margin notes 7-10; A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 202-203.

[51] Sections 122a(2) and 13(3) of the RA; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 806-07.

[52] J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, § 13, margin note 18.

[53] Ibid., §13, margin note 18.

[54] Ibid., §13, margin note 15.

Section 122g(2) RA stipulates that an approval by the shareholders of the German company being acquired is not required if it is a wholly owned subsidiary of the acquiring company.

If the acquiring company is a German stock company and holds at least 90 percent of the capital of the company being acquired, a merger resolution of the acquiring stock corporation is generally not required (Sections 122a(2), 62(1) RA).[55]

d. Exemption from shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly-owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) CBMD has been transposed into German national law. Section 122g(2) RA stipulates that an approval by the shareholders of the German company being acquired is not required if 100 percent of its shares are held by the acquiring company.[56]

If the exemption in Section 122g(2) RA applies, the merger may proceed, provided the management or administrative organs of the company being acquired are in agreement about the CDTMs.[57] The exemption only applies to the company being acquired. The shareholder's approval of the acquiring company has to be obtained.

German law does not provide for any other exemptions to the shareholder approval.[58]

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) CBMD have been transposed into German national law[59] in Section 122k (merger out of Germany) and Section 122l (merger into Germany) RA.

b. National authority has been designated to scrutinize the legality of the merger

The Registry Court at the registered office of the company being acquired is the competent authority (Section 122k(1) RA) to issue the pre-merger certificate.[60]

[55] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122g, margin notes 14-15; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122g, margin notes 11-14; S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 14, p. 330, margin note 8.79-8.80.

[56] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122g, margin notes 14; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122g, margin notes 11-12; S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 14, p. 330, margin note 8.79.

[57] Ibid., p. 14, p. 330, margin notes 8.79-8.81.

[58] See Sections 122a(2), 62(1) of the RA, above 9c.

[59] J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122k, margin notes 2-4; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122k, margin note 4; S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 15, p. 332, margin notes 8.91-8.92.

In the case of a German company merging out of Germany, the court scrutinizes whether the requirements for a cross-border merger are fulfilled (Section 122k(2) RA). The court bases its decision on the documents submitted by the merging German entity. The court especially scrutinizes[61] whether the companies are allowed to merge cross-border; whether the common draft terms are valid and in accordance with Section 122c RA; whether the common draft terms were publicized according to Section 122d RA; whether the expert report was created and made available (or whether there was an exemption available); and whether the CDTMs were approved validly by adoption of a shareholders' resolution.[62]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) CBMD regulates whether the competent authority can nevertheless issue the pre-merger certificate.

Regarding Article 10(3) CBMD, Section 122h RA stipulates that under certain conditions, the shareholders of the company being acquired can have the exchange ratio reviewed at expedited appraisal proceedings. An outstanding review of the exchange ratio in expedited appraisal proceedings, however, does not prevent the registration of the merger or the issuance of the pre-merger certificate. As a result of the review, the shareholders may, if appropriate, require a further cash compensation, but are not in a position to block the merger or even require its rescission.[63]

If in such a situation the general meetings of the other companies do not agree, German national law does not prevent the registration of the merger or the issuance of the pre-merger certificate.

[60] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 15, p. 332, margin note 8.91; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122k, margin note 6; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 818.
[61] J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, 2009, §122k, margin note 14-15.
[62] J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122k, margin notes 14-15; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122k, margin notes 14-16; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 818-19.
[63] D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 817-18; S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 15, p. 320, margin note 8.94.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger at the level of the company resulting from the merger (or, before the cross-border merger is consummated, at the level of the acquiring company).

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed into German national law.[64]

b. The national authority has been designated to scrutinize the legality of the merger

Pursuant to Section 122l(1) RA, the Registry Court at the registered office of the acquiring company is the competent authority.[65] Therefore, generally, this is the relevant section governing the scope of the review proceedings in case of cross-border mergers into Germany.

The court scrutinizes the cross-border merger by assessing whether the pre-merger certificate(s) was or were issued by the competent authority or authorities; that the certificate(s) is or are not older than six months; and that it contains the declaration that preceding the merger, the company being acquired carried out all the legal acts and formalities required.[66] This court is also competent to scrutinize whether the requirements relating to the employee participation (cf., Article 16 of the CBMD) have formally been complied with.

1.12. Article 12 – Entry into Effect

Article 12 CBMD regulates the date when the merger enters into effect.

Article 12 CBMD has been transposed into German national law.[67] A cross-border merger into Germany enters into effect when the merger is registered in the Commercial Register of the German acquiring company pursuant to Sections 122a(2), 20 RA. A cross-border merger out of Germany enters into effect in accordance with the national law that governs the foreign acquiring company. Therefore, the registration (and immediately subsequent deletion) in the Commercial Register of the German company being acquired is a mere formality that has no impact on the legal

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[64] Section 122l of the RA; S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 15, p. 320, margin note 8.96; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, §122l, margin note 2; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122l, margin note 1.

[65] J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122l, margin note 5; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122l, margin note 4; S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 15, p. 320 ,margin note 8.96.

[66] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 333, margin note 8.97; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 821-22; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122l, margin notes 10-13; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122l, margin notes 12-13.

[67] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 199; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 823.

consummation of the merger. There is no explicit provision for effectiveness of the outbound merger; however, Article 12 CBMD and the general mechanics of cross-border merger make the consequence that foreign law governs the effectiveness sufficiently clear.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence of the CBMD provides that (provided it is in compliance with Article 3 of Directive 68/151/EEC - now Directive 2009/101/EC) each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 CBMD has been transposed into German national law.[68]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

With the exception of Article 14(3), Article 14 CBMD has been transposed in German national law (Sections 122a(2), 20 RA). Upon registration, all assets, rights, and liabilities of the companies being acquired pass to the acquiring company. This includes any employment relations, contractual relations, and physical property.[69]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a wholly-owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) CBMD provides that in a merger with a wholly-owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been partially transposed into German national law. Article 15(1) CBMD stipulates that under certain circumstances Articles 5(b), (c), and (e)[70]

[68] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 18-19, p. 336, margin note 8.107; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 122l, margin note 16.
[69] See Section 20 of the RA; see also S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 18, p. 335, margin note 8.106; Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 20 margin note 4.
[70] Ibid., p. 11, p. 323, margin note 8.39.

shall not apply. This is transposed in Section 122c(3) RA.[71] Under circumstances listed in Article 15(1), Article 8 shall not apply, which is transposed in Sections 122a(2), 8(3) RA. The exemption of Article 9 is transposed in Section 122g(2) RA.

Article 15(1) CBMD further provides that in a merger with a wholly-owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The provision with regard to independent expert report is transposed in the national law, but the provision regarding the documents necessary for scrutiny is not expressly provided for in German national law.[72]

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some Member States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Employee participation under German law is regulated on at least two levels. First, in companies, employees can create a works council (*Betriebsrat*) that is required to participate in some of the employer's decisions. In addition, some of the collaboration between the work council and the employer is optional but also regulated under the law. Second, in corporations (GmbH, AG, and SE), employees participate under certain prerequisites by being elected to the supervisory board (*Aufsichtsrat)*.[73]

Regarding the first point, pursuant to the *Betriebsverfassungsgesetz* (Works Council Constitution Act), employees are allowed to create a work council, which represents employee interests. Under the *Bundespersonalvertretungsgesetz* (Federal Staff Representation Act), public servants can create a similar council that has comparable functions.

Under the Works Council Constitution Act (WCCA), companies with at least five full-time employees can have a work council, provided the employees decide to establish the council in the first place (Section 1 of the WCAA). The number of employees being elected to serve in the council increases with the total number of employees in a company (Section 9 WCAA).

[71] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 11, p. 323, margin note 8.39.
[72] Ibid., p. 17-18, 327-328, margin note 8.62; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §122f, margin note 8.
[73] In contrast, the other organs are the management board (*Vorstand*) or managing directors (*Geschäftsführer*).

Under the WCCA, the council is required to be consulted and to take part in some of the employer's decision. Those decisions concern topics such as working hours; the time, way and means of how the employees are paid; the creation of general rules pertaining to vacation days and rules pertaining to occupational safety; and the implementation of employee surveillance systems (Section 87 WCCA). In addition, the council has to be consulted when workers are hired or when employment contracts are terminated by the employer. The council is required to be consulted for measures of employee education. Finally, the council has to be consulted in case of restructurings, in which case the council works together with the employer to ensure that employee interests are protected (Sections 91, 94, 95, 97 Abs. 2, 98, and 112 WCAA).

In contrast, the employer and the council can, by choice, create agreements pertaining to other work-related rules, such as measures to protect the environment, additional measures for occupational safety, measures to help the accumulation of capital and measures to help integrate immigrant workers (Section 88 WCAA).

Regarding the second point, employee participation in corporations is regulated under the *Mitbestimmungsgesetz* (Co-Determination Act, or CDA). It applies to stock corporations (*Aktiengesellschaft*), partnerships limited by shares (*Kommanditgesellschaft auf Aktien*), limited liability companies (*Gesellschaft mit beschränkter Haftung*), and cooperatives (*Genossenschaft*) (Section 1 CDA). If such a corporation has more than 2,000 employees, it is required to have a supervisory board,[74] according to Section 1 CDA. The supervisory board is composed of employees and shareholders. The main function of the supervisory board is to nominate and monitor the management of the company by the members of the management board.

Under the One-Third Participation Act (*Drittelbeteiligungsgesetz*), stock corporations, limited liability companies, mutual insurance associations, and cooperatives are required to fill one-third of their supervisory board with employee representatives and two-thirds with shareholders of the company. This Act applies if the companies employ more than 500 employees.

The rules on employee participation in cross-border mergers are laid down in a separate act, the Act on Employee Participation in Cross-border Mergers,[75] which came into force on December 29, 2006, and which transposes Article 16 CBMD.[76]

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[74] Note: stock corporations (*Aktiengesellschaft*) always have a supervisory board, regardless of the number of employees.

[75] *Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung* (*MgVG*), in the following abbreviated as AEP.

[76] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 205; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, Vorbemerkungen zu §§ 122a–122l, margin note 8; D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 785.

b. Transposition of Article 16(1)

Article 16(1) CBMD sets forth the general principle that the rules in force concerning employee participation of that Member State will be applicable where the company resulting from the merger has its registered office.

The provisions on employee participation in cross-border merger transactions under Article 16(1) CBMD have been transposed into German law.[77]

In accordance with Article 16(1) CBMD, Section 4 AEP stipulates that the company resulting from the cross-border merger shall be subject to the rules in force regarding employee participation in the Member State where the company has its registered office.[78]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

For companies resulting from a cross-border merger that are established in Germany and that have their registered office in Germany, as a general principle, the German rules on employee participation will apply, unless one of the exemptions stipulated in Article 16(2) CBMD (transposed into German law by Section 5 AEP) applies.[79]

All exemptions of Article 16(2) CBMD have been transposed into German law.[80]

d. Transposition of Article 16(3)(e)

Article 16(3) CBMD prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The increase of the percentage from 25 percent to 33 1/3 percent has been transposed in Section 23(1) No. 1 AEP.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a), (b) have been transposed.[81]

Article 16(4)(a) has been transposed in Section 23(1)s.1 AEP.

Article 16(4)(b) has been transposed in Section 18 AEP.

Article 16(4)(c) has not been transposed.

[77] Ibid.
[78] D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 785.
[79] A. Wuesthoff, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 206.
[80] Section 5 of the Employee Participation Act.
[81] Sections 23(1) No.1 and 18 Employee Participation Act.

f. Transposition of Article 16(5)

Article 16(5) CBMD refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) CMBD has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) CBMD has been transposed. Under Section 24(2) AEP, a merged company has to create a supervisory board.[82]

h. Transposition of Article 16(7)

Article 16(7) CBMD provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into German national law (Section 30 AEP).[83]

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into German national law.[84] Sections 122a(2), 20(2) RA provide for the same rule, but it already existed under previous German law.

1.18. Additional

a. Valuation rules

In Germany, the law does generally not provide valuation rules.[85] However, the Institute of Public Auditors in Germany provides in its rules that the *Ertragswertverfahren*[86] or the discounted cash flow method is to be used.[87] Literature

[82] C. Schubert, 'Die Mitbestimmung der Arbeitnehmer bei grenzüberschreitender Verschmelzung', *RdA* (2007), p. 9.
[83] Section 30 of the Employee Participation Act.
[84] S. Simon et al., *Cross-Border Reorganizations in Germany*, p. 15-19; J. Semler and A. Stengel (eds.), *Umwandlungsgesetz*, § 20, margin notes 4.
[85] W. Beisel and H.-H. Klump, *Der Unternehmenskauf* (C.H. Beck, München 2009), 6th chapter, margin note 53.
[86] According to the Ertragswertverfahren, the firm value is calculated as the discounted sum of future cash flows accruing to the firm's owners (i.e. the net profit that belongs to the firm's owners). The discount rate consists of three elements to calculate the present value of the future cash flows. The three elements are: The interest rate available on a risk-free alternative investment, a risk premium to reflect the uncertain

also states that the *Ertragswertverfahren* or the discounted cash flow method is predominantly used.[88]

For cross-border mergers, literature states that it is unclear which valuation rules are applicable.[89] Some literature recommends using the stock exchange price for valuation,[90] while others claim that the *Ertragswertverfahren* or the discounted cash flow method should be applicable in cross-border mergers because the stock exchange price would lead to problems in practice.[91] Literature also recommends that in practice the parties should only use one uniform valuation rule that is accepted by all Member States.[92]

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

All the necessary documents (including the CDTMs, the management report, and the independent expert report) must generally also be available in German. Otherwise, the approval of the merger may, in certain circumstances, be contested and the Registry Court may not carry out the corresponding registrations. Bilingual and multilingual documents are permitted if the German language version is (also) binding.[93]

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

There are, at least in theory, certain (minor) differences between the domestic and cross-border merger procedures. The legislation technique used in the RA dictates general rules in the general part of the law that apply to all mergers and specific rules that only apply to special kinds of mergers. Therefore, the general rules apply unless

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nature of the firm's future cash flows and a personal tax rate for the owners to account for the difference between gross and net cash flows.

[87] T. Bula, in B. Sagasser, T. Bula and T.-R. Brünger, *Umwandlungen* (C.H. Beck, München 2011), § 15, margin note 20.

[88] Roger Kiem, 'Die Ermittlung der Verschmelzungsrelation bei der grenzüberschreitenden Verschmelzung', *ZGR* (2007), p. 542; W. Beisel and H.-H. Klump, *Der Unternehmenskauf*, 6th chapter, margin note 55; M. Gutkès, in B. Sagasser, T. Bula and T.-R. Brünger, *Umwandlungen*, § 13, margin note 63; J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, § 5, margin note 13.

[89] J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, § 5, margin note 11.

[90] Roger Kiem, 'Die Ermittlung der Verschmelzungsrelation bei der grenzüberschreitenden Verschmelzung', *ZGR* (2007), p. 542.

[91] W. Beisel and H.-H. Klump, *Der Unternehmenskauf*, 6th chapter, margin note 56; T. Bula, in B. Sagasser, T. Bula and T.-R. Brünger, *Umwandlungen* (C.H. Beck, München 2011), § 15, margin note 20.

[92] Gutkès, in B. Sagasser, T. Bula and T.-R. Brünger, *Umwandlungen* (C.H. Beck, München 2011), § 13, margin note 65.

[93] S. Simon et al., *Cross-Border Reorganizations in Germany,* p. 17. p. 335, margin note 8.102; see regarding the independent expert report J. Schmitt, R. Hörtnagl and R.-C. Stratz (eds.), *Umwandlungsgesetz*, §§ 122f, margin note 6; see for the common draft terms D. Weyde and J. Hafemann, in A. Herlinghaus et al. (eds.), *Festschrift für Wienand Meilicke* (Nomos Verlag, Baden-Baden 2010), p. 807.

the specific rules apply. Thus, the same rules for cross-border mergers as for domestic mergers apply, unless Sections 122a through 122l RA provide otherwise.

b. Comparison

There are differences between domestic and cross-border procedures in German national law. In some instances, the CBMD provides more details than the rules for domestic mergers provide. Also, from a practical point of view, cross-border mergers are much more complex and carry their own difficulties. The following are some of the legal differences:

(1) For domestic mergers, the merger agreements have to be submitted to the employee representation (Section 5(3) RA), while for cross-border mergers the report (Article 7 CBMD, Section 122e RA) has to be sent to the employee representation.

(2) For cross-border mergers, Section 122e RA requires details in addition to the rule applicable to domestic mergers (Section 8 RA). This additional information pertains to the nature of the cross-border merger.

(3) Section 122c(2)(1) RA, transposing the common draft terms according to Article 5(a), is new to German law; however, it only pertains to the fact that it is a cross-border merger.

(4) Section 122j RA governs special rules regarding creditors that are only applicable to cross-border mergers. They differ from Section 22 RA, which is applicable to domestic mergers.

(5) Section 122k RA contains special rules for the registration process, including for example, that the application for registration must also contain a statement that the creditors have received a security deposit, according to Section 122j RA.

(6) The publication of the common draft terms is more detailed for cross-border mergers. Article 6(2) CBMD, transposed in Section 122d RA, only applies to cross-border mergers. There is no provision for domestic mergers requiring the same information for publication of the common draft terms.

(7) National mergers do not require the conduct of employee negotiations as may be required under Article 16 CBMD and the AEP.

(8) The merger report to be prepared by the companies cannot be waived under Section 122e RA, while it can be waived for national mergers under Section 8(3) RA.

(9) Certain items of the terms of merger are not required under national law and therefore are ambiguous, especially Section 122c(1) No. 11 RA.

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1. Transposition of the Cross-Border Mergers Directive into Greek Law

The CBMD was transposed in Greek national law with Act 3777/2009 (Government Gazette (GG) A 127/28.7.2009 (Greek Law)). The law adopting the CBMD, Cross-Border Mergers of Limited Liability Companies, was enacted on July 28, 2009.

The amendment to the CBMD, Directive 2009/109/EC, regarding the exception of the publication requirements, has been incorporated in the Greek law by the provisions of PD 86/2011.

No prior laws regarding cross-border mergers existed in Greek national law.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope of the Greek national law is similar to that found in Article 1 of the CBMD, and applies to mergers (1) of Greek limited liability companies (i.e., SA, IKE, SAS, SARL, SCA, SE) with (2) one or more limited liability companies, as defined in Article 2(1) CBMD, incorporated in other Member State(s).[1]

Greek national law does not allow for cross-border mergers outside of the scope of Directive.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Following Article 1(2) Greek Law, the Law applies in each merger of one or more limited liability company or companies with one or more limited liability company or companies that are incorporated in accordance with the law(s) of Member States and have their registered office, central administration, or principal place of business in the community, or when the company resulting from the merger of limited liability companies of non-Greek community countries has its registered offices in Greece.

Following Article 2(1a), the law applies to limited liability companies, which are a company as referred to in Article 1 CBMD: private limited liability companies, private

[1] Com. Code, Article L.236-25.

capital companies (IKE), limited partnership by shares, and European companies whose seat is located in Greece.

It also applies in Article 2(b) to companies with share capital and having legal personality, possessing separate assets, and subject to conditions concerning guarantees provided by the First Company Law for the protection of interests of members and other third-parties. It also applies to mergers of one or more Greek companies, with one or more limited liability companies established according to the law of another Member State of the European Union and with their registered office, central administration, or principal office of business within the community or when the company resulting from the merger of companies of different Member States has its registered office in Greece.

b. List of companies that can carry out a cross-border merger under Greek law

Under Greek law, a cross-border merger applies to private limited liability companies, private capital companies (IKE), limited partnership by shares, and to European companies whose seat is located in Greece.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Greek law follows the exact same definition of the term "merger" as that outlined in Article 2(2) CBMD. Greece has not introduced any diverging or additional rules.

d. Rules on the cash payment

Greek national law's rules on the cash payment are the exact same as in the CBMD: Article 2(2) was transposed in Article 2(2) Greek Law, and Article 3(1) CBMD was transposed in Article 2(3) Greek Law, without divergence.

e. CBMs and companies in liquidation

Greek national law is unclear regarding whether cross-border mergers can be carried out by companies in liquidation.

f. Geographical scope

Cross-border mergers are permitted when one or more Greek limited liability companies are merged with one or more limited liability companies that are incorporated in accordance with the law(s) of Member States and have their registered office, central administration, or principal place of business in the community or when the company resulting from the merger of limited liability companies of non-Greek community countries has its registered offices in Greece.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

In Greek national law, there is no law allowing cross-border divisions.

Greek national law does allow the transfer of a seat to another country (that is not only within the EU), with the following stipulations:

(a) for *sociétés anonyms* (SA), upon relevant decision of the General Assembly (Law 2190/1920, A. 49a(29), paragraph 3, and (31), paragraph 2), which because it is changing the nationality of the company needs to be reinforced by a quorum (two-thirds) and majority (two-thirds).

(b) for limited liability companies (EPE), upon relevant decision of the assembly of administrators, and needs to be reinforced by quorum (three-fourths) and majority (three-fourths).

(c) for private limited liability companies, a seat transfer can only occur in the European community and can only be accomplished if the European country recognizes the transfer and the continuance of the company's legal entity. Such a transfer requires a unanimous decision of all partners.

Cross-border restructuring is not addressed in Greek national law.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) CBMD has been transposed in Greek national law in Article 2(3) Greek Law, without divergence.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Greek law has not excluded cooperative companies.

c. General transposition of Article 3(3) CBMD

Article 3 (3) CBMD deals with the position of investment companies.

Article 3(3) CBMD has been transposed in Greek national law. Article 1(3) Greek Law provides that the law does not apply to cross-border mergers involving a company if their objective is the collective investment of capital provided by the public, operating

on risk-spreading, and with units which can be repurchased or redeemed from company assets. For such companies, Law 3283/2004 applies.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) has been transposed in Greek national law. The Greek Law also applies to mergers of one or more Greek companies, with one or more limited liability companies established according to the law of another Member State of the European Union and with their registered office, central administration, or principal office of business in the community (Articles 1(2) and 2(4)). However, if the new company resides in Greece, it has to be a company type recognized by Greek national law.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) CBMD was not transposed in Greek national law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Article 4(2) CBMD, regarding the protection of the creditors, was transposed in Greek national law, in Article 8(2) Greek Law. The protection period starts within 20 days from the completion of the publicity formalities. Regarding procedural steps or Greek public limited liability companies, before 20 days have passed after the completion of the publicity formalities, the creditors of the companies to be merged may request guarantees for claims that arose before the publication and had not become due. Creditors may do so if protection is necessary because of the financial situation of the merging companies and if such guarantees have not already been provided. Any dispute that may arise is resolved by the Single-Member Court of First Instance following an application of the interested creditor. The application is filed within 30 days from the publication. By its decision, the court takes the measures deemed sufficient and appropriate to secure the claim of the creditor.

This option does not exist for domestic mergers.

With a view to the possibility for creditors to block the merger, Article 8(2) Greek Law states that for the protection of creditors' rights in a Greek merging company, Article

70 Law 2190/1920 for SAs and Article 54 Law 3190/1955 for EPEs are applied. Following these articles, the merger may be completed only if the creditors do not provide any objections within the relevant timeframe. A declaration signed by all parties that there were no objections or that all objections have been resolved must be attached in the notarial contract. However, there is an opinion followed by some people in the literature that so far as EPE are concerned, following a petition of the company or companies to be merged, the competent court may allow the merger in spite of the creditors' objections, if the court decides adequate guarantees are offered to the creditors (Law 3190/1955).

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Greek national law has transposed Article 4(2) CBMD in Article 8(1) Greek Law.

The members of the Greek company being absorbed who do not approve of the merger can, within one month of the approval of the merger in the shareholders' meeting, do the following:

(1) File a petition in the Greek courts asking the Greek company participating in the merger to repurchase the securities or titles, only if the company is being absorbed or if the new company resulting from such merger is registered in another Member State. In such a case, provisions of Article 49a Greek Codified Law 2190/1920 will apply.

(2) Claim compensation if the ratio applicable to the exchange of securities and titles in absorbing company is too low. In such case, the merger procedure is not suspended.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) CBMD have been transposed in Greek national law without any divergences.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/109/EC) at least one month prior to the general meeting deciding on the merger.

Greece has transposed Article 6(1) CBMD in Article 4(1) Greek Law. However, there is another paragraph—paragraph 2—added by a presidential decree issued in 2011 (PD 86/2011, GG A 208/20-9-2011) that provides an exemption to the publication rules, stating that "the Greek based company participating in the cross border merger may be exempted to the publication rules of par. (1) above, if for a continuous period of at least one month before the date of the General Meeting, the Common Draft is published (and stays published) in the sub-directory of the website of the General Commercial Registry (in Greek GEMH)." This website is www.businessportal.gr.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/109/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed by a presidential decree issued in 2011 (PD 86/2011, GG A 208/20-9-2011).

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Regarding Article 6(2) CBMD, while publishing the CDTMs in the Greek government gazette, the following information must be included (Article 4(1) Greek Law):

(1) The type, name and registered office of every merging company;

(2) The register in which the documents referred to in Article 3(2) of the first Company Law Directive are filed in respect of each merging company and the number of the entry in that register; and

(3) An indication for each of the merging companies of the arrangement made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Article 5 Greek Law; the management report should be made available to the shareholders and the employees (and their representatives) at least one month prior to the general meeting and it should be registered in the General Commercial Registry (GEMH) and submitted to the general meeting.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD has been transposed in Article 6(1) Greek Law.

b. The independent expert

Any physical person or legal entity can serve as an independent auditor.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD has been transposed in Article 6(2) Greek Law; in Greece, the competent authority is the General Secretariat of Commerce of the Ministry of Development.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed in Greek national law in Article 6(3) Greek Law.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 8(3) CBMD has been transposed in Greek law in Article 6(3) Greek Law. There is no consequence in Greek national law for entities that do not provide the independent experts with the information they require for their report.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Greek national law in Article 6(4) Greek Law.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Article 15(1) CBMD has been incorporated in Article 13 Greek Law. Article 15(2) CBMD has not been incorporated.

h. Further exemptions in Greek law

There are no further exemptions in Greek law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Article 7 Greek Law. Paragraphs 2 and 3 of Article 7 provide for different categories of shares and bonds, and Article 7(1) provides for a reinforced quorum and majority for Greek companies.

a. Procedural requirements including majority, quorum, timing and notarization

The procedure for said approval includes the following steps:

At least one month before shareholders' meeting is convened to decide on the CDTMs, shareholders must be provided with the management's report, auditor's report, the common draft terms, the annual financial statements, and—if the draft terms are dated more than six months after close of last fiscal year—with an accounting statement for each merging company dated no earlier than three months prior to the date of the draft terms.

For Greek companies, a reinforced quorum and majority is required as follows:

(1) For public limited liability companies, meeting must have quorum only when two-thirds of paid-up share capital is present or represented. A majority of two-thirds of the votes represented can validly take decisions.
(2) For private limited liability companies, a valid decision can be taken only with majority of at least three-quarters of partners representing at least three-quarters of the capital.
(3) For limited partnerships by shares, all partners must take a unanimous decision.

b. Amendment of CDTMs by shareholders

The general meeting of each of the merging companies shall decide on the approval of the common draft terms of the cross-border merger (Article 7(a) Greek Law).

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.
Greek national law does not directly address this waiver. However, for the absorption of a wholly owned subsidiary by its parent company, shareholder approval is not required at the level of the subsidiary (Article 13(a) Greek Law).

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.
Article 15(1) CBMD has been transposed in Greek national law in Article 13(a) Greek Law, which states that for the absorption of a wholly owned subsidiary by its parent company, shareholder approval is not required at the level of the subsidiary.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Greek national law in Article 9 Greek Law.

b. National authority has been designated to scrutinize the legality of the merger

According to Article 9(1) Greek Law, the Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development (now called the Ministry of Economy, Competitiveness and Marine) has been designated as the authority to scrutinize the legality of the merger. The authority certifies that all the pre-merger actions and declarations have been dully executed.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Regarding Article 10(3) CBMD, following Article 8(1) Greek Law, the members of the Greek company which is being absorbed who do not approve of the merger can, within one month of the merger at the shareholders' meeting:

(1) File a petition in the Greek courts asking the Greek company participating in the merger to repurchase the securities or titles, only if the Greek company is being absorbed or if the new company resulting from such merger has its registered office in some other Member State. In such a case, provisions of Article 49a Greek Codified Law 2190/1920 will apply.

(2) Claim compensation if the ratio applicable to the exchange of securities and titles in the absorbing company is deemed to be too low.

Following Article 8(2) Greek Law, creditors of Greek merging companies are being protected by a mutatis mutandis application of the relevant laws (Article 70 L. 2190/1920 for *sociétés anonyms* and Article 54 L. 3190/1955 for EPE).

The Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development can issue nevertheless the pre-merger certificate, indicating that the previously discussed procedure is pending.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed in Article 10 Greek Law.

b. The national authority has been designated to scrutinize the legality of the merger

The Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development (now called the Ministry of Economy, Competitiveness and Marine) has been designated. According to Article 10(1) Greek Law, the authority ensures that the merging companies have approved the common draft terms of the cross-border merger in the same terms and that the

arrangements for employee participation have been determined in accordance with Article 14.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Greek national law. However, there is an intermediate step: Article 11 Law 3777/2009 requires that, after the general meetings have approved the merger but before its registration, the merging companies have to enter into a contract declaring the merger drawn before a notary. The contract must also include a declaration that no objections of the creditors have been provided or that such objections have been solved. This additional step is constantly provided by Greek legislation, although not required by the EC texts. Thus, a contract is required for any local merger (Article 74 Law 2190/1920 on *sociétés anonyms*), as well as for the merger of companies by means of which a SE is to be formed (Article 10 Law 3412/2005), whereas neither the "third" Directive nor Regulation 2157/2001 contain such a requirement.

This additional step before notary will not present a problem when the merger-formed is subject to Greek jurisdiction (Articles 12 and 13 Directive). However, Article 11 Law 3777/2009 seems to apply even when such a company is a non-Greek one. A problem may arise when, for example, the merger of a Greek and an Italian SA (the latter being the acquiring company) will need to be completed by a notary contract (not provided by Italian law), in order to satisfy the Greek requirement. It may be practically advisable to satisfy such requirement as a cautionary measure, but this does not comply with the standards set by the Directive. In any case the matter will not have any practical consequences, even if the contract is skipped, because once the merger has taken effect, "it may not be declared null and void" (Article 17 Directive and Article 15 Law 3777/2009).

b. Date the cross-border merger takes effect

According to Article 11(2) Greek Law, the cross-border merger takes effect on the date when the decision of the Minister of Development approving the merger is recorded in the General Commercial Register maintained within the General Secretariat of Commerce of the Ministry of Development and the relevant announcement is published by the Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development in the Greek government gazette.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Regarding Article 13 first sentence, following the notarial merger contract provided in Article 11(1) Greek Law, Article 11(2) provides that the cross-border merger is completed when the decision of the Minister of Development approving the merger is recorded in the General Commercial Register maintained within the General Secretariat of Commerce of the Ministry of Development and the relevant announcement is published by the Department of Public Limited Liability Companies and Credit within the General Secretariat of Commerce of the Ministry of Development in the Greek Government Gazette.

b. Transposition of Article 13 second sentence

Greek national law has transposed Article 13 second sentence in Article 11, paragraph 2.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 CBMD has been transposed in Greek national law in Article 12 Greek Law.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

The first paragraph of Article 15(1) CBMD has been transposed in Greek national law in Article 13 Greek Law. The second paragraph has not been transposed.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to

the extent that the laws of the Member States of the merging companies do not so require.

The further provision of Article 15(1) CBMD has been transposed in Greek national law in Article 13 Greek Law. No other documents are exempted.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Greek national law has a system of employee participation in Article 14 Greek Law that exactly emulates Article 16 CBMD.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Regarding Article 16(1) CBMD, Article 14 Greek Law foresees that the company resulting from cross-border merger with registered office in Greece falls within the provisions of the Greek law regarding the employee participation on the company.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) CBMD has been transposed in Article 14(2) Greek Law.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The percentage has been increased to 33 1/3 %, according to Article 14(3) Greek Law.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a) and (b) have been transposed in Article 14(4) Greek Law, but (c) has not been transposed.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16 (6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Greek national law in Article 14(5) Greek Law.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into Greek national law in Article 14(6) Greek Law.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Greek national law in Article 15 Greek Law; the only difference is the title of the article, which in Greek Law is titled "Invalidity (nullity)" as opposed to "Validity" provided in Article 17 CBMD.

1.18. Additional

a. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

b. Language requirements

Greek national law includes no language requirements.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

According to the Greece Negotiated MNA Guide Corporate and M&A Law Committee (Michael Tsibris of Moussas & Tsibris), the domestic merger procedure is as follows:

First, the board of directors of both companies prepare a draft merger agreement accompanied with a detailed report that describes the financial and legal aspects of the fusion. The draft merger agreement must contain general information about the participating companies (form, trade name, registered seat, and so forth) and will describe the procedure for the delivery of the new shares to the shareholders. Furthermore, the merger agreement will determine (1) the exchange ratio between the shares of the participating companies, and (2) the exact date upon which the actions of the absorbed companies are considered, from an accounting point of view, to commence on behalf of the absorbing company, as well as the handling of the financial results of the absorbing company from such date up to the date of completion of the merger. The draft merger agreement and the report must be submitted to the General Commercial Registry (GEMH, which replaced the Societe Anonymes Registry operated by the Ministry of Development). The draft merger agreement is subject to publication in the government gazette and in a daily financial newspaper of national circulation at least one month before the general meeting of shareholders of both participating companies is convened so that it can be reviewed by shareholders and creditors of both companies. The companies to be merged shall be exempt from the publicity formalities if the draft merger agreement is published in a specific subdirectory of the website of GEMH for at least a one-month period before the general meeting of the companies' shareholders.

An "experts committee" is formed of two chartered accountants appointed by the participating companies and confirmed by the regulatory authority. This committee drafts a report on the valuation of assets of both companies with a conclusion as to whether, in their opinion, the agreed exchange ratio is fair and reasonable. This committee report must be submitted to the GEMH and must be available to the shareholders at least one month before the general meeting of shareholders of both participating companies is convened in order to be taken into consideration by the shareholders.

A general meeting of shareholders of both participating companies is convened, during which the decision of the general meeting regarding the merger requires the approval of two-thirds of the voting capital. The shareholders, in order to vote for or against the

merger, must be aware of (1) the draft merger agreement, and (2) the report of the committee and of the board of directors, which must be submitted to the general meeting by the board of directors and the committee.

After the approval of the general meeting of both participating companies, the final merger agreement is signed by the participating companies in the form of a notarial deed. A solemn attestation of the board of directors of each company must be attached stating that the creditors were not opposed to the merger. The final merger agreement must be submitted to the GEMH, which must provide the final approval on the merger after reviewing all relevant documents.

Finally, the absorbing company will undertake a share capital increase for the purpose of capitalizing the absorbed companies' value to issue the new shares to be given to the shareholders of each absorbed company, in exchange for their shares. If the absorbed company is a 100 percent subsidiary of the absorbing company, the procedure for the merger is significantly less complicated and it may even be the case that the completion of the merger takes place without the approval of the general meeting.

The merger has legal effect from the day of the registration of approval by the Minister of Development in the GEMH and the publication of the approval in the government gazette.

b. Comparison

The differences between the domestic and cross-border procedures are:

In domestic mergers, only companies with the same type may be merged (i.e., SA with SA, EPE with EPE, and so on). The CBMD and its incorporating Law 3777/2009 provide that any type of limited liability companies may be merged.

One essential feature of an international merger is the certificate required from Ministry of Regional Development and Competitiveness, showing compliance with all formalities.

One feature of the cross-border merger unknown in a Greek merger, unless the latter is made for the formation of an SE, is employee participation in management organs. This leads to a complicated mechanism, which is introduced by reference to presidential decree 91/2006 governing participation in the SEs. The basic principle is the maintenance of pre-existing participation schemes, so that a cross-border merger doesn't become a device for avoiding the national participation requirements. Otherwise, Greek law does not provide for compulsory participation.

Transposition of the Cross-Border Mergers Directive into Hungarian Law

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1. Transposition of the Cross-Border Mergers Directive into Hungarian Law

The CBMD was transposed into Hungarian law on December 15, 2007.[1] It was transposed as a single act: Act CXL of 2007 on Cross-border Merger of Limited Liability Companies (hereinafter CBMA, also standing for CXL, used in the Van Gerven publication quoted in the footnotes). The Act only dictates rules for cross-border mergers.[2]

No current modification of the Act is expected. As for Directive 2012/17/EU of the European Parliament and of the Council (with transposition deadline of July 7, 2014), no domestic legislation procedure has been initiated yet.

Act CLXXIX of 2010[3] amended the CBMA's regulation regarding the exemption from the publication requirement (by virtue of Article 4(1) Directive 2009/109/EC).

Prior to the publication of the CBMD, domestic legislation did not refer to cross-border mergers.[4] There are no major differences between the law transposing the CBMD and prior procedures.[5] No domestic laws governing cross-border mergers are still in place as an alternative to the CBMD route.[6]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The transposition of Article 1 CBMD has a scope that is similar to that mentioned in the CBMD. The CBMA allows for cross-border mergers of limited liability companies (as well as cooperatives and European cooperatives) registered in Hungary. The Act is also responsible for establishing proceedings for related company registration in Hungary (Section 1(1) CBMA).

Cross-border mergers may involve a cooperative or a European cooperative society registered in Hungary. Special regulations, however, apply specifically to cross-border mergers involving cooperatives (Section 13 CBMA).[7]

The CBMA does not contain dictate the kinds of foreign companies with which Hungarian companies may merge. Therefore, a cross-border merger under the CBMA involving a foreign company that does not have a legal form expressly referred to in

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[1] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 210.
[2] Ibid.
[3] The amendment entered into force on 31 December 2010.
[4] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 210.
[5] Ibid.
[6] Ibid.
[7] Ibid.

the CBMD is, in principle, possible if the law governing the merging foreign company entitles it to take part in a cross-border merger under that country's transposition of the CBMD.[8]

There is no other national or EU-transposed legislation that addresses cross-border mergers.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability companies'. Under national law, the definition of "limited liability companies" is similar to the one outlined in the CBMD, and includes public limited companies, private limited liability companies, European public limited liability companies, and cooperatives. Exceptions, however, may apply to cooperatives.[9]

b. List of companies that can carry out a cross-border merger under Hungarian law

The scope of application of the CBMA extends to all Hungarian limited liability companies and is therefore in compliance with the scope of the CBMD. This includes the company limited by shares, the private limited liability company, the cooperative society, and the SE. The Company Act provides for two other types of companies that are outside the scope of the CBMA and therefore may not participate in a cross-border merger under the CBMD: general partnerships and limited partnerships. The CBMA does not exclude cooperative societies from its scope.[10]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

The definitions of "merger" provided by the Company Act do not differ substantially from those provided for in the CBMD, except that the Company Act does not make specific reference to cash payments in return for the merger as is the case in the CBMD.[11]

The provisions of the Company Act provide[12]:

[8] Ibid., p. 3 (ref. 9.10).
[9] Ibid.
[10] M. Barcza et al., 'Cross-Border Reorganizations in Hungary', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), p. 2 (ref. 9.07).
[11] Ibid., p. 5 (ref. 9.17).
[12] Ibid., p. 5 (ref. 9.16).

(1) a merger by acquisition is an operation involving two or more merging companies as a result of which one or several of the merging companies (the companies being acquired) cease to exist and all of their assets and liabilities are transferred to one of the merging companies (the acquiring company) in exchange for the issuance to the shareholders of the companies being acquired of shares of the acquiring company;
(2) a merger by the formation of a new company is an operation involving two or more merging companies as a result of which all the merging companies (the companies being acquired) cease to exist and transfer all of their assets and liabilities to a newly formed acquiring company in exchange for the issuance to the shareholders of the companies being acquired of shares of the acquiring newly formed company; and
(3) a merger by acquisition qualifies as a so-called "simplified merger" for the purpose of the CBMA if the acquiring company holds all the shares and other securities conferring voting rights at the general assembly of shareholders of the company or companies being acquired (wholly owned subsidiary of the acquiring company).

d. Rules on the cash payment

Article 3(1) CBMD regarding cash payment was not transposed in Hungary. However, the principle reflected in Article 3(1) should nevertheless apply in Hungary as national law should be interpreted in accordance with the provisions of European law.[13]

e. CBMs and companies in liquidation

An insolvent company that has been put into liquidation is not entitled to participate in a cross-border merger.[14] Nevertheless, companies for which a bankruptcy procedure has been initiated may still take part in cross-border merger, provided that, and as long as, the bankruptcy procedure does not turn into a liquidation procedure and the bankruptcy procedure is only temporary.[15]

f. Geographical scope

Companies from outside the EEA may not participate in a cross-border merger with Hungarian companies.[16]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Hungarian law has no provisions on organizing cross-border divisions, nor is any case law or legal literature available on this topic.[17]

[13] Ibid., p. 5 (ref. 9.18).
[14] Article 69(2) of the Company Act: ´Business associations undergoing liquidation or voluntary dissolution may not be transformed into another form of business association´.
[15] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 5 (ref. 9.11-12).
[16] Ibid., p. 4 (ref. 9.15)
[17] Ibid., (ref. 9.147).

There has been one notable Hungarian case regarding international seat transfer (within the EU).[18] Cartesio Bt., a Hungarian limited partnership, wished to transfer its operational headquarters to Italy, but wanted to stay subject to Hungarian law. The competent Hungarian Commercial Court refused to enter the new address in the Companies Register because it was not possible under Hungarian law.

The judgment of the Court of Justice of the European Union underlined the following considerations:

The Member State of incorporation can prevent a company from transferring its seat to another Member State of the EU. On the other hand, the freedom of establishment enables a company to move to another Member State by converting itself into a form of company governed by the law of that Member State, without having to be wound up or enter into liquidation during its conversion, if the law of the host Member State so permits.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) was transposed in Hungary.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

The CBMA does not exclude cooperative societies from its scope.[19]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. The CBMA did not transpose Article 3(3) CBMD into Hungarian law. As a result, the collective investment companies referred to under Article 3(3) CBMD are not excluded from the scope of the CBMA and may, therefore, take part in cross-border mergers under the rules of the CBMA if they are incorporated in one of the legal forms allowed under the Hungarian law.[20]

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[18] Case C-210/06 *Cartesio* [2008] ECR I-09641.
[19] Ibid., p. 2 (ref. 9.07).
[20] Ibid., p. 2 (ref. 9.09).

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

For a merger to be qualified as a cross-border merger (partly) governed by Hungarian law, at least one of the merging companies must have its registered office in Hungary. This requirement means that no merger can take place based on the CBMA between either exclusively foreign companies or between Hungarian companies in a purely domestic situation. In order to establish the applicability of the CBMA, the condition that all merging companies have to be formed pursuant to the law of a Member State of the EEA must be met.[21]

b. Opposition by national authorities in Article 4(1)(b)

Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

The possibility to oppose cross-border mergers on public interest grounds has not been transposed, because there is no relevant regulation regarding such domestic mergers.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Rules regarding creditor protection are transposed in Articles 76(1) and (2) Company Act.[22] Regarding the start of the procedure, *a*ny creditor whose outstanding (but not yet payable) claim against a merging company arose prior to the first publication of the approval of the merger may demand collateral security.[23] The time limit is 30 days.[24] Concerning the procedural steps, creditors may demand collateral security up to the amount of its claim from the company within 30 days of the second publication of the approval of the merger.[25]

This option also exists for mergers within Hungary, and is secured by the same provisions.

It is not possible for creditors to block the merger.[26]

[21] Ibid., p. 4 (ref. 9.13).
[22] Ibid., p. 27 (ref. 9.131-9.132).
[23] Ibid., p. 27 (ref. 9.132).
[24] Ibid., p. 27 (ref. 9.132).
[25] Ibid.
[26] Ibid., p. 27 (ref. 9.134).

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

No special protection for minority shareholders is included in the CBMA, and they may not be able to prevent a cross-border merger.[27]

Shareholders of the merging Hungarian company who do not wish to become shareholders of the acquiring company have a right to a settlement in cash.[28]

e. The protection of employees in Article 4(2)

Hungary transposed the protection of employees in Article 4(2) CBMD.[29]

The regular and substitute members of the SNB and the members of the representative body who are employed in Hungary, and employee representatives exercising functions under the information and consultation procedure, and any employee representatives on the supervisory board of the company resulting from the merger, will, while carrying out their duties, enjoy the same protection and guarantees provided by the Hungarian Labour Code (HLC) for members of works councils. This means that the works councils' approval is required before their employment contracts can be terminated by ordinary dismissal, posting, or secondment. The employee representatives enjoy this protection for the duration of their employment by the company and one year following the end of their term of office as an employee representative, provided they served as an employee representative for at least six months.[30]

This option also exists for mergers within Hungary.[31]

Although the CBMA has been already transposed and Hungarian legal scholars have been discussing the topic of cross-border mergers for some time, only a very limited amount of information is available on the employee-participation aspects of cross-border mergers in Hungary.[32]

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the

[27] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 217.
[28] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 26 (ref. 9.126).
[29] Ibid., p. 45 (ref. 9.170).
[30] Ibid., (ref. 9.248).
[31] Ibid., (ref. 9.171).
[32] Ibid., (ref. 9.173).

management report. Article 5 CMBD provides for certain particulars that have to be included.

Article 79(1) Company Act specifies the need to prepare CDTMs. Several particulars that need to be included in the CDTMs pursuant to the CBMD are not included in the relevant provisions of the CBMA and the Company Act, namely the date from when the transactions of companies being acquired will be treated for accounting purposes as being those of the acquiring company; information on the evaluation of the assets and liabilities that are transferred to the company resulting from the cross-border merger; and the dates of the merging companies' accounts used to establish the conditions of the cross-border mergers.[33]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

This requirement has been transposed in the national law.[34]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This has been transposed in the national law under Article 280(5) Company Act. The obligation is waived if the company limited by shares publishes and makes available these documents on its website for a continuous period beginning at least one month before the date for the meeting of the general assembly of shareholders that is to decide on the merger and ending not earlier than the conclusion of that meeting, free of charge, in an unrestricted manner.[35]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

[33] Ibid., p. 9 (ref. 9.32).
[34] Ibid., p. 9 (ref. 9.71).
[35] Ibid., p. 11 (ref. 9.40).

Hungary does not provide any diverging rules and instead follows the CBMD in Articles 5(1) and (2) CBMA.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Hungary transposes Article 7 CBMD in Article 78(2) Company Act,[36] and does not provide any additional or diverging requirements.[37]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) has been transposed, and the national law does not go further than the CBMD.

b. The independent expert

An auditor as an expert is to be appointed, considering special rules to avoid conflict of interests.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

As an alternative to auditors and experts operating on behalf of each of the merging companies, one or more independent auditors, appointed for that purpose at the joint request of the companies by the Court of Registry of competence with respect to one of the merging companies or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members (shareholders) under Article 4(3) CBMA.[38]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

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[36] Ibid., p. 11-12 (ref. 9.41-9.53).
[37] Ibid., p. 11-12 (ref. 9.41- 9.53).
[38] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 214.

The specification of the content of the independent expert's report under Hungarian law is in line with Article 8(3) CBMD and Article 10(2) Domestic Merger Directive, except that the CBMA does not particularly specify that the independent expert report must indicate whether the methods used are adequate in the case in question and also must give an opinion on the relative importance attributed to such methods in arriving at the value decided on. Nevertheless, as a special rule concerning only private companies limited by shares, the Company Act requires the auditor and the independent expert to provide their opinion regarding to the reliability and the reasonableness of the (Second) Management Report.[39]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

The provision has been duly transposed, and Article 4(1) CBMA affirms the liability of executive officers and references the general clause of the Company Act.[40]

The independent experts mandated to draw up these independent expert reports shall be vested with the same rights as the companies' statutory auditors to the extent required for preparing for the reports.[41]

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

This provision has been transposed in Article 4(5) CBMA.[42] The national law does not go further.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

No independent expert report is required if the merger qualifies as simplified merger under Article 9 CBMA. The Hungarian legislator has not made use of the option to waive the obligation to prepare an independent expert report in the case of a merger

[39] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* p. 16 (ref. 9.62); see also Article 279(4) of the Company Act.

[40] ´Executive officers shall bear joint and several liability toward the business association for any damage resulting from the incorrectness of the data, rights or facts notified, or from any delay in filing or failure to file the notification´(Article 26(2) of the Company Act).

[41] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* (ref. 9.63).

by acquisition carried out by a company holding 90 percent or more (but not all) of the shares and other securities.[43]

h. Further exemptions in Hungarian law

There are no further exemptions.[44]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

This article has been transposed in the national law.[45]

a. Procedural requirements including majority, quorum, timing and notarization

The general assemblies of shareholders of the Hungarian merging companies must meet twice, unless their statutes allow them to validly make a decision at just one meeting. Under Articles 234(1) and 236(1) Company Act, a quorum of 50 percent is set for the meeting of the general assembly of shareholders convened to vote on the merger, but any vote to approve a merger must be supported by a qualified majority of the votes cast.[46]

b. Amendment of CDTMs by shareholders

The general assembly of shareholders may also validly decide to approve the merger on other terms than the ones provided in the CDTMs, without repeating the whole merger procedure. The merger will then only become effective if identical (amended) terms are also approved by all the other merging companies.[47]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

This exemption has been transposed in Article 9 CBMA.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

This has been transposed in Article 9 CBMA. No approval or further formal administrative duty for the merger is required by the national law. National law does not provide for any other exemptions to the shareholder approval.[48]

[42] Ibid., p. 16 (ref. 9.68).
[43] Ibid., p. 17 (ref. 9.69).
[44] Ibid., p. 17 (ref. 9.67).
[45] Ibid., p. 18 (ref. 9.75).
[46] Ibid., p. 18 (ref. 9.75-9.78).
[47] Ibid., p. 19 (ref. 9.82).
[48] Ibid., p. 18 (ref. 9.79).

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

These articles have been transposed in Article 6(1) CBMA, which does not go any further than the CBMD.[49]

b. National authority has been designated to scrutinize the legality of the merger

The Court of Registration of the merging company has been designated as the competent authority.[50] The authority does a formal check.[51]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

This has not been transposed into Hungarian law. Neither the CBMA nor the Company Procedure Act set a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares.[52]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

These articles have been transposed in Article 8(1) and (2) CBMA.[53]

b. The national authority has been designated to scrutinize the legality of the merger

The Court of Registration of the merging company has been designated as the competent authority.[54] The authority performs a formal check.[55]

[49] Ibid., p. 20 (ref. 9.90).
[50] Ibid.
[51] Ibid., p. 20 (ref. 9.94).
[52] Ibid., p. 21 (ref. 9.104).
[53] Ibid., p. 20 (ref. 9.105).
[54] Ibid., p. 20 (ref. 9.105).
[55] Ibid., p. 20 (ref. 9.107).

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 has been transposed, but national law does not go any further.[56]

b. Date the cross-border merger takes effect

An announcement of the merger must be published in the company gazette to signify the merger. As outlined in the relevant Company Act provisions regarding third-parties, the company may rely on various information sources—such as the Companies Register data—unless it can determine that the underlying third-party had previous access to these materials. Until the 16th day after publication of this information, the third-party may prove that it did not have the chance to become aware of such materials (Article 22(3) Company Procedure Act).[57]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

This provision has been transposed in Articles 8(3) and (4) CBMA.[58]

b. Transposition of Article 13 second sentence

This provision has been transposed. The Court of Registration of the Hungarian company or companies being acquired must deregister these companies from the Company Register at the receipt of the notification by the competent authority in the Member State of the acquiring company that the merger took place. No additional formalities are required for this process.[59]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

This provision has not been transposed. Consequences are not expressly mentioned in the CBMA; therefore, in this regard, provisions of the Company Act shall be taken into account. In general, the business association established by way of transformation is

[56] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* , p. 211
[57] Ibid.
[58] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 24 (ref. 9.116).
[59] Ibid., p. 24 (ref. 9.118).

the universal successor of the business association transformed. The rights of the predecessor business association shall be transferred to the successor business association, as well as the obligations, including the commitments contained in the collective agreement concluded with the employees (Article 70(1) Company Act).[60]
There are no special formalities for making the transfer of certain assets and liabilities effective against third-parties, other than the merger formalities required by law.[61]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.
This provision has been transposed in Article 9 CBMA. No approval or further formal administrative duty is required by the national law. National law does not provide for any other exemptions to the shareholder approval.[62]
Article 15(1) provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.
The exemption to the independent expert report is provided under the national law, but the exemption on documents necessary for scrutiny has not been adopted.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The company resulting from the cross-border merger must comply with the provisions of the Company Act (Articles 38 and 39) concerning employee participation in the decision-making mechanism (Article 10(1) CBMA).[63]

[60] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 211.
[61] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 24 (ref. 9.113).

Pursuant to Hungarian employment law, employee participation is primarily achieved through works councils, which ensure cooperation between employees and their employer in relating to the management of the company. The role of the works council is to involve the employees in the areas of the company´s business that are affected by their work. Therefore the works council, or, in its absence, the trade union, must inform the employees about the employment and labor-relations aspects of the merger.[64]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

This provision has been transposed in national law. The cross-border merger-created company must follow the employee participation rules of the Member State where its registered office is located. If that office is in Hungary, the company must abide by employee participation rules from the Act.[65]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

All three exceptions have been transposed in national law under Article 10(2) CBMA.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

By virtue of Article 11(2) CBMA, the percentage has been duly raised to 33 1/3 percent.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

The provisions of 16(4)(a) and (b) have been transposed in national law under Articles 11(3)(a) and (b) CBMA. The national law does not go further.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

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[62] Ibid., p. 18 (ref. 9.79).
[63] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 218.
[64] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, (ref. 9.174).
[65] J. D. Servigny et al., 'Hungary', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 218.

Article 16(5) has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed in Article 12(1) CBMA, stipulating the establishment of a supervisory board at the relevant company.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed in Article 12(2) CBMA. The national law does not go further.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed in Article 8(5) CBMA. The charter document of the merging company may not be declared null and void following the date of transformation.[66]

1.18. Additional

a. Valuation rules

According to Article 138(2) Hungarian Accounting Act, the valuation is based on the equity capital as shown in the books.[67]

b. National case-law on provisions transposing the CBMD

The only significant case, *Vale Costruzioni S.r.l./Vale Építési Kft.*, which has also earned an international reputation, is related to the issue of cross-border conversion. The judgment of the European Court of Justice pointed out that Hungarian law

[66] Ibid., p. 217.
[67] *´The draft source and application of funds statement of transforming business associations shall contain, relative to the balance sheet date described in Subsection (1), the values of assets and liabilities, and as the difference thereof, the equity capital as shown in the books and in the value adjusted by the revaluation difference according to Article 137´*, http://www.ecovis.hu/angol/accounting.pdf (last visited 21 August 2013).

authorizes Hungarian companies to convert, but does not allow a company governed by the law of another Member State to convert to a Hungarian company.[68]

As for the procedural background, the Hungarian Supreme Court upheld the assessment by the *Fővárosi Ítélőtábla* and states that the transfer of the seat of a company governed by the law of another Member State—in this instance, the Italian Republic—entailing the reincorporation of the company in accordance with Hungarian law and a reference to the original Italian company, as requested by *VALE Építési*, cannot be regarded as a conversion under Hungarian law because national law on conversions applies only to domestic situations.[69] However, it harbors doubts as to the compatibility of such legislation with the freedom of establishment, while stressing that the present case differs from the case that gave rise to the judgment in *Cartesio*, because what is at issue here is a transfer of the seat of a company with a change of the applicable national law, while maintaining the legal personality of the company—that is to say, a cross-border conversion.

There were no other significant national cases, as most cross-border mergers have been concluded in the banking sector, without any noteworthy conflicts.

c. Language requirements

As a general rule, Hungarian company law requires any documents drafted in a language other than Hungarian to be officially translated into Hungarian.[70]

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

There are two possibilities regarding the chronology of a cross-border merger (partly) governed by the CBMA, the most common one (the two-step procedure) being different from the process prevailing in most other Member States.[71]

b. Comparison

Both types of mergers follow the same procedure.

[68] Case C-378/10 *VALE,* Judgment of 12 July 2012, not yet reported.
[69] Case C-378/10 *VALE,* para. 15.
[70] M. Barcza et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations,* (ref. 9.109).
[71] Ibid., (ref. 9.22, containing an overview of the usual procedure).

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1. Transposition of the Cross-Border Mergers Directive into Icelandic Law

The Cross-Border Merger Directive (CBMD) was transposed into Icelandic law in 2007 and transposed by Act No. 54/2007, which amended the Act on Public Limited Companies No. 2/1995 and the Act on Private Limited Companies No. 138/1994 (jointly referred to as the Companies Acts), and took effect on April 3, 2007, after being signed March 27, 2007.[1] Before the publication of the CBMD, the domestic legislation did not refer to cross-border mergers.[2]

Minor reforms have been made with respect to cross-border merger law after the transposition of the CBMD, with transposition of Directive 2007/63/EC of the European Parliament and of the Council of November 13, 2007, amending Council Directives 78/855/EEC and 82/891/EEC, in regard to the requirement of an independent expert's report in a merger or division of public limited liability companies.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

According to Icelandic law, a cross-border merger is one that occurs between companies under the legal purview of at least two members of the European Economic Area, a Member State of the Convention Establishing the European Free Trade Association and the Faroe Islands, or countries specified in regulations created by the Minister of Industries and Innovation (Article 133(a) Act on Public Limited Companies and Article 107(b) Act on Private Limited Companies).[3]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

The Icelandic national law follows the CBMD definition of public limited liability companies (*hlutafélög*), partnerships limited by shares (*samlagshlutafélög*), and private limited liability companies (*einkahlutafélög*).[4]

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[1] Art. 5 of Act No. 54/2007.

[2] O. A. Sigurdsson, 'Iceland', in D. Van Greven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 191.

[3] Ibid., p. 192.

[4] Ibid., p. 192.

b. List of companies that can carry out a cross-border merger under Icelandic law

The rules on cross-border mergers apply to all limited liability companies: public limited liability companies (*hlutafélög*), partnerships limited by shares (*samlagshlutafélög*), and private limited liability companies (*einkahlutafélög*).[5]

The company forms that are not subject to the national law transposing the CBMD include partnerships and other business associations subject to private law, as well as non-profit organizations engaged in business operations and other entities subject to public law. Furthermore, the transposition of the CBMD does not include collective investment companies.[6]

Under Icelandic law, the cross-border merger applies to companies subject to the legislation of at least two states in the European Economic Area, a Member State of the Convention Establishing the European Free Trade Association and the Faroe Islands as well as other countries in accordance with regulations laid down by the Minister of Economic Affairs in consultation with the Minister of Finance.[7,8]

The intention of the legislator, as stated in an opinion from the Committee of Economic and Trade, was to go further than was required in the Directive and give opportunity for cross-border mergers of cooperative societies (*samvinnufélög*).[9]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Icelandic law defines the term "merger" as an operation whereby one or more companies, after being dissolved without the settlement of debt, transfer all their assets and liabilities to the acquiring company. The term is also defined as when two or more companies transfer, on being dissolved without settlement of debt, all of their assets and liabilities to a new company (Article 119 Act on Public Limited Companies and Article 94 Act on Private Limited Companies).

It is required that the common draft merger schedule (CDMS) provides for a statement regarding remuneration for the shares in the company that has been taken over (Article 120(1)(iii) Act on Public Limited Companies and Article 95(1)(iii) Act on Private Limited Companies). Therefore, a remuneration to the company's members

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[5] Chapter XIV of Act No. 2/1995 on Public Limited Companies and Act on Private Limited Companies / Art. 160 (1) Act on Public Limited Companies.

[6] An opinion from the Committee of Economic and Trade, cf. parliamentary document no. 1275, the 133th Legislature 2006-2007.

[7] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 192.

[8] Article 133(a) of the Act on Public Limited Companies and Article 107(b) of the Act on Private Limited Companies.

[9] An opinion from the Committee of Economic and Trade, cf. parliamentary document no. 1275, the 133th legislature 2006-2007.

that represents the capital of the other company or the new company, as applicable, is required.

Furthermore, if a subsidiary is merging with its parent company, there will be no remuneration and the shares in the company that has been taken over will be canceled.[10]

d. Rules on the cash payment

The national law does not provide for rules on the cash payment as laid down in Articles 2(2)(a) and (b) or Article 3(1) CBMD.

e. CBMs and companies in liquidation

In case an Icelandic company is subject to winding-up proceedings, a merger may be approved on two conditions. First, the shareholder allotment must not have begun, and second, the shareholders meeting must end in a decision that the winding-up committee will stop its activity (Article 124(1) Act on Public Limited Companies and Article 99(1) Act on Private Limited Companies).[11]

f. Geographical scope

A cross-border merger applies to companies subject to the legislation of a Member State of the Convention Establishing the European Free Trade Association and the Faroe Islands. Furthermore, the Minister of Economic Affairs has the authority to name, in a regulation, other countries that the cross-border merger legislation shall apply to.[12] However, the Minister has not utilized this authority. Therefore, Icelandic law does not allow for cross-border mergers with non-EEA companies, except as stated above.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

National law allow for cross-border divisions for public limited liability companies (*hlutafélög*), partnerships limited by shares (*samlagshlutafélög*), and private limited liability companies (*einkahlutafélög*).[13] The provisions are not based directly on the CBMD but mainly refer to the provisions of a cross-border merger, which are based on the CBMD. The rule on cross-border division was transposed by Act No. 54/2007 and Act No. 81/2009, which transposed Directive 2007/63/EC of the European Parliament and of the Council of November 13, 2007, amending Council Directives 78/855/EEC and 82/891/EEC, in regard to the requirement of an independent expert's report on the occasion of a merger or division of public limited liability companies.

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[10] Art. 129(1) Act on Public Limited Companies; Art. 104(1) Act on Private Limited Companies.
[11] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 196.
[12] Article 133(a) of the Act on Public Limited Companies and Article 107(b) of the Act on Private Limited Companies.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

This article has not been transposed into national law.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

The CBMD does not apply to cooperative societies under Icelandic national law.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

The national law does not apply to companies referred to in Article 3(3) CBMD.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

At the earliest, an Icelandic participating company's shareholders may meet one month after receiving notice of the merger plan and the declaration in the legal gazette is published, but cannot meet past four months after the publication.[14]

If the merger is rejected or the shareholders fail to meet within that period of time, then the merger plan is dismissed (Article 124(4) Act on Public Limited Companies and Article 99(4) Act on Private Limited Companies).[15]

In the proposal that became Act No. 54/2007, it is stated that the foreign company shall be comparable with the Icelandic company that will take part in the merger. Furthermore, it is stated that it must be assessed in each case whether the participating foreign company is comparable with the Icelandic company, or companies, with respect to organizational and corporate structure.[16] Therefore, it is assumed that the merger could be refused if the foreign company is not compatible with the Icelandic company participating in the merger.

[13] Chapter XIV of Act No. 2/1995 on Public Limited Companies and Act on Private Limited Companies; Art. 160(1) Act on Public Limited Companies.

[14] Article 124(4) of the Act on Public Limited Companies and Article 99(4) of the Act on Private Limited Companies.

[15] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 196-197.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) CBMD has not been transposed in Iceland.[17]

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Article 4(2) CBMD in relation to creditors, debenture, and security holders has not been transposed in Iceland.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Article 4(2) of the CBMD has been transposed in Iceland (Article 133(e) Act on Public Limited Companies and Article 107(f) Act on Private Limited Companies).[18] The procedure starts after the shareholders meeting.[19,20] The time limit is one month.[21,22]

This option also exists for domestic mergers.[23,24]

With regard to the procedural steps, the following has to be noted: Once a cross-border merger is under way, shareholders in the Icelandic participating company or companies being merged who have voted against the merger with takeover or merger that establishes a new company may act to claim their shares, as long as they do so within one month of the shareholders meeting (Article 133(e)(1) Act on Public Limited Companies and Article 107(f)(1) Act on Private Limited Companies).

If shareholders were asked before the vote whether they were interested in claiming their shares, they must have expressed this interest at their meeting. The company shall purchase their shares at a corresponding value that is set by special assessors appointed by a court of law where the company is located.[25]

Either the shareholders or the company may meet with lawyers regarding the value the assessors place on the shares, and must take legal action within three months of

[16] Proposal of Act. No. 54/2007, parliamentary document no. 779, the 133th Legislature 2006-2007.
[17] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 196-197.
[18] Ibid., p. 197.
[19] Ibid.
[20] Art. 133(e)(1) Act on Public Limited Companies; Art. 107(f)(1) Act on Private Limited Companies.
[21] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 197.
[22] Art. 133(e)(1) Act on Public Limited Companies; Art. 107(f)(1) Act on Private Limited Companies.
[23] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 197.
[24] Art. 131 Act on Public Limited Companies; Art. 106 Act on Private Limited Companies.
[25] Ibid.

the assessment (Article 131 Act on Public Limited Companies and Article 106 Act on Private Limited Companies).[26]

e. The protection of employees in Article 4(2)

Member States can protect employees as regards rights other than those governed by Article 16.

Iceland has transposed this option with Article 18 Employee Participation Act No. 86/2009.[27]

Article 18 Employee Participation Act stipulates that the representatives in the SNB shall not be subject to dismissal or reduction of their employment remuneration. In addition, such representatives shall have the right to leave from their employment so they can pursue their duties in respect of the SNB.[28]

This option also exists for domestic mergers.[29]

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

The CDTMs shall include information on the likely repercussions of the cross-border merger on the company's operations (Article 133(b) Act on Public Limited Companies and Article 107(c) Act on Private Limited Companies).

Furthermore, the CDTMs shall include information concerning the following (Article 120 Act on Public Limited Companies and Article 95 Act on Private Limited Companies):

(1) The name and form of the merging companies;

(2) The companies' address;

(3) Remuneration for the shares in the company that has been taken over;

(4) When the shares grant the right to dividend, and other special conditions pertaining to that right;

(5) Which rights the potential owners of shares and bonds with special rights in the company that has been taken over will obtain in the takeover company;

(6) Other potential arrangements made for the benefit of the shareholders and bondholders referred to in Clause 5

[26] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 197.
[27] Ibid., p. 200.
[28] Ibid.

(7) Delivery of share certificates in relation to shares used as payment (only in the case of public limited liability companies)
(8) When all rights and liabilities of the company that was taken over shall be considered to have ceased in terms of accounting;
(9) Any special perks enjoyed by directors, managers in both company forms, members of representative committees, and experts in the case of public limited companies and state-authorized public accountant and inspectors in the case of private limited companies; and
(10) Draft of articles of association if a new company is to be formed upon the merger.
Furthermore, a joint audited corporate balance sheet shall be prepared that shows all assets and liabilities of the merging companies and any changes that the merger might entail, as well as a draft of the acquiring company's balance sheet. The joint balance sheet shall rely on a settlement date not more than six months prior to the date of the CDTMs.[30]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

The CDTMs have to be published in the Icelandic legal gazette a month prior to the date of the general meeting (Article 124(4) Act on Public Limited Companies and Article 99(4) Act on Private Limited Companies).

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The merging companies can be exempted from the condition of making certain merger documents available at its office, and having to provide them to any registered shareholder that requests so, if they are made available on other authorized website free of charge (Article 124(5) Act on Public Limited Companies and Article 99(5) Act on Private Limited Companies).

[29] Ibid.
[30] Act. 121(2) Act on Public Limited Companies; Art. 96(1) Act on Private Limited Companies.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Articles 6(2)(a) through (c) have not been transposed into national law.

The Company Registry publishes an announcement of the merger in the legal gazette once it has received the CDTMs and the expert report (Article 123(2) Act on Public Limited Companies and Article 98(2) Private Limited Companies). Although there are no provisions on the matter, the name, form, and registered office of every merging company are generally included in the announcement, which is then signed by the Company Registry.

If the experts believe that the merger may diminish the possibilities of creditors for recourse in the individual companies participating in the merger, the Company Registry is obliged to include information thereto in the announcement (Article 123(2) Act on Public Limited Companies and Article 98(2) Private Limited Companies).

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7(1) CBMD was transposed with Article 133(c) Act on Public Limited Companies and Article 107(f) Act on Private Limited Companies, wherein it is stated that the management report, under the relevant provision of each act, shall also include a statement of the implications of the cross-border merger for shareholders, creditors, and employees.[31]

In Article 121 Act on Public Limited Companies and Article 95 Act on Private Limited Companies, it is stated that the management report shall include legal and economic aspects of the merger. An additional requirement of a determination of remuneration for the shares shall be included in the management report.[32]

Furthermore, an exemption from this requirement is possible under the relevant provisions, provided that a prior unanimous approval by all shareholders at a shareholders meeting is made.[33]

The report has to be made available to shareholders at the company's offices at least a month prior to the shareholder's meeting. Furthermore, the copy of the report shall

[31] Art. 133(c)(1) Act on Public Limited Companies; Art. 107(f)(1) Act on Private Limited Companies.
[32] Art. 121(1) Act on Public Limited Companies; Art. 95(1) Act on Private Limited Companies.
[33] Ibid.

be provided to any shareholder requesting so free of charge. The merging companies can be exempted from this publication requirement if they make the report available on their website or other authorized website free of charge.[34]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 122 Act on Public Limited Companies and Article 97 Act on Private Limited Companies requires an independent expert report to be drawn up for the shareholders in order to receive an advice on the terms of the CDTMs. The report shall be made available not less than one month before the date of the general meeting (Article 124(5) Act on Public Limited Companies and Article 99(5) Act on Private Limited Companies).

b. The independent expert

The assessors are to be either state-authorized public accountants, attorneys at law, or other specially qualified persons who are appointed by a court of law in the relevant company's venue (Article 122 Act on Public Limited Companies).[35]

In case a participating company is a private limited liability company, a state-authorized public accountant or an inspector shall render a report on the merger schedule[36] (Article 97 Act on Private Limited Companies).[37]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

This article has not been transposed in Iceland.[38] However, according to Article 122(1) Act on Public Limited Companies and Article 97 Act on Private Limited Companies, the merger companies have the possibility of using a common expert.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

[34] Art. 124(5) Act on Public Limited Companies; Art. 99(1) Act on Private Limited Companies
[35] Art. 7(1) Act on Public Limited Companies.
[36] Art. 6(3) Act on Private Limited Companies.
[37] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 194.
[38] Ibid.

The report shall contain a declaration stating to what extent the remuneration for the shares in the company that is taken over is reasonable and substantiated.[39]

The declaration shall describe the method or methods that were used to determine the remuneration and include an assessment as to whether the method or methods were adequate in this instance.[40]

Furthermore, the declaration shall specify the price to which each method individually leads as well as which internal interpretation shall be applied to methods upon the determination of prices.[41]

In case the determination of price has been subject to special difficulties, these shall be specified in the declaration (Article 122(3) Act on Public Limited Companies and Article 97(3) Act on Private Limited Companies).[42]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Experts are entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties (Article 7(3) Act on Public Limited Companies and Article 6(3) Act on Private Limited Companies).

If the experts do not get access to the information they have requested, it could entail periodic penalty fines on a daily or weekly basis (Article 152(1) Act Public Limited Companies and Article 126(1) Act on Private Limited Companies). The Register of Limited Companies has the authority to impose the fine.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

If all shareholders in the companies participating in the merger so approve, the need for a specialist assessor report can be avoided.[43]

However, a declaration shall always be made stating to what extent the merger may diminish the possibilities of creditors for recourse in the individual companies participating in the merger (Articles 122(5) and (4) Act on Public Limited Companies and Article 97(5) Act on Private Limited Companies).[44]

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[39] Article 122(3) of the Act on Public Limited Companies and Article 97(3) of the Act on Private Limited Companies.

[40] Ibid.

[41] Ibid.

[42] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 194.

[43] Articles 122(4) of the Act on Public Limited Companies and Article 97(4) of the Act on Private Limited Companies.

[44] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 194.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

A report is not necessary in a merger by acquisition of a wholly owned subsidiary. However, independent experts shall release a statement to which extent the merger may diminish the possibilities of creditors for completion of its claims (Article 129 Act on Public Limited Companies and Article 104 Act on Private Companies).

Article 15(2) CBMD has not been transposed in Icelandic law.

h. Further exemptions in Icelandic law

There are no further exemptions in Icelandic law in relation to the expert report.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Iceland (Article 124 Act on Public Limited Companies and Article 99 Act on Private Limited Companies).[45]

a. Procedural requirements including majority, quorum, timing and notarization

A decision concerning merger of a company that has been taken over will be made by a shareholders meeting.[46]

A decision on a merger will only become valid provided it obtains the approval of a minimum of two-thirds of the votes cast and also the approval of shareholders controlling at least two-thirds of the share capital in respect of which votes are wielded at the shareholders meeting[47] (Article 93(1) Act on Public Limited Companies and Article 99(1) Act on Private Limited Companies).

A decision on a merger in an Icelandic takeover company will be made by the board of directors of the company, unless a shareholders meeting need affect amendments to the articles of association in other respects than that which pertains to the name of the takeover company.[48,49]

[45] Ibid.
[46] Art. 124(1) Act on Public Limited Companies; Art. 99(1) Act on Private Limited Companies.
[47] Ibid., p. 194.
[48] Art. 124(2) Act on Public Limited Companies; Art. 99(2) Act on Private Limited Companies.
[49] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 196.

b. Amendment of CDTMs by shareholders

Shareholders can only approve or reject the merger on the terms of the CDTMs. If the CDTMs are not approved, the merger will be cancelled (Article 124(4) Act on Public Limited Companies and Article 99(4) Act on Private Limited Companies).

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

As stated before, a decision on a merger in an Icelandic takeover company will be made by the board of directors of the company, unless a shareholders meeting need affect amendments to the articles of association in other respects than that which pertains to the name of the takeover company.[50] Furthermore, shareholders in a public limited company holding at least 5 percent of the shares, or 25 percent of the shares in a private limited company, can request a shareholders meeting decision on the merger. In that case, the decision will be subject to same conditions described in Article 124(2) Act on Public Limited Companies and Article 99(2) Act on Private Limited Companies.

Furthermore, shareholders that can request a shareholders meeting in accordance with the company's articles of association, and consist of at least 1/20 of the shareholders in the company, can request a shareholders meeting decision on the merger (Article 124(3) Act on Public Limited Companies and Article 99(3) Act on Private Limited Companies).

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

In a merger with a wholly owned subsidiary, the approval by the general meeting of that subsidiary is not required, where the board of directors of the subsidiary is granted the authority to approve the merger (Article 129(1) Act on Public Limited Companies and Article 104(1) Act on Private Limited Companies).

e. Other exemptions for shareholder approval under Icelandic law

No other exemptions are in effect under Icelandic law.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

[50] Art. 124(2) Act on Public Limited Companies; Art. 99(2) Act on Private Limited Companies.

Article 10 has been transposed in Iceland (Article 133(1)(f) Act on Public Limited Companies and Article 107(1)(g) Act on Private Limited Companies).[51]

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Iceland (Article 133(f) Act on Public Limited Companies and Article 107(g) Act on Private Limited Companies).

b. National authority has been designated to scrutinize the legality of the merger

The Icelandic Register of Enterprises is the designated authority,[52] and performs a formal check.[53,54]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD has not been transposed in Iceland.[55]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Article 11 CBMD has been transposed in Iceland[56] (Article 133(f)(2) Act on Public Limited Companies and Article 107(g)(2) Act on Private Limited Companies).

b. The national authority has been designated to scrutinize the legality of the merger

The Icelandic Register of Enterprises is the designated authority,[57] and performs a formal check.[58,59] However, the provision of the Icelandic Register of Enterprises' authority to scrutinize the merger is not as thorough as Article 11(1) CBMD, as it is not stated that the authority shall in particular ensure that the merging companies

[51] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 195.
[52] Ibid.
[53] Ibid.
[54] Article 133(f) of the Act on Public Limited Companies and Article 107(g) of the Act on Private Limited Companies.
[55] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 195.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Article 133(f) of the Act on Public Limited Companies and Article 107(g) of the Act on Private Limited Companies.

have approved the CDTMs in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 16.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Iceland[60] (Article 133(f) Act on Public Limited Companies and Article 107(g) Act on Private Limited Companies).

b. Date the cross-border merger takes effect

Upon completion of all necessary pre-merger acts and formalities, the Icelandic Register of Enterprises will issue a certificate to the merger company or companies being subject to Icelandic law (Article 133(f)(1) Act on Public Limited Companies and Article 107(g)(1) Act on Private Limited Companies).

A cross-border merger where the company continuing operations is subject to Icelandic law has effect from the date when the Icelandic Register of Enterprises registers the merger (Article 133(f)(4) Act on Public Limited Companies and Article 107(g)(4) Act on Private Limited Companies).[61]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

The first sentence of Article 13 has not been transposed in Iceland.[62]

b. Transposition of Article 13 second sentence

The Register of Enterprises will issue a certificate, after the completion of all pre-merger activities, to the merger company or companies now under the purview of Icelandic law (Article 133(f)(1) Act on Public Limited Companies and Article 107(g)(1) Act on Private Limited Companies).

If the cross-border merger-formed company will be subject to Icelandic law, the foreign companies will send certificates regarding the merger to the Register of

[60] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 195.
[61] Ibid., p. 192.
[62] Ibid., p. 198-199.

Enterprises, stating that the foreign registers will acknowledge the merger. Once the Register of Enterprises has received these certificates, it will register the cross-border merger for the operating company (Article 133(f)(2) Act on Public Limited Companies and Article 107(g)(2) Act on Private Limited Companies), and the cross-border merger will take effect from that registration date (Article 133(f)(3) Act on Public Limited Companies and Article 107(g)(3) Act on Private Limited Companies).

The Register of Enterprises will also notify foreign registers as soon as possible when the cross-border merger has been registered (Article 133(f)(2) Act on Public Limited Companies and Article 107(g)(2) Act on Private Limited Companies). [63]

If the cross-border merger-formed company will not be subject to Icelandic law, the Register of Enterprises registers the cross-border merger for the company ceasing operations and the certificate from the foreign register regarding the company.[64]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

a. Transposition of Article 14(1) and (2)

Under Icelandic company law, a cross-border merger is a merger where merger companies are subject to the legislation of at least two states in the European Economic Area, a Member State of the Convention Establishing the European Free Trade Association and the Faroe Islands, as well as other countries in accordance with the authority contained in regulations laid down by the Minister of Economic Affairs in consultation with the Minister of Finance.[65] The legal effects of a cross-border merger are the same as of a domestic merger:

(1) one company is entirely merged with another company by means of takeover of assets and liabilities (merger by takeover); and

(2) two or more companies merge into a new company (merger with the establishment of a new company) (Article 119 Act on Public Limited Companies and Article 94 Act on Private Limited Companies).[66]

The takeover company will be considered fully dissolved, and all rights and obligations transferred to the acquiring company, when (1) the merger has been approved in every merger company; (2) if a new company is formed, a shareholders meeting shall be held within two weeks to vote directors, accountants, or inspectors, if the vote was not performed immediately after the shareholders meeting approving the merger; (3,

[63] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 198-199.
[64] Art. 133(f)(5) Act on Public Limited Companies; Art. 107(g)(2) Act on Private Limited Companies.
[65] Article 133(a) of the Act on Public Limited Companies and Article 107(b) of the Act on Private Limited Companies.
[66] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 192.

4) and particular claims under Articles 125 and 126 Act on Public Limited Companies and Articles 100 and 101 Act on Private Companies have been settled. When these conditions have been fulfilled, the shareholders in the takeover company, whom receive their payments in shares, will become shareholders in the new company (Articles 127(1) and (2) Act on Public Limited Companies and Articles 102(1) and (2) Act on Private Companies.

b. Transposition of Article 14(3) and (4)

These articles have not been transposed into national law.

c. Transposition of Article 14(5)(a) and (b)

These articles have not been transposed into national law. However, if the merging companies hold any shares in the company being acquired, they will not be able to exchange them for shares in the acquiring company (Article 127(3) Act on Public Limited Companies and Article 102(3) Act on Private Limited Companies).

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Certain procedural steps do not apply in a merger with a wholly owned subsidiary (Article 129 Act on Public Limited Companies and Article 104(1) Act on Private Limited Companies).

Article 15 (1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The exempted procedural steps include the independent expert report—the only document not required that is necessary for scrutiny.[67]

[67] Article 129 of the Act on Public Limited Companies and Article 104(1) of the Act on Private Limited Companies.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Article 16 CBMD has been transposed by the Act on Employee Participation in respect to Cross-Border Mergers of Limited Liability Companies No. 86/2009 (the Employee Participation Act) from 2009. Once the cross-border merger-formed company must implement employee participation rules specific to its location, a special negotiating body (SNB) will be established to work with participating companies to structure employee participation in the CBM company.[68,69]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) CBMD has been transposed in Iceland[70] (Article 1 Act on Employee Participation).

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

The exceptions in Article 16(2) CBMD have not been transposed into national law.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The application of the standard rules requires at least 1/3 participation (Article 14(2)(a) Act on Employee Participation).

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) CBMD has been transposed by Article 13(1) Act on Employee Participation.

Article 16(4)(b) CBMD has been transposed by Article 10(1) Act on Employee Participation.

[68] Art. 5 of the Employee Participitation Act No. 86/2009.
[69] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 199.
[70] Ibid.

Article 16(4)(c) CBMD has not been transposed into national law.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

This article has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

This article has not been transposed into national law.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

This article was transposed by Article 21(1) Act on Employee Participation.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

This article has not been transposed in Icelandic law.

1.18. Additional

a. Valuation rules

There are no valuation rules applicable to cross-border mergers in Icelandic law.

b. National case-law on provisions transposing the CBMD

There is no national case-law in relation to the provisions transposing the CBMD.

c. Language requirements

No language requirements in relation to cross-border mergers have been imposed.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The cross-border merger procedure follows the same steps as the domestic merger procedure.[71]

b. Comparison

The procedure is the same as followed for a cross-border merger.[72]

[71] Art. 133(a)(2) Act on Public Limited Companies; Art. 107(b)(2) Act on Private Limited Companies.
[72] O. A. Sigurdsson, 'Iceland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 191-192.

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1. Transposition of the Cross-Border Mergers Directive into Irish Law

The CBMD has been transposed in Ireland on May 27, 2008, by the European Communities (Cross-Border Mergers) Regulations 2008 (Statutory Instrument No. 157 of 2008 (the 2008 Regulations).[1] The transposition was made by means of a new law. The legislation is not currently due to be replaced, modified, or amended.

However, after the transposition of the CBMD, various reforms to cross-border merger laws were performed. Section 16(11) of the Central Bank Reform Act 2010 effected an inconsequential reform to Regulation 16(7) of the 2008 Regulations to reflect a change in title of the Central Bank. After June 20, 2011, Regulation 6 of the European Communities (Mergers and Divisions of Companies) (Amendment) Regulations 2011 (Statutory Instrument No. 306 of 2011) amended Regulations 8 through 11 of the 2008 Regulations by relaxing the formalities required in relation to delivery of common draft terms. In addition, Regulation 6(e) deleted a minor provision relating to the disapplication of a provision of domestic law Regulation 21(1) of the 2008 Regulations. Regulation 2 of the 2008 Regulations (the interpretation provision that provides the definitions for the 2008 Regulations) was amended by section 20(4)(a) of the Protection of Employees (Temporary) Agency Work) Act 2012 and Regulation 5 and Schedule I, paragraph 11, was amended by section 20(4) of that Act with effect from May 16, 2012, so to make provision for temporary agency workers.

Before the publication of the CBMD, there was no domestic legislation for cross-border mergers with private limited companies. Cross-border mergers in Ireland could, however, take place before the publication of the CBMD under the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). Such cross-border mergers were, however, limited to public limited companies. With the adoption of the CBMD, it became possible for Irish limited liability companies, with the exception of companies limited by guarantee, to enter into a cross-border merger with limited liability companies registered in other EEA Member States.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first definition to which kind of mergers the Directive applies.

[1] Irish Statute Book, 'S.I. No. 157/2008 - European Communities (Cross-Border Mergers) Regulations 2008', http://www.irishstatutebook.ie/2008/en/si/0157.html (last visited 20 August 2013).

Regarding the general scope of the Directive, according to Irish national law, the 2008 Regulations do not add additional measures which go beyond the parameters of the CBMD.

However, in one respect, the CBMD was not transposed in Irish national law: The 2008 Regulations do not provide for the exclusion contemplated by Article 3(3) of the CBMD in respect to collective investment vehicles.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Irish law follows the CBMD's definition of the term "limited liability companies," in Regulation 1 of the 2008 Regulations.[2] It confines the scope to Irish and EEA companies with limited liability (other than a company limited by guarantee) and bodies corporate with limited liability.

b. List of companies that can carry out a cross-border merger under Irish law

Under Irish law, the new cross-border merger provisions apply to private companies limited by shares registered under the Companies Act 1963; public companies limited by shares; registered under the Companies Act 1963; private and public limited companies that pre-date the Companies Act 1963; unregistered bodies corporate with statutory limited liability pursuant to s.377 of the Companies Act 1963; and companies involved in the collective investment of capital (on the basis that the exclusion in Article 3(3) of the CBMD was not expressly transposed).[3] Cross-border mergers do not apply to cooperative societies; mergers where one of the parties to the merger is not a limited liability company located in Ireland and one is in an EEA State other than Ireland;[4] and UCIT funds.[5]

There is an issue in relation to companies that have entered liquidation participating in cross-border mergers. Although there is no express prohibition at either the EU or domestic level, this is a matter on which the courts will occasionally have a supervisory role in the course of an insolvent liquidation. In this context, the issue

[2] J. McCarthy, I. Moore and P. Fahy, 'Cross-Border Reorganizations in Ireland', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), para. 10.06.

[3] Reg. 2 of the 2008 Regulations provides the relevant definition of an EEA company.

[4] Regulation 2(1) of the 2008 Regulations.

[5] See, however, the separate regime for UCITS in UCITS IV Directive 2009/65/EC, which was transposed in Ireland by the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (Statutory Instrument No. 362 of 2011).

would be whether it is considered to be in the creditors' interests for the company to participate in a cross-border merger.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Regarding Article 2(2) of the CBMD's definition of the term "merger," domestic law is largely the same. There is no direct reference to the terms of Article 2(1)(a), which relates to companies referred to in Article 1 of Directive 68/151/EEC, as the reference in national law is to Article 2 of that Directive. However, the effect is equivalent. Article 2(1)(b) of the CBMD is transposed by Regulation 2(1)'s definitions, which equate to a private company limited by shares. Article 2(1)(c) equates to a merger by absorption in the 2008 Regulations and is provided for in Regulation 2(1).

A "cross-border merger" is defined in Regulation 2(1) of the 2008 Regulations as "a merger involving at least one Irish company and at least one EEA company." Regulation 2(1) a provides a definition of an EEA company in terms of it being within a limited company within the meaning of Article 2 of Directive 68/151/EEC (as amended).

d. Rules on the cash payment

Irish national law follows the CBMD regarding cash payment. In a merger by acquisition or a merger by formation of a new company, the shareholders of the transferor company or companies transfer all of the assets and liabilities of that company to another limited liability company in another EEA Member State. In exchange for those assets and liabilities, the shareholders of the transferor company or companies will receive shares or securities in the successor company, which can also be accompanied by a cash payment. Article 2 of the CBMD allows for cash payment of up to 10 percent of the nominal value of the shares or securities in the transferor company to be made to the shareholders of the transferor company. However, Article 3 of the CBMD allows EEA Member States to exceed this threshold and allow for larger cash payments as consideration for the cross-border merger. The 2008 Regulations (as indicated at Regulation 5(2)(c)) anticipate that a cash payment may be made as consideration and do not apply any limit to the value of such a cash payment.[6]

[6] M. Stack, J. McCarthy and M. Greene, 'Ireland', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p.45.

e. CBMs and companies in liquidation

Regarding companies in liquidation, Irish national law does not disallow them from entering into a cross-border merger.[7] As a matter of general company law, where a company is in insolvent liquidation, the High Court may, however, have a supervisory role and will be interested in ensuring that creditors' interests are protected.

f. CBMs outside of the scope of the Directive

Irish national law does not address cross-border mergers outside of the scope of the Directive. As a matter of EU law, an SE can, however, be formed by means of merger between an Irish registered public limited liability company and one registered in another EEA state.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Regarding national legislation on cross-border divisions, seat transfers, and other cross-border restructurings, as a matter of Irish company law, a company incorporated in Ireland will be governed by Irish law, irrespective of where the real seat may be located. A company incorporated in Ireland must have its registered office in Ireland.[8] It is not obliged to have its real seat in Ireland.

Irish law does not have other specific types of cross-border corporate reorganizations.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Irish national law follows Article 3(1) of the CBMD. The 2008 Regulations (as indicated at Regulation 5(2)(c)) anticipate that a cash payment may be made as consideration and do not apply any limit to the value of such a cash payment.[9]

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Regarding Article 3(2) of the CBMD, given the definition of the term "company" in Regulation 2(1) of the

[7] J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 10.15.
[8] Section 113(1) of the Companies Act 1963.
[9] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 45.

2008 Regulations, by implication cooperative societies are excluded from entering into cross-border mergers.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Article 3(3) of the CBMD has not been transposed in Irish national law; in the 2008 Regulations, there is no specific reference to collective investment companies. No official commentary is available in relation to the rationale for this omission.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Irish national law in the 2008 Regulations does not directly reference Article 4(1)(a) of the CBMD. There is no attempt to prohibit mergers between a domestic company qualifying for a cross-border merger with a company of another Member State that also qualifies for a cross-border merger under the CBMD and the laws of the second Member State, but not under the laws of the first Member State.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) of the CBMD is addressed in Regulation 16 of the 2008 Regulations, which provides that approval of the High Court is subject to approval in appropriate cases of the merger by the Competition Authority pursuant to a notification to it under section 16 of the Competition Act 2002.

The national rules on mergers essentially mirror the EU merger control regime. There are certain qualifying turnover thresholds specified in the Competition Act 2002. There is a period of up to four months provided for the Competition Authority to make a determination.

Regarding how "public interest" is defined in Irish national law, the Competition Authority will determine whether a merger would be likely to substantially lessen competition in Ireland.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Irish law has set rules regarding creditor protection specific for cross-border mergers.[10] Regulation 15 of the 2008 Regulations entitles a creditor of an Irish merging company who has a debt or claim against the company at date of the publication of the notice of the common draft terms to be heard by the court before it makes a decision to approve a cross-border merger. In such circumstances, pursuant to Regulation 14(3)(g), the court will need to be satisfied that provisions have been made for each creditor who would otherwise be unfairly prejudiced by an order approving the merger.

i. The start of the procedure

Under Regulation 15, the protection period starts as soon as notice of delivery of the common draft terms is published; creditors are then eligible to be heard on application to the Irish High Court.[11]

ii. Time limits

Under Regulation 15 of the 2008 Regulations, regarding time limits, the application can technically be made at any time from the publication of the notice of the common draft terms but before the court makes an order. However, it will make sense for a creditor to await shareholder approval of the merger and the issue by the Court of a certificate of approval of pre-merger requirements.

iii. The total period of the duration

The total period of the duration of the procedure is not specifically addressed in the 2008 Regulations.

iv. Procedural steps

The procedural steps begin once notice of delivery of the common draft terms is published; creditors are then eligible to be heard on application to the Irish High Court.[12] Provisions must be made for creditors of any of the merging companies who have established to the satisfaction of the Irish High Court that they would otherwise be unfairly prejudiced.[13] The Irish High Court can make an order for an inquiry as to the debts/claims against that company and for proceedings to be taken with a view to settling a list of creditors.[14]

v. Comparison with domestic mergers

This option does not yet apply for domestic mergers, but it is proposed under Clause 486 of the Companies Bill 2012, which is currently before the national Parliament.

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[10] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 51.
[11] Ibid.
[12] Reg. 15 of the 2008 Regulations.
[13] Reg. 15(3)(g) of the 2008 Regulations.
[14] Rule 26(2)(c) of the Rules of the Superior Courts (Order 75), 2010; M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 51.

vi. The possibility for creditors to block the merger

Creditors cannot currently block the merger, but it is proposed under Clause 481(1(ii) of the Companies Bill 2012, which is currently before the national Parliament, that a court can impose a requirement that proper provision be made for an objecting creditor who will have a right to be heard by the court.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Article 4(2) CBMD has been transposed in Irish national law.[15] Regulation 12 of the 2008 Regulations provides a buy-out procedure for minority shareholders.

i. The start of the procedure

The protection begins after the general meeting at which minority shareholders have voted against the cross-border merger draft terms.[16]

ii. Time limits

Fifteen days from the date of the general meeting is the time limit set for making a request for the successor company to purchase a minority shareholding.[17] However, there is also an independent possibility of the High Court making an order to protect a dissenting minority.[18]

iii. The total period of the duration

There is no duration specified.

iv. Procedural steps

The procedural steps begin when minority shareholders of the transferor company apply to the Irish successor company to acquire their shares in the merging company for cash in cases when the majority of votes in the transferor company are pro-merger.[19]

Any shareholder who voted against the merger will be deemed a minority shareholder as well as any other shareholder in a case where the successor company holds at least 90 percent of the transferor company.[20]

Shareholders must apply to the Irish successor within 15 days as of the general meeting date (cross-border merger approval) in order to acquire their shares.

In a case where the successor company holds at least 90 percent of the transferor company, the publication of notice of delivery of the common draft terms will be the commencement date for the 15 days requirement.[21]

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[15] Ibid.
[16] Reg. 12(1) of the 2008 Regulations.
[17] Reg. 12(1) of the 2008 Regulations.
[18] Reg. 12(3) of the 2008 Regulations.
[19] Reg. 12(1) of the 2008 Regulations.

The Irish successor company will purchase the shares according to the exchange ratio specified in the CDTMSs.[22]

Before the authorization order by the Irish High Court, a system must be created to manage inquiries regarding purchasing minority shareholders' shares.[23]

The application to the Irish High Court for approval must be accompanied by a statement containing details of share capital (number and class) of each minority shareholder who has requested to sell his shares.[24]

v. Comparison with domestic mergers

This option also applies for domestic mergers only in relation to public companies where a compulsory buy-out will apply in relation to mergers and acquisitions where 90 percent are in favor.

e. The protection of employees in Article 4(2)

The protection of employees under Article 4(2) of the CBMD has been provided by Regulation 39 of the 2008 Regulations and the Unfair Dismissals Acts 1977 to 2007, which allows that members of the special negotiating body, representative body, or employees' representatives on the board of the successor company must not be penalized for their participation.[25] If employee participation is penalized, Schedule 2 of the 2008 Regulations permits a complaint to be brought before the Irish Rights Commissioner.

Regarding what protection is provided, Regulation 39(2) of the 2008 Regulations protects against penalization in the form of dismissal, or any unfavorable change to a person's employment conditions or unfair or prejudicial treatment, including selection for redundancy.

Schedule 2 of the Regulations provides for a remedy in such cases. A Rights Commissioner is empowered to hear penalization complaints against companies pursuant to Regulation 39. After both sides have been given the opportunity to speak, a Rights Commissioner is authorized to determine whether or not the complaint is well founded, require the relevant company to take a specified course of action, and require the relevant company to compensate a penalized person for an amount that is "just and equitable having regard to all the circumstances." However, such compensation may not exceed two years remuneration of the penalized employee.

[20] Reg. 12(4) of the 2008 Regulations.
[21] Ibid.
[22] Reg. 12(2) of the 2008 Regulations.
[23] Reg. 14(2) of the 2008 Regulations.
[24] Ibid.; M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 51.
[25] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 54.

Such complaint must be brought to a Rights Commissioner within six months (extendable in certain circumstances) of the alleged incident.[26] Parties have the right to appeal against the decision of Rights Commissioners to the Labour Court[27] and from the Labour Court to the High Court on a point of law.[28] Any determination of the High Court is final and conclusive.[29]

Ireland has transposed the Acquired Rights Directive by adopting the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.[30]

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

All the particulars of Article 5 of the CBMD have been addressed in Irish national law in Regulation 5 of the 2008 Regulations.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Article 6(1) of the CBMD has been transposed in Irish national law. Regulation 9(1) provides that at least one month before the general meeting of the shareholders to approve the cross-border merger, notice of delivery of the CDTMs and Form CBM1 must be published.[31]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now

[26] Para. 2(4), (5), Schedule 2 of the 2008 Regulations.
[27] Para. 3(1), Schedule 2 of the 2008 Regulations.
[28] Para. 3(5), Schedule 2 of the 2008 Regulations.
[29] Para. 3(6), Schedule 2 of the 2008 Regulations.
[30] Statutory Instrument No. 131 of 2003.
[31] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 47.

Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed in Irish national law in Regulation 6(a) of the European Communities (Mergers and Divisions of Companies (Amendment) Regulations 2011 (S.I. No. 306 of 2011), which amends Regulation 8 of the 2008 Regulations to provide for this exception. There are no additions or divergences.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) of CBMD is transposed in Irish national law. Pursuant to Regulation 8(2)(a) of the 2008 Regulations, publication is in the Irish Companies Registration Office Gazette. Regulation 8(2)(b) requires the company to publish notice of delivery of the CDTMs in two national daily newspapers. There is an additional requirement to include the governing law of the companies contained in Regulation 8(1)(b)(iii). There are no diverging rules in Irish national law.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 of the CBMD has been transposed in Irish national law in Regulation 6 of the 2008 Regulations, without any diverging rules.[32]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Irish national law follows Article 8(1) of the CBMD, which is transposed in Regulations 7(1),(2),(3), and (4) of the Regulations. Under Regulation 7(4), it has to be made

[32] Ibid.

available not less than one month before the date of general meeting under the national law.[33] There are no additions or divergences.

b. The independent expert

Under the 2008 Regulations, an expert is considered "suitably qualified" if he or she is eligible for appointment as an auditor under section 187 of the Companies Act 1990.[34] Regulation 7(3) of the 2008 Regulations imposes some constraints concerning who may be appointed so as to guard against potential conflicts of interest. For example, a person may not be appointed as an independent expert if they have been an employee or officer of the company within 12 months of the date of the CDTMs, or they are a parent, spouse, sibling, or child of an officer of the company (without obtaining judicial approval for appointment), or where a person is a partner or in the employment of an officer or employee of the company.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) of the CBMD has been transposed in Irish national law. Regulation 7(2)(b) of the 2008 Regulations provides that merging companies may jointly request the High Court to authorize the review to be performed by one or more independent experts for all the companies involved in the merger.[35]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed in Irish national law in Regulation 7(4) of the 2008 Regulations, without any additions or diverging rules.[36]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) of the CBMD has been transposed in Irish law. According to Regulation 7(5) of the 2008 Regulations, the merging companies must provide the independent expert with all the information needed to prepare their report. Under Regulation 7(6), failure to cooperate with the expert is a criminal offence, as is knowingly or recklessly providing information orally or in writing which is "misleading,

[33] Ibid., p. 49.
[34] Reg. 7(2)(3)(a) of the 2008 Regulations; Ibid., p. 48.
[35] See further J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 10.58.

false or deceptive in a material particular." The Irish merging company and every officer in default is treated as being guilty of an offence. The penalties are a fine of up to €5,000 and/or 6 months' imprisonment.[37]

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) of the CBMD has been transposed in Irish national law. Pursuant to Regulation 7(1)(c), an independent report is not required where the shareholders of all the merging companies unanimously decide that an independent expert report is not necessary.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

The further exemptions in Articles 15(1) and 15(2) have been transposed in Irish national law.[38] Regulation 7(1)(a) deals with the scenario in Article 15(1) of the CBMD and Regulation 7(1)(b) deals with the scenario in Article 15(2) of the CBMD; each provision excludes the requirement for an independent expert's report.

h. Further exemptions in Irish law

There are no further exemptions in Irish law.[39]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed in Irish law in Regulations 10(1) and (2) and Regulations 11(1) and (2) of the 2008 Regulations.[40] National law provides some additional requirements regarding special majority approval requirements (Regulation 10(1)) and regarding transparency requirements in relation to material changes in the assets and liabilities of the transferor company between the date of the CDTMs and the date of the general meeting (Regulation 10(3)).

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[36] J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 10.53.
[37] Reg. 3 of the 2008 Regulations.
[38] J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 10.58.
[39] Ibid.
[40] Ibid., para. 10.63.

a. Procedural requirements including majority, quorum, timing and notarization

In Irish national law, the Irish merging company decides to approve the merger at a general assembly of shareholders. The presence of a notary or any other kind of civil servant at the meeting of the general assembly of shareholders is not required.

The meeting of the general assembly of shareholders of the merging company must be duly convened and quorate. The applicable quorum requirements will be those set out in the statutes of the relevant Irish merging company. Regulation 10(1) specifies that a special resolution must be passed at a general meeting of the Irish merging company not more than one month after the publication of the notice of the CDTMs. A majority of 75 percent or more of the shareholders present or represented at the meeting must approve the special resolution.[41] However, the requirement of a physical meeting of the shareholder body can be dispensed with if all the shareholders sign a written resolution approving entry into the merger.[42]

b. Amendment of CDTMs by shareholders

The shareholders' approval or rejection is expressly based on the CDTMs (Regulation 10(1)). However, pursuant to Regulation 10(2), the approval of the members can be made conditional on a number of terms: ratification of employee participation arrangements, an order from another EEA State amending the exchange ratio for or compensation of minority shareholders, receipt of merger approval from the Irish Competition Authority or the European Commission or another jurisdiction, and any other regulatory approval. There is also an overriding discretionary power conferred on members; they have the option (contained in Regulation 10(2)(e)) for the approval of members to be made subject to "such other conditions as they consider appropriate in the circumstances."

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

This provision has been transposed in Irish national law; if conditions laid out in Article 8 of the CBMD are fulfilled, then approval of shareholders is not required.[43] There is, however, no requirement that a company make the relevant documentation available for viewing, as contemplated by Article 8(b).

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[41] Ibid., para. 10.65.
[42] Reg. 10(5) of the 2008 Regulations.
[43] Reg. 11(1)(a) of the 2008 Regulations; See further J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 10.68.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

This exemption has been transposed in Irish national law in Regulation 11 of the 2008 Regulations, which is in line with CBMD.[44] Although not expressly provided for in the 2008 Regulations, in the absence of shareholder approval, the board of directors of the company being acquired should authorize the company's entry into the merger by means of a resolution passed at a board meeting.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Irish national law in Regulation 13 of the 2008 Regulations, which is broadly in line with CBMD. However, Regulation 13 includes no reference to requiring expedient scrutiny of the proposed merger "without delay."

b. National authority has been designated to scrutinize the legality of the merger

According to Regulations 13 and 14 of the 2008 Regulations,[45] the Irish High Court is the designated competent authority to scrutinize the legality of the merger. The High Court's is essentially concerned with ensuring that the procedural formalities have been completed.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Regarding Article 10(3) of the CBMD, Irish law does not specifically provide for a procedure for the Irish High Court to verify and amend the ratio applicable to the exchange of securities or shares or compensate minority shareholders.[46] However,

[44] Ibid., para. 10.71.
[45] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 50.
[46] J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 10.82.

Regulation 12(3) acknowledges the broad discretion of the court to make any order "necessary for the protection of the interests of a dissenting minority in a merging company."

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed in Irish national law; Article 11(1) has been transposed in Regulation 14 and Article 11(2) has been transposed in Regulation 14(3)(b). A right for creditors' to be heard is added in Regulation 15.

b. The national authority has been designated to scrutinize the legality of the merger

The Irish legislator has designated the Irish High Court, under Regulation 14(1) of the 2008 Regulations. The High Court's scrutiny is largely concerned with ensuring that the procedural formalities have been completed.[47] However, aspects of its role are in the substantive area, e.g., in relation to assessing whether adequate creditor protection has been built into the proposed terms.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed in Irish national law in Regulation 14(4) of the 2008 Regulations, which is in line with CBMD.

b. Date the cross-border merger takes effect

If the company surviving the merger is Irish, after scrutiny of the merger, the Irish High Court's order specifies the date on which the merger is to take effect.[48]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

[47] This is evident from the wording in Reg. 14(1) of the 2008 Regulations.

Article 13 first sentence has been transposed in Irish national law. According to Regulation 14, if the surviving company is Irish, the Registrar of the Irish High Court must send a copy of the court order approving the merger to the Registrar of Companies.[49] Within 14 days of that receipt, the Registrar of Companies will prepare publication of a notice confirming the court order in the CRO Gazette.[50]

b. Transposition of Article 13 second sentence

Article 13 second sentence has been transposed in Irish national law in Regulation 18 of the 2008 Regulations, without any diverging rules.[51]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 of the CBMD has been mostly transposed in Irish national law. Article 14(1)(a) is transposed in Regulation 19(1)(a); Article 14(1)(b) in Regulation 19(1)(b); Article 14(1)(c) in Regulation 19(1)(c); Article 14(2)(a) in Regulation 19(1)(a); Article 14(2)(b) in Regulation 19(1)(a); Article 14(2)(c) in Regulations 19(1)(c), (e), and 19(2)[52]; Article 14(4) in Regulation 19(1)(f); Article 14(5)(a) in Regulation 4(5)(a); and Article 14(5)(b) in Regulation 4(5)(b). However, Article 14(3) has not been transposed in Irish national law.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a wholly owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

Article 15(1) of the CBMD has been transposed in Irish national law with no additional or diverging rules.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to

[48] Reg. 14(4) of the 2008 Regulations.
[49] Reg. 17(1) of the 2008 Regulations.
[50] Reg. 17(2) of the 2008 Regulations.
[51] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 20.
[52] There is also a reference to transfer of legal proceedings and contracts: Reg. 19(1)(d),(g) and (h) of the 2008 Regulations.

the extent that the laws of the Member States of the merging companies do not so require.

These provisions have been transposed in Irish national law, with no other documents exempted.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Regarding the system of employee participation applicable in Ireland, an Irish successor company is subject to the rules on employee participation in force in Ireland.[53] Notwithstanding that generally speaking there are no mandatory rules on employee participation enforced in Ireland, in the following circumstances employee participation rules are required to be transposed into such Irish successor company:

a. If, six months before the CDTMs are published, at least one of the merging companies has more than 500 employees and a system of employee participation.[54]

b. If there is no legal ability for the surviving company's employees to claim the employee participation rights which they had before the cross-border merger was enacted.[55]

c. If there is no legal right for employees of the surviving company's branches in another Member State to claim the same employee participation system as employees in an Ireland branch of the surviving company.[56]

Merging companies can either adopt the standard rules of employee involvement, which are set out in Schedule I of the Regulations, or agree to set up a special negotiating body.[57]

It has been commented that "[t]he employee participation requirements of the CBMD and the Irish Regulations are likely to have limited application in Ireland, and will

[53] Reg. 23(2) of the 2008 Regulations.
[54] Reg. 23(3)(a) of the 2008 Regulations.
[55] Reg. 23(3)(b)(i) of the 2008 Regulations.
[56] Reg. 23(3)(b)(ii) of the 2008 Regulations.
[57] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 52.

probably only arise where the company merging with the Irish company has enshrined employee participation rights."[58]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) of the CBMD has been transposed in Irish national law in Regulation 35(1) of the 2008 Regulations, which does not go further or provide diverging rules.

c. Transposition of Article 16(2)

Article 16 (2) CBMD provides for three exceptions to the rule of Article 16 (1) CBMD.

The exemptions of Article 16(2) of the CBMD are addressed in Irish national law in Regulation 35 of the 2008 Regulations, which does not go further or provide diverging rules.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The 33 1/3 percent figure discussed in Article 16(3)(e) of the CBMD is transposed in Irish national law in Regulation 35(2) of the 2008 Regulations.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) has been transposed in Regulations 35(1)(a) and (b) with no additions or exceptions. Article 16(4)(b) has been transposed in Regulation 34(3). Article 16(4)(c) has been transposed in Regulation 35(6) with no additions or exceptions.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the size of the workforce giving rise to participation rights under national law and to what extent employees from other Member States have to be taken into account.

Article 16(5) CBMD has been transposed into Irish national law under Regulation 43 of S.I. No. 157 of 2008.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16

[58] J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 10.137.

CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) CBMD has been transposed into Irish law under Regulation 44 of S.I. No. 157 of 2008.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed in Regulation 37 of the 2008 Regulations, without further additions or divergences.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 of the CBMD has been transposed into Irish national law in Regulation 20 of the 2008 Regulations, which states that a cross-border merger that has taken effect by an order of the Irish High Court cannot be declared null and void.[59]

1.18. Additional

a. Valuation rules

In Irish national law, there is no legally binding method for valuing domestic mergers.

b. National case-law on provisions transposing the CBMD

At present, there is no national case law concerning cross-border mergers in Ireland.

c. Language requirements

Under Irish national law, it is possible to produce the documents required for the merger in more than one language. Under the Rules of the Superior Courts, if a document to be relied upon in the Irish Court is not produced in English or Irish, a translation into either language by a qualified translator will be required.[60]

[59] M. Stack, J. McCarthy and M. Greene, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 46.
[60] J. McCarthy, I. Moore and P. Fahy, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 10.88.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

Irish national law recognizes mergers effected by share acquisition (two previously independent companies coming under common control) or asset acquisition.[61] The concept of merger by absorption, well-established in civil law jurisdictions, is not recognized. Domestic law also recognizes schemes of arrangement whereby the rights and liabilities of a company are transferred to another company and the first company ceases to exist.[62] The Companies Bill 2012 aims to provide, for the first time, a statutory mechanism for two Irish companies (i.e., without a cross-border element) to merge so that the assets and liabilities (and identity) of one are transferred to the other, before the former is dissolved.

By 2012, more than 50 cross-border mergers had been registered with the Irish Companies Registration Office.[63]

b. Comparison

Differences between domestic and cross-border procedures exist in Irish national law. Turnover thresholds are imposed to determine which mergers are notifiable. There is no pre-clearance procedure, simply a substantive determination by the Irish Competition Authority rather than the High Court as to whether competition in Ireland is likely to be substantially impeded pursuant to the provisions of the Competition Act 2002. Appeals may be brought to the High Court on an issue of fact or law. A further appeal to the Supreme Court (the highest court) on a point of law is possible.

[61] Section 16 of the Competition Act 2002.

[62] A.W.J. McCarthy and V.J.G. Power, *Irish Competition Law: The Competition Act 2002* (Butterworths, Dublin 2003), para.9.18.

[63] T.B. Courtney, *The Law of Companies* (3rd edition, Bloomsbury Professional, 2012), para. 9.032.

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1. Transposition of the Cross-Border Mergers Directive into Italian Law

The CBMD has been transposed by the *Decreto Legislativo* 108/2008 (the Decree). The Decree was published in the official gazette of the Italian Republic on June 17, 2008, and it entered into force on July 2, 2008, after the usual period of *vacatio*.

The *Decreto Legislativo* is the typical normative instrument through which the Italian Republic transposes the EU Directives. The government receives the delegation from both Houses of the Parliament to enact the EU dispositions. The law delegating the Government is usually the s. c. *Legge Comunitaria* (Community Law), the law that is voted by the Parliament each year in order to transpose the EU Directives adopted during the previous year.

The delegating law was the *Legge 6 febbraio 2007, n. 13 – Legge Comunitaria 2006* and, in particular, Article 1 and Annex B. The preliminary draft was adopted by the Council of Ministers of the Government *Prodi II* on February 27, 2008, and the new Council of Ministers of the Government *Berlusconi IV* adopted the definitive draft on May 21, 2008. The law is officially the *Decreto Legislativo* 108/2008, *Attuazione della Direttiva 2005/56/CE, relative alle fusioni transfrontaliere delle società di capitali* (Transposition of the Directive 2005/56/CE, concerning the cross-border merger of limited liability companies). It was published in the official gazette of the Italian Republic on June 17, 2008, and entered into force on July 2, 2008.

The regulation has been already modified once to accommodate recent EU modifications. The *Decreto Legislativo n. 22 giugno 2012, n. 123* had the objective to transpose the Directive 2009/109/CE pursuant the modification of Directives 77/91/CEE, 78/855/CEE, 82891/CEE, and 2005/56/CE regarding the subject matter of the documentation required in case of mergers and acquisitions.

Prior to the enactment of the CBMD, the national law did not face the specific topic of cross-border mergers; the doctrine and the jurisprudence did not find a consensus over the juridical nature of mergers. But all civil code norms that were considered applicable to cross-border mergers are still part of the legal system, as they have just been complemented by the Decree.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

Article 2 defines the scope of the Decree, which is applied to:

1. *Società di Capitali* (limited liability companies) (Article 2(1)), or companies that are different from the limited liability companies, conditional upon the fact that a similar extension is provided also by the transposing law regulating the other EU companies involved in the merger (Article 2(2));

2. Performing a merger (Article 2(1));3. Pwhose registered office, central administration, or principal place of business is established within the EU (Article 2(1)) or not, conditional upon the fact that a similar extension is provided also by the transposing law regulating the other EU companies involved in the merger (Article 2(2)).

If this is not the case, only a few articles of the Decree will be applied in any case:

1. Article 3(1), providing that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States;
2. Article 3(2), excluding the cooperative companies from cross-border mergers;
3. Article 4, making reference to the domestic merger discipline embodied in the civil code as the default rule and restating the clauses of safeguard;
4. Article 5, concerning the withdrawal right;
5. Article 6, regulating the information to be included in the common draft terms of cross-border mergers (CDTMs);
6. Article 7, regulating the publication in the official gazette;
7. Article 8, regulating the management report;
8. Article 9, regulating the independent expert's report;
9. Article 18, concerning the simplified merger.

Article 2(4) Decree specifically excludes companies regulated under Article 43 *Decreto Legislativo 58,* February 24, 1998, s. c. TUF – *Testo Unico della Finanza;* hence the SICAV–*Società di Investimento a Capitale Variabile* (open-ended collective investment scheme) does not fall within the scope of the Decree.

The national provisions can apply to entities that are different from those envisaged in the CBMD, both under a subjective and a geographical point of view.

The subjective scope has been extended to comprehend virtually any kind of company—even those not incorporated in the form of limited liability companies—provided the exclusions impacting the cooperatives societies and the SICAV. In particular, the commercial partnerships (*società semplice, società in nome collettivo, società in accomandita semplice*) would also fall within the scope of the CBMD. This extension has been adopted also to transpose the rationale expressed by the European Court of Justice in the *Sevic* case.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability companies'.

For the purpose of the Decree, *Società di Capitali* are defined through the list of definitions provided at Article 1, which are:

1. the companies regulated by the Civil Code, Book V, Heading V, Chapter V: S.p.A.– *Società per Azione* (public limited liability company);
2. the companies regulated by the Civil Code, Book V, Heading V, Chapter VI: S.A.A.– *Società in Accomandita per Azioni* (partnerships limited by shares);
3. the companies regulated by the Civil Code, Book V, Heading V, Chapter VII: S.r.l.– *Società a Responsabilità Limitata* (private limited liability company);
4. the companies regulated by the Civil Code, Book V, Heading VI, Chapter I: *Imprese cooperative e Mutue assicuratrici* (cooperative societies);
5. the European company (SE);
6. The European mutual company (EMS);
7. The companies regulated under Article 1 Directive 68/151/CEE of the Council dated March 9, 1996 (for Italy, this means the companies that have already been mentioned, such as S.p.A., S.r.l., S.A.A.);
8. any other company of any Member State having legal personality and having a shared capital, limited liability, and subject, by virtue of the respective national legislation, to the discipline provided by the Directive 68/151/CEE set in order to protect the shareholders and third-party interests.

b. List of companies that can carry out a cross-border merger under Italian law

The scope of the Decree is wider than that provided in the CBMD.

For what concerns the companies falling within the scope of the Decree, the Italian legislator did not make any specific choice, apart from two clear exclusions: the SICAV regulated under Article 43 TUF and the cooperative companies. In fact, Article 1(1):a(3) Decree fixes a general clause that grants a residual application to almost any limited liability company. Moreover, Article 2(2) extends the application also to any form of company not incorporated into a limited liability company, such as commercial partnerships (*società semplice, società in nome collettivo, società in accomandita semplice*).

Nevertheless, these extensions can be granted only when the legislation of the involved companies incorporated within other EU Member States also provides the same extension.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

The national law provides a definition of merger that is in line with that provided in the CBMD. According to Article 2501(1)c.c., the merger of companies consists of either the merging of two companies into a new one (merger by formation of a new entity) or the acquisition of one company to a different one (merger by acquisition). Moreover, Article 2501c.c. makes a specific reference to the case of the acquisition of a company whose shares are entirely detained by the acquiring company.

The possibility of merger is excluded for those companies in liquidation that already started the distribution of the assets (Article 2501(2)c.c.).

The Decree did not modify the national definition following the Directive definitions.

d. Rules on the cash payment

The cash payment is allowed, with some stipulations.

In the domestic merger by formation of a new entity and by acquisition, the cash payment cannot exceed the 10 percent of the nominal value of the shares issued by the new or by the incorporating company (Article 2501-*ter* c.c.).

Regarding cross-border mergers, the Italian law gives the pass to the foreign law that permits a cash payment above 10% percent of the nominal value of the shares when the other company involved is governed by a national law allowing such an option (Article 4(2) Decree). However, when an Italian company is merging with a company incorporated in a country where a cash payment above 10 percent is not permitted, the limit of 10 percent will still be in place.

In the case of absence of a nominal value, the accounting par value of the securities or shares representing the capital of the surviving company is utilized.

e. CBMs and companies in liquidation

Article 2501(2)c.c. is rather clear in excluding the feasibility of merging for companies in liquidation if they have already started distributing the assets. The latter stipulation is an innovation compared with the previous limitation, which completely excluded the eventuality of merging for the simple fact that the company was undergoing the liquidation.

As a result, the merger of companies in liquidation should be considered as a feasible scenario as far as the distribution has not started yet.

f. Geographic scope

The geographic scope of the Directive has been extended by the national legislator as it can be applied to any kind of cross-border merger of limited liability companies, notwithstanding the seat of their registered office, or principal place of activities or their central administration, provided that the law applicable to each involved company provides the enforcement of the national rules on cross-border mergers.

There are different scenarios:

(1) When the merger involves one Italian company and one or more other EU companies, the norms of the Decree are surely applicable;

(2) When the merger involves more EU companies and one non-EU company, the discipline set by the Decree should be applied, as long as the national law of the other EU company transposing the Directive is also applicable to mergers involving non-EU companies;

(3) When the merger involves one Italian company, one EU company, and one non-EU company and the national law of the other EU company is not applicable in a similar scenario, the norms of the Decree still considered applicable are recapped at Article 2(3) Decree.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

National law has never explicitly mentioned cross-order divisions, nor has Article 25 of the *Diritto Internazionale Privato*, or International Private Law (DIP), regulated the phenomenon. Nevertheless, scholars have always admitted its feasibility, considering it similar to mergers.

For what concerns the seat transfer, the situation is more nuanced, depending on the fact that Italy adopted a cumulative application of the real seat theory and of the seat of incorporation. In fact, Article 25(1) DIP fixes the stipulations for incorporation, unless the principal place of business or the main administration is placed in Italy, in which case the Italian law should be applied regardless of the incorporation. Moreover, Article 25(3) DIP implies that the transfer is valid under the Italian law only if carried out in compliance with the laws applicable in the previous incorporation state. Without the recognition of the seat transfer, either the company would continue to be considered incorporated in the previous state, or it would be considered terminated, but not simply transferred.

The national rules are based in the interpretation of the DIP. The current text of the International Private Law was enacted by the reform adopted with the *Legge 31 maggio 1995, n. 218.*

Regarding cross-border mergers with companies formed outside of the EEA or formed within the EEA but having its registered office, central administration, or principal place of business outside of the EEA, the geographical scope of the Decree is virtually extended worldwide by virtue of Article 2(2) Decree, but only with reference to limited liability companies. Therefore, also in the hypothesis of a pure international merger, the discipline resulting from the rules enacted in the civil code and in the decree would be applied.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General Transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3 Decree declares that the cross-border merger is allowed only between those kinds of companies which may merge under their national law. The Decree does transpose only a diverging rule establishing that, in any case, a cooperative company falling within the scope of Article 2512c.c. cannot take part in the merger in any case.

b. General Transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Article 3(2) Decree excludes the cooperative societies with main mutual purpose, because it would have undermined the coherent interpretation and application of Article 2545-*decies* c.c. that prevents the cooperative societies from deliberate transformation into capital company, person company, or consortia. In this way, the Italian legislator equalled the merger to a transformation, with the purpose of avoiding a society transforming into a different scheme through merging, notwithstanding the law forbidding the transformation.

Nevertheless, this norm has been criticized for being too rigid since it excluded the cooperative tout court without distinguishing whether the resulting company was a cooperative or not.[1] Moreover, there is a civil code provision authorizing the loss of the mutual character in Article 2545-*octies* c.c.

c. General Transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

[1] MAGLIULO, *La Fusione delle Società*, 2009, p. 18.

Article 2(4) Decree specifically excludes from cross-border mergers the companies regulated under Article 43 *Decreto Legislativo 58, February 24, 1998, s. c. TUF–Testo Unico della Finanza*; hence the SICAV, or *Società di Investimento a Capitale Variabile* (open-ended collective investment scheme), does not fall within the scope of the Decree.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 3 Decree declares that the cross-border merger is allowed only between those kinds of companies that may merge under their national law. The Decree does transpose only a diverging rule establishing that, in any case, a cooperative company falling within the scope of Article 2512c.c. cannot take part in the merger in any case.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

This option does not seem to be clearly transposed in the national legislation, as there is not a plain public interest veto declaration. However, there is a series of safeguard clauses contained in the Decree that imply public interest considerations that might prevent the cross-border merger, in particular:

1. *Decreto Legislativo 1 settembre 1993, n. 385, TUB–Testo Unico Bancario* (banking law);
2. *Decreto Legislativo 24 febbraio 1998 n. 58, TUF–Testo Unico della Finanza* (financial market law);
3. *Decreto Legislativo 7 settembre 2005 n. 209, Codice delle Assicurazioni Private* (private insurance law);
4. *Legge 10 ottobre 1990, n. 287 (c*ompetition law).

The financial sector is heavily regulated; banks are specifically subject to Articles 31, 36, 57 and 150-*bis* TUB, by virtue of which the Bank of Italy can have a veto on banking mergers. Financial intermediaries are subject to Articles 34(4), 36(7), 48(1), 49(4), and 117-*bis* TUF, allowing the Bank of Italy and CONSOB (*Commissione Nazionale Società di Borsa*, the stock exchange regulator) to veto the merger project. Insurances are subject to the ISVAP (now IVASS), according to Articles 168, 201, 202, and 347 *Decreto Legislativo 7 settmbre 2005, n. 209*. Some strategic industries

(defense, transportation, and so forth) are subject to the veto power of the Ministry of Economic Affairs pursuant to Article 2, *Decreto Legge 31 maggio 1994, n. 332*, and the Antitrust Authority can oppose merger projects that might jeopardize the competitiveness of the market.

c. The protection of creditors in Article 4(2)

Under Article 2503c.c., the creditors can oppose the merger. The Decree did not provide any other protective measure in favor of the creditors.

After the last filing in the Register of the Enterprises Merger Deed, the effectiveness of the merger is suspended for 60 days, unless:

(1) the creditors of the involved companies have given their consent to the merger before the date of the filing;

(2) the creditors who did not give their consent have already been fully paid and satisfied;

(3) the sum necessary to pay the dissenting creditors has been deposited in a bank as a guarantee of their credit.

These guarantees are not necessary when the independent expert report has been redacted by the same auditing company for all the involved companies and it has declared that there are no grounds for similar guarantees because the financial and economic situation of the companies is solid enough.

There is not a starting point for the opposition of the creditors. However, there is the deadline after which the opposition is not valid (60 days from the last filing; Article 2502-*bis* c.c.). A time limit of 60 days from the last filing is required under Article 2502-*bis* c.c.; the last filing of the merger deed of each company involved. In accordance with Article 2505-*quarter* c.c., the term of 60 days may be reduced to 30 days in case of merger involving companies having the form of *società a responsabilità limitata* (i.e., limited liability companies). During this period the further processing is suspended so that the creditors are given the opportunity to file a lawsuit before the tribunal. The waiting period is required to allow possible creditors of the companies involved in the merger to object to the same. An objection would evidently delay the process.

Lastly, please note that in accordance with a recent opinion of the Companies Register of Milan, the above waiting period will be interrupted from August 1 until September 15, due to court holidays. This opinion is currently applicable in case of merger involving Italian companies having its registered offices in Milan, but it cannot be excluded that the same opinion will be also followed by other Companies Registers; therefore it is recommended to clarify this aspect with the competent local Italian register.

The following procedural steps are of importance: When the exceptions are not verified and the creditors opposed the merger within the requested time frame, Article 2445(4)c.c. is applied. Article 2554c.c. regulates the procedure concerning statutory reduction of the company's capital.

Also in this case, the creditors can oppose the statute amendment as their collateral may be diminished: the tribunal will judge the creditors' opposition. The tribunal can allow the merger when it deems that there are no reasonable grounds for opposing, as the credit does not suffer considerable damages or dangers or adequate guarantees have been already offered.

The procedure for cross-border mergers is the same as provided for the domestic mergers. The legislator did not provide any alternative protection to be applied to cross-border mergers.

With a view to the possibility for creditors to block the merger, in theory, the opposition of the creditors may prevent the effectiveness of the merger when the situation does not fall under one of the exceptional circumstances envisaged. In this case, only the judge will be able to allow the merger, either dismissing the opposition of the creditors or demanding the involved companies to provide adequate guarantees in the interest of the creditors.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Under Article 5 Decree, the minority shareholders who did not approve the merger can withdraw from the company (*Recesso*) when the resulting company incorporated in a different Member State is governed by the law of a different Member State. However, the scope might be wider than in the CBMD, because in the Italian law the right of withdrawal is granted to any shareholder who did not approve the plan, thus not only those that opposed the plan—the simple abstention may be sufficient to withdraw.

The rules stipulating the minority shareholders withdrawal are defined by those presiding over the domestic merger. Therefore, there would be as many withdrawal procedures as many categories of limited liability companies.

The time limit for the dissenting shareholder with reference to the company having the form of S.p.A. is 15 days from the filing of the minute in the Register of Enterprises. If the decision giving ground for the withdrawal is repealed within 90 days, the request of withdrawal is deprived of effectiveness.

The discipline exists also at national level and it forms the reference discipline for the cross-border merger's shareholders' withdrawal.

e. The protection of employees in Article 4(2)

The employees' protection has been safeguarded through Article 2112c.c., enshrining the protection of the substantial rights of current employees, and Article 47 *Legge 428 del 29 dicembre 1990, Legge Comunitaria 1990,* establishing a procedure for the negotiations between the unions and the company management in case of merger. Article 2112c.c. regulates the firm transfer, including the merger of different companies whereby the former companies maintain their individuality as firms, although the management and the ownership have changed. In this case, the employee saves his post and the rights attached to it, as the transfer does not constitute in itself a sufficient ground to dismiss the workers. Moreover, the obligations of the former employer are assumed by the new one; the new employer must respect the collective labor agreements in force, unless new collective agreements are adopted by the new employer.

Article 47 *Legge 29 dicembre 1990* aims to regulate the procedures leading to the firm transfer. It has been amended many times, and in its current state is characterized by the reference to the circumstances set under Article 2112c.c, when the employees working in the transferred firm number at least 15. The workers must be informed through a notification to their union's representatives at least 25 days before the completion of the transfer procedure. The notification must include a description of the industrial plan underpinning the transfer and the expected consequences for the employment and the firm development. Within seven days the unions can signal their intention to start the negotiations with the management, which has to invite them within the following seven days; the agreement, if any, must be found within 10 days from the beginning of the negotiations. This procedure has to be followed also when the firm is already controlled by another company. The default of these rules is considered and punished as anti-unionist conduct.

The guarantees provided by Article 2112c.c. are not fully applied when the company is in crisis, as the collective agreements may waive a part of the previous guarantees in the light of saving the employment level.

These forms of protection were already enforced in the national law governing the restructuring of firms, including mergers. As a matter of fact, the national discipline is recalled by the Decree.

These forms of protection, either substantial or procedural, are applied in every circumstance. The situation can be tenser when the merger intervenes in the case of a company in crisis, as the employment levels may be more affected.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

The discipline of the CDTMs is set under Article 6 Decree, which makes reference to Article 2501-*ter* c.c., which provides the basic content of the disclosure obligation. The Decree also requires some extra information to be disclosed.

Article 2501-*ter* c.c. requires the Boards of Administration of the involved companies redact CDTMs in which are clarified the following details:

(1) categorization and location of the incorporation seat of the involved companies;

(2) the new bylaw (or a draft of it) of the resulting (or incorporating) company with information regarding modifications caused by the merger;

(3) the exchange of securities or shares ratio, along with the company capital and information on the cash payment;

(4) the resulting company's terms of allotment of securities or shares;

(5) the date after which holding such securities or shares will allow for profits;

(6) the date after when incorporated companies' activities are added to the capital of the resulting or incorporating company;

(7) special rights created by the merger for particular members, or for those who hold securities but not shares; and

(8) any special advantages for members of the administrative, management, supervisory or controlling areas of the merging companies.

The content of Article 2501-*ter*(1)c.c. is the result of the reform purported by *Decreto Legislativo 17 gennaio 2003, n. 6, Riforma organica della disciplina delle societa' di capitali e societa' cooperative, in attuazione della legge 3 ottobre 2001, n. 366*, published in the Italian official gazette *n. 17 del 22 gennaio 2003.*

On top of this disclosure duty, the Decree added:

(1) identifying the national laws governing the companies involved in the cross-border merger;

(2) special rights regarding participating in profits;

(3) special advantages for those who examine the merger's draft terms;

(4) when Article 19 Decree (regarding employee participation) applies, information on the procedures for employees;

(5) impact of the cross-border merger on employment;

(6) information on the assets and liabilities transferred to the merger-formed company;

(7) dates of the merging companies' accounts used to create the conditions of the cross-border merger;

(8) any other information required by the law governing companies involved in the cross-border merger; and

(9) the date the cross-border merger becomes effective or the criteria used to set it.

Most of the information required under Article 5 CBMD was already transposed by the civil code in the case of national and cross-border mergers. The Decree introduced into the national law the other information required by the CBMD that were still not transposed.

After the enactment of the Decree, the set of information to be provided by the CDTMs is substantially the same in the EU and in the Italian law. The national law added:

(1) the indication of the law governing each involved company and the resulting company;

(2) the indication of the date of effectiveness of the merger, or the criteria to identify this date; and

(3) any other information required by the statute.

Moreover, the following Article 2501-*quater* c.c. requires an updated financial report redacted in compliance with the accounting norms. There are different options in order to satisfy this requirement:

(1) a financial report referring to the updated situation (not older than 120 days before the filing of the CTDMs);

(2) the annual balance, when this has been drafted within six months from the filing of the CTDMs; and

(3) a financial report issued to the market when the company is listed on the stock exchange. The report should not be older than six months, before the filing of the CTDMs.

Finally, when the merger is pursued through a leverage buyout operation, there must be a special report attached to the CTDMs that describes the source of the money used for the merger and the way the resulting company is planning to fulfill its obligations.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

The obligation of publishing the CDTMs was established long ago, and the national law had already been modified accordingly.

Articles 2501-*ter*(3) and (4)c. c require that the CTDMs shall be filed and enrolled at the Register of the Enterprise held by the Chamber of Commerce where the involved Italian company is registered.

Between the CDTMs filing in the Register and the date on which the general assembly of shareholders is called for the decision concerning the merger, at least one month must lapse. The terms can be shorter only when the unanimity of shareholders renounces to the term; since the term is fixed in the interest of the shareholders, only the shareholders have the faculty to waive it. In accordance with Article 2505-*quarter* c.c., the above term may be reduced to 15 days in case of merger involving companies having the form of *società a responsabilità limitata* (i.e., limited liability companies).

Article 7 Decree restates the duty of publication on the Register of Enterprises and provides the additional duty of publication in the national official gazette. The same 30-day term applies also with reference to the official gazette publication, although the CBMD did not fix any timeframe in this respect.

A slight difference may be represented by the interpretation of the term "one month," considering that under the Italian civil law, the term "month" corresponds to the calendar month. The Decree fixes a general rule for this term in 30 days.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6 (1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The Italian Republic has transposed Directive 2009/109/EC with the *Legge 15 dicembre 2011, n. 217, Legge Comunitaria 2010*; Article 6(1) delegated the government to modify the civil code accordingly. The government adopted the *Decreto Legislativo 22 giugno 2012, n. 123*, which introduced many novelties.

Regarding to the publication issue, the Decree 123/2012 authorizes the publication of the CDTMs in the corporate websites of the involved companies as a valid alternative to the filing in the Register of Enterprise (amendment of Article 2501-*ter* c.c).

Moreover, the companies are exempted from publishing their accounts when they are listed on the stock exchange and when they publish their financial report every semester.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 7 Decree regulates the publicity of the CDTMs in the official gazette, and the other procedures set by Article 2501-*ter* c.c. regard the deposit of the CDTMs on the Register of the Chamber of Commerce or online.

The following information must be published on the National Official Gazette:

(1) the type, name and registered office of every merging company;

(2) the register in which the company is filed and the number of the entry in that register;

(3) information concerning the rights of the minority shareholders and creditors and the modalities through which this information can be obtained free of charge by the interested parties from the involved companies.

The Decree also requires the specification of the law regulating each of the involved companies.

The publication in the official gazette must be completed at least 30 days before the general meeting of the shareholders. Different from the term provided for the filing in the Register, this term cannot be waived as it is not set only in the interest of the shareholders, but also in the interest of the stakeholders.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 2501-*quinques* c.c. already set the obligation of drafting and submitting the management report. Article 8 Decree provides additional information to be reported by the management report. The two provisions must be coordinated.

Article 2051-*quinques* c.c. provides that the administrative boards of the involved companies must submit a report clarifying the juridical and economic rationale underlying the merger project. A specific point that needs to be addressed is the ratio

of the shares exchange: in particular the criteria adopted to calculate the ratio must be explained. The possible difficulties in evaluating the ratio must be signaled.
Article 8 Decree saves the provision of the civil code and transposes the additional duties of disclosure concerning the effects on shareholders, creditors, and employees.
The draft report must be made known to the representatives of the employees or left at their disposal so that they can submit their remarks. If their written opinions are submitted in time, the report will be submitted to the general assembly together with the employees' remarks. The decree makes reference to Article 47 *Legge 29 dicembre 1990, n. 428*, regulating the transfer of the firm and the informational duties to the employees.
The management report has to be made available to the shareholders at the registered office of the involved Italian company 30 days before the date of the meeting of the general assembly of the shareholders.
Regarding making the management report also available to creditors or other stakeholders, the Decree faithfully transposes the content of the CMBD. The civil code had already been rather exigent, focusing on the importance of the shares exchange ratio and the necessity to explain its determination in a stricter manner than that provided by the CBMD. The Decree maintains this provision.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 2501-*sexies* c.c. already set the obligation of drafting and submitting the independent expert report. Article 9 Decree provides additional information to be reported. The two provisions must be coordinated.
Article 2501-*sexies* c.c. is the result of the reform enacted by the *Decreto Legislativo 17 gennaio 2003, n. 6*, and describes the minimum content of the independent report, the powers, rights, and duties of the independent experts and their qualifications.
However, no specific time schedules are set by the civil code, or by Article 8 Decree.
In any case, the report must address the following questions:
(1) the correctness of the shares or equity exchange ratio;
(2) the different criteria utilized to calculate the exchange ratio and the results determined by the adoption of each one of them;
(3) the possible difficulties implied by the choice of one method over the other must be signaled and explained; and
(4) the adequacy of the methodology followed in the determining the exchange ratio.

The transposition has been almost identical, including the particulars required under Article 10(2) Council Directive 78/855/EEC (now Directive 2011/35/EU).

b. The independent expert

The definition of the independent expert is fixed by Article 2409-*bis*(1)c.c., to which both Article 2501-*sexies* c.c. and Article 8 Decree make reference.

Article 2409-*bis*(1)c.c. requires for each company the certified auditing of accounts. The auditing is pursued by an auditor intended either as a natural person or legal person, enrolled in a specific register.

The companies without consolidated accounts, therefore without a certified external auditor, can provide the expert report redacted by the statutory auditor (Article 2409-*bis* c.c.).

However, if the company is public and it is listed in regulated markets, the expert must belong to an auditing firm registered in the Public Auditors Register and supervised by the CONSOB (Article 2501-*sexies*(3)).

When the resulting company is an S.p.A. or an S.A.A. (or the equivalent company in the foreign legal order), the independent expert is appointed by the tribunal having the territorial competence over the place of incorporation of the involved Italian company (Article 9c.2, D. Lgs. 108/2008). It does not make a difference whether the Italian company is the bidder or the target; the distinguishing point seems to be the company's type.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Under Article 2501-*sexies*(4), the two or more entities involved in the merger can apply jointly to the tribunal to issue a single report instead of two or more separate reports. The competent tribunal is the tribunal of the place of incorporation of the involved Italian company, or of the place of incorporation of the future new company (Article 9(3) Decree).

Clearly, in pursuing this task, the auditor should apply the law governing all of the companies involved.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

These provisions are substantially transposed by Article 2501-*sexies* c.c.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 2501-*sexies*(5)c.c. entitles the experts to secure all the information they might deem necessary from each of the merging companies. Moreover, they can pursue any verification they might consider necessary.

The Decree does not specify anything about the experts' powers of inspection. The law also does not fix any specific consequences for involved companies if they do not provide sufficient cooperation.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

The shareholders may waive the right to obtain an independent expert report, but the waiver is conditional upon the fact that the unanimity of the shareholders of the other involved companies decide in the same way (Article 9(4) Decree). A similar provision is set under Article 2505-*quater* c.c.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

In the case of a wholly owned subsidiary, Article 2505(1)c.c. makes an exception to the rule of the independent expert report. In fact, the main purpose of the expert report is the correct assessment of the share exchange ratio, but in this case the underlying objective would be lacking.

In the case of a company holding 90 percent or more of its subsidiary shares, the independent expert report is not necessary if the minority shareholders can sell their shares to the incorporating company at a determinable price. This price is determined according to the withdrawal discipline (*Recesso*, Article 2505-*bis*(1)).

Article 18 Decree, dealing with the simplified procedures, saves both provisions.

h. Further exemptions in Italian law

There are no further exemptions in Italian law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Under Article 2502c.c., the limited liability companies can approve the CDTMs through an amendment of their statute. This procedure requires the general meeting of the shareholders, with the presence of a notary to draft the minutes of the meetings that will be registered within 30 days at the Register of the Enterprises.

In the case of simplified mergers, the boarders of administrators can approve the project of merger.

a. Procedural requirements including majority, quorum, timing and notarization

The general meeting of the shareholders cannot be called before the terms assigned (30 days) after the filing and deposit of the relevant documents has lapsed, unless the shareholders have waived this term.

At the general meeting, the shareholders will discuss a substantial amendment of the statute; therefore the constitutive quorum and the majority required should be those provided for amending the corporate statute. In this regard, the quantities can vary according to the situations of each company:

(1) the statute may have fixed specific thresholds, different from those set by the default rules provided for by the civil code;

(2) companies listed on the stock exchange: at the first call of the meeting the constitutive quorum must be at least 50 percent of the company's shares capital, whereas the majority is fixed at two-thirds of the represented capital. From the second meeting on, the quorum must represent at least one-third of the company's shares capital and the majority is still two-thirds of the intervened capital; and

(3) the companies not listed on the stock exchange and not providing their own self-regulation are subject to the default rule, i.e., the merger is approved with 50 percent of the shares capital.

When there are shares with different rights, the assembly of each class of shareholders must express its consent with two-thirds of the votes when their rights might be affected.

The approval of the merger is expressed by approving the CDTMs.

The activities of the assembly must be notarized. Moreover, Article 12(1) Decree requires the merger deed to be drafted in the form of a public deed, similar to what is provided by Article 2504c.c. for the domestic mergers, when the resulting company is Italian.

However, the Decree applies this provision also when the resulting company is not Italian; the notarization in a public deed seems to be essential for the efficacy in the Italian legal order:

(1) when the resulting foreign company is incorporated in a legal system where a similar provision is enforced, the notarization is performed by the foreign notary and his deed registered at the Italian Register of Enterprises for the required publicity;

(2) when the resulting foreign company is incorporated in a legal system where a similar provision is not enforced, the notarization will be performed by the Italian notary in order to be registered at the Italian Register of Enterprises.

b. Amendment of CDTMs by shareholders

As previously discussed, the merger approval passes through the CDTMs' approval. However, Article 13 Decree makes reference to Article 2502(2)c.c, making it possible to amend the CDTMs given that all the involved companies approve the same amendments and that the rights of shareholders or other third-parties are not affected.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

The general meeting of the shareholders of the acquiring company can be waived only in the case of simplified mergers (wholly owned subsidiary or subsidiary owned at 90 percent). In those cases, the conditions provided by Article 8 Directive 2011/35/EU can apply, and they have been transposed in Articles 2505c.c. and 2505-*bis* c.c.

Therefore, when the circumstances set by the law are verified and the company's statutes permits it, the merger can be approved by the management organ, saved the faculty of the shareholders to call for the general meeting of the shareholders. The request of calling the general meeting must be presented by 5 percent of the shareholders at least.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 2505c.c., concerning the wholly owned subsidiaries, and Article 2505-*bis* c.c., concerning the 90 percent-owned subsidiaries, admit the exception given that the company's statute provides this option: the managements can approve the CDTMs.

However, Article 18(2) Decree makes clear that the simplified procedure can be applied to an Italian subsidiary target in any case, regardless of the statutory provision.

Article 18 Decree clarifies that when the Italian company is the merging target, there is no need of general shareholder agreement. When the Italian company is the bidder, Article 2505(2)e(3) should be applied.

According to Article 2505(2)c.c., when the company statute admits the simplified procedure, the decision must be taken by the board of administrators through a registered deliberation. This option is available when the CDTMs' provisions have been adopted by each involved company and all the relevant documents have been deposited for at least 30 days before the deliberation in the incorporating company.

e. Other exemptions for shareholder approval under Italian law

The shareholder approval can be bypassed also in the hypothesis of a not wholly owned subsidiary, when it is owned at 90 percent (Article 2505-*bis* c.c.), given the dissenting shareholders the right to withdrawal.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

The articles have been transposed through Article 11 of the Decree, as this documentary burden was new, compared with the domestic merger discipline.

b. National authority has been designated to scrutinize the legality of the merger

Article 11 Decree designates the notary as the competent authority to issue the pre-merger certificate. The notary must attest that the formalities have been respected, in particular:

(1) that the general assembly's deliberation has been filed in the Register of Enterprises;

(2) that the decision has become effective, i.e., the term assigned to the creditors to oppose the merger has lapsed or the conditions that make possible the merger even before the lapse of this term are effective, or, in case of creditors' opposition, the tribunal has given a decision in accordance with Article 2445(4)c.c.;

(3) that, in the case the approval was conditional upon the approval of the employee participation modalities, these have been approved;

(4) that the general assembly has approved the possibility for the foreign-involved companies to amend and scrutinize the shares exchange ratio;

(5) that there are no other circumstances that might prevent the effectiveness of the cross-border merger.

The control of the notary is based on the formal documents.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Italy has transposed this rule with no substantial divergences. Under Article 16 (3) Decree, when all the companies taking part in the merger have authorized the scrutinizing procedure, the Italian resulting company is bound to that decision.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

The notary has been appointed as the competent authority to scrutinize the cross-border merger completion when the resulting company is incorporated in Italy (Article 13(1) Decree). When the resulting company is incorporated elsewhere, it will be the authority designated by the state of incorporation (Article 13(2) Decree). Again, this documentary burden was not envisaged under the domestic merger discipline.

b. The national authority has been designated to scrutinize the legality of the merger

The notary (Article 13(1) Decree) performs a check based on the documents submitted. Article 13 Decree lists the formalities that need to be controlled by the notary:

(1) all the involved companies have approved the same CTDMs;

(2) the correct fulfillment of all the applicable formalities provided for each company by their relative law and attested in the per-merger certificates;

(3) the arrangements concerning the employees' participation have been determined properly.

The pre-merger certificate has a key role and continues to be drafted by each national authority that is competent over the legality of the merger; in this way, the authority over the resulting company will not have to deal with rules with which it might be not very familiar.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 15 Decree defines the moment of the efficacy of the cross-border merger.

When the resulting company is Italian, the merger takes effect with the registration of the public deed of merger in the Register of Enterprises of the incorporation place of the resulting company (Article 15(1) Decree).

When the resulting company is incorporated in a different state, the effectiveness of the merging is defined under that national law (Article 15(3) Decree). The effectiveness of the variation within the Italian Republic is acquired when the local registrar cancels the old records after the communication by the competent registrar in the foreign state. It is saved the preliminary publicity granted by the filing in the Italian local register of the public deed of merging (Article 15(4)); therefore the competent registrars of various foreign Member States do not send the communication to the local Italian register. This aspect must be clarified with the foreign registrar and it is highly recommended to file the cancellation of the foreign register, translated into Italian, directly with an Italian notary public in order to obtain the final cancellation of the company from the Italian register.

When the merger into a resulting Italian company happens through incorporation, the date of effectiveness may be postponed (Article 15(1) Decree); the date must be fixed in the CDTMs or, at least, the criterion to determine it.

b. Date the cross-border merger takes effect

The second scrutiny of legality must be performed within 30 days from the reception of the pre-merger certificates; thereafter, the notarial statement of legality must be filed and enrolled in the Register of Enterprises within 30 days together with the pre-merger certificates and the public deed of merger.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), provides that each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

In the case of a resulting Italian company, Article 14(1) Decree provides that within 30 days, the public deed of merging must be filed in the Register of Enterprises

together with the pre-merger certificates and the notarial statement of legality of the merger.

b. Transposition of Article 13 second sentence

In the case of a resulting Italian company, the registrar informs the registrars of the incorporated companies of the new enrolment, so the other registrars can cancel the old records (Article 15(2) Decree).

When the resulting company is incorporated abroad, only the statement of legality of the merger should be filed in the Italian Register of Enterprises.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

The effects provided under Articles 14(1) and (2) CBMD are basically transposed by Article 16 Decree. In principle, the cross-border merger effects are those set by Article 2504-*bis*(1)c.c.; i.e., all the assets and liabilities of the company being acquired shall be transferred to the acquiring company, along with the rights pending before the court.

The regime of formalities is similar. In the case the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights, and obligations by the merging companies becomes effective against third-parties, the Italian resulting company carries out those formalities (Article 16(2) Decree).

As for the employment rights and obligation (Article 16(4) CBMD), these are safeguarded under Article 4(4) Decree, which recalls Article 2112c.c. and Article 47 *Legge 29/12/1990 n.428* dealing with the effect of the transfers on the employee's rights.

Article 14(5) CBMD concerning the forbidding of shares exchange has been transposed, adding the Article 2504-*ter* c.c.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: or 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The Transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 18 Decree provides that the merging via incorporation can be realized when a company detains the entirety of shares, equities, or whatever kind of titles conferring the right to vote in the assembly of the incorporated company. In this situation, Article 2505c.c. is applied and a series of formalities do not apply, in particular:

(1) Article 6(1)b Decree doesn't apply: in the CDTMs there is no need to mention the special rights of participation on the profits;

(2) Article 2501-*ter*(1)(3)c.c.: the ratio applicable to the exchange of securities or shares, representing the company capital and the amount of any cash payment;

(3) Article 2501-*ter*(1)(4)c.c.: the terms of allotment of securities or shares of the resulting company;

(4) Article 2501-*ter*(1)(5)c.c.: the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits;

(5) Article 2501-*quinques* c.c.: the management report;

(6) Article 2501-*sexies* c.c.: the independent experts report.

In this case, a decision by the assembly of the Italian incorporated company is not necessary. On the other hand, in the case of the Italian incorporating company, Articles 2505c.2 and 3 still apply.

When the incorporation is realized by a company detaining at least 90% (not the totality) of shares, equities or whatever kind of title conferring the right to vote in the company's assembly, Article 2505-*bis* c.c. excludes a series of formalities, granted the right of withdrawal to the minority shareholders.

The formalities excluded are those entailed at:

(1) Article 2501-*quater* c.c.: assets and financial report

(2) Article 2501-*quinques* c.c.: the management report;

(3) Article 2501-*sexies* c.c.: the independent experts report.

(4) Article 2501-*septies* c.c.: documents necessary for the scrutiny.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

Article 18 Decree regulates the simplified formalities of a merger involving a wholly owned subsidiary. In doing so, it makes reference to Article 2505c.c., which excludes the production of a series of documents, including the independent expert report.

Article 2505c.c. regulates the merging of wholly owned subsidiaries. In these cases, there is no application of:

(1) Article 2501-*ter*(1)(3): in the CDTMs there is no need to describe the shares exchange ratio or the eventual cash payment;

(2) Article 2501-*ter*(1)(4): in the CDTMs there is no need to describe the allotment of shares and equities of the resulting or incorporating firm;
(3) Article 2501-*ter*(1)(5): in the CDTMs there is no need to fix the date after which the shares or equities enjoy the profits;
(4) Article 2501-*quinques:* there is no need for the management report;
(5) Article 2501-*sexies:* there is no need for the independent expert report.
Article 18(1) Decree maintains this provision and, moreover, excludes the necessity to include in the CDTMs the description of any special rights of participation of the profits (provided in Article 6(1)B Decree).

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The Italian companies do not have a plain system of employee participation. Employees do not participate in the management of the company nor can they formally influence it, as they do not have the right of appointing their members to the board of administration or the power to veto the management decision.
The only right of the employees in the company reorganization consists in being informed about the strategies that the management has decided to adopt, entailing the transfer of the undertaking, restructuring, and merging.
Therefore, in the case of domestic mergers, there are no provisions bestowing any prerogative whatsoever to the employees, but only the right to be informed. The same applies to cross-border mergers involving companies incorporated in states where a similar regime is enforced.
The situation is different when one of the merging companies is incorporated where the employees can actually participate in the company's administration. In this case, Article 19 Decree transposes the protection of the CBMD.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.
The rule does not emerge directly from the article dealing with employee participation (Article 19 Decree). However, the general design of the law does not pose any doubts. On the one hand, Article 4(2) Decree makes clear that, in case of a conflict of norms,

the prevailing norms are those regulating the resulting company. On the other hand, considering that the Italian labor law does not envisage the participation of workers, Article 19 Decree plainly establishes the employee participation protection transposing a negotiation procedure in adherence to the CBMD.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16 (1) CBMD.

Article 19 Decree protects employee participation in the resulting company in compliance with the CBMD. The Italian transposition is rather plain in applying the SE discipline:

(1) if one of the merging companies has, in the six months before the publication of the CDTMs, an average number of employees that exceeds 500;

(2) and it was operating under an employee participation system.

The participation of employees in the resulting Italian company shall be regulated according to the procedure and criteria agreed upon by the parties of the national collective labor agreements applicable to the Italian resulting company.

These agreements should be arranged within 12 months from the entry into force of the Decree. Without agreement, the default rule would be provided by the discipline targeted at the SE and laid down in Articles 12(2), (3), and (4) Regulation (EC) No. 2157/2001 and the following provisions of Directive 2001/86/EC, transposed in Italy by the *Decreto legislativo 19 agosto 2005, n. 188*. So far, these agreements have not been reached.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The rule of Article 7(2), first subparagraph, point (b) Directive 2001/86/EC for the application of the standard rules, which holds that the percentages required by its wording contained in part 3 of the Annex to that Directive shall be raised from 25 to 33.333 percent, was transposed, and the percentage required has been raised to 33.333 percent under Article 19(1)e Decree.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

The article has been transposed. The parallel reading of the Directive 2001/86/CE and of the Decree is impaired by the fact that Directive has been transposed by the *Decreto legislativo 19 agosto 2005, n. 188 Attuazione della direttiva 2001/86/CE che completa lo statuto della società europea per quanto riguarda il coinvolgimento dei*

lavoratori, whose article structure is slightly different.

Nevertheless, its regulations have been transposed and they have been recalled by the Decree.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Transposition of Article 16(5) has not occurred, either in the Decree or civil code, because under national law there are no opportunities for employee participation in management.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 19(4) Decree transposes the CBMD provision. As a result, the Italian resulting company must adopt a legal form that allows employee participation rights.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

This was transposed at Article 19(5) Decree, specifying that the three years of protection applies to the future domestic mergers.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Beside the effects envisaged by Article 17 CBMD, the reference made to Article 2504-*bis* c.c. implies a series of accounting consequences. Moreover, if there were unlimited liability shareholders in one of the merged companies, the merger does not discharge them of their obligations, unless the creditors consented (Article 2504-*bis*(5)c.c.).

1.18. Additional

a. Valuation rules

The valuation of the company is a preliminary step to the merger. The management of each involved company must draft an updated financial report in compliance with the accounting norms (Article 2501-*quater* c.c.). The criteria to evaluate assets and liabilities are set by Article 2426c.c. and they are mainly based on the net book value.

There are different options in order to satisfy this requirement:

(1) a financial report referring to the updated situation (not older than 120 days before the filing of the CTDMs);

(2) the annual balance, when this has been drafted within six months from the filing of the CTDMs;

(3) a financial report issued to the market when the company is listed on the Stock exchange. The report should not be older than six months, before the filing of the CTDMs).

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

The discipline concerning the language cannot be traced back in the Decree or in the civil code's articles dealing with cross-border mergers; hence, the general discipline should find application.

According to the *Legge 16 febbraio 1913, n. 89, Ordinamento del Notariato e degli Archivi Notarili* (public notary law), all the deeds must be redacted in Italian, or with a sworn translation into Italian attached when the deed is redacted in a foreign language.

The same rationale finds application in Article 2250(5)c.c. by virtue of a recent reform enacted by the *Legge 7 luglio 2009, n. 88* concerning to the Italian Register of Enterprises. The registration of the relevant documents can be pursued also in a foreign language recognized within the EU, provided that a sworn translation in Italian is attached thereto.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The domestic merger is regulated in the civil code, Book V, Heading V, Chapter X, Section II, Merger of Companies.

The merger is allowed either through incorporation or acquisition (Article 2501(1)c.c.).

It is not allowed when the company is undergoing liquidation and has already started asset distribution (Article 2501(2)c.c.).

The leveraged buyout has a specific discipline provided for under Article 2501-*bis* c.c. In particular, the CDTMs must specify the resources destined to satisfy the obligations of the resulting company. The simplified procedures are not available in case of leveraged buyout.

The content of the CDTMs is fixed by Article 2501-*ter* c.c. The CDTMs must be filed in the Register of Enterprises in which the company is incorporated or published on the corporate website at least 30 days before the general meeting of the shareholders called to adopt or reject the merger.

The management must redact the balance sheet and make it available within the same time-frame (Article 2501-*quater* c.c.); the same applies to the management merger report (Article 2501-*quinques* c.c.). The management will take care of updating the shareholders and the other companies' management of any modification of assets and liabilities eventually intervened after the filing of the CDTMs.

Article 2501-*sexies* c.c. specifies the minimum content of the independent expert report.

The redaction of the balance sheet, management report, and independent report can be waived by the unanimity of the shareholders and the unanimity of the other categories of securities giving the right to vote.

Article 2501-*septies* c.c. summarizes the documents that must be filed at the corporate seat of the companies or published online at least one month before the general meeting of the shareholders (unless the term is waived by the shareholders):

(1) the CDTMs plus the management and independent expert reports;

(2) the balances together with the report issued by the management and the auditors during the last three years;

(3) the updated balance sheet or financial report;

The shareholders have access to these documents and can copy them, unless they are already accessible and printable from the corporate website. It should be noted that the filing of these documents is required not only in a domestic merger, but also in a cross-border merger, by virtue of the general reference to the discipline set in the civil code in compliance with Article 4(1) Decree.

The merger approval consists in the adoption of the CDTMs (Article 2502c.c.). In the case of partnerships this is represented by the majority of the members determined according to the sharing of profits; in the case of corporations this is determined following the statute's amendment procedure. The CDTMs can be modified as long as that does not infringe the rights of shareholders and third-parties.

The merger deed must be filed in the Register of Enterprises together with the documents required under Article 2501-*septies* c.c. The filing procedure is regulated under Article 2436c.c., which confers the competence to the notary.

The merger can be opposed within 60 days by the creditors (Article 2503c.c.) and by the bondholder (Article 2503-*bis* c.c.). For what concerns the opposition of creditors, we refer to the headings above. The opposition of the bondholders follows the same procedure, unless the assembly of bondholders authorized the merger (the bondholder assembly is regulated under Article 2415c.c.). The holders of convertible bonds enjoy a specific protection: at least 90 days before the filing of the CDTMs, a notice must be published in the official gazette inviting the convertible bondholders to convert their bonds into shares within 30 days. Those who did not convert their bonds must be guaranteed to enjoy the same rights as before the merger, unless the bondholders' assembly gave its consent to the merger.

The merger decision must be reported by a public deed that must be filed within 30 days by the notary or the administrators in the competent Register of Enterprises (Article 2504c.c.). The filing of the incorporating/resulting company must follow those of the incorporated/acquired companies.

Article 2504-*bis* c.c. regulates the content and the timing of the merger effects.

Article 2504-*ter* c.c. forbids the issuance of new shares and their exchange.

Article 2504-*quater* regulates the invalidity of the merger: this cannot be opposed after the completion of the procedure set under Article 2504c.c. In that case, the only available option would be the compensation of the aggrieved parties, either shareholder or third-parties.

Articles 2505c.c and 2505-*bis* c.c. regulate, respectively, the merger of wholly owned subsidiaries and of companies owned at 90%.

All the filing in the Register of Enterprises produces the effects envisaged in Article 2448c.c.; i.e., the publicity is complete and they cannot be opposed by third-parties.

Article 2505-*ter* c.c. makes some distinctions with reference to mergers involving the companies whose corporate capital is not represented by shares.

b. Comparison

There are no major differences between the procedural steps provided for domestic and cross-border mergers. The domestic discipline requires the disclosure of more information in the preliminary phase, but these must be applied also to the cross-border mergers for what concerns the involved Italian company.

On the other hand, the cross-border merger discipline entails some peculiar documentary burdens, such as the pre-merger certificate and the final statement of legality.

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1. Transposition of the Cross-Border Mergers Directive into Latvian Law

The CBMD was transposed in Latvia in 2008. On April 9, 2008, the Law on the Register of Enterprises of the Republic of Latvia was amended, and on May 28, 2008, the legal framework enabling cross-border mergers between companies within the European Economic Area (EEA) was added to the Commercial Law. The Commercial Law, precisely Chapter XIX, was introduced by the amendments to the Commercial Law of April 24, 2008 that came into force on May 28, 2008, to provide a legal facility for cross-border mergers: "Special Provisions Related to Cross-Border Mergers."[1]

The bill is not due to be replaced, modified, or amended. No reforms with respect to cross-border merger laws were performed after the transposition of the CBMD. Prior to the publication of the CBMD, domestic legislation did not refer to cross-border mergers.[2]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

According to paragraph 1 of Article 335[1] of the Commercial Law, a cross-border merger is a merger of two or more capital companies, of which at least one is registered in Latvia and the others established according to the regulatory enactments of the European Union Member States. Paragraph 2 of Article 335 of the Commercial Law and Article 4 of the Law on the Register of Enterprises further specifies that the term Member States covers all the member states of the EU and also Iceland, Norway and Lichtenstein.

The amended Law on the Register of Enterprises allowed for the Register of Enterprises to register a cross-border merger when the acquiring company (in some cases a company formed as a result of the merger) is registered in Latvia, or, "if the acquiring company is registered in another member state, to carry out a legality check of the merger and to issue a pre-merger certificate" (Article 4(3) of the Law on the Register of Enterprises of the Republic of Latvia). Amendments to the Commercial Law established the procedural framework.[3]

Latvian national law does not allow for cross-border mergers outside the scope of the

[1] D. Silava-Tomsone, I. Mikelsone and J. Spigule, 'Latvia', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 63.
[2] D. Silava-Tomsone, I. Mikelsone and J. Spigule, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 63-64.
[3] Ibid.

Directive.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'. Latvian national law contains a similar definition of the term "limited liability companies" as provided in the CBMD in Article 134 of the Commercial Law.[4]

b. List of companies that can carry out a cross-border merger under Latvian law

Under Latvian law, the companies that can take part in cross-border merger are the following: private limited liability companies (SIA) and public limited liability companies (AS), according to paragraph 2 of Article 134 of the Commercial Law and paragraph 1 of Article 335[1] of the Commercial Law. The Financial and Capital Market Commission may need to approve mergers with investment management companies, credit institutions, or insurance companies.[5]

The scope of the CBMD and the provisions of the Commercial Law regulating cross-border mergers are, thus, narrower than the scope for the entities that may participate in a domestic merger. In addition to the private and public limited liability companies, also partnerships may participate in a domestic merger.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term "merger" which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Latvian national law contains the same definition of "merger" as found in the CBMD in Article 335 of the Commercial Law.[6] Merging of companies may take the form of acquisition or consolidation. Acquisition is a process in which a company (the acquired company) transfers all of its property to another company (the acquiring company). Consolidation is a process in which two or more companies (acquired companies) transfer all of their property to a newly founded company (the acquiring company). As a result of the merger all the rights and obligations of the acquired companies are transferred to the acquiring company and the acquired company ceases to exist as a legal entity without going into liquidation.

[4] Ibid.

[5] D. Silava-Tomsone, I. Mikelsone and J. Spigule, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 64.

[6] D. Silava-Tomsone, I. Mikelsone and J. Spigule, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 66.

d. Rules on the cash payment

Regarding the CBMD's rules on the cash payment, a cash payment to the acquired company's shareholders is not limited for a merger involving an SIA (a private limited liability company). Also according to the general rule, in case the share exchange ratio has been set too low, the shareholder of the acquired company may request from the acquiring company one-off payment on top of that.

The Commercial Law provides that in case a public limited liability company is involved in the merger as absorbing company and pays a compensation to the shareholders of the absorbed company in addition to the shares offered for exchange, then such compensation may not exceed 10% of the aggregate nominal value of the shares offered for exchange (paragraph 1, Article 376 of the Commercial Law).[7] However, in case the share exchange ratio has been set too low, theoretically the shareholder of the acquired company may request from the acquiring company a one-off payment that can exceed the before mentioned limits.

e. CBMs and companies in liquidation

Regarding the CBMD's rules regarding companies in liquidation, if a company is liquidated on the basis of the provisions referred to in the statutes of the company or because of a decision taken by the general meeting of the shareholders, the shareholders before the division of the remaining property may make a decision regarding the continuation of the operations of the company or its reorganization (paragraph 1, Article 331 of the Commercial Law). Article 331 further specifies the actions to be taken in case of continuation of the activity of the company, which on the same principles may be applied also to the reorganization by merger. Thus, the general meeting of the shareholders must once again establish the Management Board and the Supervisory Board (if applicable) of the company as well as it must make corrections in the share capital of the company to reflect the actual situation of the remaining property.

f. Geographic scope

The wording of paragraph 1 and 2 of the Article 335 of the Commercial Law provides that at least one of the companies participating in the cross-border merger must be a company that is registered in Latvia. With respect to other companies involved in the cross-border merger, it is only stated that they must be established in accordance with the laws of the EEA Member States. When compared to the CBMD, which clearly defines two cumulative criterions for the geographic scope of the cross-border merger (either formation or establishment and registered office) the Commercial Law refers to

[7]Ibid., p. 65.

the establishment criterion only.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Latvian national law does not allow cross-border divisions, seat transfers, and other cross-border restructurings.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Latvian Commercial Law states that only SIA and AS type of companies (being limited liability companies with a formed share capital, also so called "capital companies") qualify for a CBM. Latvian law has therefore excluded cooperative societies (paragraph 2, Article 134 of the Commercial Law[8] and paragraph 1, Article 335[1] of the Commercial Law). In Latvia, the Co-operative Societies Law also exists, yet with no cross-border merger provisions.

b. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Latvia has transposed Article 3(3) of the CBMD in paragraph 3, Article 335[1] of the Commercial Law, which states that the merger shall not be considered as a cross-border merger if there is a capital company involved that is engaged in collective distributions of capital, risk-taking, and the buying back of shares by shareholders from the company's assets.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) has not been transposed in Latvian national law. However, the principle stated in Article 4(1)(a) is implied in the provisions of the Commercial Law defining what type of companies may participate in the reorganization and thus also in the cross-border merger. Yet, special provisions of the Commercial Law for the cross-

[8] Ibid., p. 64.

border merger narrow down the list of the companies that may participate in the merger to private and public limited liability companies only. In domestic mergers, partnerships may also participate in a merger.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have also provided so for domestic mergers.

Article 4(1)(b) has not been transposed into Latvian national law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member States with the option of adopting protections for creditors, debenture and security holders.

Article 345 of the Commercial Law that introduces the creditor protection regime is applicable both to the domestic mergers and cross-border mergers. The creditor protection regime existed already before the transposition of the CBMD into the Latvian Commercial Law. Starting point for the creditor protection regime is the decision on approval of the merger. The acquiring or acquired company, depending on which company is registered in Latvia and thus subject to this procedure, must notify in writing all of its known creditors and therefore had claiming rights against the company as of the merger decision day. The Commercial Law sets the time for sending out the notifications to the creditors at 15 days as of the merger decision. In addition, a notification to the creditors on the merger decision must be published in the national publication Latvijas Vēstnesis. (Article 345(2)(5) of the Commercial Law).

The procedural steps begin within 15 days from the day when a decision is taken regarding reorganization of a company. Each of the companies involved in the reorganization process shall inform in writing all of its known creditors who have had claim rights against the company up to the taking of the decision regarding reorganization (paragraph 1, Article 345 of the Commercial Law). Each of the companies involved in the reorganization process has a duty to publish in the national publication *Latvijas Vēstnesis* a notice that a decision on reorganization has been taken. This national publication exists in electronic form only. The notice shall indicate the place and time period for creditors to submit their claims, which may not be less than one month from the day when the notice is published (Article 345(2)(5) of the Commercial Law).

The acquired company must secure the creditor claim provided that the creditor asks for security and has filed its claim to the acquired company within one month of the day the notice in the national publication *Latvijas Vēstnesis* is made. The creditors of the acquiring company may ask for security only in case they prove that the merger

may jeopardize the satisfaction of their claim.

A secured creditor may ask for security only up to the amount of the unsecure part of the claim.

The Commercial Law does not specify what can serve as the security to the creditors. It is left to the agreement between the companies involved in the merger and their creditors.

This option also exists for domestic mergers (Article 335(4)).

Creditors do not have the possibility to block the merger.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member States with the option of adopting protections for minority shareholders.

Latvian law has set rules regarding minority shareholder protection specifically for cross-border mergers in Article 353 of the Commercial Law.[9]

The procedure starts when shareholders of the acquired company who do not agree with the cross-border merger are entitled, within two months of the time when the merger comes into effect, to request the acquiring company to redeem their shares for money (compensation) (paragraph 1, Article 353 of the Commercial Law).[10] The time limits for the procedure are two months from the time when the merger comes into effect, which is the date of registration of the CBM at the Commercial Register (paragraph 1, Article 353 of the Commercial Law).[11]

The procedural steps are when shareholders of the acquired company do not agree to the cross-border merger, they are entitled, within two months of the time when the merger comes into effect, to request the acquiring company to redeem their shares for money (compensation). In order to exercise these rights the shareholder must be entered in the list of shareholders who have participated at the general meeting of shareholders adopting the merger decision and voting against the merger. Respective shareholder voting against the merger decision must also sign this list.

The amount of compensation shall be equal to the amount which the shareholder would have acquired by dividing the property of the acquired company in the case of liquidation if it took place at the time when the decision on the cross-border merger was taken.

From the effective date of the merger, the acquiring company shall pay the interest set by law on any compensation not paid out in the amount provided for and within the time period.

[9] Ibid., p. 72.
[10] Ibid.
[11] Ibid.

If shareholders of the acquired company who do not agree with the merger do not request compensation, they may alienate their shares within a period of two months, irrespective of any restrictions provided for in the decision, the articles of association, or the law (Article 353 (7) of the Commercial Law.[12]

This option also exists for domestic mergers (Article 335(1)(4) of the Commercial Law).

e. The protection of employees in Article 4(2)

Latvia has decided to transpose employee protection rules into the Latvian Labour Law. During a cross-border merger, the acquired company's system of employment relationship shall pass over to the acquiring company, as well as the employees (paragraph 1, Article 118 of the Labour Law).

A merger itself cannot be the reason for the termination of an employment contract. However, the employer may terminate an employment contract because of economic, organizational, technological, or similar reasons in the undertaking of the merger (paragraph 5, Article 118 of the Labour Law).

A one month term is applied to the merger registration date, i.e. the date when the merger becomes effective. Thus, one month before the merger registration date (or a planned merger registration date) the employees must be informed in writing on the planned merger and how the merger will impact working conditions and employment (paragraph 2, Article 120 of the Labour Law).

According to the Labour Law (paragraph 1, Article 120), both the acquiring company and the acquired company must inform its employees on the transfer of the employees. Besides, paragraph 2 of Article 120 explicitly requires the transferor of the undertaking to inform the employees of the acquired company at least one month before the transfer date (or planned transfer date).

Both the acquired and the acquiring company must provide employees with (1) the merger's date; (2) the reasons behind the process; (3) the merger's legal, economic and social ramifications; and (4) what will happen to employees (paragraphs 1 and 2, Article 120 of the Labour Law). This information can be provided through a notice letter or a meeting with employees about the merger.

The acquired company shall inform the acquiring company of all rights and obligations being passed to it; failure do so does not affect the transfer (paragraph 3, Article 118 of the Labour Law).

[12] Ibid.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called "CDTMs." These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

The Commercial Law refers to the merger agreement to be concluded between the merging companies (Article 338 of the Commercial Law). In addition to this, the Commercial Law provides for the information that must be provided in case of the cross-border merger (Article 380 of the Commercial Law). The merger agreement is concluded in writing. In essence the information to be included in the merger agreement corresponds to the information to be covered by the CDTMs when the cross-border merger is implemented with few exceptions that have not been clearly transposed in Latvian national law:

- Article 5(d) of the CBMD requires the indication of the repercussions of the cross-border merger on employment, while the Latvian Commercial Law requires disclosure of the consequences of the merger with respect to the employees of the acquired company only, thus being narrower in scope than the respective provision of the CBMD.
- Article 5(h) of the CBMD covers experts who examine the CDTMs, members of the administrative, management, supervisory or controlling organs of the merging companies while the respective provision of the Latvian Commercial Law covers only management and supervisory board members and a controller of the acquired company.

In addition, the Latvian Commercial Law requires indicating the activities to be conducted during the merger (reorganization) and the time frame for conducting them (point 9 of paragraph 2 of Article 335 of the Commercial Law).

Requirement to provide the statutes of the acquiring company has not been transposed into Latvian national law.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month

prior to the general meeting deciding on the merger.

Article 6(1) of the CBMD has been transposed in Article 343(3) of the Commercial Law.[13]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed in Article 343(1) of the Commercial Law, which refers to the decision approving the merger by the general meeting of shareholders. The general meeting of shareholders takes place not earlier than one month after official publication on the commencement of the merger has been made. Article 343(3) lists the documents that must be made available to the shareholders at the registered address of the company at least one month before the general meeting. Lastly, Article 343(1) introduces the exemption from the requirement of the Article 343(3) provided that the company makes the copies of the documents available at its internet web page at least one month before the general meeting.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) of CBMD has been transposed into Latvian national law; paragraph 5 of Article 338 of the Commercial Law states that each of the companies involved in the reorganization process shall submit a notice of reorganization, with the draft agreement appended, to the Commercial Register Office. The date of registration of a draft agreement and its amendments and the number of the Commercial Register file in which the draft agreement is located shall be published in the national publication *Latvijas Vēstnesis*.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

[13] The Latvian Commercial Law, p. 100.

Article 7 of the CBMD has been transposed in Latvian national law in paragraph 1, Article 339 of the Commercial Law requiring the merging companies to prepare a so called "merger prospectus", and in Article 381 of the Commercial Law.[14] These articles do not provide further amendments or diverging rules.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) of the CBMD has in essence been transposed into Latvian national law in Article 340 of the Commercial Law. According to paragraph 1 of Article 340 of the Commercial Law, the draft agreement of companies involved in the reorganization process is examined by a sworn auditor, who may serve as an independent expert.

Paragraph 3 of Article 340 of the Commercial Law states the reorganization agreement is not reviewed by the auditor, if all shareholders or members agree. The auditor need not examine the draft agreement of the acquired or dividing company if all the capital shares (stocks) of the acquired or dividing company are owned by the acquiring company.

b. The independent expert

According to paragraph 1 of Article 340 of the Commercial Law, a sworn auditor may serve as the independent expert.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 340(1) of the Commercial Law allows electing a joint auditor for examination of the merger agreement with respect to all companies involved in the merger. The only difference is that the Latvian Commercial law provides that the auditor is elected by the general meeting of shareholders, while the CBMD refers to the independent expert appointed by a judicial or administrative authority at the joint request of the companies. Thus, Article 8(2) CBMD has not been transposed into Latvian law.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council

[14] D. Silava-Tomsone, I. Mikelsone and J. Spigule, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 68-69.

Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

The particulars contained in Article 10(2) of the Council Directive 78/855/EEC (now Directive 2011/35/EU) are transposed into Latvian national law in Article 341(2) of the Commercial Law.[15] Paragraph 2 states the following shall be indicated in the opinion:

(1) whether all the necessary documents were submitted to the auditor;

(2) whether the capital shares (stocks) exchange coefficient and the amount of premium are fair and justified;

(3) whether the reorganization may cause losses to the creditors of the company;

(4) whether the methods used to determine the capital shares (stocks) exchange coefficient and the amount of premium are adequate; and

(5) special problems that have arisen in the application of the valuation methods used.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) of the CBMD has been transposed into Latvian law.[16] Access to the information is addressed in Article 340(4) of the Commercial Law, stipulating that the companies participating at the merger shall ensure that the auditor has access to all the documents and information that are of importance with respect to performing the duties (of the auditor).

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) of the CBMD has been transposed into Latvian national law[17]; paragraph 3 of the Article 340 of the Commercial Law states that the reorganization agreement will not be reviewed by the auditor if all shareholders or members agree. The auditor does not need to examine the draft agreement of the acquired or dividing company if all the capital shares (stocks) of the acquired or dividing company are owned by the acquiring company.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2)

[15] Ibid., p. 69.
[16] Ibid.
[17] Ibid.

CBMD).

The further exemptions to provide the expert report in Articles 15(1) and (2) of the CBMD are transposed in paragraph 3 of Article 340 of the Commercial Law. Only if the acquiring company owns all shares of the acquired company, then the auditor is not required to inspect the draft cross-border merger agreement; however, the 90% is not applicable in Latvia.[18]

h. Further exemptions in Latvian law

There are no further exemptions in Latvian national law.[19]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed in Latvian law in paragraph 1 of Article 343 of the Commercial Law, unless it is a merger of a subsidiary into a parent company under Article 385 of the Commercial Law.[20] This exception is applicable in case the acquired company is registered in Latvia. Notwithstanding this exemption, an acquired company registered in Latvia will still have to prepare "a merger decision formed as a separate document" to meet the requirement of Article 347(2) that requires filing to the Commercial Register both the minutes of the general meeting of shareholders approving a merger and a merger decision, which has to be submitted as a separate document.

a. Procedural requirements including majority, quorum, timing and notarization

Regarding procedural requirements, in the case of private limited liability companies (SIA), at least two-thirds of the votes of the present shareholders should be cast in favor of the decision approving the merger (paragraph 1, Article 218 of the Commercial Law). However, in the case of public liability companies (AS), the number of votes in favor of the merger should be three-quarters (paragraph 2, Article 284 of the Commercial Law). If the articles of association provide for a higher rate of votes, then this rate should be applied instead (paragraph 1, Article 218 of the Commercial Law with respect to SIA and paragraph 2, Article 284 of the Commercial Law with respect to AS).[21]

[18] Ibid.
[19] Ibid., p. 69-70.
[20] Ibid., p. 66.
[21] Ibid., p. 70.

b. Amendment of CDTMs by shareholders

Shareholders can only accept or reject the CDTMs; they have no right to amend it (paragraph 1, Article 218 of the Commercial Law, and paragraph 2, Article 284 of the Commercial Law).[22]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

The exemption for approval under Article 8 of Directive 2011/35/EU has not been transposed in Latvian national law. Special provisions were introduced in the Commercial Law in 2011 by Articles 354(1)-(3) in relation to mergers by acquisition in case the acquiring company owns more than 90% of the shares in the acquired company. Special provisions allow the Management Board of the acquiring company to adopt the merger decision, instead of the general meeting of shareholders, provided that certain conditions have been met. These special provisions are applicable to both private and public limited liability companies.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

The exemption to shareholder approval under Article 15(1) of the CBMD has not been transposed in Latvian national law. According to Article 385 of the Commercial Law, an exemption is applicable in case the acquired company is registered in Latvia. Notwithstanding this exemption, an acquired company registered in Latvia will still have to prepare "a merger decision formed as a separate document" to meet the requirement of Article 347(2) that both the minutes of the general meeting of shareholders approving a merger, which can be opted out following Article 385, and a merger decision formed as a separate document, be filed with the Commercial Register.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in paragraph 1 of Article 383 of the

[22] Ibid.

Commercial Law.[23]

b. National authority has been designated to scrutinize the legality of the merger

The Register of Enterprises, pursuant to Article 383(1) of the Commercial Law and Article 2(7) as well as 4(3) of the Law on the Enterprise Register of the Republic of Latvia, will scrutinize the legality of the merger.[24] The authority performs a formal check.[25]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility of scrutinizing and amending the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Regarding Article 10(3) of the CBMD, Article 382 of the Commercial Law states:

(1) if the regulatory enactments regulating the activity of a capital company registered in another Member State and involved in a cross-border merger do not provide for a procedure for the determination of a compensation for minority shareholders (stockholders), without preventing the registration of the cross-border merger, the acquired capital company registered in Latvia may apply such procedure, if the shareholders (stockholders) of a capital company registered in another Member State and involved in a cross-border merger decide to allow the application of the referred to proceed.

(2) if the regulatory enactments regulating the activity of the acquired capital company registered in another Member State do provide for a procedure for scrutinizing and amending the ratio applicable to the exchange of securities or shares (stocks), without preventing the registration of the cross-border merger, the acquired capital company registered in Latvia may allow the application of such procedure, if the meeting of shareholders (stockholders), which approves the reorganization agreement, takes a decision by unanimous vote. The decision taken in the referred to procedure shall be binding to the acquired capital company registered in Latvia and the shareholders (stockholders) thereof.

[23] Ibid.
[24] Ibid.
[25] Ibid.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed under Article 343 of the Commercial law.

b. The national authority has been designated to scrutinize the legality of the merger

The Register of Enterprises, pursuant to Article 347 of the Commercial Law and Article 2(7) as well as Article 4(3) of the Law on the Enterprise Register of the Republic of Latvia, will scrutinize the legality of the merger.[26] The authority performs a formal check.[27]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed into Latvian national law.[28] Article 387 of the Commercial Law states that if the acquiring company is registered or is being registered in Latvia, the cross-border merger shall be considered as effective when a record regarding the acquiring company has been made in the Commercial Register.

b. Date the cross-border merger takes effect

If the acquiring company is registered in Latvia, the cross-border merger is effective when it is registered with the Commercial Register and an announcement is made in the official gazette, the *Latvijas Vēstnesis* (*Latvian Herald*), by the Register of Enterprises after the registration of the merger at the Commercial Register (Articles 349(5) and 387 of the Commercial Law). In essence the merger is effective as of the registration at the Commercial Register.

The Latvian company observes all requirements in the Commercial Law regarding decision-making and protecting creditors, shareholders, and employees of the company. If the acquiring company's Member State does not have protections similar to Article 382 of the Commercial Law regarding minority shareholders, the Latvian company may apply its own protections if shareholders of the acquiring company agree.

Article 386 states that in case the acquired company is registered in Latvia, the entry

[26] Ibid.
[27] Ibid.

in the Commercial Register on the acquired company will be made only after receipt of information on the respective entry in the other country's Commercial Register. [29]

Yet, in practice, it works in a way that when the acquiring company is registered in the other country, the acquired company files an application to the Latvian Commercial Register with the request to exclude it from the Commercial Register due to the completion of the cross-border merger. An extract regarding merger registration issued by the other country's Commercial Register is then appended to the acquired company's application.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

National law has transposed the first sentence of Article 13.[30]

b. Transposition of Article 13 second sentence

Also, Article 13 second sentence ("the registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file the documents that the cross-border merger has taken effect") is transposed in the Law on the Enterprise Register of the Republic of Latvia in Article 4(3).

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 of the CBMD has been fully transposed in Latvian national law.

According to paragraph 5 of Article 335 of the Commercial Law, in the case of merging, all the rights and obligations of the acquired companies are transferred to the acquiring company.

According to paragraph 6 of Article 335 of the Commercial Law, in the case of merging, the stockholders, shareholders or members of the acquired companies shall become shareholders of the acquiring company.

According to paragraph 4 of Article 335 of the Commercial Law, in the case of

[28] Ibid., p. 66.
[29] Ibid., p. 67.

merging, the acquired company ceases to exist without liquidation procedures.

Paragraph 5 of Article 14 of the CBMD has been transposed only with respect to the private limited liability companies. In connection to limited liabilities, Article 371 of the Commercial Law states that the acquiring company shall transfer in exchange, to the shareholders of the acquired or dividing company, firstly, the shares owned by the company itself.

The shares of the acquired or dividing company shall not be exchanged for the shares of the acquiring company if:

(1) the shares of the acquired or dividing company are owned by the acquiring company or by a third person who acts in his or her own name but on behalf of the acquiring company; or

(2) the shares of the acquired or dividing company are held by the acquired or dividing company itself or by a third person who acts in his or her own name but on behalf of the acquired or dividing company.

In connection with stock companies, Article 375 of the Commercial Law only states that the acquiring company shall transfer in exchange, to the stockholders of the acquired or dividing company, firstly, the stock belonging to the company itself.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

Article 15(1) of the CBMD has been transposed into Latvian national law in the following ways:

Article 5(b) is transposed in paragraph 3 of Article 338 of the Commercial law. Article 5(c) is transposed in paragraph 3 of Article 338 of the Commercial law. Article 5(e) is transposed in paragraph 3 of the Article 338 of the Commercial law.

Article 8 has been transposed in paragraph 3 of Article 340 of the Commercial Law, which states the auditor need not examine the draft agreement of the acquired or dividing company if all the capital shares (stocks) of the acquired or dividing company

[30] Ibid.

are owned by the acquiring company.

Article 9 has been transposed in Article 385 of the Commercial Law, which states if the cross-border merger is carried out within the framework of acquisition process and this merger is carried out by a capital company, which owns all capital shares (stocks) of the acquired capital company, the provisions of Article 343, paragraph 1 of this law shall not be applied to the acquired company registered in Latvia.

Paragraph 1 of Article 343 of the Commercial Law states that a meeting of shareholders of each of the companies involved in the reorganization process shall examine the draft agreement and take a decision regarding reorganization.

Article 14(1)(b) is transposed in paragraph 6 of Article 335 of the Commercial Law.

Article 15(1) further provides that in a merger with a wholly owned subsidiary the independent expert report and "documents necessary for scrutiny" shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

These further provisions of Article 15(1) of the CBMD have been transposed into Latvian national law without any further or diverging rules.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Regarding employee participation in Latvia, in 2010 Latvia has adopted the Law on the Involvement of Employees in Decision Making in European Commercial Company, a European Cooperative Society and in the Case of Cross-border Merger of Capital Companies.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Regarding Article 16(1) of the CBMD, the Law on the Involvement of Employees in Decision Making in European Commercial Company, a European Cooperative Society and in the Case of Cross-border Merger of Capital Companies is applicable in the case of the cross-border merger of capital companies. An acquiring company is or will be registered in Latvia and the rules regarding employee participation are in force in at

least one of the capital companies involved in the cross-border merger (Article 3(1)(3).

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) of the CBMD has not been transposed in Latvian national law.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3) has been transposed in; the percentage is 33.3 (Article 18(4) of the Law On the Involvement of Employees in Decision Making in European Commercial Company, a European Cooperative Society and in the Case of Cross-border Merger of Capital Companies).

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

According to Article 14 of the Law on the Involvement of Employees in Decision Making in a European Commercial Company, a European Cooperative Society and in the case of a CBM of capital companies, the managing body of the acquiring company may decide not to start negotiations and to apply the standard rules for employee participation. Article 16(4) has been transposed under Article 12, Article 14, 18 and 21of the Law on the Involvement of Employees in Decision Making in a European Commercial Company, a European Cooperative Society and in the Case of a Cross-Border Merger of Capital Companies.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article16(5) of the CBMD has not been transposed in the Law on the Involvement of Employees in Decision Making in a European Commercial Company, a European Cooperative Society and in the Case of a Cross-Border Merger of Capital Companies.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 15(2) of the Law on the Involvement of Employees in Decision Making in a

European Commercial Company, a European Cooperative Society and in the Case of a Cross-Border Merger of Capital Companies provides that the Special Negotiating Body and the merging companies may not agree on the employee participation rules that are not compatible with the legal form of the company.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation is also protected in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed in Article 24 of the Law on the Involvement of Employees in Decision Making in a European Commercial Company, a European Cooperative Society and in the Case of a Cross-Border Merger of Capital Companies.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Regarding Article 17 of the CBMD, paragraph 7 of Article 350 of the Commercial Law, from its adoption in 2000, states that reorganization after it has come into effect may not be disputed.

1.18. Additional

a. Valuation rules

Regarding valuation rules, the following stipulations exist in Latvian national law for limited liability companies:

(1) If the acquiring company is a limited liability company that because of reorganization must increase its equity capital or which is to be founded as a new company, a valuation shall be conducted of the property of each of the acquired companies or the relevant part of the dividing company, in order to determine whether the property is sufficient to increase the equity capital of the acquiring company or for its founding.

(2) The valuation shall be conducted and a written report compiled by the person who has examined the reorganization agreement in the relevant company. In case it is decided that the auditor shall not examine the merger agreement, the valuation of the property to be invested in the share capital is performed by the expert from the list of evaluators approved by the Latvian Commercial Register (Article 372(2) of the

Commercial Law).

(3) All the shareholders of the relevant company, as well as the shareholders of the acquiring company, have the right to become acquainted with the report on the valuation of the property contribution in accordance with the procedures specified in Section 343, paragraphs 3 and 5 of the Commercial Law.

(4) The report shall be appended to the application regarding reorganization submitted to the Register of Enterprises of the Republic of Latvia.[31]

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

Documents to be submitted to the Commercial Register must be either prepared in Latvian or translated into Latvian. In case of public documents issued in foreign countries the translation must be notarized (Article 9 of the Commercial Law).

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The procedure for domestic mergers in Latvian national law is for acquisitions:

(1) The company prepares the draft of the reorganization agreement.

(2) Each company involved in the merger submits a notice of reorganization to the Register of Enterprises. The Register of Enterprises publishes the information about the draft of the reorganization agreement in the official publication *Latvijas Vēstnesis*.

(3) Each company involved in the merger prepares a reorganization overview. The companies may not prepare the reorganization overview ("merger prospectus") if all the shareholders agree to that. The acquired company does not have to prepare the reorganization overview if the acquiring company owns all the shares of the acquired company.

(4) A certified auditor verifies the draft of the reorganization agreement. The certified auditor does not verify the draft of the reorganization agreement if all shareholders agree. The draft of the reorganization agreement is not verified with respect to the acquired company if the acquiring company owns all the shares of the acquired company.

(5) The meeting of the shareholders makes a decision on the reorganization. A simplified procedure of the approval may be applicable in case the acquiring company owns at least 90% of the shares in the acquired company: The shareholders hold a

[31] Article 372 of the Commercial Law, p. 109.

meeting not earlier than one month after the publication in the official publication *Latvijas Vēstnesis*. Companies then conclude the reorganization agreement.

(6) Each company involved in the merger informs all known creditors and publishes a notice about the reorganization in the state newspaper.

(7) Companies give security to creditors, but only in case the creditors have filed the respective requests according to the procedure provided by Article 345(3) and (4) of the Commercial Law.

(8) Companies submit an application to the Register of Enterprises for entry in the Commercial Register concerning the reorganization. Companies may submit the application not earlier than three months after a notice is published in the official publication *Latvijas Vēstnesis*.

(9) The state notary makes a decision to allow or not allow the reorganization.

The procedure for domestic mergers in Latvian national law is for consolidations:

(1) Companies prepare the draft of the reorganization agreement.

(2) Each company involved in the merger submits a notice about reorganization to the Register of Enterprises. The Register of Enterprises announces the information about the draft of the reorganization agreement in the official publication *Latvijas Vēstnesis*.

(3) Each company involved in the merger prepares a reorganization overview. The company does not have to prepare the reorganization overview if all shareholders agree.

(4) A certified auditor verifies the draft of the reorganization agreement. The certified auditor must not have to verify the draft of the reorganization agreement if all shareholders agree.

(5) During the meeting of the shareholders, the shareholders make the decision regarding the reorganization. The shareholders hold a meeting no earlier than one month after the publication in the state newspaper. Companies then may conclude the reorganization agreement.

(6) Each company involved in the merger informs all known creditors and publishes a notice about the reorganization in the official publication *Latvijas Vēstnesis.*

(7) Companies give security to creditors, but only in case the creditors have filed the respective requests according to the procedure provided by Article 345(3) of the Commercial Law.

(8) The newly established company meets the term stated in the companies' reorganization decision.

(9) Each company submits an application to the Register of Enterprises to record the reorganization in the Commercial Register and together submit an application regarding the establishment of the new company. Companies may submit the

application no earlier than three months after a notice is published in the official publication *Latvijas Vēstnesis*, which is also applicable to CBMs.

(10) The state notary makes a decision to allow or not allow the reorganization.

b. Comparison

The procedures for domestic and cross-border mergers are generally the same. Yet, in practice, when the cross-border merger is implemented, the laws of other countries must be taken into account. For example, the transposing legislation and procedures for creditor notification may differ. Further, foreign laws may request the merger agreement to be signed at the presence of a notary public, which is the case when an Estonian company takes part in the merger.

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1. Transposition of the Cross-Border Mergers Directive into Liechtenstein Law

The CBMD was transposed into Liechtenstein law on September 16, 2009, by the Amendment of the Persons and Companies Act on September 16, 2009, and The Act on Employee Participation in Case of a Cross-Border Merger of Limited Liability Companies (FMG).

The Act on the Amendment of the Persons and Companies Act introduced new details on cross-border mergers into the discussion of national mergers in the Persons and Companies Act (PGR). The Act, which has 10 articles (Articles 352a to 352k of the PGR), applies the domestic merger stipulations to the cross-border merger environment, if not stated otherwise in the new subsection on cross-border mergers (Article 352b of the PGR).

The CBMD's discussion on employee participation has been transposed by the passing of the FMG, a new and separate law.[1]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope under Liechtenstein law is narrower than the scope provided by the CBMD. According to Article 352a of the PGR, the law applies only to mergers between Liechtenstein corporations (*Aktiengesellschaften*) and limited liability companies created under the law of a Member State of the European Economic Area (EEA) and with their registered office, central administration, or principal place of business within the EEA. Liechtenstein private limited companies (*Gesellschaft mit beschränkter Haftung*) or establishment (*Anstalt*) or investment undertakings do not fall under the law.[2]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

[1] A. Appel and M. Blasy, 'Liechtenstein', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 201-202.
[2] Ibid., p. 202.

The definition of limited liability companies in Liechtenstein national law only includes public limited companies and does not include private limited companies.[3]

b. List of companies that can carry out a cross-border merger under Liechtenstein law

Cross-border mergers are applicable to mergers between Liechtenstein corporations (*Aktiengesellschaften*) and limited liability companies that have been formed in accordance with the law of a Member State of the European Economic Area (EEA) and which have their registered office, central administration or principal place of business within the EEA.

The new sub-section on cross-border mergers references legal provisions on corporations in the clauses on private limited companies, cooperative societies, and establishments.[4] It is clear from the legislative records that according to these references cross-border mergers are also admissible to private limited companies, cooperative societies and establishments.[5]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Liechtenstein law did not adopt the definition provided in Article 2(2) of the CBMD. Instead, national law refers to the rules on domestic merger stipulated in Article 351 of the PGR,[6] which describes how a merger is to be effected. This can be done either by a takeover of an existing company as defined in Article 2(2)(a) of the CBMD or by a merger with a new company, as defined in Art 2(2)(b) of the CBMD. In this sense, national law follows the definition of the CBMD.

d. Rules on the cash payment

According to Article 352b of the PGR, national law applies to cross-border mergers if the law of at least one of the other involved EEA Member States allows the additional cash payment to exceed 10% of the nominal value, or, without this value, of the accounting par value of the capital shares or stakes in the merged company.

Under the existing national law, mergers involving that 10% plus cash payment cannot benefit from these rules (Article 351(1) of the PGR). A cross-border merger

[3] Ibid.

[4] Article 424 para. 3 and 4 PGR, Art. 482 PGR and Art. 550 para. 3 PGR, published in the Liechtenstein Law Gazette (1926), no. 4.

[5] Statement of the Liechtenstein Government to the Liechtenstein Parliament regarding questions raised on the occasion of the first reading concerning the amendment of the PGR, Nr. 58/2009, p. 7, available under http://bua.gmg.biz/BuA/index.jsp?erweitert=keep (last visited 26 May 2013).

[6] Art. 352b PGR, published in the Liechtenstein Law Gazette (1926), no. 4.

involving a Liechtenstein corporation can only contain such a cash payment if the foreign law applicable to one of the other participating companies allows it.[7]

e. CBMs and companies in liquidation

According to Article 352b in connection with Article 351, paragraph 2, both of the PGR, the national law allows that companies in liquidation to carry out cross-border mergers if the distribution of the assets amongst the shareholders has not yet started.[8]

f. Geographical scope

Although national law does not allow cross-border mergers with countries outside of the EEA, recent practice has allowed cross-border mergers between Liechtenstein legal entities and Swiss entities if a correspondent assessment by the responsible authorities allows it. Specifically allowed are mergers of Swiss corporations with Liechtenstein limited liability companies.[9]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

By transposing Directive 2005/56/EC, national law allows cross-border mergers between Liechtenstein corporations (*Aktiengesellschaften*) and limited liability companies that have been formed in accordance with the law of a Member State of the EEA. Beyond that, national law allows seat transfers of legal entities.[10] The national rules on seat transfer have existed since January 20, 1926, and underwent modifications since then.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

This article has been transposed into national law under Article 352b PGR.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Liechtenstein has not excluded cooperative societies.

[7] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 202-203.
[8] Article 352b in connection with Article 351 para. 2 PGR, published in the Liechtenstein Law Gazette (1926), no. 4.
[9] Statement of the Liechtenstein Government to the Liechtenstein Parliament regarding questions raised on the occasion of the first reading concerning the amendment of the PGR, Nr. 58/2009, p. 6.
[10] Article 233 and 234 PGR.

c. General transposition of Article 3(3) CBMD

Article 3 (3) CBMD deals with the position of investment companies. The new rules on cross-border mergers do not apply in relation to investment undertaking (funds) in terms of the Investment Undertaking Act.[11]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

The national law has no such provision.[12]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) has not been transposed into Liechtenstein national law.

c. The protection of creditors in Article 4(2)

The national law does transpose creditors' protection, as provided for in Article 4(2) of the CBMD, in Article 351i of the PGR.[13] The protection starts with the publication of the cross-border merger.[14] A possible time limit for the procedure is six months.[15]

The following procedural steps apply: Within the first six months of the cross-border merger's publication, the creditors of a participating Liechtenstein corporation are entitled to obtain adequate safeguards; in order to do this, they must have no due claims and they must demonstrate that the claims are at risk because of the merger. The merger, when its registration is published, must acknowledge this right of the creditors (Article 351i, paragraph 1, of the PGR).[16]

This provision is not relevant for creditors of bonds if the individual creditors or their meeting has approved the merger,[17] or for creditors who in case of insolvency are entitled to preferable satisfaction out of the legal estate being created.[18]

This option also exists for mergers within Liechtenstein.[19]

[11] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 202.
[12] Ibid., p. 202-203.
[13] Ibid., p. 208; Article 351i PGR.
[14] Ibid., p. 208.
[15] Ibid.
[16] Ibid.; Article 351i para 1 PGR.
[17] Art. 351i para. 2 PGR.
[18] Art. 351i para. 3 PGR.
[19] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 208.

Creditors cannot block the merger; they can only, in person, claim against the merging company.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member States with the option to adopt protections for minority shareholders.

The protections for minority shareholders, as discussed in Article 4(2) of the CBMD, are transposed in Article 351e(4) of the PGR, which states that in cases where the approval of the general meeting is not required, one or more shareholders representing at least 5% of the share capital may still request the convocation of a general meeting deciding on the approval of the merger.[20] The procedure may start when one or several shareholders who represent jointly at least 5% of the share capital of the absorbing company are entitled to request the convocation of a general meeting of shareholders, which shall resolve on the approval of the terms of merger (Article 351(e)(4) of the PGR).[21] Information regarding time limits is not available.

With a view to procedural steps, the following applies: One or several shareholders who represent jointly at least 5% of the share capital of the absorbing company are entitled to request the convocation of a general meeting of shareholders, which shall resolve on the approval of the terms of merger (Article 351(e)(4) of the PGR). These minority shareholder rights only exist if the law does not require the consent of the shareholders' meeting of the absorbing company (Article 351(e)(3) of the PGR).[22]

This option also exists for mergers within Liechtenstein.[23]

e. The protection of employees in Article 4(2)

The protection of employees discussed in Article 4(2) of the CBMD was not transposed in Liechtenstein national law. However, Article 16 of the CBMD has been transposed by the Act on Employee Participation in Case of a Cross-Border Merger of Limited Liability Companies (FMG).[24]

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the

[20] Ibid., p. 206; Article 351e para. 4 para. 1 PGR.
[21] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 206.
[22] Ibid.
[23] Ibid.
[24] Published in the Liechtenstein Law Gazette (2009), no. 269.

management report. Article 5 CMBD provides for certain particulars that have to be included.

Article 5 has been followed and transposed into the national law. The draft terms of a cross-border merger (*Fusionsplan*) must include the information required by the rules on domestic mergers (Article 351a of the PGR) and the information listed in Article 352c of the PGR.[25]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

This has been transposed into the national law without any diverging rules.[26]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6 (1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This exemption exists in the national law.[27]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) of the CBMD has been transposed into national law; in Liechtenstein such publication notice has to be made on the website of the Liechtenstein Office of Justice.[28]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

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[25] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 203; Article 352c PGR.
[26] Ibid., p. 205.
[27] Ibid., p. 203; Article 352c para. 3 PGR.

Article 7 of the CBMD has been transposed into national law under Article 352d of the PGR.[29]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) of the CBMD was transposed in Article 352b of the PGR in connection with Article 351c of the PGR.[30]

b. The independent expert

According to Article 351c, paragraph 2, of the PGR, the expert has to be appointed by the board. The provision does not go further with mentioning who is qualified to be an expert. However, the assessment by one single expert for all participating companies is enough if, on the unanimous application of all companies, this expert is appointed by the Liechtenstein Office of Justice.[31]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

The expert report must contain an opinion regarding whether the share exchange ratio proposed by the board is fitting. The report must include how the ratio methods were used, and must disclose how the ratios were decided upon (Article 351(c)(4) of the PGR).[32] The expert report can be submitted jointly.

d. Transposition of Article 8(3)

Article 8 (3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed into national law under Article 351c, paragraph 4, of the PGR, with no diverging rules.[33]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

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[28] Article 352c para. 3 PGR.
[29] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 205.
[30] Art. 352b in connection with Art. 351c PGR; Report and Motion of the Liechtenstein Government to the Liechtenstein Parliament concerning the amendment of the PGR, Nr. 1/2009, p. 24, http://bua.gmg.biz/BuA/index.jsp?erweitert=keep (last visited 26 May 2013).
[31] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 205; Art. 351c para. 2 PGR.
[32] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 205.
[33] Ibid.; Art. 351c para. 4 PGR.

Article 8(3) of the CBMD is transposed into national law under Article 351c, paragraph 3, of the PGR, with no diverging rules.[34] National law does not provide any consequences for entities that deny experts the information they need to prepare their report.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) of the CBMD has been transposed into national law under Article 351c, paragraph 5, of the PGR, with no diverging rules.[35]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

No such exemptions, as discussed in Articles 15(1) and (2) of the CBMD, prevail in national law.[36]

h. Further exemptions in Liechtenstein law

There are no further exemptions in Liechtenstein law.[37]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed in the national law. No additional or diverging rules have been adopted.

a. Procedural requirements including majority, quorum, timing and notarization

Procedural requirements regarding Article 9 of the CBMD include a shareholder resolution that mandates a two-thirds or greater majority of the share capital represented. If 50% or more of the share capital is represented, and the articles do not provide for a higher quorum, then a simple majority of votes is all that is needed (Article 351(e)(2) of the PGR).[38] There are no notarization requirements prescribed.

b. Amendment of CDTMs by shareholders

Shareholders can only accept or reject the CDTMs.[39]

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[34] Art. 351c para. 3 PGR.
[35] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 205; Art. 351c para. 5 PGR.
[36] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 205.
[37] Ibid.
[38] Ibid.
[39] Ibid.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Regarding Article 8 of Directive 2011/35/EU, the absorbing company's shareholder approval is not needed if:

(1) the absorbing company provides the CDTMs at least one month before the shareholder meeting of the transferring company deciding upon those terms;

(2) the CDTMs can be inspected by the shareholders of the absorbing company, as well as the merger terms, annual accounts for the previous three business years, the management report, and the report(s) of the independent experts (Article 351(e)(3) of the PGR), where the company's seat is located.[40]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

The exemption to shareholder approval under Article 15(1) of the CBMD has been transposed in Article 352k, paragraph 3, in connection with Article 351o, paragraph 1, of the PGR.[41]

The merger does not have to be approved or formalized in a different way. However, according to Article 351o, paragraph 2, of the PGR, one or more shareholders that together represent at least 5 percent of the shares of the absorbing company are entitled to request the convocation of the shareholder meeting in which it is decided on the approval of the merger.[42]

e. Other exemptions for shareholder approval under Liechtenstein law

National law does provide other exemptions for shareholder approval. According to Article 352k, paragraph 1, of the PGR, such a situation would be if the majority 90% of the capital stock of the transferring company is owned by the absorbing company and/or by third persons that hold the shares in their own names but on the account of the absorbing company.[43] However, according to Article 351n, paragraph 2, of the PGR, one or more shareholders that together represent at least 5% of the shares of the absorbing company are also entitled to request the convocation of the shareholder meeting in which it is decided on the approval of the merger.[44]

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[40] Ibid., p. 206.
[41] Ibid.; Art. 352k para. 3 in connection with Art. 351o para. 1 PGR.
[42] Art. 352k para. 1 in connection with Art 351o para 2 PGR.
[43] Art. 352k para. 1 in connection with Art 351n para 1 PGR.
[44] Art. 352k para. 1 in connection with Art 351n para 2 PGR.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles (10)(1) and (2) have been transposed into national law under Article 352e of the PGR.[45]

b. National authority has been designated to scrutinize the legality of the merger

The Office of Justice is the designated authority to scrutinize the legality of the merger,[46] and must perform a formal check.[47]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) of the CBMD has not been transposed into national law.[48]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed into national law under Article 352f of the PGR.[49]

b. The national authority has been designated to scrutinize the legality of the merger

The Office of Justice is the designated authority to scrutinize the legality of the merger,[50] and must perform a formal check.[51]

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[45] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 207.
[46] Ibid.; Art. 352e PGR.
[47] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 207.
[48] Ibid.
[49] Ibid., p. 207; Art. 352f PGR.
[50] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 207; Art 352f PGR.
[51] Ibid.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed into national law under Article 352h of the PGR.[52]

b. Date the cross-border merger takes effect

Regarding when the cross-border merger takes effect, the general rules about merger registration (Articles 351g and 351h of the PGR) are not fully relevant to a cross-border merger because the Liechtenstein Public Registry and the applicable foreign authorities must be involved in the process. Article 352h of the PGR specifies that the inclusion of the merger into the Public Registry can only be done after the legality certificate has been submitted, because of the statement in Article 12 of the CBMD that the cross-border merger only comes into effect after the scrutiny of legality is complete.[53]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence has been transposed into the national law under Article 352h of the PGR which specifies that the registration of a cross-border merger in the Public Registry may only be carried out after the certificate regarding the legality of the cross-border merger (*Rechtmässigkeitsbescheinigung*) has been submitted.[54]

b. Transposition of Article 13 second sentence

Article 13 second sentence provides for the deregistration procedure. Article 13 second sentence has been transposed into national law under Article 352h, paragraph 3, of the PGR which specifies that the Office of Justice must immediately notify the registration of a cross-border merger in the Public Register to the foreign registration

[52] Ibid., p. 207-208; Art. 352h PGR.
[53] Ibid., p. 207-208.
[54] Ibid.

authorities.[55] Article 351h, paragraph 3, of the PGR further stipulates that with the registration of the merger, the transferring companies cease to exist.[56]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger. Regarding Article 14 of the CBMD, in Liechtenstein national law, like a national merger, a cross-border merger results in all assets and liabilities of the disappearing company or companies being transferred to the surviving company (in case of a merger by takeover) or to the new company (in case of a merger by incorporation of a new company) *ex lege* and without liquidation of the participating companies (*Prinzip der Universalsukzession*). The shareholders of the company or companies that cease to exist become shareholders either of the surviving company (in case of a merger by takeover) or of the new incorporated company (in case of a merger by incorporation of a new company).[57]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The Transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply. Article 15(1) of the CBMD has been transposed in national law. According to Article 351o, paragraph 4, of the PGR, the provisions on the exchange of shares (Article 351a, paragraph 2, Nos. 3 through 5, which is equivalent to Articles 5(b), (c), and (e) of the CBMD), the management report (Article 351b of the PGR), the assessment of the merger (Article 351c of the PGR, which is equivalent to Article 8 of the CBMD), as well as Article 351d, paragraph 2, Nos. 4 and 5 (waiving management and independent expert reports), Article 351h, paragraph 3, sentence 2 (which is equivalent to Article 14(1)(b) of the CBMD), and the provisions on the responsibility of the management and the independent experts are not applicable.[58]

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[55] Art. 352h para. 3 PGR.
[56] Art. 351h para. 3 PGR.
[57] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 203.
[58] Art. 351o para. 4 PGR.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The transposition of Article 15(1) allows for the exemption of various documents.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The CBMD provisions on employee participation were transposed in a new law, the FMG,[59] which followed the stipulations on employee participation pertaining to the adoption of the European Company (SE) as well as the European Cooperative Society (SCE) in the Liechtenstein Company Law.[60]

According to Article 3 of the FMG, the merger-created company (either surviving or newly incorporated company) will not be subject to the law's rules but to those from the EEA Member State where that company will be registered.[61]

Liechtenstein has adopted the Act on the Information and Hearing of Employees in Companies (Participation Act),[62] which states that such representation—information and hearing rights—is only applicable to a company with at least 50 employees.

b. Transposition of Article 16(1)

Article 16 (1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) is transposed in Article 3 of the FMG, with the general principle being that the company resulting from a cross-border merger (being either the surviving company or the newly incorporated company) shall not be subject to the rules of the FMG but to the rules concerning employee participation in force in the EEA Member State in which the resulting company has its registered seat.[63]

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[59] Published in the Liechtenstein Law Gazette (2009), no. 269.

[60] Report and Motion of the Liechtenstein Government to the Liechtenstein Parliament concerning the amendment of the PGR, Nr. 1/2009, p. 27 sec., http://bua.gmg.biz/BuA/index.jsp?erweitert=keep (last visited 26 May 2013).

[61] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 208-209; Art. 3 FMG, published in the Liechtenstein Law Gazette (2009), no. 269.

[62] Published in the Liechtenstein Law Gazette (1997), no. 211.

[63] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 209.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 4 of the FMG states the three exceptions of Article 16(2) of the CBMD, which are if:

(1) one or more of the merging companies has an employee participation system and an average of more than 500 employees 6 months prior to the publication of the CDTM;

(2) the merger-formed company is not legally subject to the same employee participation system as the merging companies had;

(3) the law governing the merger-formed company does not provide for employees in other EEA Member States the same participation rights enjoyed by employees in the EEA Member State of the company's registered office.[64]

d. Transposition of Article 16 (3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3)(e) of the CBMD has been transposed in Article 23, paragraph 2, of the FMG.[65]

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4) of the CBMD is transposed in Chapters II, III, and IV of the FMG.[66]

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) of the CBMD has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

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[64] Ibid., p. 209.
[65] Art. 23 FMG.
[66] Published in the Liechtenstein Law Gazette (2009), no. 269.

Article 16(6) of the CBMD has been transposed into national law under Article 28 of the FMG, stating that the rules concerning employee representation continue to exist after registration of the company emerging from the cross-border merger.[67]

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed into national law under Article 29 of the FMG.[68]

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

In transposing Article 17 of the CBMD, Article 352(h)(2) of the PGR deviates from the Liechtenstein national merger rules. The Liechtenstein courts can declare a defective domestic merger null and void if (1) an involved party requests this; (2) a material defect impacts the merger; and (3) this court action is filed before 6 months have passed since the merger's publication (Article 351m of the PGR).

According to Article 352(h)(2) of the PGR, a cross-border merger cannot be labeled null and void (*nichtig*) after registration in the Public Registry. The Public Registry must immediately inform the foreign authorities involved of the registration of the cross-border merger.[69]

1.18. Additional

a. Valuation rules

Regarding valuation, according to Article 351g, paragraph 3, of the PGR, any transferring company has to submit a balance sheet together with the application of the merger.[70]

b. National case-law on provisions transposing the CBMD

National case-law on provisions transposing the CBMD is not available.

c. Language requirements

Liechtenstein has not imposed any language requirements.

[67] Art. 28 FMG.
[68] Art 29 FMG.
[69] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 208.
[70] Art. 351g para. 3 PGR.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The procedure followed in domestic mergers is the same as the procedure followed in cross-border mergers.[71]

b. Comparison

There are no major differences between the domestic and cross-border merger procedures.

[71] A. Appel and M. Blasy, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 201-202.

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1. Transposition of the Cross-Border Mergers Directive into Lithuanian Law

The CBMD has been transposed as the Law on Cross-Border Mergers of Limited Liability Companies of the Republic of Lithuania of December 13, 2007 (the Law on Cross-Border Mergers), and the Law on Employee Participation in a Company after Cross-Border Merger of Limited Liability Companies of the Republic of Lithuania of June 17, 2008 (the Law on Employee Participation). These laws join Chapter VIII, Book 2 Lithuanian Civil Code (LCC), July 18, 2000, July 1, 2001; the Law on Companies of the Republic of Lithuania, July 13, 2000, January 1, 2004 (the Law on Companies); and the Law on Corporate Income Tax of the Republic of Lithuania of December 20, 2001.

The Law on Cross-Border Mergers transposes the CBMD and the Law on Employee Participation transposes aspects of the CBMD related to employee participation. Otherwise, the most general provisions on mergers are stipulated in Chapter VIII, Book 2 LCC.

Before the CMBD, there was no special procedure for cross-border mergers, but the general rules of the LCC and the Law on Companies were applied.

The Law on Cross-Border Mergers has undergone three minor changes in 2009, 2011, and 2012. In 2009, the word "newspaper" was changed to a wider notion of "source." In 2011, provisions allowing publication of documents on companies' websites were added. The law was also harmonized with the requirements of the Directive 2009/109/EC. The change in 2012 concerned the exemptions from the scope of the law. The initial version stated that the law shall not apply if at least one of the companies participating in the merger is considered to be a management company or an undertaking for collective investment with the sole object of collective investment in transferable securities or in other assets specified in the law and which operates on the principle of risk-spreading, according to the Law on Collective Investment Undertakings. The current version states that the exemption is applicable only to management companies and to investment companies with variable capital. The change was introduced in order to harmonize the Law on Cross-Border Mergers with the new version of the Law on Collective Investment Undertakings of Republic of Lithuania (July 4, 2003; No. IX-1709).

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The definition of the scope of the national law in comparison is somewhat different from the one provided in the CBMD. First of all, it applies only to mergers between two or more either public or private limited liability companies. It does not apply to mergers between private and public limited liability companies. This requirement is related to the provision of Article 61(3) Law on Companies, which only allows mergers between companies of the same kind. Secondly, it is required that the foreign merging companies have their registered office, central administration, or principal place of business within the European Economic Area. This is wider than the EU. Thirdly, there is no explicit requirement that at least two of the companies are governed by the laws of different Member States. However, this follows from the requirement that one of the companies has to be a company whose legal form according to the Lithuanian laws is public or private limited liability company and the other company needs to be either a private or public liability company, formed in accordance with the law of other EU Member State.

The procedures stipulated by the LCC and the Law on Companies, on the one hand, and the Law on Cross-Border Mergers, on the other, are quite similar. Both require the drafting of merger terms, management report, independent expert report, public announcement of the merger, and the same procedure of approval by the general shareholders meeting. In addition, Article 1(2) Law on Cross-Border Mergers provides that for the issues that are not regulated by that law, the provisions of the Law on Companies regulating the reorganization of public and private limited liability companies by way of merger shall apply. Therefore, issues like creditor protection are regulated by the same provisions in both domestic and cross-border mergers.

The first difference between the two areas is a slightly different announcement term. According to the Law on Cross-Border Mergers, it is required to give either three public notices with intervals of at least 30 days or one notice 40 days before the general meeting of shareholders along with individual written notice to each of the companies' creditors. According to the Law on Companies, the companies must publish either three public notices with intervals of at least 30 days or one notice 30, not 40, days before the general meeting of shareholders along with individual written notice to each of the companies' creditors.

Secondly, in the case of domestic mergers, the provisions on employee participation do not apply.

Thirdly, there are some differences in the regulation of simplified procedure. For example, in case of the acquisition of a 90 percent-owned subsidiary, Article 11(2) Law on Cross-Border Mergers waives only the requirement to prepare the independent expert report. In domestic mergers, Article 70(1)(1) of the Law on Companies waives

also the requirement of the qualified majority approval subject to certain conditions. In addition, Article 70(1)(2) states that it is not required to prepare independent expert and management report as well as to comply with certain information duties, if, upon request, the acquiring company purchases the remaining shares of other shareholders before the completion of the reorganization.

Mergers of other types of companies are governed by the provisions of the LCC and specialized laws. Most of reorganization procedures closely follow the provisions of the LCC, which, in turn, are quite similar to the CBMD. However, these provisions existed well before the transposition of the CBMD; therefore, it cannot be stated that Lithuania extended CBMD.

As an example, the Law on Cooperative Societies of the Republic of Republic of Lithuania (June 1, 1993, No. I-164) requires the publication of the terms of reorganization, independent expert report, the report of the managing body, approval by two-thirds of members, and so forth.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Article 2(3) Law on Cross-Border Mergers defines a "limited liability company" as follows:

(1) "a public limited liability company, private limited liability company, or a company formed in accordance with the law of other Member States, specified in Article 1 First Council Directive 68/151/EEC of March 9, 1968, 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 58 Treaty, with a view to making such safeguards equivalent throughout the community"[1] or

(2) "a company with share capital formed in accordance with the law of other Member States having legal personality and possessing separate assets to the extent whereof the company is liable for its obligations and subject to the same requirements under the national law as applicable to the companies referred to in subparagraph 1 of this paragraph concerning the protection of the interests of their members and others".[2]

[1] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination 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 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, [1968] OJ L 65, Lithuanian special edition, chapter 17, volume 1, p. 3.

[2] Ibid.

b. List of companies that can carry out a cross-border merger under Lithuanian law

Companies subject to the CBMD under Lithuanian law are public limited liability companies (*akcinė bendrovė*, AB) and private limited liability companies (*uždaroji akcinė bendrovė*, UAB). Public limited liability companies and private limited liability companies are traditional, mostly used and the most significant types of limited liability companies in Lithuania. According to the Article 1(1) Law on Cross-Border Mergers, each with undertakings (1) formed in accordance with the law of a Member State, (2) having a legal form corresponding to their legal form, and (3) having a registered office, central administration, or principal place of business within the European Economic Area.

Companies that are not subject to the CMBD are stipulated by Article 1(3) Law on Cross-Border Mergers, which excludes companies that, while not either a public or private limited liability company, operate under the Law on Collective Investment Undertakings of the Republic of Lithuania. Also excluded are cooperative societies, agricultural companies, general and limited partnerships, individual enterprises, European companies, European cooperative societies, and all types of state companies.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Definitions based on Articles 2(2)(a) and (b) are somewhat different.

Article 2(5)(1) Law on Cross-Border Mergers is based on Article 2(2)(a) CBMD. It defines a merger as an operation whereby one or more companies, on being dissolved without going into liquidation (the companies being acquired), are merged by acquisition with another existing company (the acquiring company) and all their assets and liabilities are transferred to the acquiring company. The definition does not include the requirement that in exchange the company being acquired is provided with securities of a new company or cash.

Article 2(5)(2) Law on Cross-Border Mergers is based on Article 2(2)(b) CBMD. A merger is defined as an operation whereby two or more companies, on being dissolved without going into liquidation, are merged by formation of a new company and all the assets and liabilities of the dissolved companies are transferred to the new company. Again, the definition does not include the requirement that in exchange the companies are provided with securities of the new company or cash.

Article 2(5)(3) Law on Cross-Border Mergers most closely resembles Article 2(2)(c) CBMD. The merger is an operation whereby one or more companies, on being

dissolved without going into liquidation, (the companies being acquired) are merged by acquisition with another existing company (the acquiring company) holding all the securities or shares of the companies being acquired representing their capital and all the assets and liabilities of the companies being acquired are transferred to the acquiring company.

d. Rules on the cash payment

At first glance, the first two definitions are somewhat less demanding than the corresponding definitions of the CBMD because they do not explicitly require the issuance of securities or cash payment as a consideration for the merger. However, Article 3 Law on Cross-Border Mergers mentions the exchange of securities and cash payments as obligatory items to be discussed in the CDTMs. In addition, Article 10(2) Law on Cross-Border Mergers provides that the shares of the merging companies shall be exchanged for the securities or shares of the company resulting from the merger, and the shareholders of the companies that cease to exist shall become members of the company resulting from the merger. Article 10(3) states that if, when exchanging shares of the merging companies for new securities or shares of the company resulting from the merger, the shareholders of companies that cease to exist are paid the difference in price in cash, the cash payments shall not exceed 10 percent of the nominal value of the new securities or shares representing the capital of the company resulting from the merger received by the shareholders, or, in the absence of a nominal value, of the accounting par value of those securities or shares. According to Article 10(4), the latter rule does not apply when larger cash payments are allowed under the law of another Member State to be applied to at least one of the merging companies or to the company resulting from the merger.

Therefore, the systemic analysis would suggest that the exchange of securities or cash payment is the mandatory element of the merger definition. Thus, while the definitions do not fully correspond, the overall notion is similar to the one in the CBMD.

e. CBMs and companies in liquidation

The Law on Cross-Border Mergers is silent on this question. However, Article 2.97(8) LCC states that it shall be prohibited to reorganize a legal person under liquidation where the resolution to liquidate a legal person was passed not by the general meeting of the members of a legal person (but, for example, by the court) or where at least one member of a legal person became a successor to a part of property of a legal person under liquidation. In other cases, it is possible to include companies in liquidation in mergers.

f. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

The Law on Cross-Border Mergers is not applicable to cross-border divisions, seat transfers, or other cross-border restructurings. These issues are regulated by the LCC and the Law on Companies, which, while not prohibiting cross-border transactions, are not customized to specifically address issues related to cross-border restructurings. The provisions of the LCC and the Law on Companies on cross-border divisions are based on the so-called Sixth EU Company Law Directive.[3] Tax aspects of cross-border restructuring are also covered in the Corporate Income Tax Law.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 10(3) Law on Cross-Border Mergers states that if, when exchanging shares of the merging companies for new securities or shares of the company resulting from the merger, the shareholders of companies which cease to exist are paid the difference in price in cash, the cash payments shall not exceed 10 percent of the nominal value of the new securities or shares representing the capital of the company resulting from the merger received by the shareholders, or, in the absence of a nominal value, of the accounting par value of those securities or shares. According to Article 10(4), the latter rule does not apply when larger cash payments are allowed under the law of another Member State to be applied to at least one of the merging companies or to the company resulting from the merger.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Article 1(3) Law on Cross-Border Mergers excludes cooperative societies.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

Article 1(3) Law on Cross-Border Mergers excludes companies that, although they take the form of either a public or private limited liability company, operate under the

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

Law on Collective Investment Undertakings of the Republic of Lithuania (July 4, 2003; No. IX-1709).

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

There is no provision transposing Article 4(1) CMBD in the Law on Cross-Border Mergers. However, it can be argued that Lithuanian law would not allow the kind of merger mentioned in the question. Article 61(3) Law on Companies and Article 2.98(1) LCC state that a merger is only possible between same type of companies.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Lithuania has not transposed this option.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Article 1(2) of the Law on Cross-Border Mergers provides that the protection of the rights of creditors, debenture holders, and shareholders shall be governed by the Law on Companies. Therefore, in this domain the same rules apply both to cross-border and national mergers.

Articles 66(1) and 66(3) Law on Companies regulate the protection of creditor rights. In the course of reorganization the company must provide additional safeguards for the discharge of obligations to every creditor of the company who so requests and whose claims antedate the disclosure of the draft plan of reorganization of the company, if there are reasons to believe that because of the financial situation of the merging parties and the newly merged company, the discharge of obligations to the creditors will become more difficult. It is not explicitly stipulated in the law what kind of protection can be provided, but it is likely that creditors would require either mortgage, pledge, suretyship, or guarantee. For the purpose of this article, bondholders are treated as creditors.

Regarding time limits, the creditors may file their claims within the period from the announcement of reorganization terms until the general meeting where the resolution to reorganize the company is to be adopted.

The following procedural steps should be followed. The creditor requests additional safeguards to be provided. The company either accepts this or rejects. If the company accepts the requirement it may need to arrange the formalities associated with certain protective measures—e.g., mortgage of the real estate shall be registered with the notary and Mortgage Register. The company may also refuse to provide additional security if the discharge of obligations is adequately secured by the mortgage, pledge, suretyship, or guarantee. Finally, if there are disputes concerning the provision of additional safeguards, they are settled in court.

The same rules apply both to cross-border and national mergers.

Theoretically, there is a possibility for creditors to block the merger in case additional security is not provided. Article 66(4) states that the merger cannot go ahead (i.e., documents relating to the registration of the companies that will operate after the reorganization or of their articles of association and documents concerning the cancellation from the register of the companies that will cease to exist after the reorganization may not be submitted to the administrator of the Register of Legal Entities) until additional safeguards for the discharge of obligations have been provided to the creditors who so request, or until the effective date of the court order if the dispute regarding the additional protections is being heard in the court.

Practice shows that this option is not widely used and there is no relevant case law.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Lithuania does not require unanimous shareholder support for cross-border mergers and does not provide any special protections for minority shareholders. The only aspect can be found in Article 7(3) Law on Cross-Border Mergers, which transposes Article 10(3) Directive stating that if the law of a Member State to which any of merging company is subject provides for a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares or a procedure to compensate minority members without preventing the registration of the cross-border merger, then other merging companies situated in Member States that do not provide for such procedure shall have a right to express their opinion about the possibility for the members of that merging company to have recourse to the court with the request to initiate such procedure.

e. The protection of employees in Article 4(2)

Lithuania did not transpose this option.

Regarding domestic mergers, the only relevant provision is Article 138 LLC, which states that the merger cannot be deemed as a legitimate reason for the termination of

labor contract. Article 10(7) Law on Cross-Border Mergers also states that the rights and obligations of the merging public or private limited liability companies arising from contracts of employment or from employment relationships shall be transferred to the company resulting from the merger as of the date of completion of the merger. The Supreme Court of Lithuania has ruled that this rule should be applied automatically and there is no need for the special agreement to transfer employees between the management of the acquired and the new company (which is usually required otherwise). However, the labor contract can be terminated for other reasons, such as structural or economic changes. In this case, the termination should be done in accordance with the appropriate articles of the LLC.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

The following particulars are required under Lithuanian national legislation:

(1) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;

(2) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;

(3) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;

(4) the likely repercussions of the cross-border merger on employment;

(5) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

(6) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;

(7) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;

(8) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
(9) the statutes of the company resulting from the cross-border merger;
(10) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16; L 310/4 EN Official Journal of the European Union 25.11.2005;
(11) information on the evaluation of the assets and liabilities that are transferred to the company resulting from the cross-border merger; and
(12) dates of the merging companies' accounts used to establish the conditions of the cross-border merger.
The following additions or modifications to the particulars have been made by Lithuanian national legislation:
(1) Point 1 requires the method of merger, (new company or by absorption).
(2) Point 2 has been made into two separate items.
(3) The term "special rights" is used in Point 8.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Article 6 Law on Cross-Border Mergers requires either three public notices with intervals of at least 30 days in the source specified in the company's articles of association, or one notice 40 days before the general meeting of shareholders that is scheduled to approve the CDTMs, along with individual written notice to each of the companies' creditors.

Article 7 Law on Cross-Border Mergers stipulates that the general meeting of shareholders of each of the merging companies has to approve the CDTMs.

The approval procedure is regulated by the Law on Companies. Article 62 states that the decision should be adopted by the general meeting of shareholders unless the law provides otherwise. Article 28(1)(11) provides that decisions on the approval or mergers require a special majority of at least two-thirds (or more, if so provided in the company's articles of association). Article 62 further adds that if the company has different classes of shares, the CDTMs must be approved by each class of shareholders (including holders of non-voting shares) separately.

According to Article 11(1) Law on Cross-Border Mergers, approval by the qualified majority vote of the general meeting of shareholders of the acquired company is not required in case of a merger by acquisition by a company that fully owns the company being acquired. Article 70(3) Law on Companies states that in such cases, the decision on merger can be taken by the management board of the company continuing activities or—if there is no board—by the sole director.

In domestic mergers, according to Article 70(1)(1) Law on Companies, the approval by the qualified majority vote of the general meeting of shareholders is also not required in case of acquisition of 90 percent-owned subsidiary subject to certain conditions.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

National law follows Article 4(1) Directive 2009/109/EC. Articles 6(5) through 6(7) Law on Cross-Border Mergers provide that instead of the regular publication procedure, the company can make the CDTMs available on its website free of charge for the public for a continuous period beginning at least one month before the day fixed for the general meeting and ending not earlier than the conclusion of that meeting. The company has to submit the link to such webpage and the dates of publication to the Register of Legal Entities no later than the first day of the announcement.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(1) Law on Cross-Border Mergers states that for the content of the publication, the Law on Companies applies. Articles 65(1) and 63 Law on Companies read together state that the company shall publish the following details:

(1) the name, type, registered office, and code; register in which the data on the given legal person is filed; indication where a legal person has declared bankruptcy or is liquidated; and authorized capital and the amount of paid-in authorized capital of all companies participating in the merger;

(2) the name, type, and registered office of the new company;

(3) the mode of merger;

(4) companies that cease to exist after the merger and companies that continue or are created after the merger;
(5) the date from when rights and obligations of the companies that cease to exist after the merger are transferred to the company resulting from the merger;
(6) the date from when contractual rights and obligations of the companies that cease to exist after the merger are transferred to the company resulting from the merger and from when such contractual transactions shall be treated for accounting purposes as being those of the company resulting from the merger;
(7) information about where and when interested parties can get acquainted with merger document.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Article 5(1) Law on Cross-Border Mergers, which stipulates that a report must specify the purposes of the merger, explain the terms of merger, explain and justify the legal and economic aspects of the merger, and explain the implications of the merger for shareholders, creditors, and employees of the public or private limited liability company.

Article 5 Law on Cross-Border Mergers states that the management report must also be available to creditors and employee representatives or employees at least 40 days before the general meeting of shareholders in order to approve the CDTMs. According to Article 6(3), the report must also be submitted to the Register of Legal Entities on or before the first day that the CDTMs are publicly announced. If the employees' representatives submit their opinion on the merger 30 or more days before the date of the general meeting of shareholders to approve the CDTMs, this opinion should be attached to the management report.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 4(1) Law on Cross-Border Mergers requires an independent expert report to be prepared. An independent expert report is also required for domestic mergers (Articles 63(2) through 63(5) Law on Companies).

b. The independent expert

The appointment of independent expert is regulated by Article 4 Law on Cross-Border Mergers. There are two possibilities. First, each merging company can appoint an audit firm. Second, upon the request of all merging parties, the competent authority of one of the parties can nominate or approve the appointment of an independent expert (not necessarily an audit firm). In Lithuania, such authority is the Register of Legal Entities and the independent expert has to be an audit firm.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

The merging companies may jointly request a single report to be prepared rather than two separate reports, as stipulated by Article 4(2) Law on Cross-Border Mergers.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 63(3) Law on Companies requires the report to include, among other things, a determination of whether the shares exchange ratio is fair and reasonable, a description and assessment of the methods used to determine the ratio, and a description of any difficulties encountered in the evaluation.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 4(5) Law on Cross-Border Mergers provides that independent experts shall be entitled to request that each merging company present all information necessary for carrying out the examination.

Lithuanian law does not provide a particular remedy in case independent experts are denied access to the information. It is likely that in such case the independent expert would act in a same way the auditor is supposed to act when they are denied access to information during the regular audit of financial statements, i.e., would either note the refusal to provide information in their report or withdraw from performing the audit.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

The ability for shareholders of all merging companies to unanimously decide to waive the expert reports is stipulated by Article 4(7) Law on Cross-Border Mergers.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

A merger by acquisition of a wholly owned subsidiary, or simplified merger, is stipulated by Article 11(1) Law on Cross-Border Mergers. Merger by acquisition carried out by a company holding 90 percent or more of its subsidiary shares is stipulated by Article 11(2) Law on Cross-Border Mergers. In both cases it is not required to prepare expert report.

h. Further exemptions in Lithuanian law

There are no further exemptions.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

This article has been transposed in Article 7 Law on Cross-Border Mergers.

a. Procedural requirements including majority, quorum, timing and notarization

The approval procedure is regulated by the Law on Companies. Article 62 states that the decision should be adopted by the general meeting of shareholders unless the law provides otherwise. Article 28(1)(11) provides that decisions on the approval or mergers require a special majority of at least two-thirds (or more, if so provided in the company's articles of association). Article 62 further adds that if the company has different classes of shares, the CDTMs must be approved by each class of shareholders (including holders of non-voting shares) separately.

According to Article 11(1) Law on Cross-Border Mergers, approval by the qualified majority vote of the general meeting of shareholders of the acquired company is not required in case of a merger by acquisition by a company which fully owns the company being acquired. Article 70(3) Law on Companies states that in such cases,

the decision on merger can be taken by the management board of the company continuing activities or—if there is no board—by the sole director.

In domestic mergers, according to Article 70(1)(1) Law on Companies, the approval by the qualified majority vote of the general meeting of shareholders is also not required in case of acquisition of 90 percent-owned subsidiary subject to certain conditions.

b. Amendment of CDTMs by shareholders

Article 63(7) Law on Companies states that proposals to amend the CDTMs can be filed by the shareholders in the company holding shares for the nominal value of no less than one-third of the authorized capital.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Articles 70 and 70(1) Law on Companies, accordingly, provide for such a waiver in case of acquisition of fully owned subsidiary and of 90 percent-owned subsidiary if the following conditions are met: (1) the publication of required documents must be duly effected; (2) all shareholders of the acquiring company must be entitled to inspect the documents; and (3) one or more shareholders of the acquiring company holding at least 1/20 of the subscribed capital must be entitled to require that a general meeting of the acquiring company be called to decide whether to approve the merger but have not exercised this right. Therefore, the waiver is only applicable in simplified procedures.

Simplified procedures for cross-border mergers are regulated in Article 11 Law on Cross-Border Mergers. The waiver is applicable only in case of the acquisition of the fully owned subsidiary but not when acquiring 90 percent-owned company. It is also not required that additional conditions of Directive 2011/35/EU were met. Therefore, Article 8 Directive 2011/35/EU is not applicable in this case.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 7(1) Law on Cross-Border Mergers states that the approval by the general meeting of the subsidiary is not required during acquisition of the fully owned subsidiary.

e. Other exemptions for shareholder approval under Lithuanian law

There are no other exemptions.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

It should be noted that Lithuanian law does not distinguish between the scrutiny of legality on the level of the merging parties and the scrutiny of legality on the level of merging companies. Article 8(1) Law on Cross-Border Mergers provides that the scrutiny of the legality of merger procedures shall be assessed according to the legal norms of the Republic of Lithuania regulating the scrutiny of the legality of reorganization procedures of public and private limited liability companies by way of merger.

The scrutiny is performed by two bodies. First, Article 2.64(2)(4) LCC and Article 26(16) Law on Notary Office (September 15, 1992; No. I-2882) state that the notary public is authorized to examine the authenticity of documents that are filed with the Register of Legal Entities and the compliance of incorporation documents with the provisions of laws, as well as documents verifying the fact that a legal person may be registered because contractual obligations assumed in the incorporation contract have been fulfilled and the circumstances prescribed by the law and incorporation documents have emerged. Article 8(2) Law on Cross-Border Mergers further provides that it must be ascertained, among other things, that the merging companies have approved the terms of merger in the same terms and, where appropriate, that arrangements for employee participation in decision-making have been determined.

Once the notary certifies the authenticity of documents and other required elements, all documents are submitted to the Register of Legal Entities. According to Article 8(3) Law on Cross-Border Mergers, if the law of another Member State applies to the company resulting from the merger, then a certificate attesting to the proper completion of the pre-merger acts and formalities is issued by the manager of the Register of Legal Entities. Such certificate must, within six months of issue of the certificate, be submitted to the authority referred to in legal acts of other Member States together with the terms of merger approved by the general meeting of shareholders.

Article 8(2) transposes Article 10(2) CBMD, stating that the legality of merger procedures shall be scrutinized when the following have been submitted: (1) the documents necessary for effecting scrutiny procedures of the legality of reorganization of public and private limited liability companies by way of merger specified in the legal acts of the Republic of Lithuania; (2) the certificates issued not earlier than six months ago to each merging company, formed in accordance with the law of another EU

Member State, by the institutions specified in the legal acts of other Member States, attesting to the proper completion of all pre-merger acts and formalities; and (3) the terms of merger approved by the general meeting of members of each merging company formed according to the law of another Member State.

b. National authority has been designated to scrutinize the legality of the merger

The notary and the Register of Legal Entities have been designated. In principle, the notaries are supposed to perform the substantive review; however, in practice the review is mostly formal. The review by the Register of Legal Entities is mostly formal.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 7(3) Law on Cross-Border Mergers provides that if the law of a Member State to which at least one merging company is subject provides for a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares representing the capital of the merging companies or a procedure to compensate minority members of such companies, without preventing the registration of the merger, the general meeting of shareholders of each of the merging public or private limited liability companies shall, in its decision on the merger, be entitled to explicitly express its opinion on the possibility for the respective merging company to have recourse to such procedure to be initiated before the court.

The above provision differs from the Article 10(3) CBMD. First, it does not explicitly provide for the possibility to approve or veto the initiation of the scrutiny before the court. It rather speaks about the possibility to express opinion about such a possibility. It is unclear whether such opinion would be binding. Secondly, the Law on Cross-Border Mergers also provides the possibility to express the opinion to each of the merging companies as opposed to other merging companies situated in the Member States which do not provide for such procedure.

Regarding the possibility of the competent authority to issue the pre-merger certificate despite the ongoing scrutiny before the court, the Law on Cross-Border Mergers is silent. However, it can be implied from Article 8(2) that this possibility was not transposed. Article 8(2) states that in order to scrutinize the legality of merger procedures, the certificates issued not earlier than six months ago to each merging

company, formed in accordance with the law of another EU Member State, by the institutions specified in the legal acts of other Member States, attesting to the proper completion of all pre-merger acts and formalities, should be submitted. Therefore, the issuance of the pre-merger by the Lithuanian Register cannot proceed if the ongoing scrutiny prevents the issuance of above mentioned certificates in another Member State.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Please see answer to "Transposition of Articles 10 (1) and (2)" in Article 10.

b. The national authority has been designated to scrutinize the legality of the merger

Please see answer to "National authority has been designated to scrutinize the legality of the merger" in Article 10.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 9(1) Law on Cross-Border Mergers stipulates that if the company resulting from the merger is subject to the law of the Republic of Lithuania, the merger shall be deemed completed from the date of registration of the new public or private limited liability company formed after the merger or the registration of the amended statutes of the public or private limited liability company resulting from the merger in the Register of Legal Entities. Article 9(3) further states that from the date specified in paragraph 1 of this Article, the merger may not be declared null and void.

b. Date the cross-border merger takes effect

Article 9(2) Law on Cross-Border Mergers provides that a new public or private limited liability company formed after the merger or the amended statutes of the public or private limited liability company resulting from the merger shall be registered (i.e., merger is deemed completed) in the Register of Legal Entities not earlier than after the lapse of 10 days from the completion of scrutiny of the legality of the merger.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 9(4) of the Law on Cross-Border Mergers provides that the manager of the Register of Legal Entities shall ensure the publication of the information on completion of the merger, according to the procedure established in the Regulations of the Register of Legal Entities of the Republic of Lithuania (November 12, 2003; No. 1407). Article 163 Regulations of the Register of Legal Entities of the Republic of Lithuania states that completion of the merger should be announced in electronic informational publication by the manager of the Register of the Legal Entities. The announcement shall be done not later than the next working day after the registration.

b. Transposition of Article 13 second sentence

Article 9(6) Law on Cross-Border Mergers provides that if the company resulting from the merger is subject to the law of another Member State, the manager of the Register of Legal Entities shall, upon receiving information on the completion of the merger from the register of the appropriate Member State, remove the public or private limited liability company which ceases to exist from the register.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Lithuanian law is consistent with Article 14. Articles 2.97(3) and (4) LCC define two modes of reorganization. The first is joining, which means a merger of one or more legal persons to the other legal person, becoming successors to all rights and obligations of the reorganized legal person. Joining corresponds to the types of a merger defined in Articles 2(2)(a) and (c) CBMD. The second is consolidation, which means a merger of two or more legal persons into a new legal person, becoming a successor to all rights and obligations of reorganized legal persons. Consolidation corresponds to the type of a merger defined in Article 2(2)(b) CBMD. However, the Law on Cross-Border Mergers does not provide for the same distinction regarding the consequences of the merger as Articles 14(1) and (2) CBMD.

The provisions of the Law on Cross-Border Mergers are more general. Article 10(1) states that all the assets and liabilities of the merging public or private limited liability companies shall be transferred to the company resulting from the merger from the date of completion of the merger (applies both to joinings and consolidations). Article 10(2) states the shareholders of the public or private limited liability companies that

cease to exist after the merger shall become members of the company resulting from the merger.

It is also well accepted under Lithuanian law that the company being acquired (in case of joining) or merging companies (in case of consolidation) cease to exist. Article 2.95(2) LCC defines reorganizations (including mergers) as a termination of a legal person without the liquidation procedure. As seen immediately above, Article 10(2) also refers to the companies which cease to exist after the merger.

Article 14(3) is transposed by Article 10(1) Law on Cross-Border Mergers, which states that where the law of a Member State to be applied to at least one of the merging companies requires the completion of certain formalities before the transfer of assets, rights, and obligations by the merging companies to the company resulting from the merger becomes effective against third-parties, those formalities shall be binding on the public or private limited liability company resulting from the merger.

Article 14(4) is transposed by Article 10(7) Law on Cross-Border Mergers, which states that the rights and obligations of the merging public or private limited liability companies arising from contracts of employment or from employment relationships shall be transferred to the company resulting from the merger as of the date of completion of the merger. To be precise, the transposing article does not specify that rights and obligations shall exist at the date when the cross-border merger takes effect. There might be some uncertainty on which exactly employment contracts shall be transferred.

Article 14(5) is transposed by Article 10(6) Law on Cross-Border Mergers, which provides that no securities or shares in the acquiring company shall be exchanged for the securities or shares in the company being acquired that are held: (1) by the acquiring company or through a person acting in his own name but in the interests of the acquiring company and with its funds; or (2) by the company being acquired itself or through a person acting in his own name but in the interests of the company being acquired and with its funds. As seen above, Lithuanian law defines the notion of “acting on acquiring company behalf” as acting in the interest of the acquiring company and with its funds.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

This is transposed in Articles 11(1) and (2) Law on Cross-Border Mergers.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

This provision has not been fully transposed into Lithuanian law, as Article 11(2) Law on Cross-Border Mergers refers only to the independent expert report.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Lithuania does not have a system of employee participation that could be comparable to systems like German co-decision procedure or Dutch employee participation in structure regime companies.

However, Article 19 LLC states that in labor relations the rights and interests of employees may be represented and protected by the trade unions. Where there is no functioning trade union and if the staff meeting has not transferred the function of employee representation and protection to the trade union of the appropriate sector of economic activity, the employees shall be represented by the work council.

Article 19 Law on Work Councils (October 26, 2004; No. IX-2500) states that the work council shall have the right to: (1) participate in information and consultation procedure; (2) be consulted on decisions of the employer in the cases specified in laws, collective agreements, or agreements between the work council and the employer; (3) conclude a collective agreement of the undertaking with the employer; (4) authorize a member of the work council to enter the premises to survey the working conditions of employees; (5) receive from the employer and state and municipal institutions the information required for performing their functions; (6) put forward proposals to the employer relating to economic, social, and work issues, decisions of the employer relevant to employees, as well as the transposition of laws and collective agreements regulating employment relations; (7) apply to the court in relation to the legitimacy of decisions of the employer, as well as failure to transpose

or improper transposition of laws and collective agreements; (8) apply to the court for the protection of the rights of the work council established in laws, collective agreements or agreements between the works council and the employer; (9) when it is necessary to discuss important economic, social, and work issues, convene a general staff meeting; (10) take a decision to call a strike and lead it where an undertaking has no functioning trade union; (11) carry out other actions which are in compliance with laws.

Article 22 Law on Work Councils further provides that in cases when such possibility is established by laws, collective agreements, or agreements between the work council and the employer, the employer must hold consultations with the work council prior to taking a decision or reaching an agreement on its intended decision with the work council. To this end, the employer shall apply in writing in advance to the work council, giving reasons for its decision and furnishing all the relevant information. The work council must express its opinion on the decision of the employer within the time limit set by the employer for response. When necessary, the work council may request additional information. Upon receiving the opinion of the work council, the employer must consider it and give a reasoned response. The employer may initiate additional discussions or negotiations with the work council.

According to Article 23 Law on Work Councils, work councils also have a right to information. The employer must provide the work council with information in writing in a timely manner free of charge, and shall be responsible for the correctness of such information. Work councils can also have the right of access to information that constitutes a commercial/industrial or professional secret but is necessary for the performance of their duties, provided that they sign an obligation not to disclose the information.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 3(1) Law on Employee Participation states the rules apply if the company resulting from the cross-border merger has its registered office in Lithuania.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 4(1)(1) Law on Employee Participation provides that employees shall have participation rights in the company resulting from the merger if at least one of the merging companies has, in six months before the publication of the draft terms of the cross-border merger, an average number of employees that exceeds 500 and is

operating under an employee participation system. Article 4(1)(2) Law on Employee Participation states that the participation rights arise if employees of at least one of the merging companies have representatives in an administrative or supervisory body of a merging company.

No reference to Articles 16(2)(a) and (b) can be found.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 20(2)(1) Law on Employee Participation states that standard rules apply if before the conclusion of the merger in one or more merging companies, covering at least one-third of the total number of employees of all merging companies, employee participation was applied.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) CBMD is transposed by Article 20(1)(3), which states that standard rules apply when the relevant organs of each merging company, without any prior negotiation with the special negotiating body, decide that employees will participate in the new company according to the standard rules. As seen above, the transposing article clarifies that the decision should be taken by each of the merging companies and that negotiations with the special negotiating body are not required.

Article 16(4)(b) CBMD is transposed. Articles 15(1) and 15(2) Law on Employee Participation state that the special negotiating body has the right to decide whether to open negotiations or to terminate such negotiations with the relevant organ of the merging company by a majority of two-thirds of its members representing at least two-thirds of employees in at least two different Member States. Article 15(3) provides that in this case standard rules do not apply and employee participation in the related controlled companies will be transposed relying on the rules on participation in force in the Member State where such company has the registered office.

Regarding Article 16(4)(c) CBMD, Lithuania has not set the limit on the proportion of employee representatives. However, Article 21 Law on Employee Participation states that the number of representatives that the employees of the newly established company have a right to propose and elect shall be proportionate to the highest number of employee representatives which was available in any of merging companies before the completion of the merger. Article 22 further states that the number of employee representatives that each of the Member States participating in the merger

is allocated shall be proportionate to the number of employees that will work in such Member State after the merger. If due to the proportionate distribution some Member States do not get the right to propose and elect a representative, the free seats are allocated to the Member State in which the new company has its registered office.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

According to Article 4(2) Law on Employee Participation, the size of workforce thresholds giving rise to participation rights is calculated according to Article 7 Law on European Works Councils (February 19, 2004; No. IX-2031). It sets several rules. In short, the number of employees of a European company in Lithuania shall be calculated by adding up the number of all persons in employment relationship with that European company and all establishments of that European company operating in Lithuania. When the registered office of a European company is situated outside Lithuania, the number of employees of that company in Lithuania shall be calculated by adding up the number of all persons in employment relationship with establishments of that company operating in Lithuania. Therefore, there is no requirement to take employees employed in other Member States into account when calculating a number of employees in Lithuania.

In turn, the number of employees of a company in another Member State shall be calculated in accordance with the legislation and/or practice in force in that Member State. The total number of employees of the company in Member States shall be derived by adding up the numbers of employees in Lithuania and of employees in every other Member State. The total number is used when calculating, for example, how many members of a special negotiating body a particular branch or company can have. According to Article 10(2) Law on Employee Participation, the number of members one can appoint depends on the proportion of the number of employees of that company to the total number of employees. In this case employees employed in other Member States are taken into consideration.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 5(2) Law on Employee Participation states that the merger cannot be finalized as long as the statutes of the company resulting from the merger do not comply with

the agreed rules on employee participation or the standard rules, or the special negotiating body did not adopt the decision to terminate or did not start negotiations.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Articles 5(3) and 5(4) Law on Employee Participation precisely transpose Article 16(7) CBMD.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 is transposed by Article 9(3) Law on Cross-Border Mergers, which provides that after the date the merger took effect, the merger may not be declared null and void.

1.18. Additional

a. Valuation rules

According to Article 26 Property and Business Valuation Methodology (April 27, 2012; No. 1K-159), in case of the transfer of ownership, either market value or other values indicated in the International Valuation Standards, European Valuation standards, or other legal acts are used. However, given that the valuation is performed upon the request of the private party, there are no mandatory rules.

b. National case-law on provisions transposing the CBMD

There is no relevant case law.

c. Language requirements

No language requirements have been transposed.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The most general provisions on mergers are stipulated in Chapter VIII, Book 2 LCC. Its provisions are applicable both to domestic and cross border mergers as *lex generalis*.

The LCC states that mergers can be of two types: joining (merger of one or more legal persons to the other legal person, which become successors to all rights and obligations of the reorganized legal person) or consolidation (merger of two or more legal persons into a new legal person, which becomes a successor to all rights and obligations of reorganized legal persons). Merger is a type of reorganization.

The merger process starts with management preparing the terms of reorganization and the report on reorganization. In certain cases, the independent expert report shall also be drawn. Next, the terms of reorganization and the report are publicly announced. The general meeting of shareholders is summoned not earlier than 30 days after the public announcement of the terms of reorganization. The resolution to reorganize a legal person can be passed by members of a legal person, the court or, in certain circumstances, the managing body of a legal person. Members of a legal person pass the resolution by no less than two-thirds of qualified majority vote.

The LCC also regulates the conditions of invalidity of reorganization, simplified reorganization of certain legal persons, and other miscellaneous matters. LCC also provides that specialized laws shall lay down the particularities of reorganization process for different types of legal persons.

The Law on Companies applies to public and private limited liability companies (a maximum of 250 shareholders). It mostly repeats and somewhat details the provisions of the LCC. It also contains provisions on the exchange of shares in the course of reorganization; the taking over of the assets, rights, and liabilities of the companies being reorganized; special provisions for mergers by acquisition by a company that owns all of the shares in the company being acquired; and special rules for mergers by acquisition by a company that owns at least 90 percent of shares in the company being acquired.

The Law on Corporate Income Tax transposes the Merger Tax Directive 2005/19/EC.

b. Comparison

The procedures stipulated by the LCC and the Law on Companies, on the one hand, and the Law on Cross-Border Mergers, on the other, are quite similar. Both require the drafting of merger terms, management report, independent expert report, public announcement of the merger, and the same procedure of approval by the general shareholders meeting. In addition, Article 1(2) Law on Cross-Border Mergers provides that for the issues that are not regulated by that law, the provisions of the Law on Companies regulating the reorganization of public and private limited liability companies by way of merger shall apply. Therefore, issues like creditor protection are regulated by the same provisions in both domestic and cross-border mergers.

The first difference between the two areas is a slightly different announcement term. The Law on Cross-Border Mergers requires three public notices with intervals of at least 30 days or one public notice 40 days before shareholders' meeting, as well as an individual written notice to each of the companies' creditors. According to the Law on Companies, the companies must publish either three public notices with intervals of at least 30 days or one notice 30, not 40, days before the general meeting of shareholders along with individual written notice to each of the companies' creditors.
Secondly, in the case of domestic mergers, the provisions on employee participation do not apply.
Thirdly, there are some differences in the regulation of simplified procedure. For example, in case of the acquisition of a 90 percent-owned subsidiary, Article 11(2) Law on Cross-Border Mergers waives only the requirement to prepare the independent expert report. In domestic mergers, Article 70(1)(1) Law on Companies waives also the requirement of the qualified majority approval subject to certain conditions. In addition, Article 70(1)(2) states that it is not required to prepare independent expert and management reports as well as to comply with certain information duties, if, upon request, the acquiring company purchases the remaining shares of other shareholders before the completion of the reorganization.

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1. Transposition of the Cross-Border Mergers Directive into Luxembourg Law

The transposition of the CBMD into Luxembourg legislation occurred in two different stages. After proceeding with the partial transposition of the CBMD by two laws dated March 23, 2007 (the 2007 Laws), the Luxembourg Parliament fully transposed the CBMD with the law dated June 10, 2009 (the 2009 Law). The 2007 Laws and the 2009 Law amended the Luxembourg law on commercial companies of August 10, 1915 (the Luxembourg Company Act).

The bill of law No. 5730 aims, among other things, to bring minor modifications to the Luxembourg Company Act's provisions governing cross-border mergers.

After the transposition of the CBMD, the law of August 3, 2011, transposed the elements of Directive 2009/109/CE regarding reporting and documentation requirements for cross-border mergers. This law aims to simplify the information and publicity requirements to be met by the merging companies.

Prior to the transposition of the CBMD, although there were not any Luxembourg laws that specifically referred to cross-border mergers, in practice cross-border mergers took place in accordance to the procedure applicable to domestic mergers of Luxembourg public limited liability companies, as provided for by the law of September 7, 1987. The laws transposing the CBMD have not only confirmed the possibility of Luxembourg public limited companies to participate in cross-border mergers but also have extended the scope of cross-border mergers to all Luxembourg commercial companies and economic interest groupings. In addition, the companies to be absorbed or ceasing to exist after the merger may be subject to bankruptcy procedures. This was not possible under the law of September 7, 1987.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first definition to which kind of mergers the Directive applies.

The scope of the Luxembourg law is much broader than the one of the CBMD. Pursuant to Article 257, paragraphs 1 and 2, Luxembourg Company Act, the rules and procedures of domestic and cross-border mergers shall apply to all companies with legal personality pursuant to this law[1] and to economic interest groupings.

[1] I.e. common limited partnerships (*société en commandite simple, SCS*), partnership limited by shares (*société en commandite par actions, S.C.A.*), public limited liability companies (*société anonyme*), private limited liability companies (*société à responsabilité limitée, S.à r.l.*), cooperative societies (*société coopérative*), Luxembourg based European company (*societas europea*).

A merger can also occur where one or more of the companies or economic interest groupings that are absorbed or will cease to exist by virtue of the merger, are the subject of bankruptcy proceedings, proceedings relating to composition with creditors, or a similar procedure, such as the suspension of payments, controlled management, or proceedings instituting special management or supervision of one or more of such companies.

A merger under the cross-border merger provisions transposing the CBMD involving a Luxembourg company would only be possible if the laws of all foreign companies involved in the merger do not explicitly prohibit cross-border mergers with companies having other legal forms than those referred to under the CBMD (Article 257, paragraph 3, Luxembourg Company Act). If not, a cross-border merger may only take place based on the principle of the freedom of establishment as confirmed by the decision *Sevic System AG,* rendered by the European Court of Justice on December 13, 2005—i.e. that a jurisdiction of the European Union cannot refuse to give effect to a cross-border merger, if a merger would be permitted between two entities of that jurisdiction.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability companies' as "(a) a company as referred to in Article 1 of Directive 68/151/EEC, or (b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others." Under Luxembourg law, the term "limited liability company" describes a certain legal form of company. It is worth mentioning that the Luxembourg Company Act contains a similar definition of the term "limited liability company" in its Article 179.

b. List of companies that can carry out a cross-border merger under Luxembourg law

Cross-border mergers are applicable to the following forms of companies with a legal personality governed by the Luxembourg Company Act: public limited liability companies, private limited liability companies, partnerships limited by shares, general partnerships, common limited partnerships, cooperative societies, Luxembourg-based European companies, Luxembourg-based European cooperative companies and civil

companies. Economic interest groupings can also carry out cross-border mergers under Luxembourgian law.

In practice, the Luxembourg merging companies are most often either private limited liability companies or public limited liability companies.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

In defining the term "merger," the Luxembourg Company Act goes beyond the definitions provided by the CBMD. The three types of mergers possible under Luxembourg law are:

(1) merger by acquisition (Article 259, paragraph 1, Luxembourg Company Act);

(2) merger by incorporation of a new company (Article 260, paragraph 1, Luxembourg Company Act); and

(3) simplified merger (Article 278 Luxembourg Company Act).

Cross-border mergers under the Luxembourg Company Act are not limited to cross-border mergers with companies incorporated in the EEA, but also apply to mergers with companies incorporated in non-EEA countries where cross-border mergers are not prohibited by national law (Article 257, paragraph 3, Luxembourg Company Act).

Moreover, mergers may also take place where one or more of the companies being acquired or ceasing to exist are in liquidation, provided that those companies have not yet begun to distribute their assets to their members.

Lastly, in accordance with Article 284 Luxembourg Company Act, other operations that are similar to mergers but do not meet certain requirements to qualify as merger in the meaning of the Luxembourg Company Act are nevertheless subject to the same rules than mergers. This is the case of the following corporate reorganizations: (1) the cash balance exceeds 10 percent of the nominal value of the shares or corporate units issued by the absorbing company or, in the absence of a nominal value, of their accounting par value of the shares of the absorbing company, or (2) one or more companies enter into liquidation and transfer their assets and liabilities to another company against the issue of shares or corporate units in the latter company to the members of the former company, with or without a cash balance.

d. Rules on the cash payment

Luxembourg follows the rules on the cash payment as laid down in Articles 2(2)(a) and (b) CBMD and it also follows Article 3(1) CBMD through Articles 259, 260, and 284 Luxembourg Company Act.

e. CBMs and companies in liquidation

Under Luxembourg law, merging companies in liquidation are explicitly allowed to participate to cross-border mergers. Indeed, pursuant to Article 257, paragraph 2, Luxembourg Company Act, a merger can also occur when one or more of the companies or economic interest groupings that are acquired or will cease to exist are the subject of bankruptcy proceedings, proceedings relating to composition with creditors, or a similar procedure, such as the suspension of payments, controlled management, or proceedings instituting special management or supervision of one or more of such companies. However, if the distribution of the assets to their members has occurred, the company in liquidation will not be allowed to participate to the cross-border merger.

f. Geographical scope

Luxembourg allows cross-border mergers with companies formed outside of the EEA or formed within the EEA but having its registered office, central administration or principal place of business outside of the EEA (in short, non-EEA companies). Provided the law of such third country does not prohibit such a cross-border merger and such foreign company complies with the provisions and formalities of the national law by which it is governed (Article 257, paragraph 3, Luxembourg Company Act), they are subject to the same cross-border merger rules than cross-border mergers within the EEA.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

The 2007 Laws transposing the CBMD not only confirmed the ability of Luxembourg companies to participate in cross-border divisions, but also extended the scope of division provisions (Section XV Luxembourg Company Act) to other companies (other than public limited liability companies) and introduced further types of reorganizations (such as transfers of assets, branch of activity transfers and all assets and liabilities transfers, transfers of professional assets) into Sections XV-*bis* and XV-*ter* Luxembourg Company Act. The transfer of seat is based on legal practice. No procedure is referred to in law.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal

value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) of the CBMD is transposed in Articles 259, 260, and 284 Luxembourg Company Act.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Luxembourg has decided not to exclude cooperative societies from the possibility to participate to cross-border mergers.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

The undertakings for collective investment in transferable securities (UCITS, UCI) are excluded from the cross-border mergers provisions of the Luxembourg Company Act and are governed by specific laws. However, the non-UCITS investment companies in the form of SICAVs (investment companies with variable capital) or SICAFs (investment companies with fixed capital) and SICARs (investment companies in risk capital) are subject to the mergers provisions of the Luxembourg Company Act.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

The Luxembourg Company Act does not limit its scope to mergers with entities within the EEA but extends it to foreign entities of third countries where such cross-border mergers are not prohibited by the law of such third country (Article 257, paragraph 3, Luxembourg Company Act).

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Luxembourg did not transpose this option.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Luxembourg adopted this option under Article 268, paragraph 1, Luxembourg Company Act.

With regard to the start of the procedure, creditors of the Luxembourg merging companies whose claims pre-date the date of publication of the deeds recording the approval of the merger may, notwithstanding any agreements to the contrary, apply within two months from the date of publication of the merger deed to obtain adequate safeguard of collateral for any matured or unmatured debts.

This same procedure applies to domestic mergers.

It is however not possible for creditors to block the merger.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Luxembourg did not set rules to protect minority shareholders, provided for under the last sentence of Article 4(2) CBMD. Shareholders of a Luxembourgian company who voted against a merger that was validly approved by the required majority have to accept the consequence of the merger.

e. The protection of employees in Article 4(2)

Luxembourg did transpose the option to protect employees, in Article 274, paragraph 4, Luxembourg Company Act. Luxembourg has adopted a rather straightforward protection plan, whereby all rights and obligations of the merging companies in connection with employment relationships are assigned to the acquiring company, as they existed at the date of the cross-border merger.

This option also exists for domestic mergers within Luxembourg, but this option was not frequently used because most cross-border mergers are intra-group and the participating merging companies do not have any employees.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called "CDTMs" (meaning "Common Draft Terms of Cross-Border Mergers"). These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Article 261 Luxembourg Company Act is in line with and does not go beyond the requirements of Articles 5(a) to (l) CBMD.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Luxembourg has transposed Article 6(1) CBMD in Article 262, paragraph 1, Luxembourg Company Act. The publication of the CDTMs in the Luxembourg official gazette (*Mémorial, Recueil des Sociétés et Associations*) must occur for each of the merging companies at least one month before the date of the meeting of the general assembly of shareholders convened to decide on the merger.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

Article 267, paragraph 4, Luxembourg Company Act follows the amendment of Article 6 (1) by Article 4 (1) of Directive 2009/109/EC, but, if the copy of the information is made available on the Internet, it will not remove the obligation to have printed copies available for consultation by members at the company's registered office.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD has been literally transposed into Article 262, paragraph 2, Luxembourg Company Act.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Article 265, paragraph 1, Luxembourg Company Act, with no additional or diverging requirements.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8 (1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 266, paragraph 1, Luxembourg Company Act follows the one-month requirement of Article 8(1) CBMD and does not go any further.

b. The independent expert

The expert must be chosen among the approved statutory auditors in Luxembourg (*réviseurs d'entreprises agréés).*

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD is transposed in Article 266, paragraph 1, Luxembourg Company Act, which provides that one or more independent experts for each of the merging companies may be impelled by the management bodies of each merging companies to craft the report. The expert's placement may be sought by all the companies that are merging, and they must, in this case, request the judge overseeing the Court on Commercial Matters in the district where the acquiring company office is registered to appoint the expert in charge of preparing the report for all merging companies.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been literally transposed into Article 266, paragraph 2, Luxembourg Company Act.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision has been transposed in Article 266, paragraph 4, Luxembourg Company Act.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Article 266, paragraph 5, Luxembourg Company Act.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15 (1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have been transposed in Article 278, paragraph 1, and Article 281, paragraph 2, Luxembourg Company Act.

In case of an acquisition carried out by a company holding 90 percent or more of its subsidiary shares, a report from an independent expert may not be required under certain conditions (Article 282 Luxembourg Company Act).

h. Further exemptions in Luxembourg law

There are no further exemptions in Luxembourg law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

This Article has been transposed in Article 263, paragraph 1, Luxembourg Company Act, which does not go any further than Article 9 CBMD.

a. Procedural requirements including majority, quorum, timing and notarization

The general meeting of shareholders deciding upon the merger shall be held at least one month after the provision for inspection of the CDTMs together with the required documents at the registered office of the merging companies.

The quorum and majority required for the validity of the merger approval are those laid down for the amendments of the articles of association and will therefore depend on the legal form of the merging companies (Article 263 Luxembourg Company Act). However, it should be noted that the unanimous consent will be required if the partners of the acquiring company or company being acquired bear unlimited liability for the debts of the partnership.

The minutes of the general meeting shall be drawn up in the form of a notarial deed (Article 271, paragraph 1, Luxembourg Company Act).

b. Amendment of CDTMs by shareholders

The shareholders may only approve or reject the CDTMs, and are not able to make any amendments. However, the members of any of the merging companies may reserve the right to render the transposition of the merger conditional to the express

ratification of the arrangements made with respect to the participation of the employees in the company that will result from the cross-border merger.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

The same circumstances are laid down in Article 264 Luxembourg Company Act.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

This provision has been transposed in Article 279, paragraph 2, Luxembourg Company Act (which is applicable to simplified mergers in general).

Article 15(1) of the CBMD is transposed in Article 271, paragraph 1, of the Luxembourg Company Act. According to Article 271, paragraph 1, a notarial deed will be crafted from the minutes of the general meetings when the merger was discussed. A similar process will occur for the common draft terms of a merger that does not need to be approved by general meetings of the merging companies.

National law provides other exemptions to the shareholder approval. Depending on the legal form of the absorbing company, the approval of the merger by the general meeting may not be necessary under certain conditions (Article 264 Luxembourg Company Act).

Moreover, in case of a simplified merger, the approval of the merger by the general meeting of the absorbing company may be waived under certain conditions and in particular if the members had one month before the holding of the general meeting the opportunity to consult the documents at the registered office of the acquiring company. However, a general meeting may be convened by one or more members representing together at least 5 percent of the units representing the corporate capital (Article 279, paragraph 1, and Article 281, paragraph 1, Luxembourg Company Act).

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Article 271, paragraph 2, Luxembourg Company Act. It does not go any further.

b. National authority has been designated to scrutinize the legality of the merger

The Luxembourg legislator has designated the notary as the competent authority to scrutinize the legality of the Luxembourg aspects of a cross-border merger. The authority does a formal check.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

This provision has been transposed under Article 271, paragraph 3, Luxembourg Company Act, and it does not go any further. This provision is also applicable in case of international cross-border mergers.

Pursuant to Article 271, paragraph 3, such procedure shall only apply if all the other participating merger companies explicitly accept the recourse of such procedure. In the absence of an approval, the right of recourse to the procedure amending the exchange ratio or compensating minority members will not be recognized by the other merging companies.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed in Article 271, paragraph 2, Luxembourg Company Act, with no additional or diverging rules.

b. The national authority has been designated to scrutinize the legality of the merger

The notary has been designated to scrutinize the legality of the merger with a substantive check.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Articles 272, 273, and 273-*ter* Luxembourg Company Act.

b. Date the cross-border merger takes effect

In case of a merger by absorption of a foreign law-governed company, the merger shall take effect and be effective against third-parties from the date of the publication of the minutes of the general meeting that is to decide on the merger. This publication shall not occur until after the second verification to be made by the notary. In case of absorption of a Luxembourg company by a foreign company, the law applicable to that foreign company determines when the merger takes effect.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

This provision has been transposed into Article 273-*ter*, paragraph 2, Luxembourg Company Act.

b. Transposition of Article 13 second sentence

This provision has been transposed into Article 273-*ter*, paragraph 2, Luxembourg Company Act without any additions or diversions.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Articles 14(1), (2), and (4) CBMD have been transposed into Article 274 Luxembourg Company Act.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

This provision has been transposed in Articles 278 and 279, paragraph 2, Luxembourg Company Act.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

These provisions have been transposed into Article 281, paragraph 2, Luxembourg Company Act. Under certain conditions, the management report may be exempted in addition to the independent expert report (Article 282 Luxembourg Company Act).

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Luxembourg does have a system of employee participation. In all Luxembourg public limited companies employing more than 1,000 employees and in all Luxembourg public limited liability companies in which the participation of the Luxembourg state is more than 25 percent, at least three employee representatives shall be appointed to the managing body. For the determination of the employee participation system applicable for the company resulting from a cross-border merger, reference should be made to the entirely new section of the Luxembourg Labor Code.[2] Based on these provisions, the Luxembourg employee participation system will apply when the thresholds under Luxembourg law are met. If the thresholds are not met, Luxembourg law refers to SE Regulation (EC 2157/2001). On this basis, special provisions must be set and agreed, especially in the field of employee involvement. The special negotiation body may also opt in such case for the Luxembourg employee participation system.

[2] Luxembourg Labor Code, Book IV, Title I, Chapter VI, Section 4 '*Employee participation in case of cross-border merger*'.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

The transposition of Article 16(1) CBMD into Luxembourg law goes partially beyond the scope of the CBMD; Articles L.426-13 to L.426-16 Luxembourg Labor Code are also applicable to cross-border mergers of companies that have their registered office outside the EEA.[3]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16 (1) CBMD.

These exemptions have been transposed in Articles L.426-14 and L.426-15 Luxembourg Labor Code. It should be noted that under Luxembourg law, the negotiation does not only include the participation of the employees but also the information and consultation of such employees by the staff representative body.

Moreover, diverging rules exist regarding of Article 16(2)(b) CBMD. Indeed, pursuant to Article L.426-1 Luxembourg Labor Code, the Luxembourg employee participation regime shall apply to any public limited liability company resulting from the cross-border merger having at least 1,000 employees in Luxembourg, regardless of whether the employees from the establishments located in other countries are entitled or not to exercise the same participation rights as the Luxembourg employees.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

National law has transposed Article 16(3) in Article 443-1 Labour Code.

e. Transposition of Article 16(4)

Article 16 (4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a), (b), and (c) have been transposed into national law.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has been transposed into national law.

[3] P. Reckinger et al., 'Cross-Border Reorganizations in Luxembourg', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), p. 27.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) has been transposed in Article 426-16 Labour Code.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

An action for avoidance of a merger may be brought before the expiry of a period of six months from the date on which the merger took effect (Article 276, paragraph 1, Luxembourg Company Act) when the decision of the general meeting of shareholders of the Luxembourg company approving the merging has not be done in the form of a notarial deed, if this form was required by the Luxembourg Company Act or when the resolutions of the general meeting adopted by either of the merging companies have not been validly taken. However, the avoidance of a merger by acquisition of a foreign law-governed company that has become effective toward third parties may not be ordered (Article 276, paragraph 3, Luxembourg Company Act).

1.18. Additional

a. Valuation rules

The valuation rules applicable to mergers for a share exchange or the valuation of the merging companies are not prescribed by law. The valuation should however be carried out in light of the corporate interest of the merging companies.

b. National case-law on provisions transposing the CBMD

There is no relevant case-law on provisions transposing the CBMD.

c. Language requirements

Luxembourg has imposed language requirements. The documents may be published in French, German, or English, but if the CDTMs and the notarial deed recording the

decision of the general assembly of members approving the merger are written in English, a French or German translation is required before their publication.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The procedure for domestic mergers is very similar to that of cross-border mergers.

b. Comparison

Domestic mergers are not obviously subject to the provisions regarding employee participation of the Luxembourg Company Act.

Finally, there are certain steps of the procedure that are not required for domestic mergers, such as the scrutiny of the legality of the merger by the notary or the management report in case of a cross-border merger with a wholly owned subsidiary.

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1. Transposition of the Cross-Border Mergers Directive into Maltese Law

The transposition of the CBMD into Maltese law took place in 2007, under the Cross-Border Mergers of Limited Liability Companies Regulations (the Company Regulations), which entered into force on December 15, 2007.[1]

Transposition was promulgated by the minister responsible for the registration of commercial partnerships under the Companies Act (the "Act")[2] by virtue of Article 425(1) of said Act.[3]

The bill is not due to be replaced, modified, or amended.[4] No further reforms regarding cross-border merger laws were performed after transposition of the CBMD.[5] Prior to the publication of the CBMD, no provision for cross-border mergers existed in Maltese national law.[6]

1.1. Article 1 – Scope General

Article 1 CBMD outlines the general scope of the Directive and the kind of mergers to which the Directive applies.

Regarding the scope of Maltese national law transposing the CBMD, according to Regulation 2 of the Company Regulations, the "purpose of [the] regulations is to transpose and implement the EC Directive and [the regulations] shall be interpreted accordingly." Thus, Maltese national law limits itself exclusively to the provisions of the CBMD, from Article 1 of the CBMD onward.

There is no allowance for cross-border mergers outside the scope of the CBMD in Maltese national law. The Company Regulations' specific purpose is to transpose the CBMD into Maltese law, and this instrument contains no provisions applying to legal entities outside the scope of the Directive.

1 Legal Notice 415 of 2007, S.L. 386.12.
2 Act XXV of 1995 as amended by Acts XXIV of 1995, IX and XXX of 1997, XVII of 1998, XXII of 2000, XVII of 2002, IV and IX of 2003, and II and XIII of 2004; Legal Notices 390 and 391 of 2005, and 181 and 186 of 2006; Acts V and XII of 2006, and XV of 2007; Legal Notice 425 of 2007; Acts IX of 2008, III of 2009 and XIX of 2010; Legal Notice 561 of 2010; Act X of 2011; and Legal Notices 171, 337 and 338 of 2012, Cap. 386 of the Laws of Malta.
3 This Article specifies that 'The Minister may make regulations for the purpose of carrying into effect the provisions of this Act […]'.
4 Dr. Edward Dalmas, former Legal Officer, Malta Financial Services Authority, interview on 8 May 2013.
5 Ibid.
6 The act regulating commercial mergers prior to transposition of the CBMD into Maltese law, the Companies Act, op. cit. (cf. fn. 3), only made provision for domestic mergers in Title II of Part VIII, entitled 'Amalgamation of Companies', Articles 343 – 359, No provision for cross-border mergers was made in this Act, or in any other Maltese legislation prior to CBMD transposition.

Specifically, no such rules exist regarding either cooperative societies or collective investment companies. There are also no plans to introduce national cross-border legislation for these two types of entity in the near future.[7]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability companies'. Maltese national law defines the term "limited liability companies" in Regulation 3(3) of the Company Regulations, which paraphrases the definition found in Article 2(1) of the CBMD.[8]

b. List of companies that can carry out a cross-border merger under Maltese law

The Company Regulations have been enacted as subsidiary legislation to the Act. The Act regulates three types of partnerships: the partnership *anonyme* (more commonly known as the limited liability company), the partnership *en commandite* and the partnership *en nom collectif*.

It is only the limited liability company (which can take the form either of a public limited liability company or a private limited liability company) which qualifies under the definition of "company" in terms of Regulation 3(3) of the Company Regulations (reflecting the definition of Article 2(1) of the CBMD).

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Maltese national law defines the term "merger" in the same way as Article 2 of the CBMD, in Regulation 3(4) of the Company Regulations.[9]

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7 Dr. Edward Dalmas, former Legal Officer, Malta Financial Services Authority, interview on 8 May 2013.

8 Article 3(3) of the Company Regulations reads as follows: 'For the purpose of these regulations, "company", unless otherwise qualified, means:
(a) a company as referred to in article 1 of Directive 68/151/EEC; or
(b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning safeguards such as are provided for by European Community Directive 68/151/EEC for the protection of the interests of members or others'.

9 Regulation 3(4) of the Company Regulations reads as follows: 'For the purpose of these regulations, "merger" means an operation whereby:
(a) one or more companies, on being dissolved without going into liquidation, transfer all their assets, rights, liabilities and obligations to another existing company ("the acquiring company") in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares, hereinafter referred to as "merger by acquisition"; or
(b) two or more companies, on being dissolved without going into liquidation, transfer all their assets, rights, liabilities and obligations to a company that they form ("the new company") in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a

d. Rules on the cash payment

The rules on cash payments in Articles 2(2)(a) and (b) of the CBMD are transposed verbatim in Regulations 3(4)(a) and (b) of the Company Regulations, as are the rules in Article 3(1) CBMD, transposed verbatim as Regulation 4(2) of the Company Regulations.[10]

e. CBMs and companies in liquidation

Although Regulation 3(4) of the Company Regulations simply reproduces Article 2(2) of the CBMD, there are no specific provisions in the Regulations as to companies in liquidation; however, there are no specific exclusions either.

In respect of domestic mergers Article 343(5) and (6) of the Act provide that:

(5) The fact that one or more of the companies being acquired, or one or more of the merging companies has been dissolved voluntarily by an extraordinary resolution, and a declaration of solvency has been filed shall not prevent such companies taking part in the amalgamation provided that none of their assets have been distributed to shareholders after dissolution.

(6) The fact that one or more of the companies being acquired or one or more of the merging companies has been dissolved by the court... and if in the case of a voluntary winding up a declaration of solvency has not been filed, it shall invalidate the amalgamation with respect to all the amalgamating companies.

The above provisions under domestic law in respect of domestic merger are an indicator that only solvent companies may avail themselves of a cross-border merger.

f. Geographical scope

Under Maltese law no provision exists that may allow cross-border mergers with companies formed outside of the EEA or formed within the EEA but having its registered office, central administration or principal place of business outside of the EEA (in short: non-EEA companies)

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cash payment not exceeding 10% of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares, hereinafter referred to as "merger by formation"; or
(c) a company, on being dissolved without going into liquidation, transfers all its assets, rights, liabilities and obligations to the company holding all the securities or shares representing its capital, the acquiring company.

10 Regulation 4(2) of the Company Regulations reads as follows: 'Notwithstanding the definition of "merger" in regulation 3(4), these regulations shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in paragraphs (a) and (b) of the said definition to exceed 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger'.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

The continuation of companies is authorised by virtue of the Continuation of Company Regulations[11]. Transfers of the registered office of a *Societas Europaea* are possible in terms of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). However, no provision is made in Maltese national law for cross-border divisions or other cross-border restructurings.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) of the CBMD is transposed verbatim in Regulation 4(2) of the Company Regulations.[12]

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Domestic cooperatives do not fall within the definition of a "company" under Regulation 3(3) of the Company Regulations. The fact that Company Regulations have been enacted under the Act, whereas cooperatives are regulated for under different legislation[13] is also an indicator that the Maltese legislator did not want cooperatives to benefit from the CBMD.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

Maltese national law follows Article 3(3) of the CBMD by citing it directly in Article 4(3) of the Company Regulations.[14]

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11 Legal Notice 344 of 2002, as amended by Legal Notices 352 of 2003, 181 and 186 of 2006, and 425 of 2007,S.L. 386.05., subsidiary to the Act.

12 Regulation 4(2) of the Company Regulations reads as follows: 'Notwithstanding the definition of "merger" in regulation 3(4), these regulations shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in paragraphs (a) and (b) of the said definition to exceed 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger'.

13 Co-Operatives are regulated under Maltese law by the Co-operative Societies Act XXX of 2001, as amended by Legal Notice 426 of 2007; Act V of 2007; and Legal Notice 346 of 2008., Cap. 442 of the Laws of Malta).

14 Article 4(3) of the Regulations reads as follows: 'These regulations shall not apply to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request,

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Maltese company law recognises only one type of limited liability company (which can take the form either of a public limited liability company or a private limited liability company). Mergers between domestic limited liability companies are possible under Maltese law. Thus Maltese limited liability companies are not restricted from benefiting from a cross-border merger under the CBMD.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4 (1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have also provided so for domestic mergers.

Article 4(1)(b) was transposed into Maltese national law under Regulation 5(2) of the Company Regulations.[15]

This option has not yet been used.[16]

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member States with the option of adopting protections for creditors, debenture and security holders.

Regulation 13(2) of the Company Regulations offers protection to creditors outlined in Article 4(2) of the CBMD.[17] A creditor whose debt existed prior to the publication of the common draft terms of cross-border merger (CDTMs), may object to the cross-border merger by filing an application before the Maltese courts. The application has to be made within a three month period from the later of either:

repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption'.

15 Regulation 5(2) of the Company Regulations reads as follows: 'Any law in force in Malta which empowers any authority in Malta to oppose a merger between companies registered in Malta on grounds of public interest, shall also be applicable to a cross-border merger in which a Maltese merging company participates: Provided that this provision shall not prejudice the provisions of article 21 of European Community Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings'.

16 Dr. Edward Dalmas, former Legal Officer, Malta Financial Services Authority, interview on 8 May 2013.

17 Regulation 13(2) of the Company Regulations specifies that: '[w]ithout prejudice to sub-regulation (1), any creditor of the Maltese merging company or companies whose debt existed prior to the publication of the common draft terms of cross-border merger made pursuant to regulation 7(2) may, within the period of three months from the last publication referred to in regulation 12, by application, object to the cross-border merger and, if he shows good cause why it should not take effect, the Court shall either uphold the objection or allow the cross-border merger on sufficient security being given. This remedy shall apply also to the debenture holders of the Maltese merging company or companies so long as the merger has not already been approved by the debenture holders individually, or by a special meeting of the debenture holders called specifically for that purpose, at which meeting all the debenture holders signify their consent'.

(i) The publication by the Registrar of Companies in the Government Gazette or in a website maintained by him of a statement containing notification of the extraordinary resolution adopted to approve the merger and registered by the Maltese Register of Companies; and

(ii) The publication of the same statement in a daily newspaper circulating wholly or mainly in Malta.

Regulation 13(2) states that "[w]ithout prejudice to sub-regulation (1) [offering general rights of contestation and objection to interested parties], any creditor of the Maltese merging company or companies whose debt existed prior to the publication of the common draft terms of cross-border merger made pursuant to regulation 7(2) may, within the period of 3 months from the last publication referred to in regulation 12, by application, object to the cross-border merger and, if he shows good cause why it should not take effect, the Court shall either uphold the objection or allow the cross-border merger on sufficient security being given."

This remedy also applies to the debenture holders of the Maltese merging company or companies so long as the merger has not already been approved by the debenture holders individually, or by a special meeting of the debenture holders called specifically for that purpose, at which meeting all the debenture holders signify their consent

Under domestic law, this contestation option is provided for in Article 351 of the Act in respect of mergers by acquisition;[18] and in Article 357(1)[19] for mergers through the formation of a new company.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member States with the option of adopting protections for minority shareholders.

Malta has taken up the option of providing for minority shareholder protection in respect of cross-border mergers under Regulation 10(3) of the Company Regulations. Regulation 10(3) provides: "When a Maltese merging company approves the common draft terms of cross-border merger by extraordinary resolution... it shall be required to redeem the shares of the dissenting members who so request, on such terms as may be agreed, or as the Court... thinks fit to order."

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18 Article 351(2) of the Act reads as follows: 'During the aforesaid period of three months [from the date of the last publication of the statement relating to the extraordinary resolutions approving the amalgamation),any creditor of any of the amalgamating companies whose debt existed prior to the publication of the draft terms of merger in terms of article 345(6)(a) may by sworn application object to the amalgamation and, if he shows good cause why it should not take effect, the court shall either uphold the objection or allow the amalgamation on sufficient security being given'.

19 Article 357(1) of the Act reads as follows: 'The provisions of articles 344 to 356 other than article 345(6) shall apply to merger by formation of a new company as though references to the acquiring company were

This period allowed for the company or the minority shareholders to make an application before the Court to fix the terms for the redemption of the shares held by dissenting members at 3 months from the approval of the CDTMs by an extraordinary resolution adopted at the general meeting. However, where one or more of the merging companies is situated in a Member State which does not provide such protection to minority shareholders, redemption shall only apply if the other merging company or companies explicitly accept, when approving the CDTM, the possibility for the members of the Maltese merging company to have recourse to such a procedure.
This protection is also provided for domestic mergers under Article 345(1) of the Act in respect of mergers by acquisition;[20] and under Article 357(1) in respect of mergers through the formation of a new company.[21]

e. The protection of employees in Article 4(2)

The protection of employees through Maltese law is discussed in Regulation 5(1) of the Company Regulations.[22].
All the different forms of protection afforded to employees under the Employment and Industrial Relations Act[23]—Malta's principal legislative instrument regulating employee rights and protection—are automatically extended to employees of the merging companies by virtue of the said Regulation 5(1).
This protection also applies to domestic mergers since the Employment and Industrial Relations Act and subsidiary legislation therein applies to all companies regulated by Maltese law.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CBMD provides for certain particulars that have to be included.

references to the new company and as though references to the amalgamating companies and to the companies being acquired were references to the merging companies'.
20 Article 345(1) of the Act specified that 'Each of such [merging] companies shall be required to redeem the shares held by the dissenting members, if they so request, on such terms as may be agreed or as the court, on a demand by either the company or the dissenting members, thinks fit to order'.
21 See footnote 49.
22 The relevant part of Regulation 5(1) of the Company Regulations reads as follows: '5. (1) Unless otherwise provided in these regulations, a Maltese merging company shall comply with the provisions and formalities of the Act, in particular those concerning [...] the rights of employees.'
23 Act XXII of 2002, as amended by Acts IX of 2003 and III of 2004, Cap. 452 of the Laws of Malta.

Article 5 of the CBMD has been transposed verbatim under Regulation 6 of the Company Regulations.[24]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Malta has transposed Article 6(1) of the CBMD through Regulations 7(2)[25] and 7(3) of the Company Regulations.[26]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

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24 Regulation 6 of the Company Regulations reads as follows: 'The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger which shall include at least the following particulars:
(a) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;
(b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;
(c) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;
(d) the likely repercussions of the cross-border merger on employment;
(e) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;
(f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;
(g) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;
(h) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
(i) the statutes of the company resulting from the cross-border merger;
(j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined;
(k) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;
(l) dates of the merging companies' accounts used to establish the conditions of the cross-border merger'.

25 Regulation 7(2) of the Company Regulations. "...the Registrar shall register the common draft terms of cross-border and shall cause without delay a statement to be published in the Gazette or in a website maintained by him".

26 Regulation 7(3) of the Company Regulations reads as follows: 'The publication referred to in sub-regulation (2) shall be made at least one month before the date of the general meeting which is to decide on the approval of the common draft terms of cross-border merger in terms of regulation 10'.

This amendment has not been transposed; no such exemptions are specified in Regulation 7(2) and 7(3) of the Company Regulations, or anywhere else in said Regulations. The exemption arising from the amendment to the said Directive has not yet been transposed into Maltese law, although other elements of the Directive have been transposed.[27]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Regulation 7(2) of the Company Regulations provides that apart from the registration of the common draft terms of the cross-border merger, the Registrar has to publish without delay a statement with a number of specificities. This statement has to be published either in the Malta Government Gazette or on a website maintained by the Registrar.[28] The specificities that have to be included in the statement are the same as those prescribed by Article 6(2) – with the exception that the statement also has to indicate the date on which the registration of the CDTM was made and that the document registered relates to the CDTM.[29]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 of the CBMD has been transposed under Regulation 8 of the Company Regulations, which covers the provisions of the CBMD article verbatim, requiring the board of directors of the Maltese merging company to prepare such a report.[30]

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27 See. 3.4.6.1.
28 Although the website is not specified in the legislation, such notices are usually posted on the website of the Registry of Companies, http://rocsupport.mfsa.com.mt/pages/Default.aspx (last visited on 6 May 2013).
29 Regulation 7(2) of the Company Regulations lists the following specificities that need to be included when publication occurs:
'(a) the date on which registration was made, together with an indication that the document registered relates to the common draft terms of the cross-border merger;
(b) the type, name and registered office of every merging company;
(c) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;
(d) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.'
30 Regulation 8 of the Company Regulations reads as follows:
'(1) The board of directors of the Maltese merging company or companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees.
(2) The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting referred to in regulation 10.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8 (1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) of the CBMD is paraphrased in Regulation 9(1) of the Company Regulations, with the national law transposing no further or diverging rules.[31]

b. The independent expert

Regulation 9(1) of the Company Regulations requires the independent experts (which can be one or more) to be approved by the Registrar. The said Regulation however does not specifically provide that the said experts may be natural or legal persons, as mentioned in Article 8(1) of the CBMD.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) of the CBMD has been transposed under Regulation 9(4) of the Company Regulations,[32] without the national law going further or transposing any diverging rules.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed under Regulation 9(2) of the Company Regulations, without the national law going further or transposing any diverging rules.[33]

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(3) Where the board of directors of the Maltese merging company or companies receives, in good time, an opinion from the representatives of their employees that opinion shall be appended to the report'.
31 Regulation 9(1) specifies that the 'report shall be made available to the members not less than one month before the date of the general meeting referred to in regulation 10.'
32 Regulation 9(4) provides for the report being drawn up by 'one or more independent experts may be appointed by the Registrar, at the joint request of the merging companies, in order to draw up a single written report for all the merging companies'.
33 The particulars listed in Regulation 9(2) are that '[t]he report shall examine the common draft terms of cross-border merger and shall specify whether the share exchange ratio is fair and reasonable and to this effect it shall -
(a) indicate the method or methods used to arrive at the share exchange ratio proposed;
(b) state whether such method or methods are adequate in the case in question, indicating the values arrived at using such method or methods and giving an opinion on the relative importance attributed to such method or methods in arriving at the value decided on;
(c) describe any special valuation difficulties which have arisen'.

e. Access to information

Article 8 (3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 8(3) of the CBMD has been transposed in Regulation 9(3) of the Company Regulations, without the national law going further or transposing any diverging rules.[34]

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) of the CBMD has been transposed into Maltese national law under Regulation 9(5) of the Company Regulations, without the national law going further or transposing diverging rules.[35]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD and (2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have been transposed in their entirety into Maltese national law under Regulations 19(1)[36] and 19(2)[37] of the Company Regulations, without the national law going further or transposing diverging rules. In case of a cross-border merger by acquisition carried out by a company which holds 90% or more but not all of the shares or other securities conferring the right to vote at general meetings of the company or companies being acquired, an expert's report is only dispensed with if the dissenting minority shareholders of the company or companies being acquired have

34 Regulation 9(3) of the Company Regulations states that '[e]ach expert shall be entitled to obtain from the merging companies all relevant information and documents for the discharge of his duties'.

35 Regulation 9(5) of the Company Regulations states that: 'Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the merging companies have so agreed'.

36 The relevant part of Regulation 19(1) of the Company Regulations reads as follows: 'Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, the provisions of regulation [...] 9 [...] shall not apply. [...]'.

37 Regulation 19(2) of the Company Regulations reads as follows: 'Where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, and the acquiring company or the company being acquired is a Maltese merging company, the report by an independent expert or experts referred to in regulation 9 shall not be required as long as the dissenting minority shareholders of the company or companies being acquired have the right to have their shares purchased by the acquiring company for an agreed consideration corresponding to the fair value of their shares, or in the event of disagreement regarding the fair value of such consideration, as shall be determined by the Court.

the right to have their shares purchased by the acquiring company for an agreed consideration corresponding to the fair value of their shares, or in the event of disagreement regarding the fair value of such consideration, as shall be determined by the Court.

h. Further exemptions in Maltese law

There are no further exemptions in Maltese law.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed in Maltese law in Regulation 10(1) of the Company Regulations,[38] without the national law going further, apart from specifying that the decision has to be taken through an extraordinary resolution which resolution shall cover both approval of the common draft terms of cross-border merger and any alterations and additions to the Memorandum and Articles of Association as may be necessitated by the merger.[39] This section also does not provide for diverging rules.

a. Procedural requirements including majority, quorum, timing and notarization

Regulation 10(2) of the Company Regulations states that approval shall not be valid unless the extraordinary resolution is adopted at least one month after the publication of the CDTMs of the cross-border merger and not later than three months afterward.

Regulation 10(3) further specifies that when a Maltese merging company approves the CDTMs of the cross-border merger by extraordinary resolution in accordance with this regulation, it shall be required to redeem the shares held by any dissenting members who so request, on such terms as may be agreed, or as the court, pursuant to an application filed within the 3 month period referred to in sub-regulation as the Maltese merging company or the dissenting members, thinks fit to order. Where such an application has been filed before the court, the Registrar may nonetheless issue the pre-merger certificate referred to in Regulation 14, as long as he indicates in the

38 Regulation 10(1) of the Company Regulations reads as follows: 'After taking note of the reports referred to in regulations 8 and 9, the general meeting of the Maltese merging company or companies shall decide on the approval of the common draft terms of cross-border merger by extraordinary resolution[.]'.

39 Under Maltese law, an extraordinary resolution is one taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given and in case of a public limited liability company passed by those members holding, in the aggregate, not less than 75 per cent in nominal value of the shares represented and entitled to vote at the meeting and at least 51 per cent in nominal value of all the shares entitled to vote at the meeting (Art. 135(1)(a) Companies Act) and in case of a private company passed by a number of members having the right to attend and vote at any such meeting holding in the aggregate not less than fifty-one per cent in nominal value of the shares conferring that right or such other higher percentage as the memorandum or articles may prescribe.

certificate that the procedure is pending. The court's decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members.

The proviso to this sub-section states that provided that one or more of the other merging companies is situated in a Member State that does not provide for such a procedure, the provisions of this sub-regulation shall only apply if such other merging company or companies explicitly accept, when approving the CDTMs of the cross-border merger, the possibility for the members of the Maltese merging company to have recourse to such procedure.

Finally, Regulation 10(4) specifies that where there is more than one class of shares in a Maltese merging company or companies, the extraordinary resolution of that company or companies concerning the merger shall be subject to a separate vote by at least each class of shareholders whose rights are affected thereby.

As to majority requirements and quorum, these are regulated by the Act, by virtue of Regulation 5(1) of the Company Regulations.[40] Regulation 10(1)(b) demands an extraordinary resolution in order for the merger to be approved. Article 135(1) of the Act defines an extraordinary resolution as one taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given. In case of a public limited liability company an extraordinary resolution has to be passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51%, or such other higher percentage as the memorandum or articles may prescribe, in nominal value of all the shares entitled to vote at the meeting.

Provided that if one of the aforesaid majorities is obtained, but not both, another meeting shall be convened within 30 days in accordance with the provisions for the calling of meetings to take a fresh vote on the proposed resolution. At the second meeting the resolution may be passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting. However, if more than half in nominal value of all the shares having the right to vote at the meeting is represented at that meeting, a simple majority in nominal value of such shares so represented shall suffice.

In case of a private limited liability company an extraordinary resolution has to be passed by a number of members having the right to attend and vote at any such

40 Regulation 5(1) of the Company Regulations states that '[u]nless otherwise provided in these regulations, a Maltese merging company shall comply with the provisions and formalities of the Act'.

meeting holding in the aggregate not less than 51% in nominal value of the shares conferring that right or such other higher percentage as the memorandum or articles may prescribe.

Notarisation is not required. However, in terms of Article 350 of the Act, if the original copy of the said extraordinary resolution is not delivered to the Registrar, an authenticated copy thereof must be delivered. A certified true copy of such resolution is typically made by a company secretary or a director of the company.[41]

b. Amendment of CDTMs by shareholders

Regulation 10 of the Company Regulations only allows shareholders to approve or reject the CDTMs.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

This provision has been transposed by the proviso to Regulation 10(1) of the Company Regulations, which specifies that approval of the general meeting of the acquiring company (where such a company is a Maltese company) shall not be required if the conditions of Article 345(6) of the Companies Act are satisfied.[42] The conditions laid down in Article 345(6) are:

(a) the draft terms of the merger for the acquiring company have been duly published …. by the Registrar at least one month before, and not more than three months before the date fixed for the general meeting of the company or the latest of the separate general meetings of the companies being acquired which are to decide on the draft terms of merger; and

(b) at least one month before the date specified in paragraph (a), all shareholders of the acquiring company shall be entitled to inspect the documents referred to in article 349, in accordance with the provisions of that article:

Provided that, in any case, one or more shareholders of the acquiring company holding at least 5% of the issued share capital of the company entitled to vote at

41 Article 350 of the Act reads as follows: 'The extraordinary resolutions taken by each of the amalgamating companies approving the amalgamation together with the instruments giving effect thereto, or an authentic copy thereof, shall be delivered for registration to the Registrar, who, being satisfied that the requirements of this Part have been complied with, shall register them.' This Article also applies to mergers by virtue of Article 357(1) of the Act, to an acquisition of one company by another which holds 90% or more of its shares by virtue of Article 358(1), and to similar mergers where the acquiring company does not hold all of the voting shares, by virtue of Article 359(2).42 The proviso to Regulation 10(1) of the Company Regulations states that 'Provided that where a Maltese merging company is an acquiring company, the approval of the merger by the general meeting of such company shall not be required if the conditions laid down in article 345(6) of the Act are fulfilled'.

42 The proviso to Regulation 10(1) of the Company Regulations states that 'Provided that where a Maltese merging company is an acquiring company, the approval of the merger by the general meeting of such company shall not be required if the conditions laid down in article 345(6) of the Act are fulfilled'.

general meetings of the company shall have the right to require that a general meeting of the acquiring company be called to decide whether to approve the amalgamation.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) of the CBMD has been transposed under Regulation 19(1) of the Company Regulations, without the national law going further or providing for diverging rules.[43]

National law does not provide for any other exemptions to the shareholder approval, either in the Company Regulations or in the Act.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed under Regulations 14[44] and 13[45] of the Company Regulations, which provide for review by the Registrar of Companies and

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43 Regulation 19(1) of the Company Regulations states that 'Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, the provisions of regulation 6(b), (c) and (e), regulation 9 and regulation 18(1)(b) shall not apply. Regulation 10(1) shall not apply to the company or companies being acquired:

44 Regulation 14 of the Company Regulations states that 'After verifying that each Maltese merging company has complied with the requirements of these regulations, the Registrar shall, after the lapse of three months from the date of the last publication referred to in regulation 12, issue without delay to every Maltese merging company a Cross-Border Pre-Merger Certificate conclusively attesting to the proper completion of the pre-merger acts and formalities:

Provided that where an application has been made under regulation 13, the Registrar shall only issue such certificate, after the date of the final judgment rejecting the application. Where an application under regulation 13 is allowed, the Registrar shall not issue such certificate and shall amend the registration accordingly as if the merger procedure had never commenced."

45 Regulation 13 of the Company Regulations states that: '(1) A registration made by the Registrar by virtue of either regulation 7 or regulation 12 may be contested before the Court by any interested party in accordance with the following conditions:

(a) the contestation shall be made by application against the Registrar within one month from the publication following the registration referred to in regulation 7 on the grounds that the common draft terms of cross-border merger were not drawn up in accordance with the provisions of regulations 6 and 7(1); or within three months from the last publication following the registration referred to in regulation 12 on the grounds that the resolution of the extraordinary general meeting was void or voidable. Notice of the application shall be published by the Registrar in the Gazette or on a website maintained by him;

(b) where it is possible to remedy a defect liable to render the cross-border merger void or voidable, the Court shall grant the companies involved a period within which to rectify the situation;

(c) a notice that the judgment of the Court has been delivered shall be published by the Registrar in the Gazette or on a website maintained by him, which notice shall specify whether the application has been allowed or dismissed.

(2) Without prejudice to sub-regulation (1), any creditor of the Maltese merging company or companies whose debt existed prior to the publication of the common draft terms of cross-border merger made pursuant to regulation 7(2) may, within the period of three months from the last publication referred to in regulation 12, by application, object to the cross-border merger and, if he shows good cause why it should not take effect, the Court shall either uphold the objection or allow the cross-border merger on sufficient

judicial review respectively, without the national law going further or providing any diverging rules.

b. National authority has been designated to scrutinize the legality of the merger

Regulation 14 designates the Maltese Registrar of Companies as the national authority to scrutinize the procedural requirements of the merger and to issue a pre-merger certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

Regulation 13(1) allows any interested party to contest the registration by the Maltese Registrar of Companies of the common draft terms of merger and of the extraordinary resolution taken by the general meeting of the Maltese merging companies approving the cross-border merger, by means of an application before the First Hall Civil Court of the Maltese Courts[46], on the procedural grounds that the draft terms of merger were not drawn up in accordance with the requirements of the Company Regulations or that the extraordinary resolution was void or voidable. Thus, even the Courts have been designated as reviewers of the procedural requirements of the merger. Indeed in cases where an application before the Courts has been made, the Maltese Registrar of Companies may only issue the pre-merger certificate in terms of Regulation 14, after the date of the final judgment by the Court rejecting the application made by an interested party. If on the other hand, the Court upholds such an application, the Registrar would not be able to issue the pre-merger certificate.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility of scrutinizing and amending the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) of the CBMD has been transposed under Regulation 10(3). Access to the procedure is based on the proviso,[47] while issue of the pre-merger certificate although labelled as "pending," is provided by the main body of this sub-article.[48]

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security being given. This remedy shall apply also to the debenture holders of the Maltese merging company or companies so long as the merger has not already been approved by the debenture holders individually, or by a special meeting of the debenture holders called specifically for that purpose, at which meeting all the debenture holders signify their consent'.46 Article 2(1) of the Act defines "court" as the First Hall, Civil Court.

46 Article 2(1) of the Act defines "court" as the First Hall, Civil Court.

47 The proviso to Regulation 10(3) of the Company Regulations reads as follows: 'Provided that where one or more of the other merging companies is situated in a Member State which does not provide for such a procedure, the provisions of this sub-regulation shall only apply if such other merging company or

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed in Regulations 17(1)[49] and (2)[50] of the Company Regulations, without the Member State transposing additional or diverging rules.

b. The national authority has been designated to scrutinize the legality of the merger

The Maltese Registrar of Companies has been designated, and must carry out a formal check.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed into Maltese national law under Regulation 17(3) of the Company Regulations.

b. Date the cross-border merger takes effect

Regulation 17(3) states that the date is established by the Registrar and included in the Certificate of Completion of Cross-Border Merger, subsequent to the scrutiny carried out under the terms of the previous two sub-articles.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

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companies explicitly accept, when approving the draft terms of cross-border merger, the possibility for the members of the Maltese merging company to have recourse to such procedure'.

48 The relevant part of Regulation 10(3) states that '[w]here such an application has been filed before the Court, the Registrar may nonetheless issue the certificate referred to in regulation 14, as long as he indicates in the certificate that the procedure is pending'.

49 Regulation 17(1) of the Company Regulations states that: 'The Registrar shall scrutinise the legal validity of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of the new company resulting from the cross-border merger. In particular, he shall ensure that all the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined'.

50 Regulation 17(2) of the Company Regulations states that: 'Each merging company shall submit to the Registrar the certificate which conclusively attests to the completion of the premerger acts and formalities:
(a) in respect of a Maltese merging company or companies, the certificate issued by the Registrar in accordance with regulation 14;
(b) in respect of a foreign merging company or companies, the certificate issued by the foreign authority in accordance with Article 10(2) of the EC Directive;
Such certificate shall be submitted to the Registrar within six months of its issue, together with the common draft terms of cross-border merger approved by the general meeting'.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Regulation 17(3) of the Company Regulations transposes Article 13 first sentence of the CBMD by providing for a statement to be published in the Malta Government Gazette by the Registrar, or on a website maintained by him, confirming the completion of the cross-border merger.

b. Transposition of Article 13 second sentence

Regulation 17(5) of the Company Regulations mirrors Article 13 second sentence of the CBMD,[51] without the national law going further or providing for diverging rules.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 of the CBMD has been transposed verbatim under Regulation 18 of the Company Regulations, with each of the sub-sections of the regulation mirroring the similarly numbered sub-section in the CBMD article, respectively, without the national law transposing any additional or diverging rules.[52]

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51 Regulation 17(5) of the Company Regulations states that '(5) When the Registrar issues a Certificate of Completion of Cross-Border Merger under sub-regulation (3), he shall without delay notify the registry where each of the merging companies was required to file documents that the cross-border merger has taken effect, indicating the effective date of the cross-border merger'.

52 Regulation 18 of the Company Regulations reads as follows:

'(1) From the date on which the cross-border merger takes effect, a cross-border merger carried out pursuant to regulation 3(4)(a) and (c) shall have the following consequences:

(a) all the assets, rights, liabilities and obligations of the company being acquired shall be transferred to the acquiring company;

(b) the members of the company being acquired shall become members of the acquiring company;

(c) the company being acquired shall cease to exist.

(2) From the date on which the cross-border merger takes effect, a cross-border merger carried out pursuant to regulation 3(4)(b) shall have the following consequences: (a) all the assets, rights, liabilities and obligations of the merging companies shall be transferred to the new company; (b) the members of the merging companies shall become members of the new company;

(c) the merging companies shall cease to exist.

(3) Where the laws in force in Malta or in another Member State require the completion of special formalities for the transfer of certain assets, rights and obligations by the merging company or companies to become effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger.

(4) The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect.

(5) No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

(a) by the acquiring company itself or through a person acting in his or her own name but on its behalf;

(b) by the company being acquired itself or through a person acting in his or her own name but on its behalf'.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

Article 15(1) of the CBMD has been transposed under Regulation 19(1) of the Company Regulations, without the national law going further or providing for diverging rules.[53]

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

These further provisions are transposed in Regulation 19(1) of the Company Regulations. In case of a merger with a wholly owned subsidiary, Regulation 19(1) dispenses with:

I. The approval by the shareholders of the company or companies being acquired:

II. The independent expert's report; and

III. The following items from the CDTMs:

  a) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;[54]
  b) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;[55]
  c) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement.[56]

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53 Regulation 19(1) of the Company Regulations reads as follows: 'Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, the provisions of regulation 6(b), (c) and (e), regulation 9 and regulation 18(1)(b) shall not apply. Regulation 10(1) shall not apply to the company or companies being acquired'.

54 As per Regulation 6(b) of the Company Regulations, transposing Article 5(b) CBMD.

55 As per Regulation 6(c) of the Company Regulations, transposing Article 5(c) CBMD.

56 As per Regulation 6(e) of the Company Regulations, transposing Article 5(e) CBMD.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Malta does not yet have a system of employee participation in domestic legislation. The Maltese transposition process granted employees access to any rights prevalent under domestic law, but to date, there are none allowing for employee participation. Therefore, this provision will be applicable if and when employee participation legislation is introduced in Malta. Such new legislation, when introduced, would be applicable through Regulations 6(j),[57] 10(7),[58] and 17(1)[59] of the Company Regulations, as well as through the Employee Involvement (European Company) Regulations,[60] Employee Involvement (European Co-operative Society) Regulations,[61] and Employee Involvement (Cross-Border Mergers of Limited Liability Companies) Regulations.[62]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) has been transposed under Regulation 7(1) of the Employee Involvement (Cross-Border Mergers of Limited Liability Companies) Regulations (the "Employee Regulations"), without national law going further or transposing diverging rules.[63]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

58 Regulation 6(j) states that 'where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined [.]'.
59 Regulation 10(7) states that '[t]he general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger'.
60 Regulation 17(1) states that '[t]he Registrar shall scrutinise the legal validity of the cross-border merger [...]. In particular, he shall ensure that [...] where appropriate, that arrangements for employee participation have been determined'.
61 Legal Notice 452 of 2004, as amended by Legal Notice 427 of 2007, S.L. 452.94, subsidiary to the Employment and Industrial Relations Act; Ibid.
62 Legal Notice 48 of 2007, as amended by Legal Notice 427 of 2007, S.L. 452.98, subsidiary to the Employment and Industrial Relations Act; Ibid.
62 Legal Notice 165 of 2008, S.L. 452.103, subsidiary to the Employment and Industrial Relations Act; Ibid.
63 Regulation 7(1) of the Employee Regulations states that 'the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office'.

The three exceptions of Article 16(2) of the CBMD have been transposed into Maltese law under Regulation 7(2) of the Employee Regulations, without national law going further or transposing diverging rules.[64]

d. Transposition of Article 16 (3)(e)

Article 16 (3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3) of the CBMD has been transposed under Regulation 7(3) of the Employee Regulations.[65]

e. Transposition of Article 16(4)

Article 16 (4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a) and (b) have been transposed under Regulation 7(4)(a) and Regulation 7(4)(b) of the Employee Regulations. The option provided for in Article 16(4)(c) has not been taken up by Malta.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Since Malta does not yet have a system of employee participation in domestic legislation, Article 16(5) has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16

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64 Regulation 7(2) of the Employee Regulations reads as follows: 'Notwithstanding sub-regulation (1), the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross- border merger has its registered office, shall not apply:
(a) where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger in accordance with the directive, an average number of employees that exceeds five hundred and is operating under an employee participation system; or
(b) where the national law applicable to the company resulting from the cross-border merger does not provide for at least the same level of employee participation as operated in the relevant merging companies:
Provided that the level of employee participation is measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation; or (c) where the national law applicable to the company resulting from the cross-border merger does not provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlements to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office'.

65 The proviso to Regulation 7(3)(e) of the Employee Regulations stated that 'for the purposes of these regulations, the percentages required by regulation 10(2)(b) for the application of the Standard Rules on Participation set out in the Schedule shall be 33 1/3%[.]'.

CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Maltese national law in Regulation 7(5) of the Employee Regulations, without any further or diverging rules.[66]

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of 3 years the employee participating are protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed into Maltese national law in Regulation 7(6) of the Employee Regulations, without any further or diverging rules.[67]

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 of the CBMD has been transposed into Maltese national law by virtue of Regulation 17(4) of the Company Regulations.

1.18. Additional

a. Valuation rules

The Company Regulations have transposed the requirement that the draft terms of the cross-border merger must contain "information on the evaluation of assets and liabilities which are to be transferred to the company resulting from the cross-border merger," however the Company Regulations and the Act do not elaborate on the rules to be applied to such an evaluation.

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

The documents to be presented to the Maltese Registry of Companies must be either in Maltese or English.

66 Regulation 7(5) of the Employee Regulations states that: '[w]hen at least one of the merging companies is operating under an employee participation system and the company resulting from the cross-border merger is to be governed by such a system in accordance with sub-regulation (2), that company shall be obliged to take a legal form allowing for the exercise of participation rights'.

67 Regulation 7(6) of the Employee Regulations states that: '[w]hen the company resulting from the cross-border merger is operating under an employee participation system, the company shall take measures to ensure that its employees' participation rights are protected in the event of subsequent domestic mergers for a period of three years after the cross-border merger has taken effect by applying this regulation.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

This procedure is outlined by Title II of Part VIII of the Act, entitled "Amalgamation of Companies." Mergers can either occur through acquisition of one company by another or through a new company being formed. Draft terms of merger are to be drawn up in writing by the directors of each of the merging companies, following prescribed requirements, signed by at least one director and the company secretary of each such company, and registered with the Registrar of Companies. The directors of each of the amalgamating companies are required to draw up a detailed written report explaining the draft terms of the merger and setting out the legal and economic grounds for them and inform the general meeting of their company and the directors of the other amalgamating company or companies so that they may inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of merger and the date of the general meetings which are to decide on the draft terms of merger. An independent experts' report is also required. The merger terms are voted upon by an extraordinary general meeting of the merging companies. Shareholders are also entitled to inspect a prescribed set of documents. Following a positive vote by means of an extraordinary resolution in the extraordinary general meetings, a period for contestation and objection by creditors (and in some cases debenture-holders) is allowed, after which the notice of the merger is formally published by the Registrar. Waivers and exemptions are applicable in respect of the requirements of shareholders' approval, directors' reports and expert's reports, generally reflecting the conditions of the waivers and exemptions for a cross-border merger under the CBMD.

b. Comparison

There are no major differences between domestic and cross-border procedures in Maltese national law.

The main differences are the following:

I. In respect of Maltese domestic mergers, the draft terms of merger do not need to contain the information stipulated in (i) – (l) of Article 5 of the CBMD;

II. In respect of Maltese domestic mergers the directors, apart from preparing a directors' report are also required to inform the general meeting of their company and the directors of the other amalgamating company or companies so that they may inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft

terms of merger and the date of the general meetings which are to decide on the draft terms of merger.

III. In case of Maltese domestic mergers, the directors' report has to be presented only to the shareholders and not also to the employees' representatives or employees themselves;

IV. In case of domestic mergers, the two requirements of the directors' report and that of the directors informing the shareholders of material changes in the position of the assets and liabilities are not required in the following circumstances:

a) when all the shareholders and the holders of other securities conferring the rights to vote of each merging company have so agreed;
b) in case of a merger with a wholly owned subsidiary;
c) in case of a merger by a company which holds 90% or more, but not all, of the shares or securities conferring voting rights in the companies being acquired, as long as the dissenting minority shareholders in the companies being acquired have a right to have their shares purchased corresponding to the fair value of their shares.

These waivers and exemptions form the requirements of a directors' report but do not feature in the Company Regulations transposing the CBMD.

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1. Transposition of the Cross-Border Mergers Directive into Dutch Law

The CBMD has been transposed into Dutch law with effect from July 15, 2008, by means of a transposition act. The provisions can now be found in Chapter 3A of Book 2 of the Dutch Civil Code (DCC). These provisions are not yet scheduled to be replaced, but several have been amended since 2008.[1] Before the publication of the CBMD, the domestic legislation did not refer to cross-border mergers.[2]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The definition of the scope of national law can be found in Article 2:308(3) DCC and is as follows: "Furthermore, the present Title (Title 2.7) applies to an Open Corporation ('*naamloze vennootschap*'), Closed Corporation ('*besloten vennootschap met beperkte aansprakelijkheid*') and a European Cooperative Society that merges with a limited liability company* or cooperative company** formed (incorporated) under the law of another Member State of the European Union or the European Economic Area."

The definition of the national law is narrower than the respective one in Article 1 CBMD, for two reasons. First, the CBMD refers to limited liability companies formed in accordance with the law of a Member State and headquartering their registered office, central administration, or principal place of business within the community, whereas Dutch law refers only to limited liability companies incorporated under the laws of a Member State. However, another provision has voluntarily been included in the DCC that does not follow from the Directive and gives a broader regulatory scope: Articles 2:333(c)1 and (c)2 facilitate mergers between foreign entities as disappearing entities, and the surviving entity is a newly incorporated NV, SE, BV, or SCE.

Dutch transposition of the CBMD has not extended it to apply to other types of companies. Transposition has adhered to the basic scope of the CBMD: mergers between limited liability companies.

[1] Art. 2:333g DCC, Art. 2:333k DCC, Art. 2:333h (1) DCC, Art. 2:333h (2) DCC; See for example for the amendment based on the introduction of the Flex-BV legislation H. Koster, 'Aanpassingen juridische fusie en splitsing door Flex-bv wetgeving', *Bedrijfsjuridische berichten* 53 (2012).

[2] H. Reumkens et al., 'Cross-Border Reorganizations in the Netherlands', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), p. 801; Vermeulen and P.J. Dortmond, 'Enige aspecten van grensoverschrijdende juridische fusie', in H.J.M.N. Honee, *Grensoverschrijdende samenwerking van ondernemingen: voordrachten en discussieverslag van het gelijknamige jubileumcongres ter gelegenheid van het 25-jarig bestaan van het Van der Heijden Instituut op*

1.2. Article 2 – Definition of Limited Liability Companies and Mergers

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'. National law contains a similar definition to the one in Article 2(1) CBMD in Articles 2:308(3) and 2:333b, namely: The term "limited liability company" refers to the public and private limited liability companies defined in Article 2(1) Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. It includes companies referred to in Article 1 Directive 68/151/EEC and companies with share capital and having legal personality, possessing separate assets that alone serve to cover its debts, and subjected under national law to conditions concerning guarantees, such as those provided by Directive 68/151/EEC for the protection of the interests of members and others. It covers at least all public and private limited liability companies with share capital.

b. List of companies that can carry out a cross-border merger under Dutch law

Forms of companies that are subject to the domestic law transposing the CBMD are: public limited liability company (*naamloze vennootschap*) (NV); European company (*Europese naamloze vennootschap*) (SE) that has its seat in the Netherlands; private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) (BV); and European cooperative society (*Europese cooperatieve vennootschap*) that has its seat in the Netherlands (SCE).[3]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Article 2(2) CBMD on the definition of "merger" has been transposed, and the Dutch definition reads as follows:

> *"A merger is a juridical act of two or more legal persons through which one of them acquires, under universal title, the property (assets and liabilities) of the other, or through which a new legal person, who has been formed (incorporated) by them jointly under that juridical act, acquires their property (assets and liabilities) under universal title."* [4]

vrijdag 15 en zaterdag 16 november 1991 te Nijmegen (Kluwer, Deventer 1992), p. 19; P. Vlas, *Rechtspersonen, Praktijkreek IPR: deel 9* (Deventer, Kluwer, 1993), p. 115.

[3] Article 2:333b DCC.

[4] Dutch Civil Code, 'English translation of the DCC - Section 2.7.2 General provisions regarding mergers: Article 2:309 Definition of 'merger'; passage of property under universal title', http://www.dutchcivillaw.com/legislation/dcctitle2277.htm (last visited 24 August 2013).

A dissolved legal person may not merge if a distribution has already been made out of its property on account of a winding-up (liquidation). Cash payment, as referred to in Article 2(2)(a) Directive, may not exceed 10 percent of the aggregate nominal value of the shares allotted in the surviving entity's capital, if the surviving entity is Dutch (Article 2:325(2) DCC). Therefore, two types of mergers from Articles 2(2)(a) and (b) Directive were transposed by the Dutch.

Article 2(2)(c) Directive is transposed as follows:

> *"An acquiring Association ('vereniging'), Cooperative ('coöperatie'), Mutual Insurance Society ('onderlinge waarborgmaatschappij'), or Foundation ('stichting') may as well merge with an Open Corporation ('naamloze vennootschap') or Closed Corporation ('besloten vennootschap') of which it holds all shares. An acquiring Foundation ('stichting'), Open Corporation ('naamloze vennootschap'), or Closed Corporation ('besloten vennootschap') may merge as well with an Association ('vereniging'), Cooperative ('coöperatie') or Mutual Insurance Society ('onderlinge waarborgmaatschappij') of which it is the sole member."* [5]

Also after the transposition of Directive 2009/109/EC, the Dutch legislator has not included the possibility for a merger with a subsidiary of which a company holds 90 percent of the shares.[6]

Moreover, a triangular merger possibility has been provided for companies in Article 2:333(a) DCC. Yet this possibility is only provided for inbound mergers and if the group company is governed by Dutch law.[7]

d. Rules on the cash payment

The Netherlands has followed the rules on the cash payment as laid down in Article 2(2)(a) and (b) CBMD in Article 2:325(2) DCC. Cash payment, as referred to in Article 2(2)(a) Directive, may not exceed 10 percent of the aggregate nominal value of the shares allotted in the surviving entity's capital, if the surviving entity is Dutch (Article 2:325(2) DCC). Article 3(1) CBMD is followed, and this situation applies if a Dutch entity is a disappearing entity.

e. CBMs and companies in liquidation

The Dutch Civil Code provides that a legal person in liquidation or an entity that has been dissolved or declared bankrupt can in principle merge (Article 2:310(5)).

[5] Dutch Civil Code, 'English translation of the DCC - Section 2.7.2 General provisions regarding mergers: Article 2:310(4) Type of legal persons capable of merging with each other', http://www.dutchcivillaw.com/legislation/dcctitle2277.htm (last visited 24 August 2013).

[6] M.A. Verbrugh, 'Wijziging van Boek 2 BW ter uitvoering van Richtlijn 2009/109/EG inzake (grensoverschrijdende) juridische fusies en splitsingen', *Ondernemingsrecht* 44 (2011).

f. Geographical scope

The Netherlands does not allow cross-border mergers with non-EU/EEA companies.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

There is no legislation in the Netherlands allowing for cross-border divisions or seat transfers (apart from the rules applicable to the SE).[8]

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD is followed.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Cooperative societies (cooperatives) governed by Dutch law have been excluded not by the law, but by virtue of their nature cannot meet the definition laid down in Article 2(1) CBMD. There is no provision explicitly excluding this company form from the scope of the CBMD.[9]

c. General transposition of Article 3(3) CBMD

Article 3 (3) CBMD deals with the position of investment companies. Article 2:333b(2) includes open corporations (*naamloze vennootschap*), which are investment companies within the meaning of the Financial Supervision Act; the units (rights of participation) of which, upon the request of their holders, are repurchased or redeemed, directly or indirectly, out of the assets of the investment company. But Article 2:333(c)4 expressly allows open-ended investment institutions meant in Article 2:333b, paragraph 2, to merge with a public limited liability company formed (incorporated) under the law of another Member State of the European Union or European Economic Area of which has the objective of investing public capital collectively under the prerequisite that it is doing so by means of risk-spreading and are repurchased by using the assets of the company in question.[10] If a company ensures by means of such action the equivalence of its stock exchange value to its net asset value, it is regarded as similar to such a repurchase and thus permitted.

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[7] E.E.G. Gepken-Jager, 'Wetsvoorstel betreffende grensoverschrijdende fusie van kapitaalvennootschappen', *Ondernemingsrecht* (2007-8); Yet, considering the *Sevic* or *Vale* case of the CJEU, it remains questionable whether this restriction is not in violation of Article 49 TFEU.

[8] H. Reumkens et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 821.

[9] See on this subject also H.J.M.M. van Boxel en G.J.C. Rensen, 'Crossing borders met coöperaties', *Ondernemingsrecht* 82 (2012).

[10] P. van der Bijl and F. Oldenburg, 'The Netherlands', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 83.

The legal framework of cross-border mergers of investment companies will, however, change. To those entities, provisions will be applicable transposing Articles 27 to 48 UCITS IV and Articles 3 and 4 Commission Directive 2010/42/EU. The transposition deadline for this Directive was June 30, 2011.[11]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

The Netherlands provide companies with specific other company types with which they can merge. Article 2:333c states:

> *"(1) An Open or Closed Corporation ('naamloze of besloten vennootschap') may merge with a limited liability company that is formed (incorporated) under the law of another Member State of the European Union or of the European Economic Area. Furthermore, an Open or Closed Corporation ('naamloze of besloten vennootschap') may be the acquiring company in a merger between limited liability companies that are formed (incorporated) under the law of another Member State of the European Union or European Economic Area.*
>
> *(2) A European Cooperative Society with its seat (registered office) in the Netherlands may merge with a cooperative company that is formed (incorporated) under the laws of one or more other Member States of the European Union or European Economic Area. A European Cooperative Society with its seat (registered office) in the Netherlands may, furthermore, be an acquiring company in a merger between cooperative companies formed (incorporated) under the laws of one or more other Member States of the European Union or European Economic Area. Articles 2:324 up to and including 2:333 apply as well to such merger, unless otherwise provided in the present Section (Section 2.7.3A).*
>
> *(3) An Open or Closed Corporation ('naamloze of besloten vennootschap') may merge, under the application of Article 2:333a, with a limited liability company in accordance and pursuant to the law of another Member State of the European Union or European Economic Area, provided that the acquiring company and the group company meant in Article 2:333a, paragraph 1, are*

[11] H. Reumkens et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 803.

limited liability companies (Corporations) with their seat (registered office) in the Netherlands.

(4) An investment company meant in Article 2:333b, paragraph 2, may merge with a public limited liability company formed (incorporated) under the law of another Member State of the European Union or European Economic Area of which the objective is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption." [12]

From this it can be deduced that for the definition of the company law types in a merger with a foreign company, Dutch law will rely on the definition that is given to the company under foreign law.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

In general, the Netherlands have not transposed this option. But in accordance with Articles 3:96(1) and (2) Financial Supervision Act of January 1, 2007, the Minister of Justice can veto the merger of banks and insurance companies. However, this is not a CBMD-specific rule.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

The Netherlands has transposed rules on creditor protection in Article 2:316 DCC.

Creditors can ask for security if the creditor's claims are not sufficiently secured and if the risk exists that the financial situation of the surviving company will provide less security for the satisfaction of the claims.[13]

For the procedure to start, it is first necessary that all of the legal persons to be merged have announced the merger in the national gazette. Then, according to Article 2:316, paragraphs 1 and 2, DCC, the protection starts when the District Court rules a

[12] Dutch Civil Code, 'English translation of the DCC - Section 2.7.2 General provisions regarding mergers: Article 2:333c Types of companies from different Member States that can enter into a cross-border merger', http://www.dutchcivillaw.com/legislation/dcctitle2277.htm (last visited 24 August 2013).

[13] Boschma and Schutte-Veenstra, 'Waarborgen voor schuldeisers; verzet door schuldeisers,' in *T&C Burgerlijk Wetboek, commentaar op artikel 316 Boek 2 BW* (2012).

verdict in favour of the creditor, granting him or her protection. Nevertheless, as mentioned in Article 2:316, paragraph 3, DCC, the court may grant securities or guarantees of the credits to the creditor for a specific set of time before a decision by the court is rendered. In this case, before giving a decision, the court can give the merging companies the possibility to give, through the court, prescribed security. The court will provide a deadline for this, but this may cause a delay of the merger.[14]

Article 2:316, paragraph 2, DCC, sets the time limit. Accordingly, the security or guarantee for the performance of the debt claim can be demanded within one month from the moment on which all of the legal entities to be merged announced that the merger proposal has been deposited or disclosed for public inspection.

The protection lasts until the merged company ceases to exist. If there is an agreement between the merging and the merged company, it is also possible that the period will last after the merger becomes effective. In the latter case, the surviving company will become the debtor.

The first procedural step is to file a petition for opposition to the merger and request for a special form of security of the credit at the competent district court. The objection is well founded in the case there is at least one of the merging companies providing for a guarantee. If there are sufficient protections prior to the merger, the claim will be rejected. Before ruling on the creditor's demand the court gives the opportunity to the merging company to provide for securities within a specific time frame.

If the merger has already been carried out and entered into effect before the court decided whether the objection of the creditors was well-founded, the court can order that specific security, together with a penalty payment, must be given (Article 2:316(5) DCC).

Since a Dutch company participating in a cross-border merger remains—to the fullest extent possible—subject to the provisions of the DCC on domestic mergers that apply mutatis mutandis to cross-border mergers and a cross-border merger is not regarded to be distinct from a national merger in the Netherlands, Article 2:316 DCC applies as well to cross-border mergers.

Creditors may block a merger by filing a petition after having opposed the merger. The notarial deed cannot be executed and so the merger is blocked until the opposition has been withdrawn or the court judgment dismissing that opposition has become enforceable. According to Articles 2:316(4) and (5) DCC, in the case the

[14] H. Reumkens et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 820.

notarial deed has been executed anyway, this provision would be violated, and the merging company would be subject to the payment of a penalty for noncompliance.

If no opposition has been made within the period of objection, the notary can apply to the court in order to issue a declaration that no opposition has been made. In that case the merger would take place and no further opposition can be made.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

The Netherlands has transposed rules on minority shareholder protection in Articles 2:333h and 2:333i(4) DCC.[15]

If the surviving entity will be foreign and shareholders have voted against the merger, they can demand compensation. The notion of minority-shareholders is therefore defined on the basis of the shareholders that have objected the merger.[16] In 2012, the Netherlands have introduced the flex BV in the context of which non-voting shares are possible. In this case of such shares, an objection is not necessary.[17] The shareholders or their representatives must have been present at the general meeting. Holders of depository rights (Article 2:118a DCC) also have this possibility (Article 2:333h(4) DCC). This right was included because shareholders have to exchange their shares for shares in the foreign company and possibility can lose rights, such as the right to investigation, the right for compensation and right to a claim of annulment (Article 2:15 DCC).

In the case that the ceasing and the surviving legal entities agree that the compensation will be paid to the dissenting shareholders by the new company, the shareholder will have a claim on the surviving company as soon as the merger enters into effect (Article 2:333i(4) DCC). Article 2:330a has, under circumstances, also provided this right in domestic mergers for holders of shares that do not give a right to dividend or voting.

With a N.B., if a SE or a SCE is formed, this provision cannot be applied.

The procedure starts at the general meeting, during which the merger will be approved (Article 2:333h, paragraph 1, DCC). In the case of Article 2:330a DCC, the

[15] See on the issue of minority shareholder protection in cross-border mergers in the Dutch transposition legislation also Van Solinge and Van Boxel, 'Bescherming van minderheidsaandeelhouders bij een grensoverschrijdende fusie', *Weekblad voor Privaatrecht, Notariaat en Registratie* 6776 (2008), p. 888-890.
[16] See also Van Solinge and Van Boxel, *WPNR* 6776 (2008), p. 888-890.
[17] H. Koster, 'Aanpassingen juridische fusie en splitsing door Flex-bv wetgeving', *Bedrijfsjuridische berichten* 53 (2012).

request for compensation has to be filed within a month after the BV has announced to the shareholders that they can ask for compensation.[18]

According to Article 2:233h, paragraph 1, DCC, the time limit is within one month following the adoption of the resolution to enter into the merger or the announcement of the possibility to ask for compensation, as in the case of Article 2:330a DCC.

The total period of the duration depends. If there are two or more minority shareholders who make the request, the merger cannot progress until the Dutch disappearing company reaches an agreement on the amount of the compensation with these shareholders.

First, the shareholder has to oppose the merger during the general meeting where the entry into merger is being discussed (Article 2:333h, paragraph 1, DCC). Then, as ruled in Article 2:333h, paragraph 1, DCC, the shareholder must submit a request for compensation with the Dutch disappearing company. This demand for compensation does not require any justifications but has to be lodged within one month after the date of the merger resolution.

The price is determined by independent experts. Their report must be disclosed at the same time the merger proposal is publicly filed. The entities of the company (on a specific agreement) may provide for guidance as to the price. Dutch literature remarks that the possibility that the procedure is carried out by independent experts, not by an independent tribunal, could potentially be in violation of Article 6 European Convention on Human Rights.[19]

The shares of the ceasing company for which this cash-out right is exercised will lapse as soon as the merger becomes effective (Article 2:333h, paragraph 3, DCC).

Because the *Invoeringswet vereenvoudiging en flexibilisering bv-recht* was transposed on October 1, 2012, this possibility is also open in domestic mergers for holders of shares that do not give rise to a right for a dividend or voting.

e. The protection of employees in Article 4(2)

There is no transposition of this option in Dutch law.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging

[18] Boschma & Schutte-Veenstra, 'Verzoek tot schadeloosstelling', in *T&C Burgerlijk Wetboek, commentaar op artikel 333h Boek 2 BW* (2012).
[19] Boschma & Schutte-Veenstra, 'Verzoek tot schadeloosstelling', in *T&C Burgerlijk Wetboek, commentaar op artikel 333h Boek 2 BW* (2012); H. Reumkens et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 818.

companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

The provisions regarding the CDTMs have been transposed fully by the Dutch transposing legislation in Articles 2:312, 2:325, 2:326, and 2:333d DCC. The following provisions were added by the Dutch legislature:

(1) Article 2:312 DCC: the intentions with regard to the composition of the board of directors after the merger and, if a supervisory board will be present, with regard to the composition thereof (e); the intentions regarding the continuation or termination of operations (h); which persons or bodies, where appropriate, shall have to approve the resolution (decision) to enter into a merger (i); the merger proposal shall mention the impact of the proposed merger on the size (proportion) of goodwill and the distributable reserves of the acquiring legal person (4).

(2) Articles 2:325(3), (4) DCC: if applicable, the number of shares in the surviving entity's capital held either by itself or by another merging corporation that will cease to exist.

(3) Article 2:333d(f) DCC: compensation per share for minority shareholders must be included.

(4) Articles 2:312(3), (4) DCC: the proposal must be signed by all members of the administrative and supervisory organs. If members do not sign, this has to be explained in the common draft terms.

However, no diverging rules have been transposed.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Pursuant to Article 2:314 DCC, the provisions of Article 6(1) CBMD have been transposed. With respect to creditors, the transposing legislation, notably Article 2:314(1) DCC, goes further than the CBMD.[20] According to Article 2:317(2) DCC, one month must elapse after the merger proposal has been deposited for public inspection

[20] C.f. Groene Serie Rechtspersonen, 'Artikel 314. bij: Burgerlijk Wetboek Boek 2, Artikel 314',http://deeplinking.kluwer.nl/?param=00C1C803 (last visited 13 March 2013)
[15] See also MvT p.13.

before the general meetings of the merging entities may adopt the merger proposal.[21] Dutch law, therefore, follows the specificities of Article 6(1) CBMD in this regard.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The *wet van 20 mei 2010 tot wijziging van het Burgerlijk Wetboek en enkele andere wetten in verband met lastenverlichting voor burgers en bedrijfsleven*[22] has transposed Article 4(1) of Directive 2009/109/EC.

Article 2:314(1) and Article 2:334h(1) DCC provide the possibility to make public the merger proposal, as well as the last three annual accounts and the annual reports, through the website of the *Kamer van Koophandel* (Chamber of Commerce). This website works as the central electronic platform as defined in Article 3 First Company Law Directive.[23]

According to Articles 2:314(2) and 2:334h(2) DCC, the management makes available the documents, which have not to be made public, at the office of the legal person or its domicile if there is no office. A second possibility is that the management makes the documents available electronically, such as on the website of the company. Moreover, if the shareholders agree, the copies of the documents can be sent electronically. If the shareholders have the possibility to save the copies electronically, the company is not required to provide copies.[24]

Article 2:314(3) DCC stipulates that the merging companies have to announce in a countrywide published newspaper where the documents can be acquired (e.g., electronically).

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Dutch national law fully follows the three provisions of Article 6(2) CBMD through the transposition of these provisions under the corresponding letters in Articles 2:333e(1)(a) through (c) DCC. This information must be published in the Dutch

[21] See also MvT p.13.
[22] Stb. 2010, 205.
[23] See on the transposition also M.A. Verbrugh, 'Wijziging van Boek 2 BW ter uitvoering van Richtlijn 2009/109/EG inzake (grensoverschrijdende) juridische fusies en splitsingen', *Ondernemingsrecht* 44 (2011).

government gazette (*Staatscourant*). Under Article 2:333e(2) DCC, merging companies (corporations) with registered offices in the Netherlands may comply with the publication requirements jointly. In addition, the merger has to be announced in a Dutch daily newspaper with national distribution and must indicate the location and availability of these documents (Article 2:314(3) DCC).

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed pursuant to Article 2:313 DCC.

In addition to the requirements set forth by the CBMD, Dutch law requires additional information in the explanatory memorandum (the Dutch equivalent to the management report) pursuant to Articles 2:313(1) and 2:327 DCC.

First, the board of directors shall "mention the reasons for the merger, including a clarification of effects to be expected on operations, and a further commentary from a legal, economical and social point of view" (Article 2:313(1) DCC). Second, according to which method or methods the exchange ratio of shares is established (Article 2:327(a) DCC) and, third, whether this method or methods were appropriate (Article 2:327(b) DCC). Fourth, to which valuation these methods led (Article 2:327(c) DCC). Fifth, if several methods were used, whether this comparative approach can be regarded acceptable under generally applicable standards (Article 2:327(d) DCC) and, finally, whether difficulties have been encountered in the valuation process (Article 2:327(e) DCC).

The explanatory memorandum prior to the merger being effective shall be available for inspection by the works council or the employees of the merging entities (Article 2:333f DCC). Furthermore, pursuant to Article 2:314(2) DCC, "the members or shareholders and of those who may exercise a particular right against the legal person, like a right to a distribution of profits or the right to take (acquire) shares," have the right to inspect the document.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

[24] Boschma and Schutte-Veenstra, 'Openbaarmaking bescheiden', in *T&C Burgerlijk Wetboek, commentaar*

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

This article has been transposed into Dutch law through Articles 2:328(1), 2:333g, and 2:393 DCC.

b. The independent expert

An auditor (accountant), as meant in Article 2:393, will be appointed by the board of directors and has to examine the merger proposal (Article 2:328 DCC). According to Article 2:393 DCC, an independent expert is "a chartered auditor or […] an accounting consultant with regard to whose registration in the register meant in Article 36, paragraph 1, Accounting Consultants Act (*Wet op de Accountants–Administratieconsulenten*), a mark is made as referred to in Article 36, paragraph 3, of that Act." The auditor may be from an organization (firm) in which auditors (chartered auditors or accounting consultants), who may be assigned for this purpose, work in cooperation.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

In the case of a merger of two (or more) open corporations (*naamloze vennootschappen*), a single report by the accountant may be drawn up, if the President of the Enterprise Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal has approved such appointment upon a uniform request (Article 2:328(3) DCC).

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Pursuant to Article 2:328 DCC, the auditor has to draw up a report stating his opinion on the written explanation of the board of directors, as specified under Article 2:327 DCC. The requirements under Article 2:327 DCC, thereby, correspond with the requirements set forth in Article 10(2) Council Directive 78/855/EEC. Therefore, the auditor has to include—indirectly, by stating his opinion on the report of the board of directors on the particulars of Article 10(2)—a statement on these matters.

Dutch law goes further insofar as Article 2:327(d) stipulates that "if more than one method is used: whether the comparative importance of the used methods, as applied in the valuation, is regarded as acceptable to generally applicable standards."

op artikel 314 Boek 2 BW (2012).

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

The accountant is entitled to request and examine information, as well as documents, from all merging entities, irrespective of whichever entity designated him (Article 2:328(4) DCC). Therefore, this provision has been transposed through the Dutch legislative act. The transposing act goes further insofar as the account can obtain documents from all merging entities and not only the designating entity, which considerably broadens the access to relevant information.

In addition to the criteria set forth in Article 8(3) CBMD, the auditor is instructed to give his opinion on the particulars of the explanatory memorandum pursuant to Articles 2:327(a) through (e) and 2:333g DCC, unless the merger concerns a simplified procedure.

According to legal commentary,[25] the accountant has to refuse to issue the certificate in cases where access to documents is being denied, which would in turn render the merger null and void.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

If all shareholders or members consent to waive them, then the auditor's report and the statement regarding the exchange ratio will not be necessary (Article 2:328(6) DCC). However, the auditor's statement concerning the aggregate equity of the merging companies must still be created, safe for a merger under the simplified procedure.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

The simplified merger procedure pursuant to Article 15(1) CBMD is allowed for pursuant to Article 2:333 DCC in cases of a wholly owned subsidiary (100 percent participating interest). In such cases, the procedural aspects set forth in Article 2:326

[25] Kluwer, 'Groene Serie Rechtspersonen, 2 De (benoeming van) de deskundige: leden 1 en 3 bij: Burgerlijk Wetboek Boek 2, Artikel 328 [Onderzoek door accountant]', http://deeplinking.kluwer.nl/?param=00BE16C1 (last visited 11 March 2013).

and up to and including Article 2:328 DCC do not apply (Article 2:333(1) DCC). Therefore, the additional information concerning the merger proposal (such as the exchange ratio), additional information regarding the explanatory memorandum, and additional information of the auditor's report do not have to be included in case of a simplified merger. A procedure in which a company only holding 90 percent of the shares is merging with its subsidiary, pursuant to Article 15(2) CBMD, is not allowed for under Dutch law.

h. Further exemptions in Dutch law

According to Article 2:333(3) DCC, "if an acquiring Association (vereniging), Cooperative ('coöperatie'), Mutual Insurance Society ('onderlinge waarborgmaatschappij') or Foundation ('stichting') merges with an Open or Closed Corporation (naamloze of 'besloten vennootschap') of which it holds all shares, then only Article 2:329 [DCC] will be applicable."

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

For each Dutch merging entity, a resolution to enter into the merger must be adopted by the entity's general meeting of shareholders or general meeting of members, as the case may be (Article 2:317 DCC).

a. Procedural requirements including majority, quorum, timing and notarization

For Dutch merging entities, a resolution to enter into the merger must be adopted by the entity's general meeting of shareholders or general meeting of members, as the case may be. The general meeting can only resolve to enter into the merger on the terms set out in the merger proposal (Article 2:317(1) DCC). The resolution can only be adopted after the opposition period (Article 2:317(2) DCC). This resolution is adopted in the same manner as a resolution to amend the relevant entity's articles of association.

The general meeting's resolution for a merger requires a majority of at least two-thirds if less than one-half of the issued share capital is represented at the meeting (Article 2:330(1) DCC). If more than one-half is present, a simple majority is sufficient. The articles of association can stipulate more strict majority or quorum requirements (Article 2:317(4) DCC).

When there are different types (classes) of shares and the rights of the shareholders of these classes are harmed, then, in addition to the merger resolution of the general meeting, a prior or simultaneous approving resolution (decision) is required of each

group of holders of shares of the same type (class) whose rights are affected by the merger (Article 2:330(2) DCC). The minutes of general meetings where the resolution for a merger has passed or where it has been approved pursuant to paragraph 2 are drawn up by notarial deed (Article 2:330(3) DCC).

It is not clear what "damage of rights"[26] exactly means in Dutch law.

A resolution for a merger of a foundation (*stichting*) requires the approval of the district court, unless the articles of incorporation make it possible to amend all of its provisions. The district court denies a request for such approval if there are well-founded grounds to believe that the merger is contrary to the interests of the foundation (Article 2:317).

b. Amendment of CDTMs by shareholders

The general meeting can only resolve to enter into the merger on the terms set out in the merger proposal (Article 2:317(1) DCC). If the shareholders want to change the terms in the CDTMs, they first have to approve a resolution that changes the CDTMs. Afterward, a second resolution has to be passed approving the amended terms. Before they can do so, the amended version of the CDTMs has to be filed with the Chamber of Commerce (Article 2:314(5) DCC).

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

The Netherlands waive the need for a general meeting approval under similar circumstances. Article 8 Directive 2011/35/EU has been transposed in Article 2:331 DCC. Article 2:331(2) DCC seems to transpose Article 8(b) Directive, but reports by judicial or administrative authorities on draft terms, as specified in Article 11(1) Directive mentioned in the DCC (Articles 11(e) and 10(1) Directive), do not seem to exist. As for the requirement of publication, Article 2:314(3) DCC transposes it as follows:

> *"The legal persons to be merged shall announce in a national daily newspaper that certain documents are deposited for inspection or can be checked, with mention of the public registers where they can be found or where they are electronically available and of the address where they are deposited, pursuant to paragraph 2, or where they are electronically available for inspection."* [27]

d. Exemption to shareholder approval under Article 15(1) CBMD

[26] In Dutch: *afbreuk van rechten*.

[27] Dutch Civil Code, 'English translation of the DCC - Section 2.7.2 General provisions regarding mergers: Article 2:314(3) Documents to be deposited at the commercial register', http://www.dutchcivillaw.com/legislation/dcctitle2277.htm (last visited 24 August 2013).

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

If an acquiring legal person merges with a corporation of which it holds all shares, then the disappearing legal person may resolve (decide) by a resolution of the board of directors to enter into the merger, unless the articles of incorporation provide otherwise (Article 2:331(4) DCC).

Moreover, there is a simplified procedure in case of 100 percent participating interest. Certain provisions do not apply, including requirements on additional information in the merger proposal (Article 2:326 DCC), additional information in the written explanation (Article 2:327 DCC), and auditor's certificate and report on additional items (Article 2:328 DCC).

Articles 2:326, 2:327, and 2:328 DCC do not apply if the acquiring corporation merges with a corporation of which it holds all shares or with an association (*vereniging*), cooperative (*coöperatie*), or mutual insurance society (*onderlinge waarborgmaatschappij*) of which it is the only member; and if someone, or another person on his behalf (for his account), holds all shares in the capital of the corporations to be merged, and the acquiring corporation does not allot any shares under the notarial deed of merger.

However, if an acquiring association (*vereniging*), cooperative (*coöperatie*), mutual insurance society (*onderlinge waarborgmaatschappij*) or foundation (*stichting*) merges with an open or closed corporation (*naamloze* of *besloten vennootschap*) of which it holds all shares, then only Article 2:329 DCC will be applicable.

e. Other exemptions for shareholder approval under Dutch law

In the event of a triangular merger, the abovementioned provision Article 2:331 DCC applies, mutatis mutandis, to the resolution by the shareholders or members, as the case may be, of the relevant group company to enter into the merger (Article 2:333a(2) DCC).

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) CBMD have been transposed in Article 2:333i DCC. National law does not provide for diverging rules regarding the first two paragraphs of the article.

b. National authority has been designated to scrutinize the legality of the merger

The notary is the national authority that has been designated to check for compliance with all the necessary procedural requirements (Article 2:333i(3) DCC).[28] The notary performs a formal check.[29] Prior to the merger becoming effective, a notary must issue a certificate to the effect that he or she has found that the procedural requirements in Sections 2, 3, and 3a of Title 7 of Book 2, DCC, and the articles of association in respect of all resolutions of the general meeting in order for such entity to participate in the merger, have been complied with (Article 2:333i(3) DCC). Additionally, the notary shall ensure that all other requirements stipulated by the statutory provisions referred to above have been complied with.

The notary has to wait one month after issuing the certificate in order to give minority shareholders the opportunity to lodge a request for compensation after the general meeting of shareholders that approved the cross-border merger. If shareholders lodge such a request, the notary has to express so in the pre-merger certificate.[30]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD has not been transposed into Dutch law in the sense that it remains silent on this issue.[31]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Article 11 CBMD has been transposed in Article 2:333i(5) DCC. The article has to be read in conjunction with the general provisions applicable to merger in the

[28] See in this context also H.J.M.M. van Boxel, 'De rol van de notaris bij de grensoverschrijdende fusie', *Weekblad voor Privaatrecht, Notariaat en Registratie* 6721 (2007).
[29] Also MvT p. 21; However, van Boxel remarks that if the notary should have any doubts as to substantive issues, e.g. the legality of certain issues, he is required to make further going enquiry; H.J.M.M. van Boxel, 'De rol van de notaris bij de grensoverschrijdende fusie', *Weekblad voor Privaatrecht, Notariaat en Registratie* 6721 (2007).
[30] H. Reumkens et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 814.
[31] Ibid.

Netherlands. In particular, Articles 2:314 and 2:318 DCC are important. Article 2:314(1) DCC stipulates that every merging legal entity with legal personality has to provide or make publicly available through the Internet at the Commercial Register (*Kamer van Koophandel*) certain documents, including the draft terms of the merger. Article 2:318(1) DCC stipulates that the merger shall be concluded by notarial deed and that the drawing up of the notarial attested act has to take place within six months after the announcement of the lodging or publication of the terms of the merger at the Commercial Register. The law does not stipulate that the pre-merger certificate has to be issued within six months, nor does it explicitly mention this certificate, but since the notary is the authority to scrutinize both the procedures leading to a merger (Article 2:333i(3) DCC) and the actual completion of the merger (Article 2:333i(5) DCC), it seems to comply with the obligation in Article 11(2) CBMD, because every notarial deed has to be registered with the tax authorities (Article 3 *Registratiewet* 1970). However, the text of Article 2:333i(3) DCC is ambiguous. From the text itself, it is unclear if the declaration has to be in the form of notarial deed (*authentieke akte*) or if a notarized private document (*onderhandse akte*) is required. The explanatory memorandum clearly requires a notarial deed.[32] So, Article 11 CBMD has been transposed.

b. The national authority has been designated to scrutinize the legality of the merger

The notary is the national authority who has been designated to scrutinize the legality and completion of the merger where a Dutch entity participates as the receiving entity (Article 2:333i(5) DCC).

The notary performs a substantive check. If a Dutch surviving entity participates in the merger, prior to the execution of the notarial deed of the merger the notary shall ensure that formalities in Article 2:318(1) DCC have been complied with, that the disappearing entity has approved the merger on the same terms, and that the rules regarding employee participating (Article 2:333k DCC) have been complied with.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 has been transposed in Article 2:318(I) DCC. Essentially, pursuant to Articles 10 through 12 Directive, three steps must be taken to complete and effectuate a directive merger. National law goes further—there is the possibility of opposition

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[32] H.J.M.M. van Boxtel, "De rol van de notaris bij de grensoverschrijdende fusie", *Weekblad voor Privaatrecht, Notariaat en Registratie, 2007* (6721), p. 701.

proceedings by a creditor of a merging entity within one month after the opposition has become enforceable.

The national law also diverges from the Directive in other ways: at the end of the notarial deed of merger, the notary must include a certificate to the effect that he has found certain requirements. Furthermore, a merger involving a foreign surviving entity will become effective in the manner and on the date stipulated by the laws of the Member State where the surviving entity has its corporate seat (Articles 2:333(i)(5) and 2:333(i)(1) DCC).

b. Date the cross-border merger takes effect

A merger involving a Dutch surviving entity will become effective on the day after the execution of the notarial deed of merger. The deed must be executed within six months after announcement in the state gazette.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

The provision has been transposed in Article 2:318(3) DCC. The national law goes further than the Directive. If the surviving entity is a Dutch entity, it must register the merger with the trade registry within eight days after the execution of the notarial deed of merger (Article 2:318(3) DCC). Immediately after the registration, the trade registry must notify the registries where the relevant information regarding foreign merging entities is filed that it has registered the merger (Article 2:333j DCC).

b. Transposition of Article 13 second sentence

The second sentence of Article 13 has been transposed. If the surviving entity is a foreign entity, the trade registry will register the merger and delete the registration of any Dutch disappearing entity upon receipt of the notification from the registry where the relevant information regarding the entity is filed.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

The transposition of Article 14 of the CBMD concerning the consequences of the cross-border merger was only partially made, in the sense that the Dutch legislature chose

to transpose only the first and second paragraphs of Article 14 in their entirety (Articles 2:309, 2:311(1), and 2:311(2) DCC). The legislator virtually merged the first two paragraphs of the article into one by using the word "surviving entities" to describe both the "acquiring" and "newly formed companies" as distinct types of mergers.

The Member State added a fourth main consequence of cross-border mergers, namely that the shares in the capital of each disappearing entity lapse.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been transposed in Article 2:333 DCC. If a surviving entity holds all the shares in each disappearing entity's capital (Article 2:333(1) DCC), or all of the shares in the merging entities' capital are held by or on behalf of a third-party and the surviving entity will not allot any shares in its capital pursuant to the merger to shareholders of disappearing entity, (Article 2:333(2) DCC), the following apply:

(1) Certain particulars required by Article 2:326 DCC, such as the exchange ratio, do not need to be included in the merger proposal.

(2) The particulars referred to in Articles 2:313(1) and 2:327 DCC do not need to be included in the explanatory memorandum.

(3) No auditor's statement(s) or report(s), as referred to in Article 2:327 DCC, are required.

Article 15 (2) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

This provision has not been transposed into Dutch law.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The "structure regime" is the general concept applicable to employee participation in the Netherlands.[33]

The structure regime's scope determines that it is obligatory for so-called "large" corporations (or legal entities such as the *naamloze vennootschap*, NV, or en de *besloten vennootschap*, BV) to meet the following three requirements during a period set for three years (Articles 2:153(2) and 2:263(2) DCC). First, the company's outstanding capital (issued capital and reserves) amounts to at least 16 million EUR according to the balance sheet. Second, a works council is installed, and has to be either at the parent company or the subsidiary; this can either be a mandatory requirement for every company with 50 employees or more or may be done voluntarily. And third, at least 100 employees are employed in the Netherlands by the company and its dependent companies.[34]

Companies that do not meet these three requirements for the "large" company are legally entitled to voluntarily opt for the structure regime by introducing this in their articles of association (Articles 2:157 and 2:267 DCC), unless they do not have a works council.[35] Certain types of companies that meet the previously mentioned criteria for the "large" company may ask for exemption from the application of the structure regime. Such exemption is granted to international concerns that have their principal residence established in the Netherlands, function merely as a management company, and employ the majority of employees outside the Netherlands. Its Dutch subsidiaries, which fall under the scope of the structure regime, are then subject to a less strict regime that implies they must have a supervisory board. Nevertheless, the entity's board does not hold the power to either appoint or dismiss members of the managing board.[36]

The structure regime obliges companies that fulfill these three requirements and consequently fall under the scope of the regime to install a supervisory organ whose members are appointed (by the board) by way of co-optation. The members are

[33] P. van der Bijl and F. Oldenburg, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 248.
[34] Ibid.; J.A. McCahery et al., *Corporate governance and regimes: Convergence and Diversity* (Oxford University Press, New York 2002), p. 288.
[35] P. van der Bijl and F. Oldenburg, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 249.
[36] J.A. McCahery et al., *Corporate governance and regimes: Convergence and Diversity*, p. 288.

appointed by the general meeting on the basis of a nomination by the supervisory organ, in which the works council and the general meeting can recommend candidates to the supervisory organ to be nominated for appointment. The works council has also an extended right of recommendation in respect of one-third of the members of the supervisory organ (Articles 2:158 and 2:268 DCC).[37] However, the general meeting of shareholders and the works council are allowed to veto these candidates if they either consider a candidate not qualified for the position or if they judge the composition of the board to be inappropriate.[38]

A number of responsibilities were transferred to the supervisory board of the corporation with a structure regime that under the normal regime would usually be allotted to the general meeting of the shareholders. These responsibilities include the right to appoint and dismiss members of the managing board. Furthermore, a number of major managerial decisions are subject to approval by the supervisory board. Thereby, in companies governed by the structure regime, the supervisory directors are authorized to approve major decisions of the management board, such as large acquisitions or disposals and issuance of share capital.[39] Consequently, the Dutch legislator considered it unnecessary to transpose the provisions of Article 16(1) Directive 2005/56/EC on employee participation, because he believes a structure regime will always provide for a level of employee participation that is higher than, or at least sufficiently equal to, the level under an employment participation system of another Member State.[40]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) CBMD has not been transposed into Dutch legislation. As discussed, the Dutch legislator considered a transposition of the principle as unnecessary because the generally applicable structure regime offers sufficient employee participation. If the surviving entity is Dutch, the provisions on what is known as the "structure regime" will apply and, if the surviving entity is foreign, the employment participation system in the relevant Member State will apply, in both cases without the enactment of an additional provision in the DCC being required. In practice, negotiations on the employment participation system can be evaded if the structure regime is applied by a

[37] P. van der Bijl and F. Oldenburg, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 248.
[38] J.A. McCahery et al., *Corporate governance and regimes: Convergence and Diversity*, p. 288.
[39] J. van Bekkum et al., 'Corporate Governance in the Netherlands', 14 *Electronic Journal of Comparative Law* 3 (2010), http://www.ejcl.org (last visited 8 March 2013).
[40] P. van der Bijl and F. Oldenburg, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 247.

Dutch surviving entity (mandatorily by an NV or BV, if the discussed requirements are met, or voluntarily if a company that falls outside of the scope of the structure regime has a work council).

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) CBMD provides for three situations in which the rule of Article 16(1) CBMD shall be set aside.

First, at least one of the merging companies has, in the six-month period prior to publication of the draft terms of cross-border merger, employed on average more than 500 employees and is operating under an employee participation system, within the meaning of Article 2(k) of the SE Directive. That is in practice a system whereby the body representative of employees and/or the employee representatives are granted influence on the company's affairs by giving them the power to elect or appoint certain members of the company's supervisory or administrative organs or the right to recommend and/or oppose the appointment of some members of these organs. The first paragraph of Article 16(2) CBMD has been transposed into Article 2:333k(2a) DCC. That provision rules that even if one of the merging entities is subject to the structure regime, negotiations must be initiated if that entity employed, on average, more than 500 employees during the relevant period. Consequently, the negotiations may result in a regime different from the structure regime.[41]

The second situation would be the case where the national law applicable to the company resulting from the cross-border merger does not provide for at least the same level of employee participation as operated in the relevant merging companies (the level that is referred to is the level of employee participation with reference to the proportion of employee representatives on the administrative or supervisory organs or their committees or within the management group covering the company's profit units). Such a situation thus implies that the existing employee participation systems provide for employee representation within the above-mentioned organs or groups (Article 16(2)(a) CBMD). The Dutch legislator decided to introduce the provision of subparagraph (a) under Article 2:333k(2)(b) DCC, amending the European provision by adding the concept of the structure regime. The rationale for this is that if a merger is entered between entities that operate under different employment participation system, the structure regime will always provide for a level of employee participation that is higher than, or at least equal to, that under an employment participation system of another Member State, even if the structure regime is applied voluntarily. In

[41] Ibid., p. 249.

practice, this means that if the surviving entity is subject to Dutch law and the structure regime applies to it, no negotiations need to be initiated.[42]

Thirdly, the respective national law applicable to the entity resulting from the cross-border merger does not give employees or establishments located in other Member States the same entitlement to exercise participation rights as enjoyed by employees employed in the Member State where the company resulting from the cross-border merger will have its registered office (Article 16(2)(b) CBMD). Subparagraph (b) was not codified. The legislator considered that where the structure regime is applicable to a surviving entity, employee participation rights are already guaranteed at the highest level.[43]

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The rule of Article 7(2), first subparagraph, point (b) Directive 2001/86/EC for the application of the standard rules, which holds that the percentages required by its wording contained in Part 3 of the Annex to that Directive shall be raised from 25 to 33.333 percent, was transposed by Article 1:21(2)(a) Environmental Impact Assessment Directive and Article 2:333k(2)b DCC.

Further relevant articles in the context of Article 16(3)(e) of the CBMD are Articles 2:333k(2)(b) and 1:4 to 1:12; 1:14(1) to (3(a)), (4); 1:16 and 1:17; 1:18 (1)(a)(h) through (j); 18(3)(6); 1:20; 1:21(4) and (5); 1:26(3); and 1:31(2) Environmental Impact Assessment Directive.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) CBMD gives the competent organs of the merging companies the right to opt, without prior negotiations, to be subject to the standard participation rules and to abide by these rules from the date of registration. The content of this rule was introduced into national legislation in Article 2:333k(3) DCC and Article 1:31 Environmental Impact Assessment Directive. However, there still exist some ambiguities concerning the scope of the articles on the European and the national level: Whereas 16(4)(a) CBMD refers to the relevant organs of the merging entities, Article 2:333k(3) seems to refer to the general meetings.[44]

[42] Ibid.; Tweede Kamer, vergaderjaar 2006–2007, 30 929, nr. 3, p. 24.
[43] P. van der Bijl and F. Oldenburg, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 250; Tweede Kamer, vergaderjaar 2006–2007, 30 929, nr. 3, p. 24.
[44] P. van der Bijl and F. Oldenburg, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 252.

Article 16(4)(b) of the CBMD was codified in Article 2:333k(4) DCC. The article holds that Member States shall confer on the special negotiating body the right to decide, by a majority of two-thirds of its members representing at least two-thirds of the employees—not to open negotiations. This includes the votes of members representing employees in at least two different Member States. Moreover, they can terminate negotiations already opened and to rely on the rules on participation in force in the Member State where the registered office of the company resulting from the cross-border merger will be situated is conferred to the special negotiating body. However, in comparison it is held in Dutch law that as a general rule all decisions are taken by an absolute majority of the members representing an absolute majority of the employees. The exceptions are a decision not to initiate negotiations or to terminate negotiations already initiated and a decision to approve an agreement leading to a reduction of employee participation rights, if such participation covers at least 25 percent of the aggregate number of employees of the merging entities.

Articles 1:1(1) and 1:31(2) of the Environmental Impact Assessment Directive introduced Article 16(4)(c) CBMD. Nevertheless, unlike the European rule, neither the national provisions nor the literature mention a possibility to limit the proportion of employee representatives. Furthermore, it can be seen that the standard rule holds that there has to be at least an equal number of members of the administrative or supervisory organ in respect of which they had such rights in any of the merging entities prior to the merger.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) CBMD was not transposed into the DCC. The article refers to Article 16(2)(b), which was not codified. Consequently, here again the Dutch legislator did not consider it to be necessary to transpose further rules next to the already-existing provisions (Articles 2:153 and 2:163 DCC).[45]

g. Transposition of Article 16(6)

Article 16(6) CBMD is governed by Article 2:333k(5) DCC on a national level. The article provides that the applicable employee participation system resulting from Article 2:333k DCC, which can be the structure regime or any other employee participation system, must be laid down in the articles of association of the surviving

[45] Tweede Kamer, vergaderjaar 2006–2007, 30 929, nr. 3, p. 28.

entity if the latter is subject to Dutch law. No further diverging rules or changes were undertaken when implementing the provision.

h. Transposition of Article 16(7)

Article 16(7) CBMD was transposed by Article 2:333k(7) DCC. The legal text holds that if a surviving entity participates in a domestic merger or cross-border merger within a period of three years after a previous cross-border merger to which Article 2:333k DCC was applicable became effective, Article 2:333k DCC will apply, mutatis mutandis, to the subsequent merger.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Dutch legislation transposed that a merger that took effect cannot be declared null and void.

However, this does not mean that legal proceedings cannot be started against resolutions taken by company organs. These proceedings must, however, be started before the cross-border merger took effect.[46]

1.18. Additional

a. Valuation rules

Both real value and book value are possible as long as it is mentioned.

b. National case-law on provisions transposing the CBMD

There is no case law on the articles that have transposed Directive 2005/56/EC (Articles 2:333b through 2:333l DCC).

c. Language requirements

Dutch legislation does not impose language requirements. Multilingual CDTMs are possible, but without a Dutch text as well they cannot be submitted to the Chamber of Commerce. Therefore, a Dutch version has to be approved by the management organs of the Dutch company in order to make the filing possible.[47]

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[46] Boschma and Schutte-Veenstra, 'Geen nietigheid of vernietiging', *T&C Burgerlijk Wetboek, commentaar op artikel 333l Boek 2 BW* (2012); H. Reumkens et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 814.

[47] Ibid., p. 855; H. ten Voorde, *Deponering, publicatie en verzet* (Kluwer, Deventer 2006), p. 83.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The merger procedure commences with a preparatory and publication phase, during which:

(1) the management board of the merging companies prepares a merger proposal (that includes an explanatory memorandum);

(2) the accountants prepare reports related to the companies and, where applicable, the share exchange ratio; and

(3) the proposal and reports are made available to the public.

Creditors of the company or companies may object to the merger by filing a petition at any time during the one-month period following the notice of publication of the proposal and reports. In addition, creditors may require that adequate security is provided to them for their outstanding claims.

After the completion of the preparatory activities, the competent corporate bodies of the companies (as specified in the articles of association) may adopt the resolution on the merger. If the shareholders are the competent corporate body, the legal merger may only proceed if it is approved by that special majority that is required to amend the articles of association (or, if relevant, the different majority explicitly set forth in the articles of association for approving a legal merger), of both sets of shareholders. Following this resolution, the statutory merger is effected through a notarial deed.

b. Comparison

In the Netherlands, the legislation on cross-border mergers has basically been put 'on-top' of the legislation on domestic mergers. This means that the legislation on domestic mergers applies mutatis mutandis also to cross-border mergers. The additional provisions can be found in Part 3A, Book 2 DCC under the heading "special provisions for cross-border mergers." These provisions are therefore what is different when comparing domestic and cross-border Dutch merger legislation.

The cross-border legislation has the following additional specificities:[48]

- additions to the requirements that have to be in the CDTMs based on Article 2:312 and Article 3:326 DCC (Article 2:333d);
- additional and diverging publication rules (Article 2:333e);
- a right for employee representatives or if there are non the employees, to take notice of the management report (Article 2:333f);

[48] This is based on M.E. Koppenol-Laforce, 'De Uitvoeringswet grensoverschrijdende fusies', *Weekblad voor Privaatrecht, Notariaat en Registratie* 6721 (2007).

- an addition to Article 2:328(1) DCC mentioning the amount potentially given to minority shareholders (Article 2:333g);
- the non-application of Article 2:328(1) first sentence and (2) if all shareholders agree so
- compensation for minority shareholders that seek to exit the company (Article 2:333h);
- a provision of Article 2333i(1) over the entering to effect of the merger because Article 2:318(1) will not be applied if the surviving entity will be a foreign entity where the registration is a constitutive requirement for the entering into effect of the merger;
- a provision over the supervision of the merger (in the Netherlands through the notary) (Article 2:333i);
- task for the national register of the surviving entity to notify the national register of the disappearing entity(/ies) (Article 2:333j);
- the rules covering employee participation (Article 2:333k);
- the rule that a cross-border merger cannot be declared null and void (Article 2:333l).

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1. Transposition of the Cross-Border Mergers Directive into Norwegian Law

The Cross-Border Merger Directive (CBMD or the Directive)—EU's 10th company law directive—was adopted as Norwegian national law pursuant to an amendment of the EEA Agreement of September 22, 2006,[1] as approved by the Norwegian Parliament on March 20, 2007.[2]

The provisions of the CBMD were incorporated into Norwegian law through an amendment of the Private Limited Liability Companies Act of 13 June 1997 No. 44 (the LLC Act) and the Public Limited Liability Companies Act of 13 June 1997 No. 45 (the PLLC Act), in accordance with the amending Act dated 21 December 2007 No. 129. The amendments came into force immediately after the Act dated December 21, 2007, was adopted. Further, the regulation of employees' rights of representation in connection with cross-border mergers was adopted January 9, 2008.[3]

Before the transposition of the CBMD into the PLLC Act, Norwegian national law did not permit mergers between Norwegian and foreign companies, including companies established within the EEA; the relevant provisions regulating mergers in Chapter 13 PLLC Act applied only to domestic mergers.[4] Before the transposition of the CBMD into Norwegian law, combinations or amalgamations of Norwegian companies and foreign companies had to be carried out by means of asset transfer agreements or capital increases through contributions in kind.

The detailed rules on cross-border mergers are set out in the PLLC Act and adopted in the LLC Act by reference to the relevant provisions of the PLLC Act. For the sake of easy reference, it is accordingly in the following referred to the corresponding rules in the PLLC Act and the LLC Act by referring only to the relevant provisions of the PLLC Act.

Some recent amendments to the LLC Act and the PLLC Act came into force July 1, 2013, but none affected the rules on cross-border mergers. Currently, the relevant provisions of the LLC Act and PLLC Act regulating cross-border mergers are not due to be replaced, modified, or amended.

[1] Decision No. 127/2006 of 22 September 2006 by the EEA Joint Committee, amending Annex XXII to the EEA Agreement by inserting a Section 10e in the annex, [2006] OJ L 333, p. 59.
[2] See St.prp. No. 34 (2006–2007), Innst. S. No. 139 (2006–2007) and the Norwegian Parliament's decision No. 380 of 20 March 2007; S. Berge and H. Bondeson, 'Norway', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 305-306.
[3] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 306.
[4] Ibid.

1.1. Article 1 – Scope General

Article 1 of the CBMD sets out the general scope of the Directive and gives a definition of the type of mergers to which the Directive applies.

The scope of the cross-border rules in the PLLC Act is similar to the scope of the CBMD as set out in Article 1, i.e., all five criteria set out in Article 1 CBMD are transposed in Sections 13 to 25 PLLC Act.

Note that cross-border demergers may be carried out in accordance with Norwegian legislation.[5]

Norwegian national law does not allow for cross-border mergers outside of the scope of Directive, except for combinations of companies through other mechanisms, such as through the rules on winding up or capital increases through contributions in kind.[6]

1.2. Article 2 – Definitions of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) of the CBMD defines the term 'limited liability company'.

Norwegian law contains a definition of the term "limited liability company," which in effect is similar to the definition set out in Article 2(1)(b) CBMD, although the wording of Section 1-1 PLLC Act is different from the wording of Article 2(1)(b).

b. List of companies that can carry out a cross-border merger under Norwegian law

Under Norwegian law, public limited liability companies (in Norwegian: *allmennaksjeselskap),* private limited liability companies (in Norwegian: *aksjeselskap*), and European companies (SEs) can carry out a cross-border merger.

Companies established according to special laws, and which are organized as either public or private limited liability companies, can also carry out cross-border mergers unless otherwise stated in the relevant legislation. This applies, for example, to commercial banks, insurance companies and investment firms.

According to the preparatory work of the Act, cooperatives (national cooperatives and European cooperative societies, or SCEs) are exempted from the applicability of the cross-border merger rules, i.e., these entities cannot carry out cross-border mergers.[7]

c. General transposition of Article 2(2) of the CMBD

Article 2 (2) of the CBMD defines the term 'merger'.

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[5] The relevant provisions in the PLLC Act and LLC Act on the basis of an interpretation of the case C-411/03 *SEVIC* requiring Member States to allow cross-border demergers.

[6] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 307-308.

[7] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 307; Ot.prp. No. 78 (2006-2007), p. 12.

The PLLC Act does not contain an equivalent detailed definition of the term "merger" as set out in Article 2(2) CBMD, but the provisions of the PLLC Act provide for the same transactions as set out in Article 2(2) CMBD to constitute mergers.[8]

d. Rules on the cash payment

With respect to the rules on the cash payment outlined in the CBMD, Article 3(1) CBMD allows for cross-border mergers to be carried out against a consideration consisting of shares in the transferee company with an additional cash payment.

Sections 13-2(1)(2) and 13-25(2)(1) PLLC Act allow for a cross-border merger to take place with a cash payment of up to 20 percent of the total consideration due to the shareholders, or more than 20 percent, if one of the companies allows it.[9] With respect to the size of the cash component, the wording of Norwegian law deviates from the CMBD; according to Article 2(3) CBMD, cross-border mergers shall be allowed if at least one of the Member States allows the cash component of the consideration to exceed 10 percent.

e. CBMs and companies in liquidation

The Norwegian PLLC Act does not expressly exclude companies in liquidation from participating in cross-border mergers, so it is possible that Article 2(2) CBMD is not completely followed in Norwegian national law. However, the procedures leading up to registration of a merger (the increase of the capital in particular), and also the notification period in relation to creditors will normally exclude companies going into liquidation from participating in a merger.

f. Geographical scope

The relevant provisions regulating cross-border mergers in the PLLC Act apply to mergers between one or more public or private limited liability companies and one or more foreign limited liability companies having their registered offices or their main offices in another EEA State, and which are subject to the laws of another EEA State that is not Norway.[10]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Cross-border restructurings may be carried out outside the scope of the CBMD, primarily by means of the rules regulating demergers and other applicable rules on liquidation and capital increases through contributions in kind.[11]

The cross-border demerger rules in the PLLC Act were adopted simultaneously as the transposition of the CBMD on December 21, 2007. These rules are based on the *SEVIC*

[8] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 306-307.
[9] Ibid.
[10] PPLC Act.
[11] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 307.

judgment, EC Court of Justice, Case C-411/03. However, there are certain restrictions related to divisions and restructuring set out in laws regulating commercial banks, insurance and pension companies. Sections 31(1) and (2) of the Commercial Banks Act of 24 May 1961 No. 2 and Sections 13-1(1) and (2) of the Insurance Companies and Pension Fund Act of 10 June 2005 No. 44 state that a decision to merge or transfer the seat of a commercial bank or an insurance company outside Norway requires the approval of the government and, in certain situations, also entitles the depositors or the insurance customers to terminate the account or the insurance agreement without any charge.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) of the CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Sections 13-2(1)(2) and 13-25(2)(1) PLLC Act allow for a cross-border merger to take place with a cash payment of up to 20 percent of the total consideration due to the shareholders, or more than 20 percent, if one of the companies allows it.[12] With respect to the size of the cash component, the wording of Norwegian law deviates from the CMBD.

b. General transposition of Article 3(2) of the CBMD

Article 3(2) of the CBMD regulates the applicability of the CBMC to cooperative societies.

As mentioned above, in Norwegian law cooperative companies are excluded from the scope of the cross-border merger rules.[13]

c. General transposition of Article 3(3) of the CBMD

Article 3(3) of the CBMD regulates the position of investment companies.

In Norwegian national law, entities falling under this definition in Article 3(3) CBMD will not be regarded as limited liability companies and will therefore not be subject to the cross-border merger rules of the LLC Act. In Norway securities funds are regulated in the Act on Securities Funds (Act of 25 November 2011 no. 44). The Cross-Border Merger Directive is not implemented in the Act on Securities Funds.

[12] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 306-307.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be permitted between types of companies that may merge under the national law of the relevant Member States.

The cross-border merger rules of the PLLC Act apply only to companies which may merge under Norwegian national law. Accordingly, the express transposition of Article 4(1)(a) is not required into Norwegian law.

b. Opposition by national authorities in Article 4(1)(b)

Article 4(1)(b) of the CBMD provides that Member States may empower national authorities with the right to oppose a cross-border mergers on public interest grounds provided that the national authority has equivalent powers also for domestic mergers.

Norwegian national law has not transposed Article 4(1)(b) CBMD.[14]

c. The protection of creditors in Article 4(2)

Article 4(2) of the CBMD provides Member States with the option to adopt protections for creditors, debenture- and security holders.

Norwegian national law has transposed the option to adopt protections for creditors.[15] Pursuant to Section 13-15 PLLC Act the protection *period starts* when the Register of Business Enterprises publishes the merger resolution notifying creditors that objections must be submitted within a period of two months.[16] Accordingly, the *time limit* for objecting is within two months from the Register of Business Enterprises' notification.[17]

The *procedural steps* include the following: The creditor has to submit claims within a period of two months after the Register of Business Enterprise publishes the merger resolution. If a creditor with an undisputed and matured claim objects within the two-month period, the merger may not be made effective until the claim has been settled (Section 13-16 PLLC Act). A creditor with a disputed or un-matured claim may require adequate security unless his claim is already adequately secured. The District Court resolves any disputes as to whether a claim exists and whether the security is adequate, and may reject a demand for security if it is determined that the merger will not weaken the creditor's possibility of achieving coverage for its claims or when it is evident that there is no claim.[18] Creditors *can block* the merger until the creditors'

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[13] Ibid., p. 307.
[14] PLLC Act (Translated-English).
[15] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 319.
[16] Ibid.
[17] Ibid.
[18] II to the EEA Agreement by inserting a Section 10e in the annex (*Official Journal* L 333 of 30 November 2006 page 59).

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claims are resolved; until then a pre-merger certificate will not be issued and a merger cannot take place.

Special protection rules apply to one group of creditors in the financial area, namely the customers of commercial banks and insurance companies. According to Sections 31(1) and (2) of the Commercial Banks Act of 24 May 1961 No.2 and Sections 13-1(1) and (2) of the Insurance Companies and Pension Funds Act of 10 June 2005 No. 44, merging or transferring the seat of a commercial bank or an insurance company cannot be done before the government approves, and, in certain situations, also allows depositors or insurance customers to terminate the account or agreement.

A Norwegian company involved in a merger shall, when the objection deadline has passed and all settlements are complete, report the completion of pre-merger acts and formalities to the Register of Business Enterprises. Until then, the Register cannot issue the pre-merger certificate.[19]

Equivalent provisions regulating the creditors' right to object are also applicable to domestic mergers.[20]

d. The protection of minority shareholders in Article 4(2)

Article 4(2) of the CBMD provides Member State with the option to adopt protections for minority shareholders.

Norwegian law has not adopted rules regarding minority shareholder protection specifically for cross-border mergers.[21] However, pursuant to Section 13-3 PLLC Act, the cross-border merger resolution must be approved by the general meeting by a majority of at least two-thirds of both the votes' cast and the share capital represented. The merger plan and any other relevant documentation shall be made available to the shareholders no later than one month prior to the day of the general meeting.

e. The protection of employees in Article 4(2)

There are no special provisions designed to ensure protection of employees in Norway, save for those governed by Article 16 CBMD and the employee regulations.

However, employment agreements (and in certain cases, also collective arrangements) by virtue of law are transferred to the merged company.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 of the CBMD stipulates that the management or administrative organs of each of the merging companies have to prepare so-called common draft terms of the

[19] See St.prp. No. 34 (2006–2007), Innst. S. No. 139 (2006–2007) and the Norwegian Parliament's decision No. 380 of 20 March 2007; S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 305-306.

[19] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 306.

[20] The relevant provisions requiring Member States to allow cross-border demergers.

merger ("CDTMs"). Article 5 stipulates the minimum information which must be included in the CDTMs. The purpose of these terms is to provide the shareholders with information about the merger and the consequences of the merger for employees etc. and set out the results of the negotiations between the merging companies. The CDTMs shall also provide a basis for the other required documents to be prepared in connection with a merger, such as the management report.

Articles 5(a) through (l) CBMD are transposed in Norwegian national law in Sections 13-6 to 13-13 PLLC Act. These provisions inter alia set out the content of the merger plan, i.e., which CDTMs the merger plan must contain. Further, since the national rules set out in Sections 13-8(1) and (2) PLLC Act are also made applicable to cross-border mergers, the following documents must be attached to the CDTMs: the articles of association, annual accounts, annual reports, and auditor's reports of all the merging companies for the preceding three financial years.[22]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) of the CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

The draft terms of the cross-border merger must be filed with the Norwegian Register of Business Enterprises (in Norwegian: *Foretaksregisteret*) one month prior to the general meeting scheduled to decide on the merger (Sections 13-13(1) and 13-25(2)(5) PLLC Act).[23]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

Section 5-11(a) PLLC Act was transposed in the PLLC Act in 2009 on the background of Directive 2009/109/EC. Section 5-11(a) states that a company's articles of association may expressly provide that documents concerning issues that shall be resolved in a general meeting, inter alia a merger, may be made available on the

[21] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 307-308.
[22] Ibid., p. 307.
[23] Ibid., p. 306-307.

company's website. In such cases, the PLLC Act's provisions requiring certain documents to be sent to shareholders shall not apply.

c. Transposition of Article 6(2)

Article 6(2) of the CBMD provides that certain details regarding the merger have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed into Norwegian law through Sections 13-29 and 13-13 PLLC Act. The Register of Business Enterprises shall, after receiving the initial merger resolutions of the board of directors of the merging Norwegian company, publish a notice of the cross-border merger on the Brønnøysund Register Centre's electronic bulletin for public announcements. In addition, no later than one month following the approval of the merger plan by the general meeting in all participating companies, these resolutions shall be filed with the Norwegian Register of Business Enterprises. The Register shall publish the resolutions notifying creditors that objections must be submitted within a period of two months. The announcement shall be published in the Brønnøysund Register Centre's electronic bulletin as a public announcement and published twice, with at least one week's interval in a newspaper that is commonly read at the company's place of business (Sections 13-13(3), 13-15, and 13-25(2)(5) PLLC Act). The public announcement shall include an announcement of the CBMD (Sections 13-25(2), 13-29, and 13-13).

1.7. Article 7 – Management Report

Article 7 of the CBMD requires the management or administrative organ of each merging company to prepare a management report. This report shall explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Section 13-9 PLLC Act.[24]

1.8. Article 8 – Independent Expert Report

Article 8 of the CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) of the CBMD requires that an independent expert report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

[24] Ibid., p. 312.

Article 8(1) CBMD has been transposed in Section 13-28 PLLC Act, which states that the board of directors of the merging companies shall ensure that the independent expert's report is prepared.

b. The independent expert

Under Norwegian law, state-authorized public auditors and registered auditors qualify as independent experts for the purpose of preparing the report (Section 13-28(2) PLLC Act). Auditors are subject to authorization from the Financial Supervisory Authority of Norway (in Norwegian: *Finanstilsynet*) and thus fulfil the requirement under Article 8 CBMD.[25] The PLLC Act provides that the Norwegian Justice Department through regulations may allow other occupations to qualify as experts for the purposes of providing the independent report in connection with mergers.

c. Transposition of Article 8(2)

Article 8(2) of the CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Norwegian Law has transposed Article 8(2) CBMD in Section 13-28(1) PLLC Act; the merging companies may jointly appoint one or more experts to prepare a single report for the companies involved in the merger.[26]

d. Transposition of Article 8(3)

Article 8(3) of the CBMD provides that certain particulars set out in Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in the independent expert report.

Article 8(3) CBMD is transposed in Norwegian national law through Sections 13-28(3) and 13-10 PLLC Act, which state that certain particulars have to be included in the expert's report. The content of the independent expert report shall be the same in relation to domestic mergers as for cross-border mergers.

e. Access to information

Article 8(3) of the CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 8(3) CBMD is not transposed in the PLLC Act.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the requirement that an expert report shall be prepared.

[25] Ibid., p. 313.
[26] Ibid., p. 307.

Article 8(4) CBMD is transposed in Norwegian national law through Section 13-28(4) PLLC Act, which provides that no report will be required if all shareholders of the merging companies consent to such a waiver.[27]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

An independent expert report is not necessary in the case of (i) a cross-border merger by acquisition of a wholly owned subsidiary (Article 15 (1) CBMD) and (ii) a cross-border merger by acquisition carried out by a company holding 90 percent or more of its subsidiary shares (Article 15(2) CBMD).

Under Norwegian law an expert report is not required for a cross-border merger between a company and its wholly owned subsidiary (Section 13-36(2) PLLC Act). However, if the acquiring company holds less than 100 percent of the shares in the subsidiary being acquired through the merger, a report must be prepared.[28]

h. Further exemptions in Norwegian law

There are no other relevant exemptions in Norwegian law.

1.9. Article 9 – General Meeting

According to Article 9 of the CBMD, the general meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD is transposed in Norwegian law through Sections 13-25(2) and 13-3(2).[29]

a. Procedural requirements including majority, quorum, timing and notarization

The cross-border merger must be approved by the general meeting of the companies involved in the merger with the same majority required for amendment of the articles of association, i.e., by a majority of two-thirds of both the votes cast and the share capital represented at the general meeting (Sections 13-25(2)(2), 13-3(2), and 5-18 PLLC Act).[30]

b. Amendment of CDTMs by shareholders

The shareholders can only approve or reject the proposed CDTMs in the general meeting; there are no rules to suggest that they can make any kind of alterations.[31]

[27] Ibid., footnote 8.
[28] Ibid., p. 313.
[29] Ibid., p. 319.
[30] Ibid.
[31] Ibid., p. 314 and PLLC Act.

c. Exemption for approval by General Meeting under Article 25 Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

If a domestic merger is completed by absorption of a wholly owned subsidiary, the board of directors of the companies can approve the CDTMs. Accordingly, no general meeting is required in the merging companies (Section 13-24 PLLC Act).[32]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) of the CBMD provides that if a cross-border merger by acquisition is carried out by a company with a wholly owned subsidiary, the approval of the general meeting of the acquired company is not required.

Article 15(1) CBMD has been transposed in Norwegian national law.[33]

If a merger is completed by absorption of a wholly owned subsidiary, the board of directors of the companies involved in the merger can approve the CDTMs (Section 13-36(3) PLLC Act).[34]

However, if a capital increase is necessary in the acquiring company in order to complete the merger, a general meeting must be held to determine the capital increase, unless the board of directors may resolve the capital increase on the basis of a power of attorney already granted to the board by the general meeting (Sections 10-14 to 10-19 PLLC Act).

As a general rule, a general meeting shall be held if demanded by shareholders representing at least 5 percent of the share capital (Sections 13-5 and13-25(2)(3) PLLC Act).

When the approval of the CDTMs may be made by the board of directors, only a simple majority is needed. More than half of the board members must be present at the meeting for the board to form a quorum (Sections 6-24(1) and 6-25(1) PLLC Act).[35]

There are no other exemptions under Norwegian national law.[36]

[32] See St.prp. no 34 (2006–2007), Innst. S. No. 139 (2006–2007) and the Norwegian Parliament's decision no 380 of 20 March 2007; S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 305.
[33] Footnote 36.
[34] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 306
[35] Ibid., p. 315.
[36] Ibid., p. 314-315.

1.10. Article 10 – Pre-merger Certificate

Article 10 of the CBMD provides for the scrutiny of the legality of the cross-border merger by designated national authorities as regards the part of the procedure subject to national laws.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been adopted in Norwegian national law (Section 13-31 PLLC Act).

When the time limit for objections pursuant to Section 13-15 cf. Section 13-25, paragraph 2, point 5, has expired for all the companies that participate in the merger, and any matters with the creditors that have made objections have been solved, the company shall report to the Norwegian Register of Business that it has satisfied the conditions for the execution of the merger. The Norwegian Register of Business Enterprises shall issue a certificate confirming the proper completion of all premerger documents and formalities.

b. National authority has been designated to scrutinize the legality of the merger

According to the preparatory work[37] transposing Directive 2005/56/EC in Norway, the Register of Business Enterprises has been designated competent to scrutinize the legality of the cross-border merger. This entails that the Register shall perform a substantive, yet not exhaustive, control of the legality of the merger. The Register shall determine the completion of the merger conditions pursuant to Norwegian law. If the merger is to be approved by public authorities, the Register shall ensure that all relevant permits are obtained. Moreover, the Register shall, according to the preparatory work, examine whether a prospectus for the offering of the shares has been prepared and approved by the necessary authority (the Financial Supervisory Authority of Norway), if this is required according to the Norwegian Securities Trading Act of 29 June 2007 No. 75, which has transposed the rules of Directive 2003/71/EU as subsequently amended by Directive 2010/73/EU. Further, if the company is required to prepare an information memorandum according to the Continuing Obligations of Stock Exchange Listed Companies adopted by Oslo Børs, the preparatory work provides that the Register of Business Enterprises shall also check if such document has been approved by Oslo Børs.[38]

In practice, however, the Register's control of the legality of the merger will as a main rule consist of a check to ensure that all the formalities and the merger conditions are complied with and that all necessary permissions from public authorities, if any, are

[37] Ot.prp. No. 78 (2006-2007) pages 25-26.
[38] S. Berge and H. Bondeson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 315-316.

obtained. The Register may, however, conduct a closer analysis of the legality of the merger upon receipt of complaints from third-parties.

c. Transposition of Article 10(3)

Article 10(3) of the CBMD regulates the situation where the law of the Member State of one of the merging companies provides for a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority shareholders, without preventing the registration of the cross-border merger, and the law applicable to other merging companies does not provide for such procedures.

Norwegian law does not provide for a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares or a procedure compensate minority shareholders, as referred to under Article 10(3) CBMD.

1.11. Article 11 – Scrutiny of the Legality

Article 11 of the CBMD provides that Members States shall designate a competent authority to scrutinize the legality of the cross-border merger with respect to the applicable procedure when completing the cross-border merger and if relevant, the formation of a new company were the company created by the cross-border merger is subject to its national law.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed in Norwegian national law (Section 13-13 PLLC Act).[39]

b. The national authority has been designated to scrutinize the legality of the merger

The Norwegian Register of Business Enterprises has been designated to scrutinize the legality of the merger (Sections 13-31 and 13-32 PLLC Act).[40]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD is transposed in Sections 13-17 and 13-32 PLLC Act.[41]

b. Date the cross-border merger takes effect

When the time limit for creditor objections has expired and the Norwegian Register of Business Enterprises has issued the certificate confirming the proper completion of all

[39] Ibid., p. 307-308.
[40] Ibid., p. 307.
[41] Ibid., p. 306-307.

premerger documents and formalities, the transferee company (if governed by Norwegian law) shall notify the Norwegian Register of Business Enterprises that the merger shall take effect and the merger takes effect upon the registration. After the registration of the merger, the Register of Business Enterprises shall notify, without delay, the other Member States' registers of the entry into force of the merger (Section 13-32(2) PLLC Act).[42]

However, if the transferee company is governed by the laws of another EEA State than Norway, the merger shall be registered when the Norwegian Register of Business Enterprises has received a statement from the register authority of the EEA State under which the transferee company is registered, confirming the transposition of the merger.

1.13. Article 13 – Registration

Article 13 of the CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence stipulates that each Member State to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that state, in accordance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), the arrangement for publishing completion of the merger in the relevant public registry in its jurisdiction.

Article 13 first sentence has been adopted in Section 13-32 PLLC Act.[43]

b. Transposition of Article 13 second sentence

Norwegian national law has not expressly adopted the last sentence of the second paragraph of Article 13, but follows from Sections 13-17 and 13-32 PLLC Act.

1.14. Article 14 – Consequences

Article 14 of the CBMD sets out the consequences of the cross-border merger.

Article 14 CBMD has been adopted in Norwegian national law. Pursuant to Sections 13-33(1) and 13-17(1)(1)–(6) PLLC Act, a cross-border merger shall have the same legal consequences as a domestic merger. In addition, Section 13-33(1) states that a cross-border merger shall have the effect that the rights and obligations resulting from employment contracts and employment relationships shall be transferred by operation of law to the acquiring company.

However, the transfer of certain assets to the acquiring company does not become effective against third-parties by operation of law. In order for the transfer of these

[42] Ibid., p. 309.

assets to be legally perfected, the acquiring company must perform an act of perfection. Registration is the relevant act for transfers of real property (the Norwegian Land Register), vessels (the Norwegian Ship Register or the Norwegian International Ship Register), aircraft (the Norwegian Civil Aircraft Register), and registered financial instruments (the Norwegian Central Securities Depository; in Norwegian: *VPS*). A transfer of movable property or unregistered negotiable instruments is perfected when the acquiring company takes actual possession of the assets, while notification to the debtor is required in order to perfect a transfer of non-negotiable debt instruments.[44]

1.15. Article 15 – Simplified Procedure

Article 15 of the CBMD provides for a simplified formalities in two instances: (i) where a merger with a wholly-owned subsidiary is carried out or (ii) where a cross-border merger by acquisition is carried out by a company that holds 90 percent or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides for a simplified procedure in a merger by acquisition with a wholly-owned subsidiary.

Article 15(1) CBMD has been adopted in Norwegian national law. In the event that the cross-border merger takes place through the absorption of a wholly owned subsidiary, certain specified CDTMs can be omitted from the merger plan (Section 13-36(1) PLLC Act).

Accordingly, the information required to be included in the demerger plan is less extensive for cross-border merger by way of absorption of a wholly owned subsidiary (Section 13-36(1) PLLC Act).

In the event of a merger by absorption of a wholly owned subsidiary, the approval of the CDTMs can be made by the board of directors of the involved companies (Section 13-36(3) PLLC Act). Under Norwegian law, an expert report on the merger is not required for a cross-border merger by way of absorption of a wholly owned subsidiary (Section 13-36(2) PLLC Act).

There are no other exemptions.[45]

[43] Ibid., p. 317.
[44] Ibid., p. 310-311.
[45] Ibid., p. 319.

1.16. Article 16 – Employee Participation

Article 16 of the CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The background for this Article is that in some Member States employees have a right to participate in the decision making bodies of a company, for example the board of directors.

a. The system of employee participation applicable in the Member State

Norwegian law provides the employees in both private and public limited liability companies with the right of representation on the board of directors or on the corporate assembly of the company. Whether the employees have the right of employee participation on the board depends on the number of employees in the company and whether the employees demand to use their right of participation. Employees in companies with fewer than 30 employees are not entitled to any representation. If there are more than 30 employees, the employees can elect one member and one observer (with deputy members) to the board of directors (Section 6-4(1) PLLC Act). If there are more than 50 employees, employees are entitled to elect one-third and at least two of the members of the board of directors (with deputy members) (Section 6-4(2) PLLC Act).

When a company has more than 200 employees, it shall, regardless of whether employees demand representation, create a corporate assembly in which one-third of the members shall be elected by and among the employees (Section 6-35(1) PLLC Act). The board of directors shall be elected by the corporate assembly. One-third of the members of the corporate assembly may, however, demand that one-third and a minimum of two members on the board of directors may be elected by and among the employees (Section 6-37(1) PLLC Act). According to Section 6-35(2) PLLC Act, it may be agreed between the company, a majority of the employees, or trade unions representing two-thirds of the employees that the company shall not have a corporate assembly. If so, employees are entitled to elect one member (with deputy member) or two observers to the board in addition to the further representation if the company has more than 50 employees.

If the company is part of a corporate group and (i) a trade union that represents at least two thirds of the company's employees, or (ii) a majority of the company's employees apply to the governmental Corporate Democracy Board (in Norwegian: *Bedriftsdemokratinemda*), the Corporate Democracy Board may decide that the

employees are also entitled to elect members of the parent company's board (Section 6-5(1) PLLC Act).[46]

b. Transposition of Article 16(1)

Article 16(1) of the CBMD provides that the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation in the member state where it has its registered office.

Article 16(1) has been transposed into Norwegian law; Section 4(1) Employee Regulation states that the acquiring company shall be subject to the rules regulating employee participation in force in the Member State in which the company has its registered office.[47]

c. Transposition of Article 16(2)

Article 16(2) of the CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

According to Article 16(2) CBMD, the representation rules of the Member State where the acquiring company is located can be set aside if: (i) one of the merging companies has an average of more than 500 employees and its own employee participation system six months before the publishing of the CDTMs; (ii) the national law under which the acquiring company must operate does not have the same level of employee participation as the merging companies do; or (iii) the employee participation rights applicable to the acquiring company in other Member States differ from those available to the acquiring company.

Article 4(2) Employee Regulation sets out a list of employee participation rights under Norwegian national law; consequently, the provision referred to previously will have the effect that when the transferring company is Norwegian, the Member State rules for the acquiring company will probably be disregarded.

Article 16(2)(iii) is transposed in Section 4(2)(c) Employee Regulation.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3) CBMD has been adopted in Norwegian national law in Sections 4(3) cf. 5-15 Employee Regulation.

e. Transposition of Article 16(4)

Article 16(4) of the CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) of the CBMD. This refers primarily to situations in which the standard rules can be made applicable.

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[46] Ibid., p. 319.
[47] Ibid., p. 320.

Articles 16(4)(a), (b), and (c) have been adopted in the Norwegian Employee Regulation.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Under Norwegian law, employees working for a foreign establishment of a Norwegian company may enjoy the same representation rights as employees working in Norway (Section 6-5 PLLC Act).

g. Transposition of Article 16(6)

Article 16(6) of the CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 of the CBMD, the company shall be obliged to assume a legal form allowing for the exercise of participation rights.

The exact wording of Article 16(6) has not been adopted into Norwegian national law, but the regulation applies to all companies resulting from a cross-border merger.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 of the CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation is protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been adopted into Norwegian national law. If there is a subsequent domestic merger, the employees' protection rights are maintained for three years after the cross-border merger takes effect (Section 2(3) Employee Regulation).[48]

1.17. Article 17 – Validity

Article 17 of the CBMD regulates the validity of a merger.

Norwegian national law has adopted Article 17 CBMD in Section 13-35(3) PLLC Act, which states that a merger cannot be null and void after entering into force.[49]

1.18. Additional

a. Valuation rules

There are no valuation rules in the PLLC Act. According to Section 5-15 Norwegian Accounting Act dated 17 July 1998 No. 56, a merger shall be included in the accounts

[48] Ibid., p. 319.

as an equity transaction with the transferred assets and liabilities as contributions in kind in the acquiring company. In the case of a merger with a newly established company, assets and liabilities in the transferring company must in reality be regarded as the acquiring company, however so that they are continued on the basis of their registered values, accept for a general refusal to register cross-border divisions on such grounds.[50]

b. Language requirements

If a joint auditor's report for the merging companies is written in a language other than Norwegian, Swedish, or Danish, an authorized translation into Norwegian must be made available to the shareholders within a deadline (Section 13-28(3) PLLC Act).[51]

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The rules followed in cross-border mergers are in all material respects the same as in domestic mergers.[52] The cross-border regulations are to a high degree adopted by the rules regarding the domestic mergers.

b. Comparison

In cross-border mergers, a joint or a single expert report could be made by companies, but in domestic mergers, a single expert report is not possible.[53]

[49] Ibid., p. 312.
[50] Ibid., p. 319.
[51] Ibid., p. 313.
[52] Ibid., p. 307-308.
[53] Ibid., p. 313.

Transposition of the Cross-Border Mergers Directive into Polish Law

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1. Transposition of the Cross-Border Mergers Directive into Polish Law

The CBMD was transposed into Polish national law on April 25, 2008,[1] through a new chapter added to the Code of Partnerships and Commercial Companies (CPCC): Chapter 2 in Section I, Mergers of Companies, of Title IV, Mergers, Divisions, and Transformations of Companies.[2]

The chapter is not due to be replaced, modified, or amended.[3]

After the transposition of the CBMD, cross-border merger laws were reformed twice: a transposition of Directive 2009/109/EC changed Articles 516(4)(1), 516(6)(3), and 516(11)(4) CPCC and added (3) to Article 516(15) CPCC.

Prior to the publication of the CBMD, domestic legislation did not refer to cross-border mergers.[4]

The transposition was made via an updating of existing laws codified within several codes (Commercial Code (FCC or Com. Code), Financial and Monetary Code, Labor Code, and so forth). For example, the Commercial Code was updated with the creation of a new Section IV entitled Special Provisions for Cross-Borders Mergers (Articles L. 236-25 to L. 236-32 Com. Code), and the Labor Code was updated with the creation of Articles L. 2371-1 et seq.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The CBMD was transposed into Polish national law on April 25, 2008,[5] through a new chapter added to the Code of Partnerships and Commercial Companies (CPCC): Chapter 2 in Section I, Mergers of Companies, of Title IV, Mergers, Divisions, and Transformations of Companies.[6]

The CPCC does allow the cross-border merger provisions to be applied to other companies outside of its scope.[7]

[1] M. Barłowski, 'Poland', in D. Van Greven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 257.
[2] M. Wroniak et al., *Cross-Border Reorganizations in Poland* (Oxford University Press, Oxford 2012), p. 2.
[3] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 257.
[4] Ibid.
[5] Ibid.
[6] M. Wroniak et al., *Cross-Border Reorganizations in Poland*, p. 2.
[7] Ibid., p. 4.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

The scope of application of Polish transposition of the CBMD is in line with the CBMD, and there are no differences.[8] National law regarding the definition of "limited liability companies" is the same as it is found in CBMD.[9]

b. List of companies that can carry out a cross-border merger under Polish law

The Commercial Companies Code governs three kinds of companies allowed to participate in a cross-border merger under Polish national law: limited liability companies, joint-stock companies, and joint-stock limited partnerships (Article 491 Commercial Companies Code).[10] However, in national law, a joint-stock limited partnership cannot become the company resulting from cross-border merger, or the acquiring company.

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Polish national law follows is in line with Article 2(2) CBMD and has no diverging rules (Articles 492 and 516(15) CPCC[11]). Poland national law has not transposed any additional or diverging rules.[12]

d. Rules on the cash payment

Polish national law follows the rules on the cash payment laid out in Article 2(2) CBMD. The merging company transfers their assets and liabilities to the merger-formed company or the acquiring company participating in the merger. In return, the merger-formed company or acquiring company provides shares or securities of capital, and shareholders may be applicable to receive 10 percent of the nominal value or the accounting par value of the shares or securities in cash. The merger-formed company or acquiring company may also issues shares or securities to the shareholders subject to payment upon subscription.[13]

[8] Ibid., p. 2.
[9] Ibid.
[10] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 258.
[11] M. Wroniak et al., *Cross-Border Reorganizations in Poland*, p. 4.
[12] Ibid.
[13] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 258.

e. CBMs and companies in liquidation

Polish companies in liquidation that have begun to distribute their assets, as well as bankrupt companies, may not merge.[14]

f. Geographical scope

Cross-border mergers in the national law could only be done for companies formed within the EEA whose registered seat, head office, or registered office is located in a Member State.[15]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Polish national law has no provisions referring to cross-border divisions, seat transfers, or other cross-border reconstructions. However, national law does not forbid such practices, especially when taking account the freedom of establishment expressed in the Treaty on the Functioning of the European Union.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 3(1) CBMD does not apply to provisions of the CPCC. In Polish national law, Article 492 CPCC determines the upper limit of payment as 10 percent of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. In Polish national law, cooperative societies are excluded from entering into cross-border merger by Article 516(2)(1) CPCC.[16]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

[14] M. Wroniak et al., *Cross-Border Reorganizations in Poland*, p. 3.
[15] Ibid.
[16] Ibid.

In Polish national law, Article 516(2)(2) Code of Partnerships and Commercial Companies states the mechanism of a cross-border merger does not apply to collective investment companies.[17]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) CBMD has been transposed in Polish national law and is in line with CBMD.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) CBMD has not been transposed in Polish national law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Polish national law has transposed Article 4(2) CBMD in Articles 495 and 496 CPCC[18] and in Article 516(10) CPCC for the merger, when the acquiring or the new company is foreign. The protection starts from the publication of the draft cross-border merger terms.[19] Possible time limits for the procedure are one month to demand establishing security by company and two months to apply to court to do so.

The following procedural steps apply: In accordance with Article 516(10) CPCC, when the acquiring or the new company is foreign, a timely request has to be made during one month after the publication and national company creditors should substantiate that satisfaction of their claims are in danger due to the merger. In case of dispute, creditors can file a motion to the court to establish security in two months after the publication.

In accordance with Articles 495 and 496 CPCC, when the acquiring or the new company is national, creditors may demand, in writing during six months after the publication, a payment of receivables. The assets and liabilities of each of the merged companies or partnerships shall be managed by the acquiring company or the new

[17] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 258.
[18] Ibid., p. 263.
[19] Ibid., p. 264.

company separately until the date of satisfying or securing all creditors. Creditors may also request that the court provide appropriate security for their claims if such security has not been provided by the company.

This option also exists for domestic mergers.[20]

Creditors cannot block the merger. Creditors can only demand providing security for possible claims, as ex ante protection, if the acquiring or the new company is foreign (Article 516(10) CPCC).

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Minority protection has been transposed in national law. The protection starts from the date of general meeting.[21] The possible time limit for this procedure is 10 days.[22]

The procedural steps begin with the shareholder objecting to the CDTMs, and the written buyback demand must be filed with the Polish company within 10 days from the meeting of shareholders.[23]

This option also exists for domestic mergers.[24]

e. The protection of employees in Article 4(2)

Employee protection has been transposed in Polish national law.[25]

The special negotiation board members of the representative body, or the representatives on the surviving company board, have certain protections. One protection is regarding whether an employee wants to end their employment contract; if he or she is not a member of a union, a competent labor inspector is required to provide consent regarding the end of their contract (Article 49 Terms of Employee Participation Act). Another protection stipulates that an employer cannot amend employment terms in a way without cooperation from the trade union or labor inspector, and another allows employees to become familiar with the merger (Article 516(7) CPCC).

Finally, the employees' representatives may file a report regarding their interests to the registration court (Articles 516(5), paragraph 3, and 516(12), paragraph 2, point 3, CPCC).

There are no such regulations for domestic mergers in Poland.

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[20] Ibid., p. 264.
[21] Ibid., p. 263.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid., p. 265.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) CBMD have been transposed in Article 516(3) CPCC, the management bodies of the merging companies shall prepare draft cross-border merger terms. This document does not need to be in notarized form. Moreover, the CPCC in Article 516(3), point 9, does state "the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge."[26]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Poland has transposed Article 6(1) CBMD, and is line with its provisions with no diverging rules.[27]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed in Article 516(4)(1) CPCC. The merging companies can be exempted from certain publication if they publish the merger plan on its website free of charge, uninterruptedly, at least one month before the start date of the shareholders' meeting or the general meeting at which the merger resolution is to be adopted, until the end of the meeting adopting the merger resolution.

[26] Ibid., p. 258.
[27] Ibid., p. 259.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed in Polish national law; the common draft terms of merger must be published in the official Polish journal or other newspaper.[28]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has been transposed in Article 516(5) CPCC, which states the requirement for management report and is line with the CBMD.[29] Poland has applied no additional or diverging requirements.[30]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD has been transposed in Polish national law. Under Article 516(7) in conjunction with Article 504(2)(2) CPCC, the independent expert report must be made available to the shareholders and representatives of the employees (if there are none, to employees themselves) at least one month before the meeting of the general assembly of shareholders called to approve the merger resolution.[31]

b. The independent expert

An auditor is appointed to serve as an independent expert.[32]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD has been transposed in Article 516(6)(2) CPCC, which allows the merging companies to submit a joint application for appointment of an independent

[28] Ibid.
[29] Ibid. p. 260.
[30] Ibid., p. 260.
[31] M. Wroniak et al., *Cross-Border Reorganizations in Poland*, p. 10.
[32] Ibid.

expert to either the Polish Registry Court of the Polish merging company, or the competent judicial or administrative authority with jurisdiction over one of the foreign merging companies.[33]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed in Polish national law. Article 503 CPCC follows Article 19(2) Directive and is in line with CBMD.[34]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) CBMD has been transposed in Polish law. The auditor may request any information deemed necessary from the merging companies in order to prepare the report.[35] In accordance with Article 512 in conjunction with Article 516(1) CPCC, the organ responsible for making such information available may be liable for damage to the shareholders.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Polish national law in Article 516(6)(3) in conjunction with Article 503(1) CPCC. National law is in line with CBMD and there are no differences.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have been transposed in Polish national law. Under Article 516(15) CPCC, a report is not required in the event of absorption of a wholly owned subsidiary by its parent company. However, a report is required in a merger by acquisition carried out by a company holding 90 percent or more of its subsidiary shares, as outlined in Article 516(15)(3) CPCC.

[33] Ibid.
[34] Ibid.
[35] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 261.

h. Further exemptions in Polish law

Polish law does provide a further exemption: if the shareholders of all the merging companies unanimously waive through a resolution.[36]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Polish law and is in line with CBMD.[37]

a. Procedural requirements including majority, quorum, timing and notarization

The procedure required for approval under national law begins with the approval of the merger by three-quarters of the votes. A public company merger requires a majority of two-thirds of the votes. In both cases, however, the articles of association may provide for a larger majority (Article 506(1) Commercial Companies Code). In order to duly approve the cross-border merger, at least 50 percent of the share capital must be present or represented.[38]

b. Amendment of CDTMs by shareholders

The shareholders of the company can only accept or reject the CDTMs.[39]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Regarding the acquiring company, the merger may be effected without adopting the resolution referred to in Article 506 CPCC if such company holds shares of the total nominal value representing no less than 90 percent of the share capital of the company being acquired, but not its entire capital. This shall not apply to instances where the acquiring company is a public company (Article 516(1) CPCC). Additionally, Article 516(6) CPCC states that such provision shall apply accordingly in the event of the acquiring company acquiring its single-member company.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

There is no such requirement in Polish national law, and the law does not provide any other exemptions to shareholder approval.[40]

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[36] M. Wroniak et al., *Cross-Border Reorganizations in Poland*, p. 10.
[37] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 261.
[38] Ibid.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Polish national law and are in line with CBMD (Article 516(12) CPCC).[41]

b. National authority has been designated to scrutinize the legality of the merger

The Commercial Court is the competent authority to scrutinize the legality of the merger.[42] The authority must perform a formal check.[43]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

The Polish transposition of the CBMD does not provide any procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares, as referred to under Article 10(3) CBMD.[44]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed in Polish national law, which is line with the CBMD (Article 516(13) CPCC).[45]

b. The national authority has been designated to scrutinize the legality of the merger

The Commercial Court is the competent authority designated to scrutinize the legality of the merger.[46] The authority performs a formal check.[47]

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[39] Ibid., p. 262.
[40] Ibid., p. 261-262.
[41] Ibid., p. 262.
[42] Ibid.
[43] Ibid.
[44] M. Wroniak et al., *Cross-Border Reorganizations in Poland,* p. 15.
[45] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 262.
[46] Ibid.
[47] Ibid.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Polish national law (Article 493 CPCC).[48]

b. Date the cross-border merger takes effect

A cross-border merger is effective from the date of the court registration. The merger shall be announced a day after the registration in the *Monitor Sądowy i Gospodarczy* (Court and Commercial Gazette) or any other gazette stipulated in the company articles.[49]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence has been transposed in Polish national law with no diverging rules (Article 493 CPCC).[50]

b. Transposition of Article 13 second sentence

Article 13 second sentence has been transposed in Polish national law, which is in line with the CBMD and has no diverging rules.[51]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

In Polish national law, a cross-border merger must include the transfer of assets and liabilities to the merger-formed or acquiring company, and the legal effects of a domestic merger apply:

(1) Except for the surviving company, the companies that are merging no longer exist;

(2) The surviving company includes the shareholders of the no-longer-existing companies; and

(3) The surviving company receives all transferred assets, liabilities, rights, and obligations.

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[48] Ibid., p. 259
[49] Ibid.
[50] M. Wroniak et al., *Cross-Border Reorganizations in Poland*, p. 16.

The surviving company also receives all transferred administrative decisions, such as licenses, permits, and reliefs, unless the administrative decision itself does not agree to this process. The authority that issued the financial institution's license or decision has one month from when the draft cross-border merger terms are published to object to the transfer (Article 494 Commercial Companies Code).[52]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

All provisions of Article 15(1) CBMD have been transposed in Polish national law.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

These provisions of Article 15(1) CBMD have been transposed in Polish national law without any diverging rules.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

There is no general system of employee participation in Polish national law.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

[51] Ibid.
[52] M. Barłowski, in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 259.

The stipulations of Article 16(1) CBMD on employee participation in cross-border merger transactions have been transposed into Polish law by the Terms of Employee Participation in a Company Resulting from Cross-Border Merger Act, which came into force on April 25, 2008.[53]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

There is only one act referring to employee participation in companies resulting from cross-border mergers that applies to such mergers, and there are no exemptions to Article 16(1) of the CBMD in Polish law due to lack of any other acts or provisions referring to employee participation.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

The percentage was increased to 33 1/3 percent and is in line with CBMD requirements.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) CBMD has been transposed in Polish national law. Articles 16(4)(b) and (c) have not been transposed because of a lack of general system of employee participation and because the company resulting from cross-border merger will be subject to the dualistic company organ system (without an administrative organ).[54]

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into national law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has not been transposed into Polish national law.

[53] Ibid., p. 264.
[54] Justification of the draft of the Terms of Employee Participation in a Company Act.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into Polish national law and is in line with the CBMD.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Polish national law; from the effective date of the cross-border merger, it cannot be declared void by a court under Article 516(17) CPCC.[55]

1.18. Additional

a. Valuation rules

In general, the valuation issue is settled in Accountancy Act of January 1, 1995. In Articles 44a through 44c, the Act states the net book rule and the so-called "honest" rule that is used during the valuation process in mergers of companies.

b. National case-law on provisions transposing the CBMD

Literature and case-law databases are silent on national case-law on provisions transposing the CBMD in Polish national law.

c. Language requirements

There are no language requirements in general, but the document has to be translated in Polish.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The rules followed for a domestic merger are same as the rules followed for a cross-border merger.

b. Comparison

There are no differences between domestic and cross-border procedures in Polish national law.

[55] M. Barłowski, 'Poland', in D. Van Greven, *Cross-Border Mergers in Europe: Volume I*, p. 263.

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1. Transposition of the Cross-Border Mergers Directive into Portuguese Law

The CBMD was transposed into Portuguese law on May 12, 2009, through Law No. 19/2009 of 12 May 2009, and amendments to the Portuguese Companies' Code and the Commercial Registry Code.

The bills are not due to be modified or replaced. Prior to the publication of the CBMD, domestic legislation did not refer to cross-border mergers.

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope of the Portuguese law, as defined under Article 117-A Portuguese Companies Code, is completely in line with CBMD and has no diverging rules.

The Portuguese law provisions transposing the CBMD are not applicable to legal entities outside the scope determined by the Directive.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Portuguese law has no definition for the term "limited liability companies," but *sociedade anónima* and *sociedade em comandita por acções* (public companies by shares) and *sociedade por quotas* (private limited liability companies) are commonly included in this term, and are all companies incorporated with limited liability.[1]

In accordance with Portuguese law, both domestic and cross-border merger laws are applicable only to said types of companies, as defined in the CBMD and referred to in Article 1 Directive 68/151/EEC (now Directive 2009/101/EC).

b. List of companies that can carry out a cross-border merger under Portuguese law

The companies that may participate in cross-border mergers within the EU are *sociedade anónima* and *sociedade em comandita por acções* (public companies by shares) and *sociedade por quotas* (private limited liability companies).

[1] P. O. Cunha, *Direito das Sociedades Comerciais* (Almedina, Coimbra 2006), p. 5-9.

The companies that may not participate in cross-border mergers within the EU are *sociedades em nome colectivo* (partnerships) and *sociedades em comandita simples* (limited partnerships).

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Portuguese national law is in line with Article 2(2) CBMD, with no diverging rules, and transposed in Article 97, paragraph 4, Portuguese Companies Code and Article 73 Corporate Income Tax Code.

d. Rules on the cash payment

Regarding the rules on cash payment, in domestic mergers, the cash the shareholders may be entitled to receive for their shares after the cross-border merger cannot be more than 10 percent of the nominal value of shares (Article 97-5 Portuguese Companies Code). Provisions related to domestic mergers are applicable if there are no other regulations for such a situation.[2]

e. CBMs and companies in liquidation

Portugal does not exclude companies in liquidation from entering into cross-border mergers as long as they fulfil the requirements they would be subject to if they were to return to their former corporate activities,[3] which are the following:

(1) A shareholder general meeting resolution determining the return of the company to its corporate activities;

(2) Such resolution may not be adopted prior to the settlement of the company's liabilities as per Article 154 Portuguese Companies Code, except for situations where creditors have expressly waived the requirement for reimbursement upon liquidation;

(3) If there is no cause for dissolution anymore;

(4) If the balance of the liquidation is sufficient to cover the share capital, unless this capital is reduced.

Furthermore, Portuguese law does not allow the merger of a company upon the filling for insolvency.

f. Geographical scope

Article 117-A Portuguese Companies Code defines cross-border mergers within the EU as mergers involving companies incorporated in accordance with the legislation of a Member State of the EEA whose registered office, central headquarters, or principal place of business is located within the EEA.

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[2] E. Marques, *Código das Sociedades Comerciais em Comentário - Volume II* (Almedina, Coimbra 2011), p. 170-175.

[3] Ibid., p. 161.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Portuguese national law has no provisions referring to cross-border divisions, seat transfers, or other cross-border reconstructions.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Portuguese law does not have any provision allowing the cash payment to which shareholders are entitled, as referred to in Articles 2(2)(a) and (b) CBMD, to exceed the mentioned 10 percent. Where there are no specific different regulations derived from the CBMD provisions, the provisions related to domestic mergers are applicable on a subsidiary basis. Therefore, in cross-border mergers of companies involving Portugal, Article 3(1) CBMD would not be applicable by reference to the Portuguese law, since Portugal is not one of the Member States allowing cash payment exceeding 10 percent of the nominal value of the company to its shareholders.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Portuguese law excludes cooperative societies from entering into cross-border mergers because such types of companies are not within the definitions of commercial companies and limited liability companies under the Portuguese Companies Code.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

Portuguese law excludes collective investment companies from entering into cross-border mergers because such types of companies are not within the definitions of commercial companies and limited liability companies under the Portuguese Companies Code.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) CBMD has not been transposed in Portuguese national law. Article 117-A Portuguese Companies Code only states the foreign company has to be incorporated under the laws of a Member State.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Article 4(1)(b) CBMD has not been transposed in Portuguese national law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Portuguese national law has transposed in Articles 101-A through 101-C Portuguese Companies Code. The protection starts within one month following the date of publication of the project's registry. Possible time limits for the procedure are 15 days for the first request and one month for the judicial intervention.

Regarding the procedural steps, the following applies: Once the registration has been published, the creditors of the participating companies whose credit existed prior to that publication have one month to issue a judicial opposition to the merger regarding the potential damages. This opposition can only be claimed if the creditors, at least 15 days beforehand, already contacted the company requesting a satisfaction of their credits or a guarantee offer and were denied.

This option also exists for domestic mergers.

Creditors can block the merger, until one of the following occurs:

(1) The judicial opposition is turned down, or, in the case of a ruling being passed down in res judicata by the court, the opponents fail to file a new suit within 30 days;

(2) The opposing parties gave up the judicial opposition;

(3) The company paid the opposing creditor or provided the guarantee defined by agreement or judicial decision;

(4) The opposing parties agreed to the registration;

(5) The amount owed to the opposing party has been deposited.[4]

[4] Ibid., p. 218-219.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

The protection provided under Article 105 Portuguese Companies Code, in which the shareholder has the right to resign in case he voted against the respective merger and may sell his participation to the company, is not mandatory. It would only be applicable if the law or the company's contract so allows. The protection starts one month after the date of the resolution approving the merger. The possible time limit is one month after the date of the resolution approving the merger.

The procedural steps begin with the shareholder, who notifies the company within one month of the resolution to approve the merger. Unless the company's articles of association or an agreement between the parties stipulates otherwise, the consideration for this acquisition shall be calculated by a mutually appointed statutory auditor, pursuant to Article 1021 Portuguese Civil Code, with reference to the date on which the resolution to merge was adopted. If no agreement is reached regarding an acceptable statutory auditor, the courts shall calculate the value of the consideration. Any of the parties may seek a second evaluation as per the Portuguese Code of Civil Procedure.

This option also exists for domestic mergers.

e. The protection of employees in Article 4(2)

Employee protection has been transposed in Portuguese national law in the Portuguese Companies' Code, and provides employees with the possibility of consulting the documentation of the merger and creditors with the possibility of opposing the merger.

Members of the special negotiation group and employees' representatives on the management or supervision body are also provided rights regarding absences to work and disciplinary procedures, dismissal, and transfer.

Employees of the company resulting from the merger are entitled to elect, designate, recommend, or oppose the appointment of a number of members of the management or supervision body of said company equal to the highest of the proportions in force in any of the participant companies before registration of the merger.

There are no specific rules for domestic mergers, but the same provisions apply.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging

companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

All the requirements of Articles 5(a) through (l) are transposed in Article 98-1 Portuguese Companies Code, which further adds the equity interest one company owns in the other, the measures taken to protect the rights of non-partner third-parties to the company's profits, and the measures taken to protect creditors' rights.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Portugal has transposed Article 6(1) CBMD in Article 100-2 Portuguese Companies Code, which states the CDTMs have to be published at least one month prior to the general meeting deciding on the merger.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has not been transposed in Portuguese national law.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed in Portuguese national law, which provides that certain specificities are published in the online official gazette.

Furthermore, all the information on the merger is accessible to all the interested parties at the companies' headquarters and, if the company wishes so, on its official webpage, in accordance with Article 101, paragraph 4, Portuguese Companies Code.

Additionally, Article 98, paragraph 4, Portuguese Companies Code establishes that the merger project may be drafted with an electronic model provided online in the Commercial Registry's official webpage.[5]

[5] Ibid., p. 188.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 CBMD has not been transposed in Portuguese national law.[6] However, in Portugal, the merger project is prepared and executed by the management of the company. The management explains the reasoning, both legally and economically, for the respective merger, and this has to be available to creditors and stakeholders. Such an activity could be considered as effectively performing Article 7.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) CBMD has been transposed in Portuguese national law in Article 99 Portuguese Companies Code. Additionally, Article 100-2 Portuguese Companies Code stipulates that the expert report has to be made available not less than one month before the date of the general meeting.

b. The independent expert

A chartered/official accountant or statutory auditors/single official accountants' company is to serve as an independent expert.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD has been transposed in Portuguese national law; under Articles 117-D-2 and 3 Portuguese Companies Code, a joint report could be prepared by a single official accountant or a single official accountants' company.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) CBMD has been transposed in Portuguese national law and is in line with the CBMD.

[7] Ibid., p. 199.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) CBMD has been transposed in Portuguese law. The experts may obtain any information and documents believed to be necessary from the companies involved in the merger and perform any examinations deemed indispensable under Article 99-5 Portuguese Companies Code. There are no direct consequences provided by Portuguese law if the experts do not receive this information, but the lack of access to information may be mentioned in the independent expert report.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Portuguese national law in Article 99-6 Portuguese Companies Code, if all the shareholders unanimously decide the report need not be prepared.[7]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have been partially transposed in Portuguese national law. Article 117-I Portuguese Companies Code states the expert report is not necessary in the case of a merger acquisition by a wholly owned subsidiary.

However, under Article 117-J Portuguese Companies Code, the independent expert report is always necessary in case of a merger by acquisition carried out by a company holding 90 percent or more of its subsidiary, even if the national law of the incorporating companies says otherwise.

h. Further exemptions in Portuguese law

Portuguese law does not provide further exemptions.

[7] Ibid., p. 199.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed in Portuguese law and is in line with the CBMD.

a. Procedural requirements including majority, quorum, timing and notarization

Procedural requirements in Portuguese national law regarding the general meeting include the following:

(1) The shareholders' general meeting has to be held at least one month after the registration and publication of the merger project.

(2) Approval of a cross-border merger by a Portuguese company shall be approved by the same quorum required for changing the bylaws.

(3) Approval of a cross-border merger by public companies by shares will take place as following:

(a) First call: Presence of at least one-third of the company's share capital (in person or by proxy) and the favorable vote of two-thirds of the voting capital.

(b) Second call: Favorable vote of two-thirds of the voting capital present (in person or by proxy) at the general meeting.

(4) Approval of a cross-border merger by private limited liability companies requires the favorable vote of at least three-quarters of the votes corresponding to participations in the share capital.

No notarization requirements are necessary.[8]

b. Amendment of CDTMs by shareholders

The shareholders can only accept or reject the CDTMs.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Portuguese law waives the need for a general meeting approval under different circumstances when compared with Article 8 CBMD, such as:

(1) Exemptions are not only applicable to public companies by shares but also to private limited companies;

(2) Such exemptions are only applicable in a merger by acquisition carried out by a company holding 90 percent or more of its subsidiary's shares.

[8] P.O. Cunha, *Direito das Sociedades Comerciais*, p. 478–520.

Thus, under Article 116 Portuguese Companies Code, a shareholder approval is not required when the following requirements are met:

(1) The merger plan mentions that there is no requirement for a prior resolution by the general meeting if Item 3 hereunder does not require a general meeting to be convened;

(2) The partners have had the opportunity, at the registered office, to review the documents to which Article 101 Portuguese Companies Code refers no later than the eighth day following publication of the merger plan, and were so informed simultaneously with the plan or its announcement; and

(3) Within 15 days of publication of the merger plan, no partner with 5 percent or more of the share capital requested a general meeting to discuss the merger.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) CBMD is transposed in Article 117-I, paragraph 3, Portuguese Companies Code, which states the approval of a general meeting of shareholders is not required for takeover mergers where the surviving company holds, directly or indirectly, all shares or participations in the share capital of the company or companies taken over.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Portuguese national law, which is in line with the CBMD.

b. National authority has been designated to scrutinize the legality of the merger

The Commercial Registry Office is the competent authority to scrutinize the legality of the merger. The authority must perform a formal check.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

The Portuguese transposition of the CBMD does not provide any procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares, as referred to under Article 10(3) CBMD.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed in Portuguese national law, which is line with the CBMD.

b. The national authority has been designated to scrutinize the legality of the merger

The Commercial Registry Office is the competent authority to scrutinize the legality of the merger. The authority must perform a formal check.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Portuguese national law in Article 117-H Portuguese Companies Code, which is in line with the CBMD.

b. Date the cross-border merger takes effect

A cross-border merger is effective upon registration of a new Portuguese company or registration of a takeover with the competent Commercial Registry Office.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence has been transposed in Portuguese national law.

b. Transposition of Article 13 second sentence

Article 13 second sentence has been transposed in Portuguese national law in Article 67-A Commercial Registry Code.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

With the exception of paragraph 3, Article 14 CBMD has been transposed in Portuguese national law. A cross-border merger creates a single company from two or more, transferring their assets and liabilities to an incorporating or new company. The shareholders of the dissolving companies become shareholders of the incorporating company or new company.[9]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

All provisions of Article 15(1) CBMD have been transposed in Portuguese national law in Article 117-I Portuguese Companies Code, which is in line with the CBMD.

Article 15 (1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

According to Portuguese national law, an expert report is required even if the parent company is taking over a subsidiary. Such an exemption is only applicable to the incorporated companies.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

[9] E. Marques, *Código das Sociedades Comerciais em Comentário - Volume II*, p. 289–298.

a. The system of employee participation applicable in the Member State

According to Article 3 Law 19/2009 of 12 May 2009, and as a general rule, a company resulting from a cross-border merger with registered office in Portugal will apply the national employee's participation system.

However, in case at least one of the companies employs an average of more than 500 employees and is managed with an employee participation regime within six months prior to the publication of the draft terms of cross-border merger, and/or where the general Portuguese employee participation laws do not provide appropriate participation rights as Law 2009/19 of 12 May 2009 provides or does not establish the possibility of employees of other undertakings in other Member States exercising the some participation rights as the employees employed in the Member State of the registered office, the regime of Articles 4 and subsequent of said Law 19/2009 of 12 May 2009 will apply.

According to that law, employee participation rights generally follow two systems. The first includes a special negotiation body and the second only applies when the parties involved cannot, after six months of negotiating (a period that can be prolonged by another six months), reach an agreement. In the second case, each company agrees to apply this residual procedure. Another applicable situation would be if one or more of the companies have an employee participation system that impacts at least one-third of the total employees, or when fewer employees are affected but the special negotiation body still needs to be involved.

As to the general national employee's participation system, it establishes the possibility of employees constituting work councils, sub commissions, and coordination commissions (with up to a certain statutory number of members) entitled to information and consultation rights, including the right to participate in restructuring procedures of the company.

The work council is entitled to (1) receive the necessary information to the performance of its activities, (2) exercise control over the company, (3) participate in the execution of professional training plans and reports and in procedures in view of changing the work conditions, (4) run or participate in social activities of the company, and (5) meet, at least once a month, with the management of the company to analyze matters related to the exercise of its rights.

The information right includes, notably, plans for general activity and budget, organization of the production, accounting situation of the company, forms of financing, tax costs and projects of amendment of the commercial purpose, share capital or reconversion of the company.

Consultation should take place, among other situations statutorily foreseen, in cases of changes to the criteria for professional classification and promotions, change of the place of the activity of the company or of the undertaking of any measure that might substantially reduce the workforce, diminish the work conditions, or change the work organization and winding up or insolvency procedure of the company.

Employees also have participation rights through union delegates (being that there is a statutory limit to the number of union delegates with special protection rights in the company, who also have information and consultation rights in matters such as (1) recent and expected development of the activity of the company or of the undertaking and respective economic situation, (2) expected development of the employment within the company or the undertaking and preventive measures whenever a reduction of the workforce is foreseen, and (3) a decision capable of leading to a substantial change in the organization of the work and/or employment contracts.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) CBMD has been transposed into Portuguese national law, which is line with the CBMD.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

The three exceptions of Article 16(2) CBMD have been transposed in Portuguese national law, which is in line with the CBMD.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Under Portuguese national law, the participation in one or more participant companies must include at least 25 percent of the employees of the total of participant companies or less than 25 percent of employees if the special negotiation group decides to apply such a structure.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) CBMD has been transposed in Portuguese national law. The number of employees' representatives may be limited to one-third of the total members of the

management body, without prejudice of the possibility of having a percentage greater than one-third by agreement.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Under Portuguese national law, the level of participation is made by referring to the proportion of employees' representatives that the regime foresees will integrate the managing or supervision body or its committees, or the direction body responsible for the profitable units of the company.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Under Portuguese national law, if there are different forms of employees' participation systems within the participant companies, the special negotiation group will choose the one applicable to the company resulting from the merger. In the absence of such a choice, the company will adopt the participation system applicable to most of the employees of the participant companies.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into Portuguese national law.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Portuguese national law in Article 117-L Portuguese Companies Code, which is in line with the CBMD.

1.18. Additional

a. Valuation rules

There are no valuation rules applicable to mergers in Portugal. The merger project has to clearly indicate the valuation methods adopted in the respective merger, which may be netbook, market value, discounted cash flow, values based on earnings before interest, taxes, depreciation and amortization, and so forth.

No particular or specific problems regarding the valuation rules applicable to cross-border mergers are mentioned in the Portuguese literature.

b. National case-law on provisions transposing the CBMD

Literature and case-law databases are silent on national case-law on provisions transposing the CBMD in Portuguese national law.

c. Language requirements

No language requirements have been adopted in Portuguese transposition of the CBMD. However, the Portuguese Commercial Register establishes that documents written in a foreign language may only be accepted when translated in accordance with the applicable legislation, with the exception being facts that should be registered by transcription be written in English, French or Spanish, which the competent public employee in charge of the register should be able to understand.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

According to Portuguese law, the domestic mergers must be executed by preparing and filing certain merger documentation followed by a merger implementation, which includes the following steps:

(1) Approval of special balance sheets: The merger operation will be carried out based (1) on the balance sheet for the last financial period, provided that the same has been closed no more than six months prior to the date of the merger project, or (2) a balance sheet issued on a date not before the first day of the third month prior to the date of the merger project, being in this case necessary, prior to the beginning of the merger project, to carry out the approval of the referred balance sheets by means of general shareholders' meeting resolutions.

(2) Draft and approval of the merger project: The management of the participating companies that intend to merge must draft together and approve, by means of a resolution of the boards of directors, a merger project containing all necessary information to allow full legal and economic transparency of the merger operation.

According to the Portuguese Companies Code, the merger project shall include—in addition to other information deemed necessary or convenient for the best understanding of the merger operation from both a legal and an economic perspective—the following information:

(a) The type, reasons, terms and objectives of the merger with respect to all participating companies;

(b) The name, registered office, share capital, and registration number within the commercial registry of each of the participating companies;

(c) The shares representing the other company's share capital held by each participating company;

(d) The balance sheet for each of the participating companies, specifying the value of assets and liabilities to be transferred to the incorporating or new company. This balance sheet may be the balance sheet for the last financial period, provided that it ended no more than six months prior to the date of the merger project, or a balance sheet issued on a date not before the first day of the third month prior to the date of the merger project;

(e) A draft of the changes to be introduced in the articles of association of the incorporating company;

(f) The measures to be carried out to the protection of third-party (non-shareholders) rights to participate in the company's profits;

(g) The measures to be carried out to protect creditor rights;

(h) The date on which, from an accounting standing point, the incorporated company shall be considered to be the incorporating company;

(i) The rights ensured by the incorporating or new company to the partners of the incorporated or merging companies who own special rights;

(j) Any special advantages assigned to the experts who intervened in the merger and to the members of the management or supervisory bodies of the companies that participated in the merger;

(k) Means of delivery of the incorporating company's shares, as well as the date on which they shall have the right to profits, and the specifications of this right.

(3) Supervision of the merger project: After the approval of the merger project, the management of the participating companies shall provide the statutory auditors of the company with the referred project in order for the auditors to proceed with a review and duly issue a report. The statutory auditors may require of the participating companies any information or documents they consider necessary to issue their opinion.

(4) Registration of the merger project: The merger project must be registered before the Commercial Registry Office, by means of deposit. This registration will have to be requested both regarding the incorporating and the incorporated company.

(5) Notice to the creditors: After the registration of the merger project, a notice to the creditors of the participating companies must be published (in the official website of the Ministry of Justice) stating the merger project and attached documentation is available for examination by the creditors at the registered office of each company and that the creditors have the right to oppose to the merger, according to the terms of Article 101-A Portuguese Companies Code.

Following the publication of the notice mentioned above, the creditors of any of the companies participating in the merger may consult the following documents at the registered office of each company and may obtain full copies of the same, free of any charge:

(a) Merger project;

(b) Report from the corporate bodies and auditors;

(c) Accounts, annual reports, reports, and statements of opinion from the supervisory bodies and resolutions adopted at the general meeting regarding the accounts for the previous three financial years.

The creditors of the participating companies with debts that pre-date the date of the above referred notice may, within a period of one month following to the publication of such notice, judicially object to the merger based on the fact that it would damage its rights, as long as the creditor who so files the objection demanded that the company discharged its debt or provided adequate guarantees in the preceding 15 days and this demand was denied. If the companies have any bond-holding creditors, then those are also allowed to oppose to the merger in the same terms applicable to the creditors. In this case it will also be necessary to hold bondholders' general meetings of each participating companies, to resolve on a position regarding the merger.

(6) General shareholders meetings of the participating companies: Following the term for the opposition of creditors referred above, the merger must be approved by the shareholders of each participating company.

The shareholders who voted against the resolution approving the merger may have the right to sell their participation to the company, within one month as of such general meeting.

(7) Agreement of merger or public deed of merger: After the approval of the merger project by the shareholders of the participating companies, the management of the same shall execute a merger agreement or a public deed of merger, whereby it will be stated that the companies agree in proceeding with the merger by incorporation of the

incorporated company into the incorporating company, being transferred to the latter all rights and obligations and all assets and liabilities of the incorporated company at its accounting value, in accordance to the merger project—and that, as a consequence of the merger, the incorporated company shall be extinguished.

(8) Registration of the merger: After the execution of the merger agreement or public deed of merger, the merger shall be registered before the Commercial Registry Office. The merger may only be registered with the consent of harmed shareholders if:

(a) It increases the liabilities of some or all shareholders;

(b) It affects the special rights of some shareholders;

(c) It changes a shareholder's share of equity in relation to the remaining shareholders of the same company, except to the extent that such change is the result of payments required complying with legal requirements that impose a minimum or fixed value for each investment unit.

Once the merger has been registered:

(a) The incorporated company shall be extinguished and its rights and liabilities assigned to the incorporating company;

(b) The shareholders of the extinguished companies shall become partners of the incorporating company.

After the merger is definitely registered, the Commercial Registry Office shall order the publication of a notice of such registration at the official publications website of the Ministry of Justice. This publication is officially made by the Commercial Registry Office and it does not require any intervention of the participating companies.

(9) Communications after the registration: Apart from other tax obligations (Article 72 Corporate Income Tax Code), after the commercial registration of the merger, the participating companies should within 15 days file declarations before the Portuguese tax authorities informing about the changes resulting from the merger (Article 110, paragraph 5, Corporate Income Tax Code).

(10) Simplified procedure: In accordance with the Portuguese Companies Code there is a simplified merger procedure in case the acquiring company owns at least 90 percent of the shares and/or voting rights of the company that will be incorporated. The provisions regarding equity swaps, reports of experts and of the corporate bodies, and the responsibility assigned to these bodies and experts, shall not apply. The merger may be registered without the requirement of a prior resolution by the general meeting, provided that all of the following requirements are met:

(a) The merger plan mentions that there is no requirement for a prior resolution by the general meeting if item (c) hereunder does not require a general meeting to be convened;

(b) The partners have had the opportunity, at the registered office, to review the documents to which Article 101 refers no later than the eighth day following publication of the merger plan, and were so informed simultaneously with the plan or its announcement;

(c) Within 15 days of publication of the merger plan, no partner with 5 percent or more of the share capital requested a general meeting to discuss the merger.

The shareholders who voted against the resolution approving the merger may have the right to sell their participation to the company, within one month as of such an eventual shareholder meeting.[10,11,12]

b. Comparison

The major different procedures are the following:

(1) As per domestic mergers, when a merger by acquisition is carried out by a company that holds all the shares and voting rights of the company being acquired, Portuguese law still requires an independent report for the acquiring company;

(2) The cross-border merger project shall contain the following information, which is not requested in the domestic merger procedures:

(a) The rules for the equity swaps as per the share capital of the company resulting from the cross-border merger;

(b) The date of closing of the accounts from the companies' part of the merger project, which have been used to define the conditions of the cross-border merger;

(c) If it is relevant, the procedures to ensure that the employees have intervened in the definition of their participation rights in the company resulting from the cross-border merger;

(d) The eventual repercussions of the cross-border merger in company employment.

(3) In the case of a cross-border merger, all the companies involved may agree that the analysis of the merger project may be executed by the same chartered accountant/official accountant regarding all of the companies involved, which shall execute one report addressed to all the shareholders of the companies involved;

(4) In the case of a cross-border merger, the general meeting approving the cross-border merger may subordinate the execution of such merger to the condition that the provisions related to the employees' participation in the resulting company are met;

(5) The existence of a pre-merger certificate and the respective control procedures in case of a cross-border merger;

[10] E. Marques, *Código das Sociedades Comerciais em Comentário - Volume II*, p. 155-341.
[11] P.O. Cunha, *Direito das Sociedades Comerciais*, p. 636-639.
[12] J.H. Pinto Furtado, *Curso de Direito das Sociedades* (Almedina, Coimbra 2001), p. 541-550.

(6) The simplified procedure in case of a domestic merger has no distinction between the acquisition of a totally owned subsidiary and the acquisition of a company whereby the acquisition company owns more than 90 percent.

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1. Transposition of the Cross-Border Mergers Directive into Romanian Law

The CBMD was transposed into Romanian national law on April 30, 2008,[1] with an amendment to the Romanian Company Law No. 31/1990 (the "Company Law"), through the Government Emergency Ordinance No. 52 of 21 April 2008. This amendment created a new section that addressed laws regarding cross-border mergers.

On March 2, 2012, the Emergency Government Ordinance no. 2/2012 (the "Ordinance") amending the Romanian Companies Law no. 31/1990 was published with the Official Gazette No. 143, and entered into force.[2]

The amendment made the following changes:

Regarding the publicity procedure during a merger or spin-off, companies may publish a national or cross-border merger/spin-off project on their website, instead of publishing the project in the official gazette.

Regarding provisions simplifying the procedure to inform shareholders in case of a merger/spin-off, shareholders can decide to waive the directors' obligation to prepare a report; the companies can publish the merger/spin-off documents (projects, reports, financial statements) on their website; and the shareholders may obtain copies of the aforementioned documents by e-mail, free of charge.

Provisions regarding cases when the general meeting of shareholders' (the "GMS's") approval regarding the merger/spin-off is not necessary for merger through absorption, when one or more companies are dissolved without going into liquidation, and all their assets and liabilities are transferred to another company that holds voting rights at the GMS; for merger through absorption, when the absorbing company holds at least 90% but not all of the voting rights in the GMS; and for a spin-off, when the beneficiary companies of the spin-off jointly hold all the voting rights in the GMS of the spun-off company.

In the aforementioned situations, the shareholders that disagree with such operations have the right to withdraw (by selling their shares) from the company within 30 days from the date that the merger/spin-off project is published. Costs related to assessment of such shareholders' rights shall be incurred by the company.

Therefore, in order to proceed to the merger/spin-off without the GMS approval, the companies have to:

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[1] G. Cacerea, 'Romania', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 152.

(i) meet the publicity requirements of the operation one month before said operation enters into effect;

(ii) ensure that all the shareholders of the absorbing company or of the companies involved in the spin-off have access to the documents relating to the operation (the project, the management report and the financial statements) and, in case of spin-off;

(iii) inform the shareholders and the management bodies of other companies involved in the merger/spin-off (to be noted that in case of mergers, one or more shareholders of the absorbing company, owning at least 5% of the share capital, have the right to call the GMS in order to decide upon the merger).

Regarding opposition of the creditors to the merger/spin-off, the court may reject the opposition of a creditor if such creditor has not brought evidence that the satisfaction of his or her receivable may be affected by the merger/spin-off.

Regarding material changes to the assets and liabilities that arise prior to the GMS decision related to the merger/spin-off, unless waived by shareholders, the directors' obligation to inform such changes to both the shareholders at the GMS and the directors of the company's creditors involved in a merger/spin-off will apply not only to mergers, but also to spin-offs.

Regarding documents to be submitted to the trade registry with respect to the merger/spin-off, companies are required to submit to the trade registry, together with the merger/spin-off project, a statement regarding the means for publishing such projects. Such provision is also applicable in cases of transnational mergers.

Regarding the expert's evaluation report regarding equity-in-kind, the report is no longer necessary for the incorporation of a company that resulted from a merger/spin-off or for the increase of the share capital in order to perform a merger/spin-off, if such an operation has been subjected to the examination of an independent expert.[3]

Prior to the publication of the CBMD, domestic legislation did not refer to cross-border mergers.[4]

1.1. Article 1 – Scope General

Article 1 CBMD outlines the general scope of the Directive and the kind of mergers to which the Directive applies.

[2] M. Petriu and A.M. Chira, 'Amendments to Companies Law no. 31/1990', http://www.lexology.com/library/detail.aspx?g=884c386e-65ed-4a19-899c-6338999bda46 (last visited 20 August 2013).

[3] Ibid.

[4] Ibid.

The scope of Romanian national law is broader than the general scope of the Directive.[5]

The Company Law expressly regulates, in more detail than the Directive, the type of companies that may participate in a cross-border merger and also the exceptions from the area of applicability of the CBMD.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines the term 'limited liability companies'. Romanian Company Law contains a similar definition to the term "limited liability companies" as that provided in Article 2(1) of the CBMD.

b. List of companies that can carry out a cross-border merger under Romanian law

The new rules for cross-border mergers apply to almost all companies governed by the Company Law: joint stock companies (SA), partnerships limited by shares (SCA), limited liability companies (SRL), and European companies (SE). Companies limited by shares (SCS) and general partnerships (SNC) may not participate in cross-border mergers. If a merger-formed company (*i.e.*, the absorbing company) is a partnership limited by shares that falls under Romanian law, the shareholders of the absorbed company will be limited partners of the new company limited by shares, unless otherwise stated in the merger decision (Article 251(4) of the Company Law).[6]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

The Company Law, Article 251(1) is in line with Article 2(2) of the CBMD.[7]

d. Rules on cash payment

Under the Company Law, shareholders in the absorbed company can only receive a cash payment of 10% of the nominal value of the surviving company's shares, and there is no additional cash payment allowed. However, if the law of the foreign companies involved in the merger allows for a cash payment of more than 10%, then the payment will be made. Otherwise, the merger follows the rules of the CBMD regarding the 10% (Article 2(2) of the CBMD and Article 251(2) of the Company

[5] G. Cacerea, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 153.
[6] Ibid., p. 153.
[7] G. Cacerea, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 154.

Law).[8]

e. CBMs and companies in liquidation

Based on the CBMD, a company undergoing the liquidation procedure may not participate in a cross-border merger. However, under the Company Law, a national merger may be performed even if the dissolved company is under liquidation, provided that the distribution of proceeds among the shareholders has not yet commenced (Article 238(4) of the Company Law). Under Romanian law, in case the company under liquidation is insolvent, the liquidator has the obligation to request the opening of the insolvency proceedings (Article 270 of the Company Law).[9]

f. Geographical scope

According to Article 251(1) and (2) of the Company Law, joint stock companies, partnerships limited by shares, limited liability companies that are Romanian entities, and European companies that have their headquarters in Romania are allowed to merge with commercial companies that have their headquarters or central administration in other Member States, have a legal status, own share capital that is the only source to guarantee their obligations, and are subject to advertising formalities similar to the ones stated in Directive 68/151/EEC.

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

National legislation on cross-border divisions, seat transfers, and other cross-border seat restructurings is as follows:

Article 44 of the Company Law has, since 1990, allowed foreign companies to incorporate in Romania branches, agencies, secondary offices, and subsidiaries if the country of origin allows them to do this.

Article 270(2) of the Company Law, since April 30, 2008, has allowed for European companies with headquarters in Romania to transfer their headquarters to another Member State.

Therefore the Company Law allows cross-border divisions if the state where the company was initially incorporated also allows it. Seat transfers are allowed by the Company Law only in the case of European Companies, governed by Title VII[1] ("European Company") of the Company Law.

[8] Ibid.
[9] Ibid., p. 153-154.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Article 251^4(2) of the Company Law is in line with the provisions of Article 3(1) CMBD.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. The Company Law excludes cooperative societies.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Article 3(3) of the CBMD specifies that the rules thereof are not applicable to collective investment organisms in movable assets and closed investment funds, as well as any other entities having as their object of activity the collective placement of resources provided by the public which operate on the principle of risk-spreading and whose units may be, at the holder's request, purchased or redeemed, directly or indirectly, out of the company's assets. Under the Romanian law, the collective investment organisms in movable assets and closed investment funds are governed by Law No. 297 of 28 June 2004 regarding the capital market,[10] and are expressly excluded from the area of applicability of the CBMD.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Although the wording of Article 4(1)(a) is not literally transposed in the Company Law, the latter does specify exactly in Article 251^2(1) and (2) which types of companies are allowed to participate in cross-border mergers.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have also provided so for domestic mergers.

Article 4(1)(b) has not been transposed into Romanian national law.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Article 4(2) of the CBMD has been transposed in the Company Law.[11] The protection period starts with the creditors of the companies involved in the cross-border merger, who may oppose the merger process before 30 days have passed since the common draft terms are published in the Official Gazette of Romania or, as the case may be, on the company's website. However, they can only oppose the merger process if their receivables are certain and liquid before the draft terms publication date, not due as of the publication date, and without any adequate guarantees or pledges for securing their receivables (Articles 251^9 and 243 of the Company Law).[12] The possible time limit is 30 days.[13]

The following procedural steps apply: The creditors of the companies involved in the cross-border merger may oppose the merger process any time before 30 days have passed since the common draft terms were published in the Official Gazette of Romania or, as the case may be, on the company's website. However, they can only oppose the merger process if their receivables are certain and liquid before the draft terms publication date, not due as of the publication date, and without any adequate guarantees or pledges for securing their receivables (Articles 251^9 and 243 of the Company Law) and if they can prove that the proposed cross-border merger may endanger the satisfaction of their receivables.

The Trade Registry receives the creditors' opposition, makes mention thereof in the Trade Registry database and then delivers it to the tribunal of the Member State of the country's headquarters within three days.

According to the Company Law's recent amendments, for mergers done after October 2010 (more specifically, for cases when the common draft terms were published after 4 October 2010), the opposition cannot suspend the process (Articles 251^9 and 243(3) of the Company Law).[14]

This option also exists for domestic mergers, as regulated under Article 243 of the Company Law.[15] The submission of an opposition by an interested creditor does not suspend/block the performance of the merger.

[10] G. Cacerea, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 153.
[11] Ibid., p. 161-162.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides each Member State with the option to adopt protections for minority shareholders.

The Company Law has set rules for the protection of minority shareholders, as discussed in Article 4(2) of the CBMD, but the decision of the general meeting of shareholders approving the cross-border merger is also mandatory for the minority shareholders of the respective company. However, under the Company Law, there are several rights expressly granted to the minority shareholders (i.e., the right to be informed of the merger process and the right to withdraw from the company in case they do not agree with the merger operation).[16]

In case of SA, SCA and SRL companies, the right to withdraw from the company must be exercised within 30 days as of publication of the resolution of the general meeting of shareholders approving the merger (Article 251^{12} and 134(2) of the Company Law). In case of a merger through absorption whereby one or more companies are dissolved without being liquidated and all their assets and liabilities are transferred to a company holding 100% of their shares or other permissions granting voting rights in the shareholders' meetings, the shareholders must exercise their right to withdraw from the company within 30 days of the publication of the Common Draft Merger Terms (CDTMs) with the Official Gazette or, as the case may be, on the company's website (Article 251^{12}, $134(2^1)$ and 246^1 of the Company Law). The following procedural steps apply (Article 134(3), 134(4), 134(5), $251^{12}(2)$ and $251^{12}(3)$ of the Company Law): the shareholders shall submit at the company's headquarters their written declaration for withdrawal, together with their shares or, as the case may be, their shareholders' certificates. An appointed expert shall determine the price to be paid by the company to the respective shareholder, as an average amount resulting from the implementation of at least 2 valuation methods. The valuation costs shall be borne by the company.

The shareholders may exercise their right to withdraw from the company, only if the following conditions are met: (i) the legislation of all Member States of the companies involved in the merger provide a similar protection mechanism of the shareholders' interests; (ii) the companies taking part in the merger, governed by the legislation of another Member State which does not regulate the shareholders right to withdraw from the company, expressly accepted the exercise of such right by the shareholders of the Romanian company, mention thereof being made in the resolution of the shareholders' meeting (Article $251^{12}(4)$ of the Company Law).

[16] G. Cacerea, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 159.

Overall, the protection of minority shareholders is quite limited in Romania. Their only rights are to be informed, receive shares in the resulting company, to withdraw from the company or to ask that their shares are bought by the company (such as any other shareholder who didn't vote in the favor of the merger, according to Article 251(12) of the Company Law).

This option also exists for domestic mergers, as discussed in Article 134 of the Company Law.

e. The protection of employees in Article 4(2)

The employee protection discussed in Article 4(2) of the CBMD has been transposed into Romanian national law.[17]

Under the Company Law, employee participation is dealt with differently depending on whether the absorbing/newly established company is a European company. As regards the latter, the legal regime again differs depending on whether at least one of the merging companies had previously implemented a mechanism for the involvement of employees (including participation rights) or failed to do so.

In a nutshell, most likely a participation mechanism must be implemented in the absorbing/newly founded Romanian company if one or several or the merging companies had previously implemented such mechanisms.

Employee participation in Romania is further detailed under GD 187/2007, which guarantees protection to the members of a "special negotiating body" or the members of the representative body, the employees' representatives having attributions within an information and consultation procedure and the employees' representatives within the control or management body of a European company who are employees of the subsidiaries or of its companies, or of a participating legal entity, of a European company acting within the course of their role, in accordance with the level of protection granted by the Romanian Labor Code and by the Trade Unions Law.

According to the Company Law, if the merger-created company, Romanian company, has an employee participation system, the management or, as the case may be, the members of the directorate must continue to protect employees' rights for three years after the merger is in force.[18]

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose of informing the shareholders, reflect the results of the negotiations between the

[17] Ibid., p. 162.

merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) of the CBMD have been transposed under the Company Law. The CDTM does not have to be notarized or authenticated. However, a notarized form is required in case of transferring a plot of land.[19]

In case the company resulting from the merger owns 100% of the shareholding of the absorbed company/companies, the elements provided at Article 5 letters b), c) and e) of the CBMD are not applicable (Article 251[17] of the Company Law).

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Romania has transposed Article 6(1) of the CBMD as follows: the CDTM shall be published at least 30 days prior to the shareholders' meeting to decide on the merger (Article 251[6](2) of the Company Law). The Company Law further states that the shareholders' meeting shall be held within three months of publication of the draft common terms in the Official Gazette of Romania (Article 251[11](1) of the Company Law).[20]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The Company Law follows the amendment of Article 6(1) of the CBMD; according to GD 2/2012, which amends Article 251[6] of the Company Law, the publication of the CDTM can be published on the company's website for a period of at least one month before the GMS's meeting that will decide on the CDTM. In such case, the Trade Registry will publish on its own website, free of charge, the CDTM (Article 251[6](5) of the Company Law).

[18] Ibid.
[19] Ibid., p. 154.
[20] Ibid., p. 157-158.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) of CBMD has been transposed under the Company Law: the excerpt from the CDTM to be published with the Official Gazette or, respectively, the company's website, shall include the matters specified at article 6(2) of CBMD (Article 251^6(3) and 251^6(5) of the Company Law).

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees, not less than one month before the date of the general meeting referred to in Article 9

Article 7 of the CBMD has been transposed into Romanian national law (under Article 251^7 of the Company Law).[21]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) of the CBMD has been transposed into Romanian national law (under Article 251^8 of the Company Law).[22]

b. The independent expert

Under Romanian law, one or more natural or legal persons may serve as experts and are chosen by the National Trade Registry director to analyze the merger's CDTM and draft a written report for the shareholders (Article 251^8(1) of the Company Law).[23]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) of the CBMD has been transposed into Romanian national law (under

[21] Ibid., p. 156.
[22] Ibid., p. 158.
[23] Ibid., p. 156.

Article 251^{8}(3) of the Company Law).[24]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed into Romanian national law under Article 251^{8}(2) of the Company Law.[25]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 8(3) of the CBMD has been transposed in Romanian law; each designated expert has the right to receive all relevant information and documents from each of the merging companies and also the right to perform all necessary investigations in order to draft the report (Article 251^{8}(4) of the Company Law).[26]

There are no consequences in the Company Law if the expert is denied access to information. The experts are appointed by the Trade Registry director during the merger procedure and the independent experts are given access by law to the information needed for verifying the merger report (Article 251^{8}(5) of the Company Law).

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all the merging companies can unanimously decide to waive the expert reports.

Article 8(4) of the CBMD has been transposed under the Company Law. If all members of the companies involved in the merger agree not to examine the CDTM and prepare the expert report, such formalities shall not be completed (Article 251^{8}(5) of the Company Law).[27]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) or in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

In implementation of Articles 15(1) and 15(2) of the CBMD, the experts' report is not required in case the merger by absorption is performed between a parent company and a company it fully owns (Article 251^{17} of the Company Law). Additionally, if the

[24] Ibid., p. 157.
[25] Ibid.
[26] Ibid., p. 157.
[27] Ibid.

absorbing company falls under the law of a Member State and holds at least 90%, but not all, of the share capital of the absorbed company that falls under Romanian law, the experts' report is not required in case all shareholders of the merging companies agree to such a waiver of the report (Article 251[18]and article 243[3] of the Company Law).[28]

h. Further exemptions in Romanian law

There are no further exemptions in the Company Law.[29]

The experts drafting the report on behalf of the absorbed company or of the ones forming the resulting company are liable towards the shareholders of the merging companies for the faults committed during the performance of their duties (Article 251[16](2) of the Company Law).

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed into Romanian national law (under Article 251[11] of the Company Law).[30]

a. Procedural requirements including majority, quorum, timing and notarization

The procedure for said approval includes the following steps:

The general meeting of shareholders must approve the merger and the CDTMs. Voting requirements differ for joint stock companies and limited liability companies: for the joint stock companies, shareholders holding at least 25% of the total voting rights are required at the first call, and shareholders holding at least 20% of the total voting rights must be present at later calls (Articles 251[11](1) and 115 of the Company Law). The merger must be approved by a special majority of two-thirds of the voting rights of shareholders who are either present or represented in the meeting, but this threshold may be stricter under the articles of association (Articles 251[11](1) and 115 of the Company Law).

According to the Company Law, limited liability companies require a unanimous vote, unless the articles of association dictate otherwise (Article 192(2) of the Company Law). If the shares belong to various categories, then the merger will be approved based on the results of the votes on different categories (Article 251[11](2) of the Company Law).

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[28] Ibid.
[29] Ibid.
[30] Ibid., p. 158.

If the absorbing or merger-formed company is a European company, or if one of the merging companies has an employee participation system, then the general meeting of shareholders may condition the approval of the merger by the express ratification by the meeting of the mechanisms of involving the employees in the activity of the absorbed or newly established company (Article 251^{11}(3) and 251^{10} of the Company Law). [31]

In case the cross-border merger triggers the enhancement of the obligations of the shareholders of one of the participating companies, Romanian legal entities, the GMS resolution shall be taken with unanimity of votes (Article 251^{11}(4) of the Company Law).

There are no formal requirements regarding the GMS resolution, such as notarized form. However, the act amending the articles of association has to be executed in authentic form when a land plot is transferred.

b. Amendment of CDTMs by shareholders

They can accept or reject the terms of the CDTMs, but they have no option to amend the draft.[32]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Romanian national law allows the exemption under Article 8 of Directive 2011/35/EU, for the case of domestic mergers, as follows: under certain conditions, in case of merger by absorption of the wholly owned subsidiary, the GMS approval of neither of the merging companies is required (Article 246^{1}(1) of the Company Law).[33]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

The Company Law does not allow the exemption under Article 15(1) of the CBMD, for the case of cross-border mergers.[34]

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

[31] Ibid., p. 158.
[32] Ibid., p. 158-159.
[33] Ibid., p. 158.
[34] Ibid.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed into Romanian national law (under Article 251^{13} of the Company Law).[35]

b. National authority has been designated to scrutinize the legality of the merger

Under Romanian law, the legality of the cross-border merger is verified by the Trade Registry director and by the tribunal commercial department.[36] A formal check of every document which has to be presented is required (Article 251^{13} of the Company Law).[37]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Regarding Article 10(3) of the CBMD, the pre-merger certificate is stipulated within the Company Law. According to the Company Law, the tribunal commercial department will issue a decision stating that all legal requirements for the merger provided under the Romanian law have been fulfilled by the Romanian company involved in the merger (Article 251^{13}(5) of the Company Law).

In case of a merger by absorption or in case a new company is set up, the tribunal decides the registration with the Trade Registry of the additional act to the articles of association of the absorbing company/ newly incorporated company, Romanian entity or European company having its headquarters in Romania, following the verification of the certificates or similar documents issued by the competent authorities from the other Member States where the other companies participating in the merger are headquartered or, as the case may be, where the central management or main

[35] Ibid., p. 159-200.
[36] Ibid.
[37] Ibid.

headquarters is, and the term within which such have been submitted with the Trade Registry Office, a term which cannot exceed 6 months as of issuance (Article 251^{13}(1) and 251^{13}(2) of the Company Law).

The procedure for the cross-border merger starts at the competent Trade Registry, which proceeds to the formal check of documents (merger project, incorporation certificates of the companies which are going to merge). Afterward, through the Trade Registry, the request for merger is filled at the competent court of law.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed into Romanian national law (under Article 251^{13} of the Company Law).[38]

b. The national authority has been designated to scrutinize the legality of the merger

Under the Romanian law, the legality of the cross-border merger is verified by the Trade Registry director and by the tribunal commercial department. For an absorption merger or a merger-formed company, the tribunal decides upon the registration of the Romanian entity or European company headquartered in Romania after verifying that all legal requirements are fulfilled and the articles of association are submitted to the Trade Registry Office within six months after issuance (Article 251^{13}(1) of the Company Law).[39] The authority performs a formal check.[40]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed into Romanian national law (under Article 251^{15}(2) of the Company Law).[41]

b. Date the cross-border merger takes effect

Under Romanian law, the cross-border merger will take effect as of the following dates in case the absorbing company or the newly established company shall be under the Romanian jurisdiction (Article 251^{15}(2) of the Company Law):

[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid., p. 154.

(1) the date of the registration with the Trade Registry of the company, in case of establishing a new company;

(2) the date of registration with the Trade Registry of the act amending the articles of association of the absorbing company, except for the case when, by the agreement of the parties, it is stipulated that the operation will take effect on a different date. In the latter case, the stipulated date cannot be (1) subsequent to the end of the current financial year of the absorbing company or of the beneficiary companies; and (2) prior to the end of the last finalized financial year of the companies transferring their patrimony; and (3) prior to the control of the legality of the merger performed by the tribunal, commercial department;

(3) the date of registration, in case of establishing a European company.[42]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that as long as it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence has been transposed into Romanian law (under Article 251^{14} of the Company Law).[43]

b. Transposition of Article 13 second sentence

Article 13 second sentence has been transposed into Romanian law, under Articles 251^{14}(3) and (4) of the Company Law which state that the Trade Registry where the absorbed companies are registered (Romanian entities) will proceed to deregistration based on the notification received from the Trade Registry where the absorbing company is registered.

If the absorbing company is registered in Romania, the Romanian Trade Registry will inform the trade registry where the absorbed companies are registered for the merger so that they can be deregistered.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 of the CBMD has been transposed in Romanian national law (Art. 251^{15}(1) of

[42] Ibid., p. 154-155.
[43] Ibid.

the Company Law); moreover, the absorbed companies' rights and obligations resulting from employment relationships existing on the date of completion of the cross-border merger are transferred to the absorbing/newly established company on the same date (Art. 251[15](3) of the Company Law).[44]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure in two instances: i) where a merger with a whole owned subsidiary is carried out or ii) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

Article 15(1) of the CBMD has been transposed into Romanian Law (under Article 251[17] of the Company Law), except for the item referred to above at letter (iv).

Article 15(1) further provides that in a merger with a wholly owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The further provisions of Article 15(1) of the CBMD have not been transposed into Romanian national law.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some Member States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Information regarding Romania's employee participation system is quite vague.

GD 187/2007 states that a special group of negotiators will be chosen by the employees and this group shall decide how to involve, consult, and otherwise engage with employees (Article 5).

Therefore the law sets up a general framework, but the specifics shall be decided within the company.

[44] Ibid., p. 155.

Based on our previous experience and considering the reluctance of local management to involve the trade unions/representatives of the employees in the companies' management or control, the observance of participation rights (*i.e.*, the right to elect or appoint members in the company's control or administrative body, or the right to recommend and/or oppose the appointment of some of the members of the company's control or administrative body) would prove rather difficult.

The Company Law currently provides that if the absorbing or newly established company is a European company having its headquarters in Romania, the directors of the companies participating in the merger shall ensure the observance of the employees' involvement in the affairs of the European company, in accordance with the provisions of GD 187/2007 (Article 251^{10}(1) of the Company Law).[45]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) of the CBMD has been transposed into Romanian national law. The Company Law states in Article 251^{10}(1) that if the new company resulting from the merger or the absorbing company will have the headquarters in Romania, the rights of employees shall be respected according to GD 187/2007. The second paragraph of the article states that if one or more companies who participate in the merger, being governed by the legislation of another Member State under which there is in place a mechanism for involving employees in the company's affairs such mechanism shall be respected by the absorbing/newly incorporated company.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) of the CBMD has not been transposed into Romanian national law.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3) has improperly been transposed into Romanian national law because it was only transposed for the European Companies.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

[45] Ibid., p. 162.

Articles 16(4)(a), (b), and (c) have been transposed into Romanian national law under Articles 251(3), (4), and (6) of the Company Law.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into Romanian Law.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Romanian national law under Article 251^{10}(2) of the Company Law.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years employee participation is protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed into Romanian national law under Article 251^{10}(5) of the Company Law.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Regarding Article 17 of the CBMD, the merger may not be declared void by a court of law after the date it becomes effective (Article 251^{19}(2) of the Company Law), irrespective of whether the decision approving it has been published or not.[46]

1.18. Additional

a. Valuation rules

No valuation rules are stipulated under the Company Law.

b. National case-law on provisions transposing the CBMD

There have been few cross-border merger operations implemented up to date.

[46] Ibid., p. 161.

c. Language requirements

According to Article 18 of the Romanian Civil procedure code, all proceedings shall be undertaken in Romanian. Foreign documents (to be executed in notarized and apostilled form, as the case may be) shall be translated into Romanian and further notarized, in order to be submitted with the Trade Registry. If a person does not understand the Romanian language, that person shall use an authorized translator.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The rules that are to be followed in domestic mergers are, to some extent, similar to the rules to be followed in cross-border mergers.

b. Comparison

By way of example only, the differences between the domestic merger procedure and the cross-border merger procedure refer to the following:

(i) in case of a national merger by absorption of a wholly owned subsidiary, the GMS approval of the merging companies is not required, in certain conditions, by comparison to a cross-border merger; (ii) the legal regime for the annulment of the mergers are different (domestic merger procedure: Article 251 of the Company Law; cross-border merger: Article 251 of the Company Law).

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1. Transposition of the Cross-Border Mergers Directive into Slovak Law

The CBMD was transposed into Slovak national law on November 27, 2007,[1] through an amendment to the Commercial Code, creating a section in the Commercial Code on cross-border mergers of European Economic Area Member State companies (Article 69aa Commercial Code), and certain special stipulations regarding mergers for joint-stock companies (public limited liability companies) into the appropriate section of the Commercial Code (Article 218a to 218lk Commercial Code). The provisions for cross-border mergers of joint-stock companies apply to other cross-border mergers of other companies, unless otherwise stated.[2] The amendment became effective on January 1, 2008.[3]

There were no reforms with respect to the cross-border merger laws after the transposition of the CBMD. Prior to the publication of the CBMD, the domestic legislation did not refer to cross-border mergers.[4]

1.1. Article 1 – Scope General

Article 1 CBMD provides for the general scope of the Directive and gives a first of definition to which kind of mergers the Directive applies.

The scope of the Slovak national law is broader than the scope provided under the CBMD.[5]

In Slovak national law, the cross-border merger of companies means a merger of one or more Slovak involved companies with one or more foreign participating companies. All participating companies that are dissolving or acquiring have to possess similar legal forms; mergers of different legal forms of companies are not allowed, unless laws of the Member States where the participating companies have their registered seat, allow merger of different legal forms (Section 69aa(1)(e) Act).[6] This is the case of Slovak law, for example, which allows for domestic mergers a merger of a (private) limited liability with a joint-stock company, if the joint-stock company is the surviving company.

1 M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I* (Cambridge University Press, New York 2010), p. 267.

2 Ibid., p. 267-268.

3 http://www.zbierka.sk/sk/vyhladavanie?filter_sent=1&_filter_predpis_aspi_id=657%2F2007&q= (last visited 20 August 2013).

4 M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 267-268.

5 Ibid, p. 268.

6 J.Hečková and A.Chapčáková, 'Selectes Legal and Economic Aspects of the Mergers under Conditions of the Slovak Republic', http://www.pulib.sk/elpub2/FM/Kotulic12/pdf_doc/7.pdf (last visited 20 August 2013).

According to Slovak national law, the rules for cross-border merger of joint-stock companies are applicable for cross-border merger of companies of all legal forms, unless otherwise stated in the provisions regulating the other legal forms of companies.[7]

The explanatory report for CBMD transposition shows that the Slovak lawmakers intended, referring to the decision of the European Court of Justice in *SEVIC*, to go beyond the mandatory transposition of the CBMD and allow a cross-border merger of any legal form of a commercial company, thus also of general partnerships and limited partnerships. It is clear that the lawmakers did not plan to exclude cooperatives as well.[8]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

The definition of the term "limited liability company" in Slovak national law is similar to that of the CBMD.[9] Under Slovak law, there are two forms of companies with limited liability: (private) limited liability company (*spolocnost s rucenim obmedzenym*) and joint-stock company or public limited liability company (*akciova spolocnost*). The rules on cross-border merger apply to both, but with certain differences in case of a private LLC. A foreign participating company is a foreign-based company in another Member State, and a Slovak participating company is a company located in the territory of the Slovak Republic (Articles 69aa(1)(b) and (c) Commercial Code).

The decision of the CJEU in the case of *SEVIC System AG* has expanded the scope of the 10th Directive to all subjects who use the freedom of establishment and can merge under national law.[10]

b. List of companies that can carry out a cross-border merger under Slovak law

Under Slovak law, a cross-border merger applies to all types of commercial companies: general partnerships, limited partnerships, private limited liability

[7] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 268.
[8] R. Pala et al. (eds.), *Cezhranicne fuzie* (Praha, C.H. Beck, 2010), p. 25.
[9] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 268.
[10] Mathias M. Siems, 'SEVIC: Beyond Cross-Border Mergers', *8 European Business Organization law Review 2* (2007), p. 307-316, http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1207380 (last visited 20 August 2013).

companies, joint-stock companies (or public limited liability companies), as well as European companies (SE) and European cooperative societies (SCE).[11]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Regarding the definition of the term "merger," the national law is in line with the definition of "merger" given under the CBMD.[12]

As to Article 2(2)(a) CBMD, merging is process by which dissolution without liquidation leads to termination of one or more companies and the merging companies' capital is transferred to another existing company that becomes the legal successor of the merger (Article 69(3), first sentence, Commercial Code).

As to Article 2(2)(b) CBMD, merging is a process by which dissolution without liquidation leads to termination of two or more companies and the merging companies' capital is transferred to a newly created company that becomes the legal successor of the merger (Article 69(3), second sentence, Commercial Code).

For both Articles 2(2)(a) and (b) CBMD, the draft terms must be transformed into a notarial deed and must include additional data than what is listed in Article 69(6) Commercial Code, for example:

(1) determining the exchange ratio for the acquiring company in exchange for shares of dissolving companies stating their form, type and par value, or data limits the transferability of shares;

(2) determining the amount of supplementary payment, if it is to be paid to shareholders of the companies involved in the merger or merger. The payment cannot exceed more than 10 percent of the nominal value of shares issued to shareholders involved in the merger (Article 218a(1) Commercial Code).

As to Article 2(2)(c) CBMD, if the successor company owns, or if person/s acting on behalf of the successor company but in their own name own, all the merging (dissolved) companies' shares that carry the right to vote, the rules of the merger apply, except for Articles 69(6)(b) and (e), 69a(1)(b), 218a(1)(a) through (d), 218a(2) through (5), 218b, 218c(2)(d) and (e), 218g, 218h(2), 218i, and 218j Commercial Code. The stipulations of Article 218c(1) Commercial Code do not need to be applied if the conditions of 218k(1)(a) and (b) and 218k(2) Commercial Code are met (Article 218k(5) Commercial Code).

In case of a cross-border merger, if the successor company or a person acting in his own name but on behalf of the successor company owns all the shares of the merger's

[11] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 268.
[12] Ibid., p. 269.

involved companies that carry the right to vote, the provisions of Articles 69(6)(b) and (e), 69a(1)(b), 218a(1)(a) to (e), and 218a(2) to (5) Commercial Code do not apply. The written report, according to Article 218(b)(1) Commercial Code, must always be prepared for a cross-border merger. Article 218c(1) does not need to be applied to the cross-border merger if the conditions of Article 218c(1)(a) and (b) and 218c(2) are met.

d. Rules on the cash payment

According to Slovak national law, Article 218a(1)(b) Commercial Code follows the rules on cash payment as mentioned under the CBMD.[13] However, Slovak national law does not specifically follow Article 3(1) CBMD.

e. CBMs and companies in liquidation

According to Slovak national law, a company going in liquidation is not allowed to enter into a cross-border merger.

f. Geographical scope

Mergers are allowed for all companies formed within the EEA.[14]

The Slovak Commercial Code, unlike the CBMD, does not require a company to be incorporated under the law of a Member State. The law only requires that the company has its registered office in a Member State. Article 69aa(1)(c) Commercial Code defines the conditions assuring the binding of the law of a Member State by using only one criteria, and that is registered office.[15]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

According to Slovak national rules, seat transfers are only allowed, if they are within the CBMD or within the scope of the international treaty (Article 26 Commercial Code).

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Slovak national law does not specifically follow Article 3(1) CBMD.

[13] Ibid., p. 269.
[14] Ibid., p. 267-268.
[15] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 27.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies.

Slovak law has not excluded cooperative companies, and national law allows cooperative societies to enter into a cross-border merger.[16]

The decision of the ECJ in the case of *SEVIC System AG* has ruled that the right to cross-border mergers is implied by a primary law, and therefore all companies having this right on a national level have to have it on the EU-level, as well. Judgment did not extend the scope of the 10th Directive to all such companies, but because of a legal certainty, the Slovak legislator decided on appropriate application of most provisions of the Directive to all cross-border mergers.[17]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies.

Article 3(3) CBMD was not transposed in Slovak national law. The Slovak management companies are regulated by Act No. 203/2011 Col. on collective investment, as amended, which also includes special provisions on merger and cross-border merger of investment funds (managed by the management companies). Based on the text of Article 3(3), the 10th Directive is not applicable to these companies; however, the decision of *SEVIC* does apply here.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

A cross-border merger of companies involves one or more Slovak companies with one or more foreign companies; all must have similar legal form if the companies' Member States do not permit mergers of different legal forms (Article 69aa(1)(e) Commercial Code).

The Commercial Code states the rule about similar legal forms will not be applicable if the Member States where the participating companies are registered allow mergers of different legal forms (Article 69aa(1)(e) Commercial Code).

According to Article 69(2) Commercial Code, only companies with the same legal form can participate in the merger on the national level, unless the law provides otherwise. The only exception is in the provision of Article 218l, when mergers involving public limited liability companies and private limited liability companies are allowed provided

[16] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 268.
[17] http://wwwold.justice.sk/kop/pk/2007/pk07017_05.rtf (last visited 20 August 2013).

the private limited liability companies are the ones dissolved and the public limited liability company (joint-stock company) is the surviving one.[18]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have provided so also for domestic mergers.

Slovak national law did not transpose the opposition of national authorities available in Article 4(1)(b) CBMD, since such possibility does not exist even for domestic mergers.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for creditors, debenture and security holders.

Slovak law has adopted rules regarding creditor protection in Articles 69aa (5), (7), and (10) Commercial Code.[19] The protection period starts on the date when the draft terms of cross-border merger have been approved.[20] The applicable time limits are not straightforward. In the case when the Slovak participating company is an acquiring company, there is no unambiguous answer on the deadline for exercising creditor rights. Legal diction, however, favors that the period ends when the merger comes into the effect, and the creditor should be able to exercise his rights under the general regime of the provision of Article 218f Commercial Code.[21]

According to Article 218f Commercial Code, a creditor may apply his right within six months from merger publication in the commercial deed.

With a view to the procedural steps, Slovak national law dictates that if an agreement is not reached between the creditors and the Slovak participating company regarding appropriate security, a court will make a decision. If the cash for the receivables is deposited with the notary, the security will be deemed appropriate (Article 69aa(5) Commercial Code).

The owners of exchangeable, priority bonds, or other securities with special rights must obtain against the surviving company rights equal to those they had with the dissolving companies. However, this situation will not apply if the owners already agreed to changing their rights or if the merger-created or surviving company states they will buy these securities (Article 218f(2) Commercial Code).[22]

This option also applies to domestic mergers.[23]

The Commercial Code does not address whether creditors can block the merger.

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[18] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 30-31.
[19] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volum*e I, p. 281.
[20] Ibid.
[21] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 187.
[22] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 281.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides Member State with the option to adopt protections for minority shareholders.

Slovak law has adopted rules regarding minority shareholder protection in Articles 218ja and 218jb Commercial Code.[24] The protection period starts when the minority shareholders have voted against the draft terms of the cross-border merger or stated their opposition to the share-exchange ratio or amount of cash payment.[25] Under Article 218ja(2) Commercial Code, the time period starts from a date when the general meeting agrees on the cross-border merger.

The only procedural step is that the shareholder should vote against the draft terms of cross-border merger or the share exchange ratio or cash payment during the general meeting held for the approval of cross-border merger and request that his dissenting opinion be recorded in the general meeting minutes.[26]

The process for domestic mergers is, in principle, the same.[27]

e. The protection of employees in Article 4(2)

Slovak national law has transposed the employee protection of Article 4(2) CBMD in Article 218lj(1) Commercial Code.[28]

The special negotiation board (SNB) members, members of the employees' committee, and the employees' representatives in the supervisory board who are employed by participating companies in the Slovak Republic have the right to employee protection. The employees in other Member States are subject to the employee protection system of those countries (Article 218lj(1) Commercial Code).

The protection of the employees' representatives relates to their presence at the meetings of the SNB, employees' committee, and supervisory board. The SNB members and employees' committee members have the right to protection against discrimination and to work leave with salary compensation; the latter two will be provided by the Slovak company participating in the merger, even if the merger-formed or surviving company will be registered in another Member State.[29]

This option, which is a general protection of employees, also exists for the mergers within the Member State.[30]

[23] Ibid.
[24] Ibid, p. 277.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid., p. 286.
[29] Ibid., p. 286.
[30] Ibid.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose to inform the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) CBMD have been transposed in Articles 69(6), 69aa(2), 218a(1), 152a(1), and 69aa(10) Commercial Code.

However, Article 69aa(2) Commercial Code does not refer to "common draft terms," only to "draft term." In addition, the draft terms according to Articles 218ja and 218jb Commercial Code (regulation of the specific rights of the shareholders in the cross-border mergers) have to contain cash supplements in case the exchange ratio and the supplements in cash set by the original draft terms are no adequate. Moreover, the draft terms shall contain consent to this additional settlement.[31]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

The Slovak Republic has transposed Article 6(1) CBMD; the draft terms of the cross-border merger must be made available at least 30 days prior to the date of the general meeting.[32]

The draft terms are deposited to the collection deed for each of the companies involved in the merger. Notice of imposition of the draft in the collection of deeds must be published at least 30 days before the day of the general meeting, which decides on its approval (Article 218a(6) Commercial Code).

Moreover, the Slovak Commercial Code sets a duty beyond the scope of the Directive, stating that every Slovak participating company has to publish at its headquarters or at another address, as well as on its website, some information set in the provision of Article 69aa(4) Commercial Code, no later than 60 days before the vote on approving.[33]

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[31] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 48.
[32] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 271.
[33] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 70.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed (the respective amendment to the Commercial Code, Act No. 193/2011 Coll., became effective on June 30, 2011).[34]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) CBMD is transposed in Slovak national law in Article 69aa(3) Commercial Code. The draft terms of cross-border merger must be included in the Commercial Registry's collection deed and the Slovak company participating in the merger must publish the information in the commercial bulletin.[35]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 of the CBMD has been transposed in Article 218b(1) Commercial Code.[36]

The board of directors of each of the companies involved in the merger is required to prepare a detailed written report that explains and justifies the merger from the legal and economic points of view and provides details of the draft terms of the merger agreement, in particular the share exchange ratio. The report must provide special difficulties in determining the exchange ratio, if such occurred. A written report for every Slovak participating company must also contain an explanation of the expected consequences of the merger for shareholders, Slovak creditors, and employees.

In the headquarters of each of the companies involved in the merger, this report must be available to the shareholders and employees or their representatives at least 30 days before the date of the general meeting which is deciding on the merger (Article 218c(2)(d) Commercial Code).

[34] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 271.
[35] Ibid.
[36] Ibid., p. 272.

However, the third sentence of Article 7 CBMD is not transposed, and the Commercial Code does not allow employees to submit an opinion to the management report.[37]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Regarding Article 8(1) CBMD, the draft terms of merger must be, for each of companies involved in the merger, examined by an independent expert appointed by the court on the proposal of the board. Based on a joint proposal by the boards of directors of companies involved in mergers, the court may appoint one or more common independent experts for all companies (Article 218a(2) Commercial Code). The one-month availability requirements is set in Article 218c(2)(e) Commercial Code.

b. The independent expert

Once the board of directors provides a proposal to the court, the court will appoint an independent expert, and may appoint one or more common experts for all companies, according to Article 218a(2) Commercial Code.[38]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Regarding Article 8(2) CBMD, based on a joint proposal by the boards of directors of companies involved in mergers, the court may appoint one independent expert or more common independent experts for all companies (Article 218a(2) Commercial Code).

An independent expert prepares a written report on the outcome of the draft terms of merger; if one or more common independent experts have been appointed, a joint report may be made for all merging companies (Article 218a(3) Commercial Code).

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed in Slovak national law; the exact details of what is required in the reports is in Article 218a(3) Commercial Code.[39]

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[37] http://wwwold.justice.sk/kop/pk/2007/pk07017_05.rtf (last visited 20 August 2013).
[38] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 273.
[39] Ibid.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) of the CBMD has been transposed in Slovak law. The appointed independent experts must receive from all participating companies the information they require to prepare the report, under Article 218a(4) Commercial Code.[40]

There is no consequence in national law if companies do not provide experts with the information they require.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all merging companies can unanimously decide to waive the expert reports.

Article 8(4) CBMD has been transposed in Slovak national law; under Article 218a(5) Commercial Code, in case of a merger of joint-stock companies, the expert's report can be exempted if all shareholders of the participating companies agree to it.[41]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in 1) a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) and 2) in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have been transposed: Article 15(1) CBMD was transposed in Article 218k(5) Commercial Code[42] and Article 15(2) was transposed in Article 218k(3) Commercial Code.[43]

h. Further exemptions in Slovak law

Further exemptions under Slovak law are, for a private limited liability company merger, the expert's report is only necessary if a shareholder of any of the participating companies requests it (Article 152a(6) Commercial Code).[44] However, this provision is applicable only for national mergers, not for a cross-border merger.[45]

[40] Ibid.
[41] Ibid.
[42] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 90.
[43] Ibid.
[44] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*), p. 274.
[45] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 91.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed in Slovak law in Article 218c(1) Commercial Code.[46]

a. Procedural requirements including majority, quorum, timing and notarization

Procedural requirements are that, under Slovak national law, the merger's draft terms must be approved by shareholders of participating companies that are general partnerships or limited partnerships, as they do not create mandatory registered capital. For companies that do so, such as private limited liability companies and joint-stock companies, the draft terms must be approved by two-thirds of shareholders present at the general meeting, unless the foundation agreement or articles of association of the company require stricter conditions (Article 69aa(6) Commercial Code). The two-thirds majority of each type of shares is required is the company has issued different kinds or types of shares (Article 218c(1) Commercial Code).

In cooperatives for the domestic mergers, more than half of the members are required to be at the meeting, and the merger must be approved by a majority of them. However, it applicability to the cross-border mergers is unclear and it is possible that the two-third majority rule would apply. [47]

In cross-border mergers, the draft terms must be approved by shareholders in general meetings. The general meeting minutes approving the draft terms must be executed in the form of a notarized instrument, signed by the chairman of the meeting and the minute clerk (record keeper). Subsequently, when the merger is about to be finalized, the terms of the merger (Slovak law uses the term "merger contract") must be executed in the form of a notarized instrument again, in which case it is signed by the statutory representatives of merging companies.[48]

b. Amendment of CDTMs by shareholders

The shareholders can only accept or reject the CDTMs.[49]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

This exemption is set in Article 218k Commercial Code.[50]

[46] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 274.
[47] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 101.
[48] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 274-275.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

This exemption is set in Article 218k(5) Commercial Code.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed in Slovak national law.[51]

b. National authority has been designated to scrutinize the legality of the merger

Based on Article 69aa(7) Commercial Code, a notary public is a national authority designated to scrutinize the legality of the merger.[52] The authority performs a formal check[53] and scrutinizes the legality of the merger only based upon submitted documents and does not need to perform any other material inspections.[54]

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate nevertheless.

Article 10(3) CBMD has been transposed in Slovak national law in Article 218jb Commercial Code.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) CBMD have been transposed in Slovak national law in Article 7(16) Act No. 530/2003 Coll. on the Commercial Registry, as amended, and in Article 25a(5) Decree of the Ministry of Justice of the Slovak Republic No. 25/2004 Coll.

[49] Ibid.
[50] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 105.
[51] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 275-276.
[52] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 112.
[53] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 275.

stipulating the template forms for submission of applications for registration with the Commercial Registry and the list of documents to be enclosed with the application, as amended.[55]

b. The national authority has been designated to scrutinize the legality of the merger

The Registry Court (the district court in the seat of a regional court) in which jurisdiction the company's seat is registered is the national authority designated to scrutinize the legality of the merger.[56] The authority performs a formal check.[57]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed in Slovak national law[58] in Article 69aa(8) Commercial Code.

b. Date the cross-border merger takes effect

For a cross-border merger, deregistration of the Slovak dissolved company and registration of the newly created or surviving company will be done on the same date if the surviving company is in the Slovak Republic. If this is not the case, the Slovak dissolved company shall be deregistered from the Commercial Registry after a foreign registry states that the cross-border merger has become effective. The specific date will then be when the cross-border merger becomes effective according to the laws applicable to the merger-created company.[59]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that provided it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Article 13 first sentence has been transposed in Article 69aa(8) Commercial Code, in connection with the already-existing provisions of Articles 27(1) and (3) and Article 769 Commercial Code, and in Article 8(1) Act on Commercial Registry.

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[54] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 114.
[55] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 276-277.
[56] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 129.
[57] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 276-277.
[58] Ibid., p. 276.

b. Transposition of Article 13 second sentence

Article 13 second sentence has been transposed in Article 10(5) Act on Commercial Registry.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Article 14 CBMD has been transposed in Slovak national law. The merger becomes effective upon its registration with the Commercial Registry. After this, (1) the assets of the companies being dissolved are transferred to the surviving company; (2) the shareholders (members) of the companies being dissolved become shareholders (members) of the surviving company; (3) the companies being dissolved cease to exist; and (4) in case of merger by formation of a new company, the new company is created (Article 69a(1) Commercial Code). The registration of the creation of a new company or the registration of the merger by absorption and deregistration of the dissolved companies from the Commercial Registry are to be made on the same date.[60]

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure for two instances: for 1) where a merger with a whole owned subsidiary is carried out or 2) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a whole owned subsidiary, several procedural steps shall not apply.

Article 15(1) of the CBMD has been transposed in Article 218k(5) Commercial Code.

Article 15(1) further provides that in a merger with a whole owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

Article 15(2) of the CMD has been transposed in Articles 218k(1) through (3) Commercial Code (the general meeting resolution of the successor company is not required under certain conditions; the independent expert report and the management report are also not required under certain conditions).

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[59] Ibid.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The Slovak Republic does have a system of employee participation discussed in Article 200 Commercial Code. Article 200 provides for the rules under which the employees' representatives become members of the supervisory board of a Slovak joint-stock company. The supervisory board is a mandatory supervising and controlling body of a Slovak joint-stock company. It must have at least three members, natural persons, appointed for the term stipulated in the articles of association, but not exceeding five years. Under Article 200 Commercial Code, two-thirds of the members of the supervisory board shall be elected and dismissed by the general meeting and one-third by the company's employees, provided the company has more than 50 employees at the time of the election. The articles of association of the company may provide for a higher number of members to be elected by the employees, but that number cannot exceed the number of members elected by the general meeting. The articles of association may stipulate that the employees are entitled to elect a certain number of supervisory board members even if the company does not have more than 50 employees.[61]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

The stipulations of Article 16(1) CBMD on employee participation in cross-border merger transactions have been transposed into Slovak law in Article 218la(1) Commercial Code.[62]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16 (1) CBMD.

The exemptions of Article 16(2) CBMD have been transposed into Slovak law[63] in Article 218la(2) Commercial Code.

[60] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 269.
[61] Ibid., p. 281-282.
[62] Ibid., p. 282
[63] Ibid.

d. Transposition of Article 16(3)(e)

Article 16(3) prescribes the actual procedure and heavily relies on the SE Regulation and the SE Directive.

Article 16(3)(e) CMBD has been transposed in Article 218lh(2) Commercial Code by excluding the application of standard rules (further described in Articles 218lh(3) through (7)) if the number of employees covered by employee participation before the merger was less than one third of all employees of all participating companies.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16 (3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) CBMD has been transposed in Article 218lb(3) Commercial Code; and Article 16(4)(b) has been transposed in Articles 218le(2) and (4) Commercial Code. Article 16(4)(c) has not been transposed in the Commercial Code since transposition was not required.[64]

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into national law.[65]

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Slovak national law in Article 218l(1) Commercial Code, by stipulating that a merger of a private limited liability company and a joint-stock company is only possible if the joint stock company is the surviving company, as only the legal form of a joint-stock company provides for an employee participation system.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three

[64] http://wwwold.justice.sk/kop/pk/2007/pk07017_05.rtf (last visited 20 August 2013).
[65] Ibid.

years the employee participation are protected also in the event of subsequent domestic mergers.

Article 16(7) CBMD has been transposed into Slovak national law in Article 218lk Commercial Code.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 CBMD has been transposed into Slovak national law in Article 69aa(9) Commercial Code, and a cross-border merger that has become effective in compliance with the procedures laid down in the national law cannot be declared null and void.[66] However, national mergers can be declared null and void.

1.18. Additional

a. Valuation rules

In Slovak national law, valuation of assets and liabilities at fair value, defined in Article 27(2) Act on Accounting, is used.[67]

b. National case-law on provisions transposing the CBMD

Case law found regarding transposition of the CBMD is the decision of the County Court (*41Cob/108/2012*),[68] which states that Articles 69aa(2) and (7) Commercial Code are limited only to cases where the result of the process is an acquiring company based in the Slovak Republic. In other cases, conditions of deregistration are reviewed only formally, and the basis for deregistration should be only a notification of a foreign registry or of another respective foreign record-keeping authority where the foreign company is registered, that the cross-border merger has become effective.

c. Language requirements

Slovak national law has language requirements; all the documents must be submitted to the Commercial Registry in Slovak, the official language of the Slovak Republic.[69]

[66] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 270.
[67] V.Kaletová, 'Zlúčenie, splynutie, rozdelenie obchodných spoločností', *proadca podnikatel'a* (2007), http://www.pp.sk/6487/Zlucenie-splynutie-rozdelenie-obchodnych-spolocnosti_A-DUPP29453.aspx (last visited 20 August 2013).
[68] 'Preskúmavanie cezhraničného zlúčenia', *najpravo.sk* (2012), http://www.najpravo.sk/judikatura/obchodne-pravo/obchodny-register/preskumavanie-cezhranicneho-zlucenia.html (last visited 20 August 2013).
[69] M. Jurkova, 'Slovak Republic', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume I*, p. 270.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The procedure for domestic mergers in Slovak national law is, in principle, the same as for cross-border mergers.

b. Comparison

The only major difference between domestic and cross-border mergers is that once a cross-border merger is effective, it cannot be declared null and void, while in a domestic merger the decision of the general meeting, which has approved the merger, can be declared void under standard conditions, as can any other decision of the general meeting.[70]

In cases where a national merger of limited liability companies is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired or, under certain conditions, where a cross-border merger by acquisition is carried out by a company which holds 90 percent or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, a management report is not required. For cross-border mergers, the management report has to be always prepared.[71]

The ratio for the general meeting approval may be set differently in common draft terms for national mergers (Article 69(7) Commercial Code).

For a domestic merger, there is no duty of publication of certain information 60 days before the general meeting to approve a proposal on merger. There is no duty for a pre-merger certificate for national mergers.[72]

[70] Ibid.
[71] R. Pala et al. (eds.), *Cezhranicne fuzie*, p. 81.
[72] 'Cezhraničné fúzie – správy', *Deloitte* (2008), http://www.deloitte.com/assets/Dcom-SlovakRepublic/Local%20Assets/Documents/tax/sk_taxnews0208sk.pdf (last visited 20 August 2013).

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1. Transposition of the Cross-Border Mergers Directive into Slovenian Law

The CBMD was transposed in Slovenia through an amendment of the existing national law and through an enactment of a new law that entered into force on January 31, 2008, and June 7, 2008, respectively.

The amendment of the existing law was titled The Amendment of the Companies Act (ZGD-1A) and was published in the Official Gazette No. 10/2008 of January 30, 2008, and entered into force on January 31, 2008. This act amended the Companies Act (ZGD, primary legislation, Official Gazette No 41/2006 of April 19, 2006, as amended).[1]

The new law, titled The Act Regulating Employees Participation in Decision-Making in Cross-Border Mergers of Limited Liability Companies (ZSDČZKD), was published in the Official Gazette No 56/2008 of June 6, 2008, and entered into force on June 7, 2008.

1.1. Article 1 – Scope General

Article 1 CBMD outlines the general scope of the Directive and the kind of mergers to which the Directive applies.

National law does not have a specific definition of mergers that would apply to cross-border mergers. Under Article 622b of the Companies Act, if the Companies Act does not specifically provide to the contrary, the provisions governing domestic mergers also apply to cross-border mergers. Article 580 of the Companies Act contains a similar definition of a merger as Articles 2(2)a and 2(2)b CBMD, but the Companies Act does not specifically define merger as it is defined in Article 2(2)c CBMD. This narrower definition of a merger of a wholly owned subsidiary with the parent company derives from the general definition of merger of Article 580 of the Companies Act.

No domestic laws governing cross-border mergers other than those transposing the CBMD are in place. But the Companies Act's (foreign) limited liability company definition is broader than the CBMD definition in Article 2(1)(b). Namely, the national definition does not require the company to have share capital and does not specifically require that the conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others apply to such a company under the national law governing it. Therefore, the same cross-border merger provisions of the Companies Act apply to the legal entities outside of the scope of the CBMD.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

National law defines the term "limited liability company" more broadly than in Article 2(1) CBMD. The national definition does not require the company to have share capital and does not specifically require that the conditions concerning guarantees, such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others, apply to such companies under the national law governing it. Otherwise the scope of the national definition is similar to the CBMD definition in this part.

b. List of companies that can carry out a cross-border merger under Slovenian law

Under Article 622b of the Companies Act, the cross-border merger rules apply to companies with a registered seat in Slovenia and not to companies formed in accordance with the law of Slovenia as derives from the scope definition of Article 1 CBMD. Under Article 17 of the Private International Law and Procedure Act (ZMZPP, primary legislation, Official Gazette No. 56/99, as amended), the law of the country to which a legal entity belongs shall be used in matters concerning the legal status of this entity. To whom a legal entity belongs shall be determined under the law of the country in which this entity was founded. Under Article 622b of the Companies Act, a cross-border merger where a domestic company is the company being acquired is a merger of a company with a registered seat in Slovenia with a company that is incorporated under the law of another Member State or with a company that has its registered office, central administration, or principal place of business within the community or with a company that has a branch office in the community. Under Article 622b of the Companies Act, the cross-border merger is a merger of two or more companies incorporated under the laws of different Member States (if the company with its registered seat in Slovenia is the newly formed resulting company or the acquiring company). In other words, there is no requirement that the merging companies have their registered office, central administration, or principal place of business within the community for the merger to be classified as a cross-border merger under Article 662b of the Companies Act, if the newly formed resulting company or the acquiring company has its registered seat in Slovenia and if two or more merging companies are incorporated under the laws of different Member States.

[1] The translation of Articles of the Companies Act provided in this report is based on the translation of the

Under Article 622a of the Companies Act, a company limited by shares that may be involved in a cross-border merger is defined as (1) a company referred to in Article 1 of Directive 68/151/EEC or (2) a company with a recognized legal personality that is exclusively liable for its liabilities with its own assets, and for which safeguards for the protection of the interests of members and others apply, provided for in Directive 68/151/EEC. Cross-border merger provisions of the Companies Act do not apply to cross-border mergers involving a company whose objective is the collective investment of capital provided by the public, operating on risk-spreading, and for which shares can be repurchased or redeemed out of the company's assets.

Cross-border merger provisions of the Companies Act apply to the following domestic company forms: joint-stock companies (delniška družba, abbreviated d.d.), limited liability companies (*družba z omejeno odgovornostjo*, abbreviated d.o.o.), and partnership limited by shares (*komanditna delniška družba*, abbreviated k.d.d.).

Cross-border merger provisions of the Companies Act do not apply to the following domestic company forms: limited partnership (*komanditna družba*, abbreviated k.d.), general partnership (*družba z neomejeno odgovornostjo*, abbreviated d.n.o.), and Societas Europea (*Evropska družba*, abbreviated SE).

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Article 580 of the Companies Act contains a similar definition of merger as Articles 2(2)a and 2(2)b CBMD, but the Companies Act does not specifically define merger as it is defined in Article 2(2)c CBMD. This narrower definition of a merger of a wholly owned subsidiary with the parent company derives from the general definition of merger of Article 580 of the Companies Act.

d. Rules on cash payment

Article 580 of the Companies Act is narrower, but follows to some extent the rules on the cash payment as laid down in Articles 2(2)(a) and (b) CBMD. It provides that when the ratio at which the shares of the company being acquired are being exchanged for the shares of the acquiring companies is not equal to one or more acquiring company shares, the shareholders of the company being acquired shall only then be provided cash payment by the acquiring company or by some other person.

The sum of cash payments provided by the acquiring company in such a case shall then not exceed 10% of the total minimum issue of the amount of shares provided by the acquiring company. The issue amount of shares under Article 173 of the

Companies Act of the Slovenian Ministry of Economic Development and Technology

Companies Act is defined as an amount that is not lower than the nominal value and, in the case of no-par value shares, not lower than the corresponding amount. The corresponding amount of no-par value shares under Article 172 of the Companies Act is the amount of share capital accounted for by individual no-par value shares and determined in accordance with the ratio between their nominal amount and the amount of the share capital.

In other words, additional cash payments in any merger under the Companies Act are only allowed in cases when exchange rates result in a fractional number of shares given to shareholders of the companies being acquired (and not in any merger as indicated in CBMD) and may not exceed 10% of the total minimum issue amount of shares provided by the acquiring company to shareholders of the company being acquired (same 10% rule as indicated in CBMD).

e. CBMs and companies in liquidation

The Companies Act does not take a clear position on the issue of cross-border mergers by companies in liquidation, but it does not expressly prohibit such mergers.

f. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

National law does not allow cross-border divisions, seat transfers, or other cross-border restructurings. The Companies Act only provides for the seat transfer of an SE.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

The Companies Act does not expressly follow the definition of merger in Article 3(1) CBMD, but this narrower definition of a merger of a wholly owned subsidiary with the parent company of Article 2(2)(c) of CBMD derives from the general definition of merger of Article 580 of the Companies Act.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Slovenia has not expressly opted to transpose the exception for cooperative societies, but it should be noted that cooperative societies in Slovenia have a special legal status.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Under Article 622b of the Companies Act, the provisions of the Companies Act do not apply to cross-border mergers involving a company whose objective is the collective investment of capital provided by the public, operating on risk-spreading, and for which shares can be repurchased or redeemed out of the company's assets.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

The Companies Act has not expressly transposed Article 4(1) CBMD, but it mandates that a company that may be involved in a cross-border merger in compliance with the cross-border merger rules of the Companies Act must be: (1) a company referred to in Article 1 of Directive 68/151/EEC or (2) a company with recognized legal personality that is exclusively liable for its liabilities with its own assets, and for which safeguards for the protection of the interests of members and others apply, provided for in Directive 68/151/EEC. Therefore, the Companies Act does not refuse mergers between one of its domestic companies qualifying for a cross-border merger and a company of another Member State that also qualifies for a cross-border merger under the CBMD and the laws of the second Member State but not under the laws of the first Member State.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have also provided so for domestic mergers.

Article 4(1)(b) CBMD was not transposed, nor are the national authorities permitted to oppose a domestic merger on public interest grounds. The Companies Act does not enable the national authorities to oppose a cross-border merger on public interest grounds.

c. The protection of creditors in Article 4(2)

Under Article 622j of the Companies Act, creditors of the acquired company having a registered office in the Republic of Slovenia whose assets, rights, and liabilities are being transferred to a company resulting from the cross-border merger having its registered office in another Member State have the right to require security for their

non-matured, uncertain claims, or conditional claims within one month after the publication of the notification of the submission of the terms of cross-border merger to the registry. Creditors may exercise this right only if they demonstrate the probability that the fulfillment of their claims is jeopardized by the cross-border merger. The fulfilling of their claims shall be considered jeopardized when the sum of the share capital and capital reserves of the company resulting from the cross-border merger is lower than the sum of the share capital and the capital reserves of the acquired company. Creditors who are entitled to priority payment in the case of bankruptcy proceedings shall not be entitled to request security.

If the acquired company had issued convertible bonds, bonds conferring pre-emptive rights, or dividend bonds, or has otherwise secured to individual persons special rights to participate in the profit, the holders of such rights shall be provided with equivalent rights in the company resulting from the cross-border merger.

The court register may issue the pre-merger certificate only after having satisfied itself that creditors who are entitled to protection have been granted this right and that holders of special rights referred to in the preceding paragraph have been provided with equivalent rights. Under Article 622k of the Companies Act, the application for the entering of the intended merger in the register shall be accompanied by, among others, proof that all conditions for the exercise of the rights of creditors in compliance with the Companies Act or statement that such evidence is not required.

The protection period starts when the creditors are entitled to claim security for all their non-matured, uncertain claims or conditional claims. Regard must be had to the applicable time limit: The claim for security must be filed within one month after the publication of the notification of the submission of the terms of cross-border merger to the registry.

The procedural steps begin with the creditors, who must exercise their rights by filing a claim for security on behalf of the merging company. The company must accompany the application for entering the intended merger in the register by proof that all conditions for the exercise of the rights of creditors in compliance with the Companies Act or statement that such evidence is not required. The Court Register reviews whether conditions for creditors to request security have been met. If the Court Register is satisfied that the conditions have been met for creditors to request security it shall register the intention of cross-border merger and shall issue, without delay, a pre-merger certificate attesting to the proper completion of all acts necessary for cross-border merger. In other words, the court register may issue the pre-merger certificate only after having satisfied itself that creditors who are entitled to protection have been granted this right and after having satisfied itself that holders of special

rights referred to in the preceding paragraph have been provided with equivalent rights.

In comparison to Slovenian law, under Article 592 of the Companies Act, the creditors of all merging companies have the same right to request appropriate security for their non-matured, uncertain, or conditional claims, but they may request security within six months of the entry of the merger into the registry. Creditors may likewise only exercise this right if they are able to prove that the meeting of their claims is jeopardized by the merger.

Creditors who are entitled to priority payment in the case of bankruptcy proceedings are likewise not entitled to request security. There is also some additional protection for the creditors in mergers within Slovenia, namely, if any of the merging companies holds more than 25% of the shares of any other merging company (shares of the acquired company), and has given or pledged these shares as security or insurance for acquired loans or similar legal transactions, by which it has acquired funds for the acquisition of such shares of the acquiring company, the following is required for the validity of the merger contract:

(1) approval of the majority of creditors of each of the merging companies (majority approval);

(2) approval of creditors of each of the merging companies that have claims exceeding 5% of all liabilities of the company (individual approval by creditors);

(3) approval of employees of each merging company; on their behalf and in their name, the approval shall be given by their representative in compliance with the act governing the participation of employees in management.

Majority approval shall be deemed given when the approval is given by creditors whose total claims account for at least 75% of the global liabilities of the company, as evident from the balance sheet on the day of merger, as certified by the expert (auditor).

The sum of liabilities that is the basis for the calculation of majority approval shall contain the sum of cash compensations to which the employees of the company would be entitled in the event the company ceased to exist on that date. The statement that is taken into account for the calculation of majority approval shall be submitted in the name of the employees by their representatives in compliance with the act governing participation of employees in management.

Statements of approval by creditors and by the representatives of employees shall have the form of a notary record.

There is a possibility for creditors to block the merger: The court register may reject to issue the pre-merger certificate if creditors who are entitled to protection have not

been granted this right.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides each Member State with the option to adopt protections for minority shareholders.

Under Article 622g of the Companies Act, the minority shareholders who have given an oral statement opposing the resolution on the approval of a cross-border merger may require the company resulting from the cross-border merger or any other person that undertook to pay cash compensation to take over the shares, which must be provided for the purpose of the cross-border merger against payment of appropriate cash compensation. This right shall also be enjoyed by a shareholder in the acquired company who did not attend the general meeting if unlawfully prevented from doing so, or if the general meeting was not correctly convened, or if the subject put to a resolution at the general meeting was not correctly published. The offer of cash compensation is binding for one month from the date of adoption of the resolution on the approval of the cross-border merger. The offer is subject to a suspended condition of registration of the cross-border merger. The period of limitation of the obligation of payment of cash compensation shall be three years following the date of the publication of the registration of the cross-border merger. The costs of acquisition of shares shall be covered by the company (resulting from the cross-border merger) or any other person that undertook to pay cash compensation in the terms of the cross-border merger. In order to meet this obligation, the persons entitled to cash compensation shall receive cash compensation or be provided with appropriate security. The court register may issue the pre-merger certificate only after having been satisfied that, for the fulfillment of the obligation of payment of cash compensation, appropriate security has been provided or that all persons entitled to such cash compensation waived this right. Under Article 622c of the Companies Act, the CDTMs shall include the amount of monetary compensation offered to shareholders. Under Article 600 of the Companies Act, in the announcement of the convocation of general meetings of all merging companies that are to decide on the approval of a merger, it shall be indicated that cash compensation had been offered by the acquiring company.

Under Article 622i in connection with Article 604 of the Companies Act, a resolution of the general meeting of a merger company on approval of merger may not be challenged on the ground that exchange ratio or cash contribution are inappropriate. A special non-litigious civil proceeding is provided for disputes regarding the amount of cash compensation offered and the exchange ratio and possible additional payments.

Under Article 622h of the Companies Act, holders of shares who gave a statement

opposing the resolution on the approval of the cross-border merger on record may request a judicial review of the appropriateness of the cash compensation. This right shall also be enjoyed by a shareholder who did not attend the general meeting if unlawfully prevented from attending, or if the general meeting was not correctly convened, or if the subject put to a resolution at the general meeting was not correctly published. The provisions of the Companies Act for domestic merger apply, *mutatis mutandis*, to a judicial review of the appropriateness of the amount of cash compensation in a cross-border merger. Because the Companies Act does not provide any special procedural rules regarding the scrutiny of exchange ratio and additional cash payments, the same (regular) scrutiny procedure defined in Articles 605 to 614 of the Companies Act applies in cross-border mergers. There may be exceptions with respect to situations where the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders and the law applicable to other merging companies does not provide for such a situation.

With a view to the start of the procedure, the offer of cash compensation is binding for one month from the date of adoption of the resolution on the approval of the cross-border merger. The offer is subject to a suspended condition of registration of the cross-border merger.

The period of limitation of the obligation of payment of cash compensation is 3 years following the date of the publication of the registration of the cross-border merger.

Regarding the procedural steps, several points have to be noted: The CDTMs shall include the amount of monetary compensation offered to shareholders. In the announcement of the convocation of general meetings of all merging companies that are to decide on the approval of merger, it shall be indicated that cash compensation had been offered by the acquiring company. The minority shareholders, who gave an oral statement opposing the resolution on the approval of the cross-border merger, must accept the offer of cash compensation within one month from the date of adoption of the resolution on the approval of the cross-border merger. The offer is subject to a suspended condition of registration of the cross-border merger.

For judicial review of the amount of cash compensation, the scrutiny of the exchange ratio and additional cash payments the provisions of the Companies Act for domestic mergers defined in Articles 605 to 614 apply, *mutatis mutandis*, in a cross-border merger review.

In comparison, in mergers within Slovenia, minority shareholders who oppose the merger are only entitled to cash compensation if shares of the acquired company are freely transferable, but the articles of association of the acquiring company provide

that the transfer of shares is subject to the company's permission. There is no such requirement for a claim to cash compensation in a cross-border merger as long as the acquired company has its registered office in the Republic of Slovenia and its assets, rights, and liabilities are being transferred to a company resulting from the cross-border merger having its registered office in another Member State.

Persons entitled to cash compensation in a domestic merger may renounce examining the appropriateness of cash compensation or reporting on it. The statement of renunciation shall be drawn up in the form of a notary record. On the other hand, in a cross-border merger no offer of cash compensation shall be required if the same person is the holder of all shares of a company, or if all persons entitled to such cash compensation waive their entitlement. The waiver (statement of renunciation) shall also be drawn up in the form of a notary record.

In a cross-border merger, an inadequate or unfair exchange ratio may be grounds for a challenge of the resolution approving the merger in situations where the law of the Member State of one of the merging companies provides for the possibility of scrutinizing and amending the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders, and the law applicable to other merging companies does not provide for such a situation.

In a merger within Slovenia the resolution approving the merger may not be challenged on the grounds that the exchange ratio or cash contribution are inappropriate in any circumstances.

The offer of cash compensation is binding in a cross-border merger for one month from the date of adoption of the resolution on the approval of cross-border merger, but for the offer in a merger within Slovenia for two months from the date of the registering of the merger.

Under Article 600 of the Companies Act, in domestic mergers the cost connected to the transfer of shares for cash compensation shall be borne by the acquiring company, whereas under Article 622g of the Companies Act, in cross-border mergers the costs of acquisition of shares shall be covered by the company resulting from the cross-border merger or any other person that undertook to pay cash compensation in the terms of the cross-border merger.

For judicial review of the amount of cash compensation, the scrutiny of the exchange ratio and additional cash payments the provisions of the Companies Act for domestic merger defined in Articles 605 to 614 apply, *mutatis mutandis*, in a cross-border merger review.

If in a cross-border merger, general meetings of all companies having their registered offices in other Member States that are concerned by a cross-border merger, whose

jurisdiction does not provide for the procedure of judicial review or the examination of the exchange ratio, when adopting the resolution on approval of a cross-border merger expressly agree that shareholders of the company having its registered office in the Republic of Slovenia may propose a judicial review of the exchange ratio against a company resulting from the cross-border merger having its registered office in another Member State in the manner and under the conditions provided for in the Companies Act, the proposal for judicial review of the exchange ratio can only be lodged by those shareholders who, at the general meeting deciding on the approval of the cross-border merger gave an oral statement of their intention to lodge a proposal for judicial review of the exchange ratio, or who have announced the lodging of such a proposal within one month from the adoption of the resolution on the approval of the cross-border merger. Holders of shares of each acquired company having its registered office in another Member State may lodge a proposal for a judicial review of the exchange ratio if (1) it is evident from the certificate issued for this company that holders of shares have lawfully waived their right to challenge the resolution of the general meeting on the approval of the cross-border merger for reasons linked to the exchange ratio, and (2) all acquired companies established in other Member States agree to submit a request for a judicial review of the exchange ratio.

On the other hand, in a merger within Slovenia, under Article 605 of the Companies Act, any shareholder of the merging company may request scrutiny of the exchange ratio and claim additional cash payment from the acquiring company in order to balance such a difference.

A request for a judicial review of the exchange ratio may be in both types of mergers made by shareholders who fulfill the following conditions:

(1) have had the status of shareholder throughout the period between the day the general meeting of the company adopted the resolution approving merger, and the day of filing a request for judicial review of the conversion ratio; and

(2) did not waive the right to additional cash payment under the Companies Act; and

(3) their joint shares in each of the merging company are at least one-hundredth of the share capital of such company, or that the value of their joint minimum issue amount is at least EUR 25 000, or that they together hold all shares that meet the already-discussed requirements.

e. The protection of employees in Article 4(2)

Under Article 622c of the Companies Act, the management must in the CDTMs detail information on the likely repercussions of the cross-border merger on the situation of employees in merging companies and, where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition

of their rights with respect to their participation in the company resulting from the cross-border merger are determined pursuant to Article 16 of Directive 2005/56/ES.

Under Article 622č of the Companies Act, the report of the management on the cross-border merger shall explain the legal and economic implications of the cross-border merger for holders of shares, creditors, and the employees of merging companies. The report on the cross-border merger shall be made available to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting of each of the merging companies that shall decide on the approval of the cross-border merger.

Where the management or management organ of any of the merging companies receives, in good time, an opinion from the representatives of their employees, that opinion shall be appended to the report.

Under Article 622f of the Companies Act, the general meeting of each of the merging companies may reserve the right to make transposition of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

Under Article 622l of the Companies Act, prior to registration of a cross-border merger the court register shall examine whether the acquired companies had carried out negotiations on the involvement of employees in the management of the company resulting from the cross-border merger.

Articles 622c, 622č, 622f, and 622l apply only to cross-border mergers.

Under Articles 91 to 93 of the Worker Participation in Management Act (primary legislation, Official Gazette No 42/07, as amended) applicable to domestic companies, the employer is bound to inform the workers' council about and request joint consultations on the status of the company before taking decisions on this issue. Status issues include status changes, the sale of the company or of essential parts, the liquidation of the company or of its essential parts, essential ownership changes, or mergers. The employer must give the workers' council the necessary information at least 30 days before taking the decisions, and organize joint consultations at least 15 days before taking the decisions and keep the workers' council informed of planned decisions concerning status issues, seek advice from the workers' council, and to try and harmonize points of view.

Under Article 98 of the Worker Participation in Management Act, the workers' council has the right to stay the execution of individual decisions of the employer and to initiate procedures for the settling of the dispute within eight days of receiving information that the employer has adopted a decision concerning the status issues referred to in Articles 91 to 93 without acquainting the workers' council in advance

with its intention to adopt the decision, in violation of the time limits, and without requesting joint consultations on these issues. In these cases the employer will not be allowed to execute the decisions until the final decision of the competent court.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose of informing the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

All particulars of Article 5 CBMD have been transposed. However, there are minor differences in language of the CDTM elements under Article 622c of the Companies Act:

(1) The Companies Act requires that the cash payment amounts (Article 5b CBMD) are expressed in relation to each share of the acquired company;

(2) The Companies Act requires detailed information on procedures concerning the transfer of shares rather than information on the terms for the allotment of shares representing the capital of the company resulting from the cross-border merger (Article 5c CBMD),

(3) The Companies Act requires the date from which the transactions of the merging companies will be treated as being those of the company resulting from the cross-border merger (cutoff date of merger) and not limited to accounting purposes only as required by Article 5f CBMD. Article 662c of the Companies Act namely omits the phrase "for accounting purposes" from the language of this CDTM element.

Article 662c of the Companies Act further requires that the CDTMs contain the offer for the acquisition against payment of adequate cash compensation of the shares of those holders who gave an oral statement opposing the resolution on the approval of the cross-border merger at the general meeting that decided on the merger and provides that this right shall also be enjoyed by a shareholder in the acquired company who did not attend the general meeting was unlawfully prevented from doing so, or if the general meeting was not correctly convened, or if the subject put to a resolution at the general meeting was not correctly published.

The liability to provide cash compensation may be assumed by the company resulting from the cross-border merger, or any other person. No offer of cash compensation shall be required if the same person is the holder of all shares of a company, or if all

persons entitled to such cash compensation waive their entitlement. The waiver (statement of renunciation) shall be drawn up in the form of a notary record.

When the acquired company holds all shares of the acquiring company and the cross-border merger concerns only this acquired company, the Article 622c of the Companies Act does not require the CDTM to include the exchange rate (Article 5b CBMD), the information on procedures concerning the transfer of shares representing the capital of the company resulting from the cross-border merger (terms for the allotment of shares element of Article 5c CBMD) and the record date from which the shareholders are entitled to share in profits and any special conditions affecting that entitlement (Article 5e CBMD).

Under Article 622c of the Companies Act, the CDTMs must be notarized.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Under Article 622e of the Companies Act, the CDTMs shall be submitted to the registration body at least one month before the date of the general meeting that is to decide on granting approval on the merger and the company shall publish a notice of the submission of the CDTM to the court register. Therefore, the Companies Act does not require the publication of the entire CDTM, but merely the publication of the notice that CDTM was submitted to the court register. If the need for an approval of the merger by the general meeting of the acquiring company is waived under certain conditions, the notice on submission of the CDTMs to the registration authority shall remind shareholders of the right to request that the general meeting of the acquiring company be convened to decide on the approval of merger within one month of the date of the general meeting of the acquired company approving the merger.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

Under Article 586 of the Companies Act, a copy of specific documents must be

provided free of charge to any shareholder upon his request, no later than on the next working day following such a request, unless the company made them available online free of charge in a downloadable and printable format at least one month before the date of the general meeting that is to decide on granting approval on the merger and until the end of such general meeting. Upon shareholder's consent, the copies may be sent to the shareholder via email.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

The national law follows Article 6(2) CBMD. The notification of the submission of the CDTMs to the registration body shall also contain the following: (1) the legal form, the name and the registered office of each merging company; (2) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC for each merging company are kept, together with the number of the entry in that register; and (3) the method for exercising the rights of creditors and holders of shares of each merging company, and the address where full relevant information may be obtained free of charge. This information pursuant to Article 622e of the Companies Act must also be published in the official gazette.

When the cross-border merger results in the transfer of the assets, rights, and liabilities of a company having its registered office in the Republic of Slovenia to a company resulting from the cross-border merger having its registered office in another Member State, and the amount of the share capital and of capital reserves of the company resulting from the merger will be less than the amount of the share capital and of capital reserves of the acquired company, the known creditors of the acquired company shall be notified in person.

Under Article 586 of the Companies Act, the notice must also remind the shareholders about their right to examine the following at the head office of such company: (1) the merger contract; (2) annual reports of all merging companies for the previous three fiscal years; (3) final reports, if audited, of individual merging companies in compliance with paragraph 1 of Article 68 of the Companies Act in cases in which the cutoff date of merger is not the same as the cut-off date of the last annual report of such companies; (4) interim balance sheets of any of the merging companies prepared as per the date of the end of the last quarter prior to the conclusion of the merger contract or the preparation of the draft terms of merger in which the latest annual accounts of any of the merging companies relate to a financial year that ended more than six months before the date of the conclusion of the terms of merger or the preparation of the draft terms of merger; (5) explanatory report or reports by the

management of each merging company; (6) report or reports on the examination of the merger; and (7) reports on merger by the supervisory boards of each of the merging company. If these copies are made available online, the notice must contain a link to the web page. Under Articles 592 and 622j of the Companies Act, the notice must further contain a reminder to creditors of their right to require security for their non-matured, uncertain claims or conditional claims within one month of the publication of the notification and additional information on how to exercise this right.
Under Article 600 of the Companies Act, in the announcement of the convocation of general meetings of all merging companies that are to decide on the approval of merger by, it shall be indicated that cash compensation had been offered by the acquiring company.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees not less than one month before the date of the general meeting referred to in Article 9.
Article 7 CBMD has been transposed in Article 622č of the Companies Act. Under Article 622č of the Companies Act, it is also not possible to waive the requirement to prepare the report on a cross-border merger.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.
Article 8(1) CBMD has been transposed into national law. The independent expert must be appointed by the court for each of the merging companies at the proposal of the supervisory board of the merging company concerned, even if the expert report is drawn up for each merging company independently. If a company has no supervisory board, a merger expert is appointed at the proposal of the board of directors. Under Article 622d in connection with Article 599 of the Companies Act, the expert report is not required if all shareholders of each merging company give a statement (declaration) in the form of a notary record waiving the right to the audit report. The

shareholders may give their statement waiving the use of these provisions also orally at the general meeting deliberating the approval of the merger. Such a statement shall be included in the minutes of the general meeting. Under Article 622c in connection with Article 583 of the Companies Act, in a simplified merger an audit report is still required, but the Companies Act states that the provision defining the required elements of an audit report in a regular merger does not apply. In other words, there are no content requirements for an audit report in a simplified merger.

b. The independent expert

Under Article 583 of the Companies Act, the provisions on audit of annual reports of the act governing auditing shall apply, *mutatis mutandis*, to the process and conditions for examination of the merger. Under Article 3 of the Companies Act, an "auditor" shall mean an auditing company or an independent auditor licensed to perform an audit.

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) CBMD has been transposed. Under Articles 583 and 622d of the Companies Act, the same merger expert or merger experts may examine the merger for all merging companies with the consent of the supervisory boards or boards of directors of all merging companies. In such a case, a merging expert or merging experts are appointed by a court at a common proposal of supervisory boards or boards of directors.

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

All particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) were fully transposed in Articles 586 and 622d of the Companies Act. National law does not go any further nor does it add diverging rules on this issue.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Regarding Article 8(3) CBMD, the Companies Act does not provide any special sanctions or courses of action available to the expert or the other merging companies or shareholders for breach of the duty to provide information. In such a case the auditors would probably refuse to issue an expert report, thereby suspending the merger procedure.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all the merging companies can unanimously decide to waive the expert reports.

Regarding Article 8(4) CBMD, under Articles 599 and 622d of the Companies Act, the expert report is not required if the same person is the holder of all shares of a company, or if all shareholders of each merging company give a statement (declaration) in the form of a notary record waiving the right to the audit report. The shareholders may give their statement waiving the use of these provisions also orally at the general meeting deliberating the approval of the merger. Such a statement shall be included in the minutes of the general meeting.

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) or in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Under Article 599 applicable to cross-border mergers through Article 622b of the Companies Act, the expert report is not required, if the same person is the holder of all shares of a company. Slovenian national law has not transposed the exception provided for in Article 15(2) CBMD for a merger carried out by a company holding 90 percent or more, but not all, of its subsidiary shares. In other words, the Slovenian national law does require an expert report in a case under Article 15(2).

h. Further exemptions in Slovenian law

There are no further exemptions in Slovenian law.

However, it must be noted that that Article 622d of the Companies Act, which is the one directly transposing Article 8 CBMD, requires only that the report on the examination of a cross-border merger contain an opinion as to whether the cash compensation offered is suitable compensation for the shares in the company being transferred, the discussion of methods for the valuation of companies that were used to determine the amount of cash severance proposed in the terms of cross-border merger, the reasons the use of these methods in this particular case is appropriate for determining the amount of cash severance, and where several methods were used for the determination of the cash severance, what value has been established for the use of each of the methods. Therefore Article 622d of the Companies Act only focuses on the audit of the cash compensation/severance part of the CDTMs and not the exchange ratio. Likewise, Article 622d of the Companies Act provides only that no opinion of the expert on the amount of cash severance shall be required if the same person is the holder of all shares of a company, or if all persons entitled to such cash

severance waive their entitlement. The waiver shall be drawn up in the form of a notary record. However, Article 583 of the Companies Act, which applies to mergers in general as well as to cross-border mergers through Article 622b of the Companies Act (which provides that if not provided otherwise, cross-border mergers are, *mutatis mutandis*, subject to the provisions of the general merger provisions within the Companies Act), requires that the audit report for all mergers contain the opinion of the expert or experts as to the share exchange ratio, the amount of any cash payments or cash compensation offered, including the method or methods of valuation of companies used to define the share exchange ratio, the reasons the use of these methods are adequate for determining the share exchange ratio, and where several methods were used for the determination of the share exchange ratio, indicate the values arrived at using each such method.

Under Article 599 of the Companies Act, which is also applicable to cross-border mergers via Article 622b of the Companies Act, the expert report is not required, if the same person is the holder of all shares of a company, or if all shareholders of each merging company give a statement (declaration) in the form of a notary record waiving the right to the audit report. The shareholders may give their statement waiving the use of these provisions also orally at the general meeting deliberating the approval of the merger. Such a statement shall be included in the minutes of the general meeting.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 CBMD has been transposed into Slovenian law. The general meeting of shareholders of each of the merging companies has to approve the merger. Under Article 585 of the Companies Act, the merger contract (or CDTMs in a cross-border merger) shall be valid subject to the approval of each of the merging companies' general meeting. The general meeting may give its approval prior to or after the conclusion of the merger contract.

a. Procedural requirements including majority, quorum, timing and notarization

Under Article 585 of the Companies Act, a resolution of the general meeting shall be deemed to have been validly adopted if at least 75% of the share capital represented at the general meeting is in favor. A larger majority shareholding and other requirements may be stipulated by the articles of association. In the case of multiple

share classes, the resolution of the general meeting on the approval of the draft terms of merger shall be valid subject to the approval of shareholders of each share class. Shareholders of each class shall adopt an extraordinary resolution on approval. The collective consent of a class shall be voted upon with a normal (more than 50%) majority vote.[2] The merger contract, or the draft terms of merger deliberated by the general meeting shall be an integral part of the minutes of the general meeting, or attached to the same. The merger contract as well as the minutes of the general meeting shall have the form of a notary record.

Under Article 620 of the Companies Act, a resolution of the general meeting of a limited liability company shall be deemed to have been validly adopted if members who have at least three-quarters of the votes are in favor. A larger majority and other requirements may be stipulated by the memorandum of association. The resolution shall be notarized. If any members of the limited liability company that is the acquired company had, under the memorandum of association, rights concerning management, the appointment of management and supervisory bodies or concerning the transfer of business shares, and in the merger agreement they will not be granted equal rights under the articles of association or the memorandum of association of the acquiring company, the resolution of the general meeting on approval of merger shall be valid subject to the approval of such members. If the memorandum of association of a limited liability company that is an acquired company provides that the disposal of shareholding to a person who is not a member is subject to authorization of a member, the resolution of the general meeting on approval of merger shall be valid, subject to the approval of such member. If the memorandum of association of a limited liability company that is an acquired company provides that resolutions shall be deemed to be valid if adopted by a majority vote of more than 75% of all votes, the same majority shall be necessary for the validity of the resolution approving the merger, unless the articles of association or the memorandum of association of the acquiring company provide for the same level of protection of minority rights.

If capital contributions of any of the merging companies are not fully paid in, the validity of resolutions approving the merger adopted by general meetings of other merging limited liability companies shall be subject to the approval of all members of such companies. A member of an acquired company may also give the approval outside the general meeting, provided that such statement is given at the latest within 3 months of the date of the adoption of the resolution approving merger. The statement on the approval referred to in the preceding sentence shall have the form of

[2] Van Gerven, *Cross-Border Mergers in Europe,* (Cambridge University Press 2010), pg. 139

a notary record that includes the text of the merger contract.

b. Amendment of CDTMs by shareholders

Shareholders can only approve or reject the proposed merger contract.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Under Article 599 of the Companies Act, the merger contract shall be valid without the approval of the general meeting of the acquiring company in the following cases:

(1) when the acquiring company holds at least 90% of the share capital of the acquired company (the participation of the acquiring company in the share capital of the acquired company shall be calculated by subtracting from such capital own shares of the acquired company and shares held by another person on behalf of the acquired company); or

(2) when shares of the acquiring company to be provided to shareholders of the acquired company do not exceed 10% of the share capital of the acquiring company (if the acquiring company needs to increase its share capital because of the merger, the calculation shall consider the increased share capital).

When, in compliance with the preceding paragraph, the management of the acquiring company waives approval of the general meeting of the acquiring company, the acquiring company shall fulfil the documentation publication obligations at the latest one month prior to the date of the general meeting of the acquired company that decides on the approval of merger.

The general meeting of the acquiring company shall nevertheless be required to decide on the approval of the merger if the shareholders of the acquiring company holding shares in the amount of at least 5% (and not maximally 5%, as required by Article 8 of Directive 2011/35/EU) of the share capital of the acquiring company request that a general meeting of the acquiring company be convened to decide on the approval of merger within one month of the date of the general meeting of the acquired company approving the merger. The articles of association of the acquiring company may also stipulate that shareholders holding a lower percentage of share capital shall have the right to request the convening of the general meeting. The notice on submission of the CDTM to the court register shall remind shareholders of this right.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) CBMD has been transposed into national law under Article 662f of the Companies Act; if the acquiring company is the holder of all shares of the acquired company, approval of the general meeting of the acquired company is not necessary for the resolution on the approval of the cross-border merger to be valid. The general meeting of each of the merging companies may reserve the right to make transposition of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) CBMD have been transposed in Article 622k of the Companies Act, with no diverging rules. Under Article 622k of the Companies Act, the management of the company that transfers its assets, rights, and liabilities to the company resulting from the cross-border merger having its registered office in another Member State shall make an application for the entry of the intended merger in the register.

b. National authority has been designated to scrutinize the legality of the merger

Under Article 622k of the Companies Act, the Court Register where the acquired company is registered is authorized to scrutinize the legality of the merger and issue the pre-merger certificate. Under Article 622k of the Companies Act, the application for entering the intended merger in the register shall be accompanied by the following: (1) the plan for the cross-border merger (CDTM), (2) the minutes of the general meeting of the acquired company that decided on the approval of the cross-border merger, (3) the authorization of the competent body, if required for cross-border mergers, (4) the report of the management of the acquired company on cross-border mergers, (5) the report or reports on the examination of the cross-border merger, (6) the final report of the acquired company, (7) evidence that the intended cross-border merger was published in compliance with the Companies Act, (8) proof that all conditions for the exercise of the rights of holders of shares have been met and approval of companies having their registered office in other Member States to initiate the procedure for judicial review of the amount of cash compensation, (9) proof that all conditions for the exercise of the rights of creditors in compliance with

the Companies Act or statement that such evidence is not required, (10) a statement from the management of the acquired company that the resolution of the general meeting approving the merger has not been challenged in court, and (11) a statement from the management of the acquired company on the number of holders of shares who exercise their right to request acquisition of shares against payment of cash compensation, and on the method of exercising this right.

The Court Register (the registration authority) then reviews whether the application for entering the intended merger in the register is complete, whether all legal acts concerning the cross-border merger have been duly concluded, whether conditions for holders of shares to exercise their right to request acquisition of shares against payment of cash compensation have been met (or alternatively, whether there is evidence that all holders of shares have validly waived this right), whether conditions for creditors to request security have been met, and that holders of special rights have been provided with equivalent rights.

If the Court Register is satisfied that all these conditions have been met, it shall register the intention of cross-border merger and shall issue, without delay, a certificate attesting to the proper completion of all acts necessary for cross-border merger. The registration of the intention of cross-border merger contains the intended registered office of the company resulting from the cross-border merger and the registry in which this company will be registered. The entry into the register contains the remark attesting that the pre-merger certificate had been issued. Thus, the scrutiny of the merger by the court register under the Companies Act is substantial as well as formal.

c. Transposition of Article 10(3)

Article 10(3) has been transposed into Slovenian national law. It is unclear, however, whether it applies only to the situation where only the law of the Member State of one of the merging companies provides for the possibility to scrutinize and amend the exchange ratio or also to the compensation for the minority shareholders.

Minority protections under national laws:

Under Articles 590 and 622k of the Companies Act, the proposal for registration of the domestic merger submitted by the acquiring company or the application for the entering of the intended cross-border merger in the register shall contain, among other things, a declaration by the management (board of directors) of each company participating in the merger stating that against the resolution of the general meeting on approval of the merger no action has been filed to challenge this resolution or to declare null and void such resolution within the time limit for challenging this resolution, and that a legal action challenging the resolution of the general meeting on

approval of the merger or to declare null and void such resolution has been finally dismissed as unfounded or rejected on procedural grounds or withdrawn, or that all shareholders have signed a statement in the form of a notary record to waive their right to challenge the resolution of the general meeting on the approval of merger or to request that it be declared null and void.

Additionally, under Article 604 of the Companies Act, the following are not grounds for challenging a resolution of the general meeting of a merger company on approval of merger:

(1) that the provision of the acquiring company's shares at the share exchange ratio defined in the merger contract, or the provision of any additional cash payments is not adequate compensation for the shares of the acquired company, or

(2) that the amount of cash compensation is not appropriate or the cash compensation has not been offered or has not been offered correctly, or

(3) that the justification or explanation of the share exchange ratio or any additional cash payments is not in compliance with the Companies Act.

Therefore, a challenge of the exchange ratio, additional cash payments or the cash compensation for shares of the acquired company cannot stay or prevent the domestic merger and the minority shareholders can claim their rights to fair and adequate exchange ration or compensation in a special court procedure under the Companies Act.

Minority protections in cross-border mergers concerning the exchange ratio:

As a general rule, a resolution of the general meeting on the approval of a cross-border merger may likewise not be challenged for reasons referred to previously.

However, under Article 622i of the Companies Act, when a cross-border merger concerns companies from Member States whose jurisdiction does not provide for the procedure of judicial review of the exchange ratio, the resolution of the general meeting on the approval of the cross-border merger may not be challenged for the reasons referred to above (and the pre-merger certificate can be issued) only when general meetings of all companies having their registered offices in other Member States that are concerned by the cross-border merger, whose jurisdiction does not provide for the procedure of judicial review of the examination of the exchange ratio, when adopting the resolution on approval of the cross-border merger expressly agree on the following:

(1) shareholders of the company having its registered office in the Republic of Slovenia may propose a judicial review of the exchange ratio against the company resulting from the cross-border merger having its registered office in the Republic of Slovenia; or

(2) shareholders of the company having its registered office in the Republic of Slovenia may propose a judicial review of the exchange ratio against a company resulting from the cross-border merger having its registered office in another Member State in the manner and under the conditions provided for in the Companies Act.

In cases coming under point No. 2, the proposal for judicial review of the exchange ratio can only be lodged by those shareholders who, at the general meeting deciding on the approval of the cross-border merger gave an oral statement of their intention to lodge a proposal for judicial review of the exchange ratio, or who have announced the lodging of such a proposal within one month from the adoption of the resolution on the approval of the cross-border merger. The pre-merger certificate shall indicate which, if any, shareholders have announced the lodging of a proposal for a judicial review of the exchange ratio.

Holders of shares of each acquired company having its registered office in another Member State may lodge a proposal for a judicial review of the exchange ratio under the following conditions:

(1) if it is evident from the certificate issued for this company that holders of shares have lawfully waived their right to challenge the resolution of the general meeting on the approval of the cross-border merger for reasons linked to the exchange ratio; and

(2) all acquired companies established in other Member States agree to submit a request for a judicial review of the exchange ratio.

Minority protections in cross-border mergers with regards to the cash compensation:

Under Articles 622g and 622h of the Companies Act, each shareholder of the acquired company having its registered office in the Republic of Slovenia, whose assets, rights and liabilities are being transferred to a company resulting from the cross-border merger having its registered office in another Member State, who has given an oral statement opposing the resolution on the approval of the cross-border merger may require the company resulting from the cross-border merger or any other person that undertook to pay cash compensation to take over the shares, which must be provided for the purpose of the cross-border merger against payment of appropriate cash compensation. This right shall also be enjoyed by a shareholder in the acquired company who did not attend the general meeting if unlawfully prevented from doing so, or if the general meeting was not correctly convened, or if the subject put to a resolution at the general meeting was not correctly published. The offer of cash compensation is binding for one month from the date of adoption of the resolution on the approval of cross-border merger. The offer is subject to a suspended condition of registration of the cross-border merger. The period of limitation of the obligation of payment of cash compensation shall be 3 years following the date of the publication of

the registration of the cross-border merger. The costs of acquisition of shares shall be covered by the company (resulting from the cross-border merger) or any other person that undertook to pay cash compensation in the terms of cross-border merger. In order to meet this obligation, the persons entitled to cash compensation shall receive cash compensation or be provided with appropriate security. The court register may issue the pre-merger certificate only after having been satisfied that, for the fulfillment of the obligation of payment of cash compensation, appropriate security has been provided or that all persons entitled to such cash compensation waived this right.

When the articles of association provide that the transfer of shares is subject to the permission of the company or shareholders, shares may be transferred without permission from the date of adoption of the resolution on the approval of the cross-border merger to the expiry of the period for accepting the offer of cash compensation.

Holders of shares who gave a statement opposing the resolution on the approval of the cross-border merger on record may request a judicial review of the appropriateness of the cash compensation. This right shall also be enjoyed by a shareholder who did not attend the general meeting if unlawfully prevented from attending it, or if the general meeting was not correctly convened, or if the subject put to a resolution at the general meeting was not correctly published, the provisions of the Companies Act shall apply, *mutatis mutandis,* to a judicial review of the appropriateness of the amount of cash compensation.

The Companies Act expressly provides for a special procedure for the judicial review of the appropriateness of the cash compensation in a cross-border merger (as described above), said procedure regularly excludes the challenge of the resolution approving the merger and Article 622i of the Companies Act expressly mentions only the scrutiny of the exchange ratio. Therefore, the understanding that the resolution approving the merger and providing for inadequate cash compensation cannot be challenged under any circumstances in court (the prohibition of Article 604 of the Companies Act applies) is possible and the pre-merger certificate could therefore be issued in any case (regardless of the other Member State rules on the procedure in case of inadequate cash compensation). The procedure under Articles 622g and 622h of the Companies Act would still be available to the minority shareholders.

On the other hand, it must be noted that the proposal of the Amendment of the Companies Act (ZGD-1A) transposing the CBMD in commentary to Article 622i of the Companies Act referrers to the scrutiny of the cash compensation and the exchange ratio interchangeably, indicating that Article 622i applies to both scrutiny procedures, but it does not give any explanation for omission of the cash compensation scrutiny

from the Act's text nor does it explain the applicability of Article 622i in relation to the scrutiny procedure under Articles 622h and 622g of the Companies Act.

Under Article 622i of the Companies Act, the resolution of the general meeting on the approval of the cross-border merger may be challenged in court for the reasons of inadequate exchange ratio and the pre-merger certificate not being issued. Namely, if the management is unable to submit the statement that no action has been brought in due time to challenge the resolution of the general meeting approving the merger or to declare such resolution null and void, and the action has not yet been finally decided upon, the court register must under Article 662k in connection with Article 590 of the Companies Act suspend the decision on the registration of the intended cross-border merger until the decision on the action becomes final. Notwithstanding the preceding sentence, the court register shall not suspend deciding, or shall repeal the decision on suspension, and shall register the merger before the decision on the action becomes final in the case of a substantial interest for a rapid decision on the registration, if all other conditions for registration are fulfilled. When assessing the substantial interest for a rapid decision, the court register shall take into consideration the importance of the right whose violation is alleged in the action, the probability that the applicant's action would succeed, and the damage that could be caused to merging companies because of a delayed registration. It is unclear whether this rule applies likewise to the cash compensation scrutiny procedure for reasons described above.

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Article 11 CBMD has been transposed into national law. Under Article 622l of the Companies Act, the management of each merging company shall apply for registration of the cross-border merger with the court register in the Republic of Slovenia with which the company resulting from the cross-border merger will be registered. In addition to the documents and acts referred to by the Companies Act applicable for domestic mergers, the application for registration of cross-border merger shall contain the certificates issued by the competent authorities of the Member States in which the acquired companies were established after the registration of the intended cross-border merger. These certificates shall not be more than six months old. Prior to registration of a cross-border merger the court register shall examine: (1) whether the general meetings of companies concerned by cross-border merger have approved,

with their resolutions on the approval of cross-border merger, the same terms of cross-border merger, and (2) whether the acquired companies had carried out negotiations on the involvement of employees in the management of the company resulting from the cross-border merger.

After registering the cross-border merger, the court register shall notify, *ex officio* and without delay, the competent registries in Member States in which the acquired companies are registered.

b. The national authority has been designated to scrutinize the legality of the merger

The Court Register has been designated as the national authority, and the check is both formal and substantial.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 CBMD has been transposed into Slovenian law under Article 622b of the Companies Act; the date of validity of a cross-border merger shall be defined in compliance with the law applicable for the new company resulting from the cross-border merger. Under Article 591 of the Companies Act, the entry in the register of the merger shall have the following legal consequences:

(1) all the assets and liabilities of acquired companies shall be transferred to the acquiring company. When at the time of merger the merging companies have pending bilateral agreements, and because of the legal consequences of the merger, such agreements result in the following mutual obligations: obligations of acquisition, supply or other similar incompatible obligations the immediate fulfillment of which would represent an unfair burden for the acquiring company, the scope of such obligations shall undergo a fair modification by taking into consideration the interests of both parties;

(2) the acquired companies shall cease to exist; and

(3) shareholders of acquired companies shall become shareholders of the acquiring company, except for the shares of the acquired company held by the acquiring company itself. At the same time, the third-party rights to shares of the acquired company shall be transferred to the shares of the acquiring company to be provided because of the merger, or to any rights to cash payment.

b. Date the cross-border merger takes effect

A cross-border merger under Article 591 of the Companies Act takes effect with the

entry of the merger in the register of companies under provisions of Article 622l of the Companies Act.

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that as long as it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Regarding Article 13 first sentence, under Article 622l of the Companies Act, the management of each merging company shall apply for registration of the cross-border merger with the court register in the Republic of Slovenia, with which the company resulting from the cross-border merger will be registered. In addition to the documents and acts referred to by the Companies Act applicable for domestic mergers, the application for registration of cross-border mergers shall contain the certificates issued by the competent authorities of the Member States in which the acquired companies were established after the registration of the intended cross-border merger. These certificates shall not be more than six months old. Prior to the registration of a cross-border merger the court register shall examine: (1) whether the general meetings of companies concerned by the cross-border merger have approved, with their resolutions on the approval of cross-border mergers, the same terms for cross-border mergers, and (2) whether the acquired companies had carried out negotiations on the involvement of employees in the management of the company resulting from the cross-border merger.

After registering the cross-border merger, the Court Register shall notify, *ex officio* and without delay, the competent registries in Member States in which the acquired companies are registered.

b. Transposition of Article 13 second sentence

Slovenian national law has transposed Article 13 second sentence under Article 622k of the Companies Act; after all conditions determined by the law of the Member State in which the company resulting from the cross-border merger will be registered are met, the management of the company resulting from the cross-border merger shall notify to that effect the registry in which the acquired company is registered. The notification shall be in its original language and in a certified translation. The Court Register where the acquired company is registered shall, after having received

notification of the registration of transfer of assets, rights and liabilities resulting from the cross-border merger in a registry in another Member State, remove the company from the register *ex officio*.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Regarding Articles 14(1) and (2) CBMD:

Under Article 591 of the Companies Act, the entry in the register of the merger shall have the following legal consequences:

(1) all the assets and liabilities of acquired companies shall be transferred to the acquiring company. When at the time of merger the merging companies have pending bilateral agreements, and because of the legal consequences of the merger, such agreements result in the following mutual obligations: obligations of acquisition, supply or other similar incompatible obligations the immediate fulfilment of which would represent an unfair burden for the acquiring company, the scope of such obligations shall undergo a fair modification by taking into consideration the interests of both parties;

(2) the acquired companies shall cease to exist; and

(3) shareholders of acquired companies shall become shareholders of the acquiring company, except for the shares of the acquired company held by the acquiring company itself. At the same time, the third party rights to shares of the acquired company shall be transferred to the shares of the acquiring company to be provided because of the merger, or to any rights to cash payment.

Regarding Article 14(3) CBMD:

Under Articles 622j and 622k of the Companies Act, only if the court register is satisfied that the conditions have been met for holders of shares to exercise their right to request acquisition of shares against payment of cash compensation and for creditors to request security, and that holders of special rights have been provided with equivalent rights, it shall register the intention of cross-border merger and shall issue, without delay, a certificate attesting to the proper completion of all acts necessary for the cross-border merger and the court register may issue the pre-merger certificate only after having satisfied itself that creditors who are entitled to protection under the Companies Act have been granted this right and after having satisfied itself that holders of special rights have been provided with equivalent rights.

Regarding Article 14(4) CBMD:

The Companies Act does not have a special provision transposing Article 14(4) CBMD, and general rules on transfer of assets and liabilities transposing Articles 14(1) and (2)

apply. However, Article 72 of the Employment Relationships Act (primary legislation, Official Gazette No 42/2002, as amended) additionally provides that if due to the legal transfer of the undertaking or a part of the undertaking, executed on the basis of a law, any other regulation, legal transaction, final court decision, merger or division, the employer is changed, the contractual and other rights and obligations arising from employment relationship which on the day of the transfer the workers had with the transferor shall be transferred to the transferee.

Regarding Article 14(5) CBMD:

Article 14(5) CBMD is transposed in Article 589 in connection with Article 622b of the Companies Act.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure in two instances: i) where a merger with a whole owned subsidiary is carried out or ii) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

Article 15(1) CBMD has been transposed in Slovenia, but the simplified procedure under Article 622c of the Companies Act applies only for a merger with a wholly owned subsidiary and not for a cross-border merger carried out by a company which holds 90% or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired.

Under Article 599 of the Companies Act, the merger contract shall be valid without the approval of the general meeting of the acquiring company if the acquiring company holds at least 90% of the share capital of the acquired company; the participation of the acquiring company in the share capital of the acquired company shall be calculated by subtracting from such capital shares of the acquired company and shares held by another person on behalf of the acquired company. Notwithstanding this exemption, the general meeting of the acquiring company shall decide on the approval of the merger if the shareholders of the acquiring company holding shares in the amount of at least 5% of the share capital of the acquiring company request that a general meeting of the acquiring company be convened to decide on the approval of merger within one month of the date of the general meeting of the acquired company. The

articles of association of the acquiring company may also stipulate that shareholders holding a lower percentage of share capital shall have the right to request the convening of the general meeting. The notice of the merger shall remind shareholders of this right.

It is, however, unclear if and how this exemption and the provision of Article 599 of the Companies Act would apply to acquiring companies not registered in Slovenia, but in another Member State. It is probable that it would apply only to Slovenian acquiring companies.

Regarding Article 5(b) CBMD, under Article 622c of the Companies Act, the CDTMs in a simplified merger must not specify the ratio applicable to the exchange of shares of each merging company for shares of the company resulting from the cross-border merger (exchange ratio), including the amount of any cash payment expressed in cash payment in relation to each share of the acquired company.

Regarding Article 5(c) CBMD, under Article 622c of the Companies Act, the CDTMs in a simplified merger must not specify detailed information on procedures concerning the transfer of shares of the company issued from cross-border merger, and payment of cash payment; if the company issued from cross-border merger fails to provide shares, the reasons for such failure shall also be stated.

Regarding Article 5(e) CBMD, under Article 622c of the Companies Act, the CDTMs in a simplified merger must not specify, the date from which holders of shares of the company issued from cross-border merger, provided by the company as a result of a cross-border merger, will be entitled to share in profits of such company, and all details in relation to the exercise of this right.

Regarding Article 8 CBMD, under Article 622c in connection with Article 583 of the Companies Act, in a simplified merger an audit report is still required, but the Companies Act states that the provision defining the required elements of an audit report in a regular merger do not apply. In other words, there are no content requirements for an audit report in a simplified merger.

Regarding Article 9 CBMD, under Article 622f of the Companies Act, if the acquiring company is the holder of all shares of the acquired company, approval of the general meeting of the acquired company is not necessary for the resolution on the approval of the cross-border merger to be valid.

Regarding Article 14(1)(b) CBMD, under the general rule in Article 589 of the Companies Act, the acquiring company shall not be allowed, in order to make a merger, to exchange shares for the shares of the acquired company held by the acquiring company itself, and for shares held by the acquired company.

There are additional rules in national law: Under Article 622c in connection with Article

582 of the Companies Act, the Companies Act additionally states that the management explanatory report that has to be drafted under Article 582 of the Companies Act does not need to explain the legal and economic grounds for the proposed share exchange ratio and the amount of additional cash payments, if any.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some Member States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

Under the Worker Participation in Management Act, workers participate in management of a company through the right to present an initiative and receive an answer to the initiative, through the right to be informed, through the right to give opinions, make proposals and receive answers to the proposals, through the possibility or the obligation of joint consultations with the employer, through the right to participate in decision-making, and through the right to stay decisions of the employer.

Workers exercise the right to participate in management as individuals or collectively through a workers' council, representative, or assembly in company bodies.

In the merger context, the employer is, under the Worker Participation in Management Act, bound to inform the workers' council about and request joint consultations on the status of the company and personnel issues before taking decisions on these issues.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) CBMD has been transposed in Article 2 of the Act Regulating Employees Participation in Decision-Making in Cross-Border Mergers of Limited Liability Companies (primary legislation, Official Gazette No 56/08, or CBM Employee Participation Act). The CBM Employee Participation Act applies to companies with a registered seat in Slovenia as well as to companies that participate in a cross-border merger, their affiliated companies and subsidiaries in Slovenia and to their employees, if the company resulting from the cross-border merger has its registered seat in another Member State or EEA State.

Under Article 4 of the CBM Employee Participation Act, the laws of Slovenia on

employee participation (especially the Worker Participation in Management Act) apply to a company resulting from a cross-border merger that has its registered seat in Slovenia, unless any of the three exceptions of Article 16(2) CBMD applies. In such a case provisions of the Companies Act and the CBM Employee Participation Act on employee participation and protection in a cross-border merger apply.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) CBMD has been transposed into Slovenian law with no further or diverging rules.

d. Transposition of Article 16(3)(e)

Article 16(3) CBMD has not been transposed into Slovenian national law. The Directive 2001/86/EC was transposed with a special act, namely the Participation of Workers in Management of the European Public Limited-Liability Company Act (primary legislation, Official Gazette No 28/06), which was not amended since its enactment on March 2, 2006. Article 30 of the Participation of Workers in Management of the European Public Limited-Liability Company Act mandates that employees' participation in an SE must be set up in accordance with that Act in the case of an SE established by merger: (1) if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering at least 25% of the total number of employees in all the participating companies; or (2) if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering less than 25% of the total number of employees in all the participating companies and if the special negotiating body so decides.

On the other hand, Article 20 of the CBM Employee Participation Act mandates that employees' participation in a company must be set up in accordance with that Act in the case of an SE established by merger: (1) if, before registration of the company, one or more forms of participation applied in one or more of the participating companies covering at least one third of the total number of employees in all the participating companies; or (2) if, before registration of the company, one or more forms of participation applied in one or more of the participating companies covering less than a third of the total number of employees in all the participating companies and if the special negotiating body so decides.

It is unclear whether the more general rule of the later-enacted Article 20 of the CBM Employee Participation Act using the term "company "applies to SE, even though a similar rule in Article 30 of the Participation of Workers in Management of the European Public Limited-Liability Company Act explicitly refers to the SE in the same context. It is possible that it does not and Article 30 of the Participation of Workers in

Management of the European Public Limited-Liability Company Act still applies to SEs established by merger.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4)(a) CBMD was fully transposed under Article 19 of the CBM Employee Participation Act, which does not have diverging rules in this context.

Article 16(4)(b) CBMD was fully transposed under Article 16 of the CBM Employee Participation Act, which does not have diverging rules in this context.

Article 16(4)(c) CBMD was transposed under Article 20 of the CBM Employee Participation Act, which states that employees' participation in a company must be set up in accordance with that Act if, before registration of the company resulting from the merger, one or more forms of participation applied in one or more of the participating companies covering at least one third of the total number of employees in all the participating companies. Under Article 21 of the CBM Employee Participation Act, the employees of a company resulting from a cross-border merger and the employees of its affiliated companies and subsidiaries have the right to elect, appoint, recommend, or oppose the appointment of a designated number of members in administrative organs, whereby the number of such members shall be equal to the highest proportion of such members in administrative organs of any participating company. Therefore, if in one of the merging companies employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third, as required by Article 16(4)(c) CBMD.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into national law. Any thresholds under the CBM Employee Participation Act would include employees of the company resulting from the cross-border merger in other Member States.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years employee participation is protected also in the event of subsequent domestic mergers.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Under Article 622b of the Companies Act, the date of validity of a cross-border merger shall be defined in compliance with the law applicable for the new company resulting from the cross-border merger. Under Article 597 of the Companies Act, after a merger is registered, any action to declare null and void or to challenge the resolution of the general meeting of the acquired company approving the merger shall be taken against the acquiring company. Under Article 598 of the Companies Act, after a merger is registered, any possible shortcomings of the merger shall have no effect on the legal consequences of the merger referred to in Article 591 of the Companies Act. Any plaintiff who, prior to the registration of the merger, has initiated an action to declare null and void or challenge the resolution approving the merger, may, without the agreement of the defendant, modify behavior in such a way as to claim compensation for damage incurred by the registration of the merger.

Both Articles 597 and 598 of the Companies Act were effective before the transposition of the CBMD.

1.18. Additional

a. Valuation rules

The Companies Act does not prescribe or require application of a particular valuation method.

Under Article 583 of the Companies Act, in its explanatory report the management shall explain the legal and economic grounds for the proposed share exchange ratio and the amount of additional cash payments, if any. The explanatory report shall also contain a note of any special difficulties that have arisen in the process of valuation of merging companies, and on the incidence of such difficulties on the determination of the exchange ratio and other rights.

Under Article 622d of the Companies Act, the expert report containing the opinion as to whether the cash compensation offered is suitable compensation for the shares in

the company being transferred must state which methods for the valuation of companies were used to determine the amount of cash compensation proposed in the cross-border mergers terms, the reasons the use of these methods in this particular case is appropriate for determining the amount of cash compensation, and where several methods were used for the determination of the cash compensation, what value has been established for the use of each of the methods, and at the same time give an opinion as to the relative significance attached to such methods in the calculation of value to be decided, and any specific problems in the process of valuation of companies participating in the cross-border merger must be described.

b. National case-law on provisions transposing the CBMD

No court opinions in the legal databases addressing the cross-border merger Articles of the Companies Act have been found. It is probable that there have not been any disputes in cross-border mergers in Slovenia under the new regulation transposing the CBMD, because all cross-border mergers seem to have involved only small shell companies or wholly owned subsidiaries without or with only few employees.

c. Language requirements

No special language requirements are discussed in national law. However, under Article 13 of the Notary Act (primary legislation, Official Gazette of Republic of Slovenia No. 13/94, as amended) notarized records must be executed in Slovenian. However, records notarized in other Members States would be recognized under the Hague Convention Abolishing the Requirement for Legalization for Foreign Public Documents of October 5, 1961, or any bilateral agreements between Slovenia and the Member State, if applicable.

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The boards of directors of companies merging by absorption shall conclude a merger contract whose mandatory contents are defined by the Companies Act. The merger contract shall have the form of a notary record.

A separate detailed written report or a unified explanatory report on the merger shall be drawn up in respect of each merging company by the directors of each merging company.

The merger contracts of all merging companies shall be examined by one or more independent persons—merger experts (auditors) appointed by a tribunal for each of the merging companies at the proposal of the supervisory board of the merging

company concerned.

Supervisory boards of each merging company shall examine the management's report and the merger expert's report on the proposed merger and draw up a written report.

The merger contract shall be valid subject to the approval of each of the merging companies' general meeting. The general meeting may give its approval prior to or after the conclusion of the merger contract.

The management of each merging company shall submit to the court register the merger contract that has been examined by the supervisory board of such a merging company at least one month before the date of the general meeting that is to decide on granting approval on the merger. The company shall publish a notice of the submission of the merger contract to the court register and not less than one month prior to the general meeting that is to decide on the approval of merger, shareholders of each of the merging companies shall be allowed to examine at the head office of such company the documentation required by the Companies Act.

The management of each merging company shall submit a proposal for registration of the merger to the court register in the place where the acquiring company has its registered office.

With the entry in the register of the merger, all the assets and liabilities of acquired companies shall be transferred to the acquiring company, the acquired companies cease to exist and the shareholders of acquired companies become shareholders of the acquiring company.

The resolution of the general meeting on approval of the merger may not be challenged in court on the basis of inadequate exchange ratio or cash compensation, but the Companies Act provides protective provisions for minority shareholders, creditors and special rights holders. The Companies Act also provides rules on management liability in merger context.

b. Comparison

The differences between domestic and cross-border mergers include the following: As a general rule, Article 622b of the Companies Act provides that if there is nothing provided otherwise in the cross-border merger section of the Companies Act, cross-border mergers are, *mutatis mutandis*, subject to provisions of general merger provisions of the Companies Act. Therefore, cross-border merger regulation is different only when the Companies Act specifically provides so.

The date of validity of a cross-border merger shall be defined in compliance with the law applicable for the new company resulting from the cross-border merger whereas the date of validity of a domestic merger is the entry of the merger into the register.

Managements or management bodies of each merging company in a cross-border

merger shall draw up common terms of cross-border merger in addition to the merger contract, functioning as its summary with statutory prescribed content.

There is no pre-merger scrutiny stage in the domestic merger procedure.

In a simplified procedure of domestic merger, the audit report is not required, whereas the Companies Act merely does not require any specific contents for an audit report in a simplified procedure of the cross-border merger. A merger contract for domestic merger of a limited liability company shall be subject to audit only upon a member's request, whereas all cross-border mergers of limited liability companies are subject to the expert audit requirement of the Companies Act. Only in a cross-border merger the audit report may omit an opinion as to the adequacy of the cash compensation, if the right to cash compensation was waived in form of the notary record by all shareholders.

The management report in a domestic merger addresses interests of the shareholders only, whereas the management report in a cross-border merger addresses interests of the shareholders, creditors as well as the protection of employees.

Prior to the registration of a cross-border merger the registration body shall additionally examine whether the general meetings of companies concerned by the cross-border merger have approved, with their resolutions on the approval of cross-border mergers, the same terms for cross-border mergers and whether the acquired companies had carried out negotiations on the involvement of employees in the management of the company resulting from the cross-border merger. After registering the cross-border merger, the Court Register shall notify, *ex officio* and without delay, the competent registries in Member States in which the acquired companies are registered.

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1. Transposition of the Cross-Border Merger Directive into Spanish Law

The CBMD was transposed into Spanish national law with Law 3/2009,[1] of April 3, 2009, which came into force on July 4, 2009.[2] The law is called Structural Modifications relating to Commercial Companies ("SML").[3]

The bill may eventually be replaced or modified; the Preamble II of the Law states that "This is a temporal solution until the rest of the regulations that rule our Corporative Law be merged and harmonized."[4]

Law 3/2009 has been modified several times:

(i) Fourth Final Provision of the Law 27/2009 of December 30, 2011, added the Third Additional Provision to the Law 3/2009 to include in its scope the mergers between credit entities.[5]

(ii) Third Final Provision of the Law 25/2011 of April 3, 2011,[6] modified Article 34(4) and (5) of the Law 3/2009, related to the report by experts about the merger project.

(iii) Article 2 of the Law 1/2012 of June 22, 2012, modified several articles and sections of the Law 3/2009 to simplify some procedures in mergers according to the transposition of the Directive 2009/109/CE (Preamble I.3).[7]

Before the publication of the CBMD, Spanish national law did not refer to cross-border mergers.[8]

1.1. Article 1 – Scope General

Article 1 CBMD outlines the general scope of the Directive and the kind of mergers to which the Directive applies.

The scope of cross-border mergers in Spain is exactly same as in Article 1 of the

[1] BOE number 82. April 4th, 2009, http://www.boe.es/boe/dias/2009/04/04/pdfs/BOE-A-2009-5614.pdf (last visited 29 May 2013).

[2] J. Pereda Espeso and J. G. Martínez Paños, 'Spain', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 166; According to the Eighth Final Provision of this Law, it will be in force after three months from publication in the BOE [Boletin Oficial del Estado]. The publication of the Law was on April 4th, 2009, so it came in force on July 4th, 2009.

[3] Ibid.

[4] BOE number 82, 4 April 2009, sec. I, p. 31929.

[5] BOE number 315, 31 December 2009, https://www.boe.es/boe/dias/2009/12/31/pdfs/BOE-A-2009-21160.pdf (last visited 29 May 2013), p. 112034.

[6] BOE number 184, 2 August 2011, http://www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13240.pdf (last visited 29 May 2013), p. 87476.

[7] BOE number 150, 23 June 2012, http://www.boe.es/boe/dias/2012/06/23/pdfs/BOE-A-2012-8406.pdf (last visited 29 May 2013), p. 44684.

[8] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 166.

CBMD, discussed in the Structural Modifications Law (SML) (Article 54.1). The companies subject to Spanish law that may take part in a cross-border merger within the EU are public limited liability companies (*Sociedades Anónimas*), partnerships limited by shares (*Sociedades Comanditarias por Acciones*), and limited liability companies (*Sociedades de Responsabilidad Limitada*).[9] [10]

Spanish national law does allow for cross-border mergers outside of the scope of Directive; the Fourth Final Provision of the Law 27/2009 of December 30, 2011, added the Third Additional Provision to the Law 3/2009 to include in its scope the mergers between credit entities.[11]

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Spanish national law contains a similar definition to the term "limited liability companies" as that provided in Article 2(1) of the CBMD. Spanish national law explains the term from two different perspectives.

Point (a) refers to Article 1 of the Directive 68/151/ECC of March 9, 1968[12]. At that time, Spain was not a Member State of the European Economic Community (EEC). Article 1 of this directive listed the type of companies which would be relevant in the Member States. The types of the companies are named in the domestic language of each of the countries (Germany, Belgium, France, Italy, Luxembourg and the Netherlands). Nevertheless, Article 54.2 of the SML relating to commercial companies[13] that transposed the CBMD listed the same type of companies that were listed in Article 1 of the Directive 68/151/ECC.

Point (b) gives a specific definition that is as broad as that in Article 2 of the SML.[14]

b. List of companies that can carry out a cross-border merger under Spanish law

The SML (Article 54.1) states the requirements for a company to be eligible for a cross-border merger. The companies subject to Spanish law that may take part in a

[9] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 167.
[10] BOE number 82, 4 April 2009, p. 31944.
[11] BOE number 315, 31 December 2009, p. 112034.
[12] First Council Directive of 9 March 1968 on co-ordination 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 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, [1968] OJ L 65/8.
[13] BOE number 82, 4 April 2009, p. 31944.
[14] Ibid., p. 31931.

cross-border merger within the EU are public limited liability companies, partnerships limited by shares, and limited liability companies (Article 54.2).[15] [16]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

The SML is in line with Article 2(2) of the CBMD. All three situations are mentioned under Articles 23[17], 25 and 57 of the SML[18] regarding the cash payment issue.[19]

d. Rules on cash payment

In Spanish national law, payment in cash, if any, cannot exceed 10% of the nominal value of the shares or the book value of the stake allocated (Article 25.2 of the SML[20]). However, Member States follow the rule of cash payment according to Article 57 of the SML: if one of the Member States involved in the merger allows the cash payment to exceed 10% of the nominal value, or the accounting par value of the exchanged shares, then the payment will not stop the merger from being completed.[21,22]

e. CBMs and companies in liquidation

Spanish national law does not follow the CBMD and does allow companies in liquidation to merge. According to Article 28 of the SML, one or more Spanish companies that have gone into liquidation may complete a merger, provided that they have not yet started to distribute their assets to their shareholders.[23] [24]

f. Geographical scope

Article 27(2) of SML states that mergers with EEA companies are governed by the SML, while the provisions of the respective national laws govern mergers with non-EEA companies.[25] [26]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

National legislation on cross-border divisions, seat transfers, and other cross-border

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[15] Ibid., p. 31944.
[16] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 167.
[17] BOE number 82, 4 April 2009, p. 31935.
[18] Ibid., p. 31944.
[19] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, 'Cross-Border Reorganizations in Spain', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), p. 4.
[20] BOE number 82, 4 April 2009, Sec. I, p. 31936.
[21] Ibid., p. 31944.
[22] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 4.
[23] Ibid., p. 3.
[24] BOE number 82, 4 April 2009, Sec. I, p. 31936.
[25] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 4.
[26] BOE number 82, 4 April 2009, Sec. I, p. 31936.

seat restructurings is as follows:

Spain's real seat theory is applied in conformity. As a result of co-existence of the incorporation theory and the real seat theory, a merger can validly take place between companies that are governed by different *leges societatis* but have their real seat established in the same Member State.[27]

Title V of the SML[28] allows seat transfers to/from foreign countries. In cases of companies incorporated and created according to Spanish legislation, the seat transfer is allowed if the destination country allows keeping the same type of legal entity as in Spain.

Regarding cross-border restructurings, cases of European public limited liability companies are ruled by Law 19/2005 on European public limited liability companies incorporated in Spain,[29] amended by Royal Legislative Decree 1/2010 on Consolidated Version of Corporations Law.[30]

In the case of a division of one company, if the resulting companies of such division have different nationalities, each resulting company will be governed by their respective national law (Article 73.2).[31] The same would be applicable in such cases of cross-border asset and liabilities transfers (Article 84),[32] so each company (assignor and assignee) will be governed by their respective national law.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Spanish national law follows Article 3(1) of the CBMD; although Article 25.2 of the SML states that payment in cash cannot exceed 10% of the nominal value of the shares or book value of the stake allocated, Spain also follows the rule under Article 57 of the SML that if at least one of the Member States of the companies involved in

[27] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 4.
[28] BOE number 82, 4 April 2009, Sec. I, p. 31951.
[29] BOE number 273, 15 November 2005, Sec. I, https://www.boe.es/boe/dias/2005/11/15/pdfs/A37303-37308.pdf (last visited 29 May 2013), p. 37304.
[30] BOE number 161, 3 July 2010, Sec. I, http://www.boe.es/boe/dias/2010/07/03/pdfs/BOE-A-2010-10544.pdf (last visited 29 May 2013), p. 58577.
[31] BOE number 82, 4 April 2009, Sec. I, p. 31948.

the merger allows for a higher cash payment, then this will not be an obstacle to carrying out the merger.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Article 3(2) of the CBMD has been transposed into Spanish national law; Article 56.1 of the SML clearly states that cooperative companies shall not be applicable for cross-border mergers.[33,34]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Article 3(3) of the CBMD has been transposed in Spanish national law; Article 56.2 of the SML clearly states that a collective investment undertaking shall not apply for a cross-border merger.[35]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) has been transposed into Spanish national law under Article 27.2 of the SML,[36] in the same terms as in the CBMD.[37]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have also provided so for domestic mergers.

Article 4(1)(b) of the CBMD has been transposed into Spanish national law, under Article 58 of SML.[38]

The Council of Ministers (Article 58 of SML and Article 14 of the Competition Defense Law 15/2007 (CDL)[39]) is the only organism empowered to oppose a merger on the grounds of public interest different to competition (Article 10.4 of the CDL[40]).

Additionally, the Competition National Commission, which is the main agency for

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[32] Ibid., p. 31949.
[33] BOE number 82, 4 April 2009, p. 31944.
[34] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 167.
[35] BOE number 82, 4 April 2009, p. 31944.
[36] Ibid.
[37] Ibid.
[38] Ibid., p. 31944.
[39] BOE number 159, 4 July 2007, https://www.boe.es/boe/dias/2007/07/04/pdfs/A28848-28872.pdf (last visited 29 May 2013), p. 28855.

controlling mergers (Article 5 of the L3/2013, Law of Incorporation of the National Commission of the Market and the Competition), and regional agencies authorized in this field (Article 13 of CDL[41]) are governmental agencies empowered to oppose a merger on the ground of competition defense.

The procedure in case of opposition on the grounds of public interest is established in Article 60 of the CDL.[42]

The Council of Ministers can act after the Competition National Commission has resolved the merger either banning or authorized it under conditions (Article 60.1 of CDL).

The Council of Minister may confirm the resolution of the Competition National Commission or authorize the merger with or without conditions (Article 60.3 CDL).

The time limit to resolve the merger by the Council of Ministers is one month (Article 36 of CDL[43]).

Since the Competition Defence Law came into force on September 1, 2007, only once (in 2012) did the Council of Ministers modify partially one merger authorization[44] for relaxing the conditions imposed by the Competition National Commission on the grounds of guaranteeing an adequate balance in the sectorial regulation.[45]

c. The protection of creditors in Article 4(2)

Regarding Article 4(2) of the CBMD, since the SML does not make a specific reference to creditor protection in its provisions on cross-border mergers, the provisions governing mergers in general apply.[46] Thus, Article 44 of the SML[47] about creditor and debenture holders' protection applies.

For creditors, the merger cannot be executed until one month since the last publication of the merger approval (Article 44.1 of the SML[48]). In that month period, those creditors whose credits (a) arose before the date of the last publication of the merger approval and; (b) were not due at that date and; (c) is not sufficiently warranted, can oppose to the merger until their credit is warranted.

For debenture holders, it is the same procedure as for creditors except in the case that the merger had been approved in a debenture holders' meeting. In such a situation,

[40] Ibid., p. 28854.
[41] Ibid., p. 28855.
[42] Ibid., p. 28865.
[43] Ibid., p. 22860.
[44] Competition National Commission Report 2011/2012, http://www.cncompetencia.es/Inicio/ConocerlaCNC/Memorias/tabid/72/Default.aspx (last visited 29 May 2013), p. 41.
[45] Council of Ministers resolution of 28 August 2012, http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=185097&Command=Core_Download&Method=attachment (last visited 29 May 2013).
[46] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 20.
[47] BOE number 82, 4 April 2009, Sec. I, p. 31941.

debenture holders cannot oppose the merger (Article 44.2 of the SML[49]).

For security holders, the shareholders that voted against the cross-border merger in the general meeting can leave the company if the resulting company from the merger is incorporated in another Member State (Article 62 of the SML[50]). The right to leave must be practiced in written application in one month since the last merger approval publication or receipt of notice (Article 348.2 of Corporations Law[51]).

The protection period is effective until one month has passed after the date of the last notice of the resolution approving the merger, or, where notice is given in writing to all of the shareholders and creditors, one month after the last notice was sent (Article 44.1 of the SML).[52] [53] The possible time limit is one month.[54]

Creditors whose claims are not sufficiently secured may object to the merger.[55]

This option also exists for domestic mergers[56] for the cases of creditors and debenture holders because Article 44 of the SML[57] is applicable to both cross-border and domestic mergers.

However, for security holders, in cases of mergers within the Member State, the consolidated version of the Royal Legislative Decree 1/2010 on the Corporations Law, Title IX, is applicable.[58] Article 346 establishes the legal cases in which a security holder can leave the company; one of them is if the security holder votes against the change of the type of company. Article 347 establishes the possibility that bylaws included other reasons to leave the company. Nevertheless, there is no legal provision that allows security holders to leave the company in cases of mergers within the the Member State.

Only creditors whose claims are not sufficiently secured can block the merger (Article 44.3 of the SML),[59] [60] provided that such credits (a) arose before the date of the last publication of the merger approval and (b) were not due at that date.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides each Member State with the option to adopt protections

[48] Ibid., p. 31941.
[49] Ibid.
[50] Ibid., p. 31945.
[51] BOE number 161, 3 July 2010, Sec. I, http://www.boe.es/boe/dias/2010/07/03/pdfs/BOE-A-2010-10544.pdf (last visited 29 May 2013), p. 58555.
[52] BOE number 82, 4 April 2009, Sec. I, p. 31941.
[53] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in I. Vande Velde and J. Vermeylin, *Cross Border Reorganizations in Spain*, p. 20.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] BOE number 82, 4 April 2009, Sec. I, p. 31941.
[58] BOE number 161, 3 July 2010, Sec. I, p. 58555.
[59] BOE number 82, 4 April 2009, Sec. I, p. 31941.
[60] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 20.

for minority shareholders.

Spanish national law has transposed Article 4(2) of the CBMD under Article 62 of the SML, which gives shareholders a right to exit.[61] Regarding the start of the procedure, the right of exit must be exercised within one month from the publication of the resolution or receipt of the notice.[62] The time limit is one month.[63] The right to leave must be practiced in written application within one month since the last merger approval publication or receipt of notice (Article 348.2 of the Corporations Law).[64]

The procedural steps are that the right of exit has to be given in writing within one month of the publication (Article 348.2 of the Corporations Law).[65] [66]

This option does not exist for domestic mergers, unless it is authorized in the bylaws or there is a transformation in the company (Articles 346 and 347 of the Corporations Law).[67]

e. The protection of employees in Article 4(2)

Article 4(2) of the CBMD has not been transposed in Spanish national law; only Article 16 of the CBMD regarding employee protection has been transposed.

Additionally, before posting a call for the general meeting that is to deliberate on the merger, or sending individual notices of the call to the members, the directors must make available to the employee representatives, for inspection at the registered office, different documents, among others: the common draft terms of merger, the reports of the directors of each of the companies on the draft terms of merger, the independent experts' reports and the merger balance sheet of each of the companies, where it differs from the latest annual balance sheet, accompanied, if required, by the auditor's report or, in the event of a merger of listed companies, the half-yearly financial report that replaced the balance sheet (Article 39 SML).

The rest of the employment protection rights will be governed by the Statute of Employees (several times amended), which protects employees in different situations which might be affected by a merger such as the move of the location of work (Article 40) or protection of employment when there is a company/entrepreneur replacement (Article 44).[68]

For protection in case of a move of the location of work (Article 40.1 of the Statute of

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[61] Ibid., p. 19.
[62] Ibid.
[63] Ibid.
[64] BOE number 161, 3 July 2010, Sec. I, p. 58555.
[65] Ibid.
[66] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 19.
[67] BOE number 161, 3 July 2010, Sec. I, p. 58555.
[68] BOE number 75, March 29th, 1995, https://www.boe.es/buscar/pdf/1995/BOE-A-1995-7730-consolidado.pdf (last visited 29 May 2013).

Employees),[69] the employee (unless he/she had been hired with a mobility condition) has the right to cease or keep his/her job. If he/she chooses to cease work, the employee will receive an economic indemnification equivalent to 20 days of salary for each year of work in the company, up to a maximum of twelve months' salary. On the other hand, if he/she chooses to keep their job and move, then he/she will receive a compensation for the move's expenses. It is necessary that employees be informed 30 days before the effective date of the move. Finally, the employee may also claim against the employer's decision to move if he/she considers that there are no legal grounds for that (economic, production, organizational or technical related causes must be alleged and evidenced when the employer's decide to move the employee).

If the move affects the entire place of work, before being effective, there will be a period of inquiry lasting no longer than 15 days with the legal working representatives. Parties should negotiate in good faith, but the entrepreneur has the power of decision notwithstanding the right of the employees to take legal actions against that decision (Article 40.2 of the Statute of Employees).[70]

Regarding protection in case of replacement of company (Article 44 of Statute of Employees),[71] the new entrepreneur will have to subrogate the labor rights and duties of the previous entrepreneur.

These protections are applicable to both cross-border and domestic mergers.[72] The negotiation and/or the subrogation is a requirement, so it is applicable in every merger in which there is a replacement in the entrepreneur or there is a move in the entire place of work.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose of informing the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Articles 5(a) through (l) of the CBMD have been transposed into Spanish national law under Articles 30 and 31 of the SML.[73]

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[69] Ibid.
[70] Ibid.
[71] Ibid., p. 9669.
[72] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 38.
[73] Ibid.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Spain has transposed Article 6(1) of the CBMD under Article 32 of the SML amended by Article 2 of the Law 1/2012.[74] [75]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

The SML 3/2009 (by Law 1/2012 of June 22, 2012) introduced this exemption in Article 32.[76]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Article 6(2) of CBMD has been transposed into Spanish national law. Certain specificities have to be published in the Official Gazette of the Commercial Registry;[77] [78] not only the specifics of Article 6(2) of the CBMD but all the specifics in the CDTMs have to be published.

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees.

Article 7 of the CBMD has been transposed into Spanish national law under Articles 33[79] and 60[80] of the SML.[81]

[74] BOE number 150. June 23rd, 2012, p. 44685.
[75] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 8.
[76] BOE number 82, 4 April 2009, Sec. I, p. 31937.
[77] Ibid.
[78] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 8.
[79] BOE number 82, 4 April 2009, Sec. I, p. 31937.

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) of the CBMD has been transposed under Article 34.1 of the SML, but the independent expert report is only required if any of the merging companies is a public limited liability company or partnerships limited by shares company.[82]

b. The independent expert

The independent expert will be a natural or legal person belonging to a profession directly related to the assets to be valued or with specific expertise in appraisals or in expert engagements.[83] [84]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) of the CBMD has been transposed into Spanish national law.[85]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed into Spanish national law under Article 34.3 of the SML.[86] [87]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Article 8(3) of the CBMD has been transposed into Spanish law under Article 34.2 of the SML.[88]

If the independent experts do not get access to the information they require,

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[80] Ibid., p. 31945.
[81] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 169.
[82] Law 1/2012, BOE number 150, 23 June 2012, p. 44685.
[83] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 9.
[84] Mercantile Registry Regulations, art. 340; BOE number 184, 31 July 1996, http://www.boe.es/boe/dias/1996/07/31/pdfs/A23574-23636.pdf (last visited 29 May 2013), p. 23621.
[85] Structural Amendments Law 3/2009, art. 34. BOE number 82. April 4th, 2009, Sec. I, p. 31937.
[86] Ibid.
[87] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 170.

according to Article 65 of the SML[89], the Trade Registrar must determine that all legal requirements have been satisfied previous to the filing of the merger of the companies.

Additionally, the consolidated version of the Corporations Law (Article 204) establishes that the company merger might be challenged if it is against bylaws, or harm corporate rights in favor of individual benefits. They will be void if they are against law.[90]

Moreover, the Board of Directors might be sued for lack of due diligence among other corporate duties according to the Title VI, Chapter III "Administrators' Duties" of the Consolidated Version of Corporations Law.[91]

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all the merging companies can unanimously decide to waive the expert reports.

Regarding Article 8(4) of the CBMD, Article 34.4 of the amended SML (amended by Article 2 of the Law 1/2012) establishes that if all the shareholder of all merging companies agree, the expert report will only contain the experts' opinion whether the assets of extinguished companies are equal to the new company or to the capital of the merger company.[92]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) or in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Articles 15(1) and 15(2) of the CBMD have been transposed under Articles 49 and 50 of the SML.[93] [94]

h. Further exemptions in Spanish law

There are no further exemptions in Spanish law.[95]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

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[88] Structural Amendments Law 3/2009; BOE number 82, 4 April 2009, Sec. I, p. 31938.
[89] Ibid., p. 31945.
[90] Art. 204; BOE number 161, 3 July 2010, Sec. I p. 58525.
[91] Ibid., p. 58529.
[92] BOE number 150, 23 June 2012, Sec. I, p. 44686.
[93] BOE number 82, 4 April 2009, Sec. I, p. 31942.
[94] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 10.
[95] Ibid.

Article 9 of the CBMD has been transposed under Articles 40[96] and 61 of the SML.[97]

a. Procedural requirements including majority, quorum, timing and notarization

The procedure for said approval includes the following steps:

The meeting of the general assembly of shareholders approving the merger at the Spanish level can be annual or extraordinary. The presence of a notary is not required under Spanish law.

In the case of limited liability companies the resolution approving the merger will require the favorable vote of at least two thirds of the votes corresponding to the quotas into which the company's capital is divided. This percentage can be increased by bylaws (Article 199.b of the consolidated version of the Corporation Law).[98]

In public limited liability companies and in the partnerships limited by shares, the quorum necessary for a general meeting of shareholders is, in the first meeting call, at least 50% of the subscribed voting capital and at least 25% in the second meeting call (Article 194 of the consolidated version of Corporations Law).[99] The approval of the CDTMs requires an ordinary majority if the shareholders attending the general meeting represent at least 50%. If the shareholders represent less than 50% of the subscribed voting capital, the approval of two-thirds of the represented capital in the general meeting is necessary (Article 201).[100] [101]

b. Amendment of CDTMs by shareholders

The merger approval must strictly comply with the CDTM. According to Article 40(1) of the SML, a resolution by any of the companies amending the proposal is tantamount to a rejection of the proposed merger and the whole procedure should start again.[102] [103]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

Article 51.1 of the SML transposes the exemption for approval under Article 8 of Directive 2011/35/EU, but only in the case that the acquired company is a public limited liability company or limited liability company. Nevertheless, the SML

[96] BOE number 82, 4 April 2009, p. 31940.
[97] Ibid., p. 31945.
[98] BOE number 161, 3 July 2010, Sec. I, p. 58524.
[99] Ibid., p. 58523.
[100] Ibid., p. 58524.
[101] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 14-15.
[102] BOE number 82, 4 April 2009, Sec. I, p. 31940.
[103] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 13.

establishes that the general meeting for the acquiring company may be required by, at least, 1% of the shareholders of the subscribed capital.[104]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) of the CBMD has been transposed in Article 49.1 of SML. In case of a merger in which the acquiring company owns (directly or indirectly) the whole capital of the acquired company, the merger may be carried out without the approval of the merger by the general assembly of the Spanish company being acquired.[105] This is not replaced by another approval or formality.[106] Nevertheless, when the acquiring company indirectly holds all of the shares or units representing the capital of the acquired company, in addition to taking the above into account, there shall in all cases be required the experts' report and, if applicable, the capital increase in the acquiring company will be required (Article 49.2 SML).

There are other exemptions under Spanish law: According to Article 52.1 of the SML, if all the merging companies are wholly owned (directly or indirectly) by the same shareholder, or if the acquired company owns (directly or indirectly) the whole subscribed capital of the acquiring company, Article 49.1 of the SML shall apply.[107] Nevertheless, where the acquired company indirectly holds all shares or units representing the capital of the acquiring company, or where the acquired and acquiring companies are indirectly held by the same member, the experts' report will be required and, if applicable, the capital increase in the acquiring company must be carried out.

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Articles 10(1) and (2) have been transposed into Spanish national law under Article 64 of the SML.[108] [109]

[104] BOE number 82, 4 April 2009, Sec. I, p. 31943.
[105] Ibid., p. 31942.
[106] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 13.
[107] BOE number 82, 4 April 2009, Sec. I, p. 31943.
[108] Ibid., p. 31945.
[109] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 174.

b. National authority has been designated to scrutinize the legality of the merger

The Commercial Registrar of the registered office of the place where the merging company is incorporated (Article 64 of the SML)[110] [111] has been designated as the authority to scrutinize the legality of the merger. The authority conducts a formal check.[112] [113]

c. Transposition of Article 10(3)

Article 10(3) of the CBMD has not been transposed into Spanish national law. However, Spain has put in place a procedure in order to scrutinize and amend the ratio applicable to the exchange of shares.[114]

If the general meetings of the other companies do not agree, this will mean a rejection of the merger.

If the shareholders consider that they are adversely affected by exchange ratio, they may request the Commercial Registry to appoint an independent expert to determine the amount of compensation due (Article 38 of the SML).[115] [116]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Articles 11(1) and (2) of the CBMD have been transposed under Article 65 of the SML).[117]

b. The national authority has been designated to scrutinize the legality of the merger

The Commercial Registrar of the registered office of the place where the merging company is incorporated has been designated as the national authority to scrutinize the legality of the merger, and conducts a formal check.[118]

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[110] Ibid.
[111] BOE number 82, 4 April 2009, Sec. I, p. 31945.
[112] Ibid.
[113] J. Pereda Espeso and J. G. Martínez Paños, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 174.
[114] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 13.
[115] BOE number 82. April 4th, 2009, Sec. I, p. 31939.
[116] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 13.
[117] BOE number 82, 4 April 2009, Sec. I, p. 31945.
[118] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 13.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD has been transposed into Spanish national law under Articles 46 and 66 of the SML.[119]

b. Date the cross-border merger takes effect

If the merged company falls under Spanish legislation, the merger shall be effective once the new company is registered, or when the takeover is registered with the appropriate commercial registry (Article 46.1 of the SAL).[120]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that as long as it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Regarding Article 13 first sentence, if the company resulting from the merger is a company subject to Spanish law, the Commercial Registry at which the cross-border merger was registered must immediately notify the registries at which the (other) merging companies are registered in order to proceed with their deregistration (Article 66.3 of the SML).[121] [122]

b. Transposition of Article 13 second sentence

Spanish national law has transposed Article 13 second sentence in Article 66.3 of the SML.[123] [124]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Regarding Article 14 of the CBMD, no other regulation establishes the consequences of the merger beyond the formalities established in Article 45 and the effective date

[119] BOE number 82, 4 April 2009, Sec. I, p. 31941.
[120] Ibid.
[121] BOE number 82, 4 April 2009, Sec. I, p. 31946.
[122] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 18.
[123] BOE number 82, 4 April 2009, Sec. I, p. 31946.
[124] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 18.

established in Article 46 of the SML[125]. Among the formalities is the file of the merger agreement in the Commercial Registry and additionally, in the case of the formation of a new company as a consequence of the merger, the formalities for the formation of such a new company.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure in two instances: i) where a merger with a whole owned subsidiary is carried out or ii) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

Article 15(1) of the CBMD has been transposed into Spanish national law under Articles 50, 49 of the SML,[126] but with one diverging rule. The independent expert report shall be necessary in the case of cross-border mergers within Europe.

Article 15(1) further provides that in a merger with a wholly owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

The further provision of Article 15(1) of the CBMD has been transposed into Spanish national law, and no other document is exempt.

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some Member States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

In Spain, there is no legally recognized employee participation system, in the sense of having employee's representatives (or the ability to be involved in the election of the members) in the board of directors. This kind of participation system can be negotiated, but the transposition of an employee participation system is not

[125] BOE number 82, 4 April 2009, Sec. I, p. 31941.
[126] Ibid., p. 31942.

compulsory for the employers.

The only legally recognized employee participation system is the right of having labor organizations' representatives in the company as an internal organism that an employer can consult and communicate with, but this organism does not have any capability to make corporate decisions.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Article 16(1) of the CBMD has been transposed into Spanish national law, which goes further than the CBMD by adding the Title IV to the EPL through the Third Final Provision of the SML. The new Article 39.1 EPL[127] will be applicable in all the working centers (even those placed abroad) if the registered office of the company is placed in Spain and if (a) one of the merging companies had an average of at least 500 employees and an employee participation system in place six months before the merger, or; (b) if in the company resulting from the merger the participation system is inferior to the one stated in Article 20 of the EPL, or; (c) if the employment participation system in the working centers abroad is inferior to the one stated in the EPL.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Article 16(2) of the CBMD has been transposed into Spanish national law; all the exceptions have been included to exclude the application of the national law of those Member States where a company has working centers, unless otherwise stated in Chapter I of Title IV of the EPL (Article 39.2 of the EPL added by Third Final Provision of the SML[128]).

d. Transposition of Article 16(3)(e)

Article 16(3) of the CBMD has been transposed in Spanish national law; according to Article 41 of the EPL (added by the Third Final Provision of the SML[129]), the percentage required by Article 7(2) of the Directive 2001/86/EC is 33.3% unless otherwise decided by the negotiating body.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard

[127] Ibid., p. 31960.
[128] Ibid.
[129] Ibid, p. 31961.

rules can be made applicable.

Articles 16(4)(a) and (b) have been transposed under Articles 40.1ª and 40.2ª of the EPL added by Third Final Provision of the SML[130]. However, Article 16(4)(c) has been regulated in a different way. According to the added Article 40.3ª of the EPL, if the employment participation system in the bodies of administration or control of any of the merging companies affects at least the 25% of the total number of employees of the participating companies overall, then the negotiations may determine to limit the proportion of employee participation in the management board, and will need a majority of two-thirds of the negotiating body that represents at least two-thirds of the employees and the votes of members that represent at least the employees of the two Member States to be approved. There is no limit in the proportion of the reduction.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into national law. However, article 42 of the EPL added by the Third Final Provision of the SML provides that the general provisions contained in article Chapter III Title I of the EPL are applicable to the companies resulting from a merger. Article 21 of the EPL provides that the workforce shall be calculated taking into account the total of employees of the companies and working centers, including fixed – term and part – time employees.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has been transposed into Spanish national law in Article 67.2 of the SML, which provides that where at least one of the merging companies is operating under an employee participation system (within the meaning of the SE directive) and the company resulting from the cross-border merger operates such a system, the latter company must take a legal form that permits the exercise of participation rights.[131] [132]

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is

[130] Ibid., p. 31960.
[131] Ibid., p. 31946.
[132] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 32.

governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years employee participation is protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed into Spanish national law through adding Article 43 of the EPL by the Third Final Provision of the SML.[133]

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 of the CBMD has been transposed into Spanish national law under Article 47 of the SML; if a merger has been carried out in conformity with SML, it cannot be challenged after its registration with the relevant Spanish Commercial Registry.[134] [135] Notwithstanding, shareholders and third-parties have an indemnification damages right that they could bring forward within 3 months after the merger is challengeable (Article 47.2 of the SML).

1.18. Additional

a. Valuation rules

According to Article 25 of the SML[136], in cases of the exchange of shares, their values will be established on the basis of the real value of their net asset. Additionally, the expert report shall state whether the methods of valuation rules are accurate (Article 34.3 of the SML137).

If the merger involves one or more listed public liability companies whose shares are already admitted for trading on an official secondary market or in a regulated market based in the European Union, the merger balance sheet may be replaced by the half-yearly financial report required of each of them under securities exchange laws, provided that said report was closed and made public within the six months preceding the date of the merger proposal. The report will be made available to the shareholders in the same way as provided for by the merger balance sheet (Article 36.3 of the SML added by Royal Decree Law 9/2012 on simplification of information and documentation requirements in mergers and demergers of Public Limited Liability

[133] BOE number 82, 4 April 2009, Sec. I, p. 31962.
[134] Ibid.
[135] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 20.
[136] BOE number 82, 4 April 2009, Sec. I, p. 31935.
[137] Ibid., p. 31938.

Companies[138]).

b. National case-law on provisions transposing the CBMD

No national case law has been found regarding the transposition of the CBMD.

c. Language requirements

The SML does not lay down any specific rules on the use of language in the context of cross-border mergers. Consequently, the general rules on the use of language under the Spanish law apply. In Spain, official documents must be drafted in Spanish (Article 3 of the Constitution[139]). Parties can also request the relevant documents to be provided in Catalan, Basque, or Galician.[140]

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

Cross-border intra-community mergers are governed by the provisions of Chapter II of the SML and, on a secondary basis, by the provisions governing domestic merger.

b. Comparison

A major difference between the domestic and cross-border procedure is exchange of securities and cash payment. If one of the Member States affected by the merger allows a cash payment higher than 10% of the valuation (or accounting value) of the securities, that does not block the merger (Article 57 of the SML[141]). In Article 25 of the SML, there is a limit of 10% of cash payment in domestic mergers.[142]

Other differences are: (a) employee rights of participation in the company resulting from the merger, and (ii) the right of withdrawal of members, when deciding on the approval of the common draft terms of cross-border mergers, the general meeting of members each of the merging companies may make implementation of the merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

[138] BOE number 66, 17 March 2012, http://www.boe.es/boe/dias/2012/03/17/pdfs/BOE-A-2012-3812.pdf (last visited 29 May 2013), p. 24369.
[139] BOE number 311, 29 December 1978, http://www.boe.es/boe/dias/1978/12/29/pdfs/A29313-29424.pdf or [English version] http://www.tribunalconstitucional.es/es/constitucion/Paginas/ConstitucionIngles.aspx (last visited 29 May 2013), p. 29313.
[140] I. Corbera Dale, M. Borras Cabacés and F. Lavandera Noguera, in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, p. 16.
[141] BOE number 82, 4 April 2009, Sec. I, p. 31944.
[142] Ibid, p. 31936.

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1. Transposition of the Cross-Border Mergers Directive into Swedish Law

The CBMD was transposed in 2008,[1] and the law adopting the CBMD was an amendment adding a new section on cross-border mergers to Chapter 23 of the Swedish Companies Act of 2005 (*Aktiebolagslagen* (2005:551)), which came into effect on February 15, 2008.[2] The transposition of the CBMD for mergers of cooperative societies is set out in Chapter 12, Sections 22 through 43 of the Swedish Cooperative Societies Act (*Lag om ekonomiska föreningar* (SFS: 1987:667)). [3] The CBMD employee participation rules were transposed by the EPPC in 2008 (*lag* ([2008:9] *om arbetstagares medverkan vid gränsöverskridande fusioner*).[4]

The transposition was mainly made via the updating of older laws.[5] The government proposed further provisions on cross-border mergers concerning limited liability companies and cooperative societies. The amended acts state that most of the current provisions on mergers between companies in Sweden are also to be applied in the case of cross-border mergers. In addition, the government proposed a number of provisions specific to cross-border mergers, rather than other provisions on (national) mergers. The CBMD employee participation rules were transposed via the enactment of a new law, (*lag* ([2008:9] *om arbetstagares medverkan vid gränsöverskridande fusioner*).

The bills are not due to be replaced, modified, or amended. Prior to the publication of the CBMD, there was no previous Swedish legal framework for cross-border mergers.[6]

1.1. Article 1 – Scope General

Article 1 CBMD outlines the general scope of the Directive and the kind of mergers to which the Directive applies.

The scope of the Swedish national law CA 2005 is similar to the scope of Article 1 of the CBMD in that it governs mergers of EEA limited liability companies that include a cross-border element.[7]

[1] J. B. Anderson, 'Sweden', in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 181.
[2] Ibid.
[3] P. Hedman et al., 'Cross-Border Reorganizations in Sweden', in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations* (Oxford University Press, New York 2012), para. 16.21.
[4] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 187.
[5] Ibid., p. 181.
[6] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.01; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 61-62.
[7] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.10-13; Chapter 23, 36§, Companies Act; Government bill, Prop. 2007/08:15; J.

Swedish national law does not allow for cross-border mergers outside of the scope of the Directive.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

Swedish law's definition of the term "limited liability companies," in CA 2005, is similar to the scope of Article 2(1) of the CBMD. The definition includes the Swedish private limited company and public limited company, cooperative societies, European companies (SE), and European cooperative societies (SCE). Not included are cooperative housing societies and nonprofit associations.[8]

b. List of companies that can carry out a cross-border merger under Swedish law

Under Swedish law, a cross-border merger applies to public limited liability companies, private limited liability companies, cooperative societies (except cooperative housing societies),[9] European companies (SE), and European cooperative societies (SCE).[10] However, those are not especially mentioned in the legislation.[11]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Regarding the definition of the term "merger," Swedish law allows for merger by acquisition,[12] merger by formation of a new company,[13] and "simplified mergers" defined similarly to that provided in Article 2(2) of the CBMD. [14]

However, Swedish national law has some divergences. In transposing Articles 2(2)(a) and (b), more than 50% must be shares in the company, and the 10% cash limit is

B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 63; Chapter 23, 36 §, first subparagraph, Aktiebolagslagen (2005:551) (The Companies Act, CA et seq.).

[8] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 64 et seq.; Chapter 23, 36 §, first subparagraph, CA (2005:551).

[9] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.06-07; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 64 et seq.

[10] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 182, 64 et seq.; Government bill, Prop. 2007/08:15.

[11] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 71.

[12] Chapter 23, 1 §, second subparagraph (1), CA.

[13] Chapter 23, 1 §, second subparagraph (2), CA

[14] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.15-17. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 64 et seq.; Chapter 23, 1 § CA (2005:551).

not explicitly defined,[15] and (c) falls under (a).

d. Rules on cash payment

Swedish law allows cash payment to the shareholders of target companies to exceed 10% of total consideration value, as long as more than half of the total consideration consists of shares.[16] Sweden appears to follow Article 3(1) of the CBMD, though it is unclear whether this allows for cross-border mergers with cash payment exceeding half of the total consideration in cases where this is allowed by the laws applicable to at least one of the companies involved in the merger. [17]

e. CBMs and companies in liquidation

A company in liquidation can participate in a cross-border merger under Swedish law as long as, at the time of the merger, none of the remaining assets have been distributed to shareholders.[18] An officially bankrupt company cannot be acquired in a cross-border merger.[19]

f. Geographical scope

Sweden's implementation of the CBMD does not provide for cross-border mergers with non-EEA companies. [20]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

Under Swedish national law, there is no specific legal framework provided for cross-border divisions, transfers, contributions, or other cross-border restructurings.[21]

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Sweden appears to follow Article 3(1) of the CBMD, though it is unclear whether this

[15] Chapter 23, 1 §, first and second subparagraph (1), CA.
[16] Chapter 23 s 2 Companies Act in conjunction with Chapter 23 s 36 Companies Act.
[17] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.17.
[18] Art. 23:4 and Art. 23:36 CA 2005.
[19] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.09.
[20] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.14; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 64 et seq.
[21] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.03.

allows for cross-border mergers with cash payments exceeding half of the total consideration in cases where this is allowed by the laws applicable to at least one of the companies involved in the merger. [22]

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Swedish law has not excluded cooperative societies, other than housing societies.[23]

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Swedish national law conforms to Article 3(3) of the CBMD in excluding open-ended investment trusts.[24]

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Swedish law only allows for mergers between companies of the same type, with one exception, and with public and private companies considered the same for this purpose.[25] In a cross-border merger, a Swedish company or mutual association can only merge with an EEA company of the same kind, except for mutual associations which have wholly owned subsidiaries formed as companies.[26] If the company in the other Member State qualifies for a cross-border merger and has been formed in accordance with the law of that Member State and the company is having their registered office, central administration or principal place of business within the community, Swedish legislation will not refuse such a merger.[27]

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have also provided so for domestic mergers.

Swedish law has not fully transposed this option and does not provide for the possibility of national authorities preventing cross-border mergers on the grounds of

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[22] Ibid, para. 16.17.
[23] Ibid, para. 16.06; Government bill, Prop. 2007/08:15, J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 65.
[24] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.08; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 68-69.
[25] Art. 23:36 CA 2005.
J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 182.
[27] Chapter 23, 36 §, first subparagraph, CA.

public interest.[28]

National tax authorities can postpone a given merger, however, if the merger will hamper the auditing of the company and on the grounds of public interest.[29]

The national tax authorities (*Skatteverket*) can oppose the merger, and can postpone a given merger for one year, and during that time the merger can't be handled or registered at the Swedish Companies Registration Office. If there are particular reasons the duration can be extended for three months at a time.[30]

However, public interest is not defined in the Swedish national merger law; it is defined within the tax law and the regulations for the national tax authority on the basis of decisions on the European level.[31]

c. The protection of creditors in Article 4(2)

Swedish law has adopted protections for creditors: known creditors whose claims pre-date the merger have the right to receive notice of the merger, including the fact that they are entitled to oppose it.[32]

The protection period starts when the general assembly approved the merger plan and the plan is effective for all merger companies; all known creditors shall be informed about the merger plan and their right to object regarding the transposition.[33] There are no possible time limits defined in Swedish national law.

The procedural steps begin when the Companies Registration Office summons the creditors before approving applications to give effect to the cross-border merger, and at that point creditors may oppose the merger by requiring claims to be settled before the merger, or security for their claim, and have the matter referred to court in the event of a dispute.[34]

This option also exists for mergers within the Member State, and is the same procedure as for cross-border mergers.[35]

Creditors can block the merger until they are satisfied.[36] Once the opposing creditors have been satisfied, the court can approve the merger.[37]

[28] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.18.
[29] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 113.
[30] Chapter 26, 21 a § second subparagraph (1) CA.
[31] Ex. Case C-212/99 and case C-411/03.
[32] Art. 23:19, 22 CA. Government bill, Prop. 2007/08:15, J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 74; Art. 23:36 CA 2005.
[33] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 76.
[34] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 186.
[35] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 76.
[36] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 186.
[37] Art. 23:22–24 and Art. 23:36 CA 2005.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides each Member State with the option to adopt protections for minority shareholders.

The procedural steps begin when the Companies Registration Office summons the creditors before approving applications to give effect to the cross-border merger, and at that point creditors may oppose the merger by requiring claims to be settled before the merger, or security for their claim, and have the matter referred to court in the event of a dispute.[38]

This option also exists for mergers within the Member State, and is the same procedure as for cross-border mergers.[39]

Creditors can block the merger until they are satisfied.[40] Once the opposing creditors have been satisfied, the court can approve the merger.[41]

e. The protection of employees in Article 4(2)

Swedish national law did transpose the protection of employees as dictated in Article 4(2) of the CBMD, with a new law, *Lag* (2008:9) *om arbetstagares medverkan vid gränsöverskridande fusioner* (The Act on Employees' Participation in Conjunction with Cross-Border Mergers), which was transposed on January 10, 2008.

The government proposal contains a definition of the concept of employee participation corresponding to the definition in Directive 2001/86/EC supplementing the Statute for a European Company regarding employee involvement.[42] The government proposes that it should be clear that employee participation is to take place at board level because that is where it will take place when the merging company has its registered office in Sweden. The members of the special negotiating body are appointed by the local union(s) bound by collective agreement with the participating companies, involved subsidiary companies or involved affiliates in Sweden. If none of these companies is bound by collective agreement with any trade union, the members shall be appointed by the most representative local union. The local unions can agree upon another order. If none of the workers are union members, the special negotiating body is appointed by the workers in the companies in Sweden.[43]

The Swedish government does not intend to make use of the opt-out option.[44]

The Act on Employees' Participation in Conjunction with Cross-Border Mergers applies

[38] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 186.
[39] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 76.
[40] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 186.
[41] Art. 23:22–24 and Art. 23:36 CA 2005.
[42] Government bill 2007/08:20, p. 49.
[43] Government bill 2007/08:20, p. 61.

to subsequent domestic mergers within three years of the registration of the cross-border merger. The act on employee participation in conjunction with cross-border mergers does not apply when the cross-border merger results in the formation of an SE or an SCE.[45]

According to the Act on Employees' Participation in Conjunction with Cross-Border Mergers, managers have a duty to supply information on the progress of the merger. Furthermore, this duty also implies that management is obliged to present information on changes within the corporate structure that might affect the composition of the special negotiating body.[46] The reference provisions in the act are to be applied upon agreement of the parties. These provisions are also to be applied if one-third of the workforce has a right to participation, or if the participating companies have decided to refrain from negotiations on an agreement on worker participation. The special negotiating body has the issue of the introduction of participation in the merging company at its disposal if less than one-third of the workers in the participating companies are included in participation; the proportion of workers is to be calculated by establishing the amount of workers included in participation by agreement or by legislation.

The Directive does not state at what point the special negotiating body must decide on the application of the reference provisions on worker participation, should the SNB wish to make such a decision. The issue of worker participation must be resolved before registration of the merger. If the special negotiating body, in this case, refrains from deciding on the application of the reference provisions the act will not be applied in the merging company.[47] The reference provisions are also applicable when the participating companies have decided to refrain from negotiating an agreement on worker participation.

The same protection exists for domestic mergers.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose of informing the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

[44] Government bill 2007/08:15, p. 66
[45] Government bill 2007/08:20, p. 42.
[46] According to the travaux préparatoires, Government bill 2007/08:20, p. 111.

Articles 5(a) through (l) of the CBMD have been transposed into Swedish national law.[48] As to Article 5(e), it should be mentioned that special conditions affecting the entitlement are not mentioned as in the Directive.

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Sweden has transposed Article 6(1) of the CBMD, and follows the one-month publication limit.[49]

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

This amendment has been transposed; Sweden transposed the changes regarding the publication requirements on November 1, 2011.[50]

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Regarding Article 6(2) of CBMD, Swedish law requires publication of the same information as applications for registration, except for the merging companies' addresses, in the Swedish official gazette.[51]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal

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[47] Government bill 2007/08:20 p. 93, p. 114.

[48] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16, 27-31.; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 79 et seq.

[49] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 84 et seq., p. 185; Government bill, Prop. 2007/08:15; Chapter 27, 3 §; Chapter 23, 15 §, third subparagraph, first indent, CA.

[50] Government bill, Prop. 2010/11:147, p. 17 et seq. Changes implemented through Lag (2011:1046) om ändring i aktiebolagslagen (2005:551); Changes to be found in Chapter 23, 16 § CA.

[51] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.35-36; Chapter 27, 3 § CA.

and economic aspects of the merger and must be made available to shareholders and employees, not less than one month before the date of the general meeting referred to in Article 9

Article 7 of the CBMD has been transposed,[52] and the wording is similar in Swedish national law. One additional rule is that copies of the report shall be sent to stakeholders for free if they request them.[53]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

Article 8(1) of the CBMD has been transposed into Swedish national law, with the one-month requirement in place.[54]

b. The independent expert

An independent expert can be an authorized or an approved public accountant or registered public accounting firm. [55]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

Article 8(2) of the CBMD has been transposed into Swedish national law; a single expert report for all the merging companies can be requested. [56]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Article 8(3) of the CBMD has been transposed into Swedish national law[57] and Swedish law goes further to require the inclusion of the management report in the independent

[52] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.40; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 87 et seq.

[53] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 87 et seq.; Chapter 23, 43 § CA.

[54] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.50,53; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 91 et seq.

[55] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.46.

[56] Ibid, para. 16.54; Chapter 23 s 40(2) Companies Act; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 91 et seq.

[57] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.51.

expert report,[58] along with the independent expert's opinion on whether the merger is likely to jeopardize the payment of debts to the acquirer's creditors or, in case of a merger by formation, whether the value of the targets' assets and liabilities is equal to at least the share capital of the new company.[59]

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

This provision of Article 8(3) of the CBMD has been transposed into Swedish law; under Swedish law, the independent expert is entitled to the cooperation of the merging companies in obtaining the information necessary for the report.[60]

If the company does not provide or aggravate access to the required information necessary for the discharge of the independent expert's duties, he or she cannot deliver the report according to the Companies Act, and the consequence must be that the fusion plan cannot be approved by the general assembly and therefore not registered.

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all the merging companies can unanimously decide to waive the expert reports.

Swedish national law has diverged from Article 8(4) of the CBMD in its transposition; it only allows merging companies to waive certain provisions, rather than the entire report.[61] The information about whether the merger is likely to jeopardize the payment of debts to the acquirer's creditors or, in case of a merger by formation, whether the value of the targets' assets and liabilities is equal to at least the share capital of the new company is required. [62]

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) or in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

Regarding the exemptions in Articles 15(1) and (2) of the CBMD, Sweden has

[58] Chapter 23 s 40(1) Companies Act.
[59] Chapter 23 s 11(2) Companies Act.
[60] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.51-52; Chapter 23 s 13 Companies Act.
[61] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.54; Chapter 23 s 11(3) Companies Act.
[62] Chapter 23 s 11(3) Companies Act. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 91-92.

transposed the exception for a wholly owned subsidiary[63] but not a 90% subsidiary.[64]

h. Further exemptions in Swedish law

There are no further exemptions in Swedish law.[65]

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Regarding Article 9 of the CBMD, Swedish law requires approval of the draft CDTMs by the general meeting of shareholders of the merging Swedish company.[66]

a. Procedural requirements including majority, quorum, timing and notarization

Procedural requirements include the shareholder meeting, which must be at least one month after the public announcement of the registration of the CDTM.[67] Swedish law deviates from Article 6(1) of the CBMD in that if all participating companies are private limited liability companies, the minimum period is reduced to two weeks.[68] There are no specific requirements about notarization.[69] There must be a protocol of the shareholder's meeting.[70] The CDTMs must be approved by a two-thirds majority of each class of shares represented at the general assembly.[71]

When a Swedish public limited liability company target is being acquired by a private company, the target's approval of the CDTMs must be unanimously supported by all shareholders at the meeting, who must represent at least 90% of all shares of the company.[72]

[63] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.57; Chapter 23 s 51 Companies Act.
[64] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.57; Art 15(2) CBMD. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 107-108.
[65] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 107-108.
[66] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 97 et seq., p. 185; Government bill, Prop. 2007/08:15.
[67] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.61; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 98 et seq.
[68] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.61; Chapter 23 s 15(3) Companies Act. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 98 et seq.
[69] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.62; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 98 et seq.
[70] J. Bertil Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 98 et seq., p. 185; Government bill, Prop. 2007/08:15.
[71] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.63-64; Chapter 23 s 17(1)–(2) Companies Act. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 98 et seq.
[72] Chapter 23 s 17(3) Companies Act.

b. Amendment of CDTMs by shareholders

Shareholders can only approve or reject the CDTMs.[73]

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

This provision has been transposed into Swedish national law to waive approval of the merger by a general meeting under certain conditions, subject to an exception in case of a timely demand by a 5% or greater shareholder for CDTM approval within two weeks of the public announcement of the CDTMs.[74]

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Article 15(1) of the CBMD has been transposed into Swedish national law; when a wholly owned subsidiary is merging into its parent, Swedish law does not require shareholder approval at the level of the subsidiary.[75] The scope of CA 2005 is similar to the scope of the CBMD.

No other approval is required than that for regular mergers.[76]

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Regarding Articles 10(1) and (2) of the CBMD, a pre-merger certificate will be issued to companies that have complied with Swedish law in transposing the CDTMs.[77] A certificate will not be issued if there is a challenge to the merger pending in a Swedish court.[78]

b. National authority has been designated to scrutinize the legality of the merger

The Swedish Companies Registration Office (*Bolagsverket*) has been designated to

[73] Chapter 23 s 18 Companies Act.
[74] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.69; Chapter 23 s 15(2) Companies Act.
[75] Art. 23:51 CA 2005.
[76] Chapter 23, 18-35, CA. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 108.
[77] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.91.
[78] Art. 23:46 CA 2005. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 100 et seq.

issue pre-merger certificates.[79] The Swedish Companies Registration Office does a formal as well as a substantive check on the fusion plan and all the material that has to be handed in, according to the Company Act.

c. Transposition of Article 10(3)

Article 10(3) CBMD regulates the situation where the law of the Member State of one of the merging companies provides for the possibility of scrutinizing and amending the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders, and the law applicable to other merging companies does not provide for such a situation. Particularly, Article 10(3) regulates whether the competent authority can issue the pre-merger certificate regardless.

Article 10(3) has not been transposed in Sweden.[80]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Regarding Articles 11(1) and (2) of the CBMD, Swedish law provides for a second verification of the merger's legality.[81]

b. The national authority has been designated to scrutinize the legality of the merger

The Swedish Companies Registration Office has been designated to scrutinize the legality for the second verification.[82] The check appears to be both formal and substantive, because it contains a catch-all provision regarding any other impediments to the merger.[83]

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 of the CBMD requires entry into effect no earlier than the second verification is carried out,[84] and under Swedish law a cross-border merger enters into effect on

[79] J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 185.
[80] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.92; Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 102.
[81] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.94.
[82] Ibid.
[83] Ibid, para. 16.95-99; Chapter 23 s 48(2) Companies Act.
[84] Article 12 CBMD.

the date that the company is registered for the second verification,[85] so it would appear that Article 12 of the CBMD has been transposed into Swedish national law.[86]

b. Date the cross-border merger takes effect

The cross-border merger takes effect in Sweden on the date that the registration for the second verification is completed with the Companies Register.[87]

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that as long as it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

Regarding Article 13 first sentence, Swedish national law requires no additional publication or deregistration of Swedish acquiring companies, and requires foreign acquirers to notify the Companies Register immediately when a merger takes effect.[88]

b. Transposition of Article 13 second sentence

Swedish national law has transposed Article 13 second sentence. The Swedish Companies Registration Office shall deregister the company as soon as the foreign authority has notified them that the merger is registered and approved, and the company will have its seat in the other Member State.[89]

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Regarding Article 14 of the CBMD, paragraphs 1 through 4 appear to have been transposed, but paragraph 5 does not.[90]

All other required consequences are transposed, many already through the third directive, Article 19.2, and are found in Chapter 23, Section 26 of the CA.[91]

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[85] Chapter 23 s 49(1) Companies Act.

[86] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 102 et seq.

[87] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.101; Chapter 23 s 49(1) Companies Act.

[88] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.104-105.

[89] Chapter 23, § 47, CA. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 103.

[90] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.103.

[91] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 104.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure in two instances: i) where a merger with a whole owned subsidiary is carried out or ii) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

Article 15(1) of the CBMD has been transposed into Swedish national law. [92] The scope of the CA 2005 is similar to the scope of the CBMD.

Article 15(1) further provides that in a merger with a wholly owned subsidiary the independent expert report and 'documents necessary for scrutiny' shall not apply to the extent that the laws of the Member States of the merging companies do not so require.

Sweden has transposed the exemption from the independent report requirement for wholly owned subsidiaries, but not for 90% subsidiaries.[93]

Other than the independent expert report, Sweden exempts the requirements for the fusion plan, which are simplified and not as wide-ranging as regular fusions. The expert reports are required but can be narrowed down to cover the risks to the creditors and define the share capital in respect of the merging companies.[94]

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some Member States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The EPPC provides for the establishment of a special employee negotiating body with the right to appoint members to the company's board of directors or another

[92] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.16; Chapter 23 s 51 Companies Act. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 107 et seq.
[93] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.57. Art 15(2) CBMD. Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 107 et seq.
[94] Government bill, Prop. 2007/08:15; J. B. Anderson, in D. Van Gerven, *Cross-Border Mergers in Europe: Volume II*, p. 108.

administrative or supervisory body and to propose or dismiss other members of the company's board.[95]

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

Regarding Article 16(1) of the CBMD, Sweden has transposed the provision that employee participation rules will be applicable where the company resulting from the merger has its registered office.[96]

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

The three exceptions of Article 16(2) of the CBMD are not transposed in Swedish law; instead, the regulations for the SE company in Articles 16(3), (4), and (7) have been modified and transposed.[97] No threshold, as laid down in Article 16(2), is proposed. The same rules should apply to all companies, no matter what size they are.[98]

It is suggested that the new act should apply to cross-border mergers if any of the merging companies are subject to the application of provisions on employment participation.

d. Transposition of Article 16(3)(e)

Regarding Article 16(3) of the CBMD, Sweden has increased the percentage to 33.3%.[99]

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(4)(a), (b), and (c) have been transposed into Swedish national law

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16

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[95] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.156-158.
[96] Ibid., para. 16.176.
[97] Government bill 2007/08:20, p. 50.
[98] Government bill 2007/08:20, p. 39.

CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years employee participation is protected also in the event of subsequent domestic mergers.

Regarding Article 16(7) of the CBMD, the EPPC applies if an acquirer merges with a Swedish company within three years of the initial cross-border merger.[100]

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 of the CBMD has been transposed into Swedish national law.[101]

1.18. Additional

a. National case-law on provisions transposing the CBMD

No national case law has been found.

b. Language requirements

Swedish law imposes a requirement for a Swedish translation by an authorized or otherwise comparably certified translator for documents that are submitted in a language other than Swedish, but this requirement may be waived by the Swedish Company's Registration Office.[102]

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

Swedish law imposes a requirement for a Swedish translation by an authorized or otherwise comparably certified translator for documents that are submitted in a language other than Swedish, but this requirement may be waived by the Swedish Company's Registration Office.[103]

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[99] § 29 The act on employees' participation in conjunction with cross-border mergers.
[100] P. Hedman et al., in J. Vermeylen and I. Van de Velde, *European Cross-Border Mergers and Reorganisations*, para. 16.157.
[101] Ibid, para. 16.118.
[102] Chapter 23 s 42(2) Companies Act.
[103] Chapter 23 s 42(2) Companies Act.

Transposition of the Cross-Border Mergers Directive into UK Law

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1. Transposition of the Cross-Border Mergers Directive into UK Law

The CBMD was transposed in the United Kingdom through the Companies (Cross-Border Mergers) Regulations 2007[1] (the UK Regulations). The UK Regulations were laid before Parliament on October 16, 2007, and came into force on December 15, 2007.[2]

The UK Regulations were essentially designed to address the requirements of the CBMD and create a comprehensive framework on cross-border mergers between UK companies and companies of other Member States. To transpose the requirements of the CBMD the UK Regulations also incorporated minor amendments to other legal provisions.[3]

The UK Regulations were amended according to the requirements of Directive 2009/109/EC. Most of these amendments are designed to lessen the administrative compliance burden associated with cross-border mergers, e.g. by providing a list of circumstances where an expert report is not required (Regulation 9A) and allowing the draft merger terms to be published on a company website where certain conditions are met in lieu of having such terms published in the Gazette through the Registrar of Companies (Regulation 12A).

Prior to the transposition of the CBMD, UK law did not have special rules on cross-border mergers. There was no practically viable mechanism to transfer all the assets and liabilities of an overseas company into a surviving UK company. Cross-border mergers had to be structured through private contracts.[4] This, however, made the process burdensome and expensive because the transferor—i.e., the company whose assets were being "merged" into the other company, the transferee—would have existing contracts with third-parties, and, unless such contracts contained terms to the contrary, such third-parties might demand a renegotiation of the terms (in their favor) in exchange for agreeing to the novation.[5]

Domestic mergers in the UK involving a public company were (and still are) governed by the Companies Act 2006 (CA 2006)[6] and, in some instances, also by the City Code

[1] SI 2974/2007; Amendments to the UK Regulations were implemented through the Companies (Reporting Requirements In Mergers and Divisions) Regulations 2011 (SI 1606/2011).
[2] UK Regulations, http://www.legislation.gov.UK/UKsi/2007/2974/pdfs/UKsi_20072974_en.pdf (last visited 21 August 2013).
[3] UK Regulations, r63 – 66.
[4] N. Parden et al., 'Cross-Border Reorganisations in the UK', in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations* (Oxford University Press, New York 2012), p. 809.
[5] I.e., agreeing that the benefits and obligations arising under the contract be transferred to the transferee.
[6] Parts 27 and 28 of the Act address domestic mergers and divisions of public companies, takeovers and other matters.

on Takeovers and Mergers.[7] Domestic mergers between private companies are governed by private contract.

1.1. Article 1 – Scope General

Article 1 CBMD outlines the general scope of the Directive and the kind of mergers to which the Directive applies.

Article 1 CBMD provides for the general scope of the Directive and gives a broad definition of the types of merger to which the Directive applies.

The CBMD in Article 2(2) defines three kinds of merger. The UK Regulations follow the CBMD's definition. The three kinds of cross-border merger are (i) when one company (the "transferor") dissolves, without going into liquidation, and all its assets are transferred to an existing company (the "transferee"); (ii) when two companies dissolve without going into liquidation and form a new company; and (iii) when a wholly owned subsidiary is dissolved and absorbed by its parent company. Although the directive uses the words "shall apply to mergers"[8] the UK Regulations are a voluntary framework.[9] Thus, the merging companies may choose to conduct a cross-border merger under the ordinary rules of contract and company law. Companies desiring to merge may wish to avoid the UK Regulations in certain circumstances, e.g. to avoid the employee participation and protection provisions that the UK Regulations prescribe.

1.2. Article 2 – Definition of Limited Liability Companies and Merger

a. General transposition of Article 2(1)

Article 2(1) CBMD defines of the term 'limited liability companies'.

The UK Regulations do not specifically define the term "limited liability company," but do define the terms "EEA company"[10] and "UK company"[11] (Regulation 3(1)). It is noteworthy that the definition of a "UK company" specifically excludes companies limited by guarantee without a share capital.

b. List of companies that can carry out a cross-border merger under UK law

The CBMD does apply to cross-border mergers between "limited liability companies".

[7] Broadly speaking, where the company being acquired is a public company subject to the City Code.
[8] Ibid.
[9] See Explanatory Memorandum to the Companies (Cross-Border Mergers) Regulations 2007 (SI 2974/2007).
[10] "... a body corporate governed by the law of an EEA State other than the United Kingdom."

The UK Regulations use the term "UK company," defined as a company "within the meaning of the Companies Acts," instead of "limited liability company". The former term is defined in sections 1 and 2 of CA 2006. The definition is broad. It includes companies formed and registered under CA 2006 (whether public or private, and limited or unlimited). The definition in the UK Regulations is vague, however. The term "the Companies Acts" includes Part 34 of CA 2006 ("companies incorporated outside the United Kingdom"). Section 6 of CA 2006 is concerned with "community interest companies." It is doubtful, however, that the UK Regulations apply to companies incorporated outside the United Kingdom" – even where registered in the UK under CA 2006 – because the directive does not apply to companies "formed in accordance with the law" of a non-member state. It seems likely that the Regulations apply to "community interest companies", however, as these are limited liability companies. Although limited liability partnerships are not companies they can conduct cross-border mergers under the UK Regulations.[12] European companies are, arguably, covered if formed and registered in the United Kingdom under CA 2006. Finally, Chapter 1 of Part 33 CA 2006 concerns certain companies which are "registered but not formed" under CA 2006 or "incorporated in the United Kingdom but not registered under this Act [CA 2006]" (unregistered companies).[13] Old companies formed under 19th century statutes, such as the "joint stock company" are arguably entitled to benefit from the provisions of the UK Regulations, and Regulation 5 clarifies that the Regulations "apply to an unregistered company as they apply to a UK company."
One of the properties of a "limited liability company" is that it has "share capital".[14] As a "company limited by guarantee without a share capital" does not, it is excluded under the UK Regulations.[15]

c. General transposition of Article 2(2) CMBD

Article 2(2) CBMD provides for a definition of the term 'merger' which can be found in Article 1 CBMD on the general scope of the Cross-Border Mergers Directive.

Regulation 2 of the UK Regulations uses the term "cross-border merger," which broadly follows, and expands on, the CBMD definition.

d. Rules on cash payment

The CBMD definition of "merger" includes a 10 percent limit based on nominal value of the cash consideration that the members of a company may receive (in addition to

[11] "… a company within the meaning of the Companies Acts (see section 1 of the Companies Act 2006) other than – (a) a company limited by guarantee without a share capital [...] or a company being wound up.".
[12] The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, Part 10 (SI 2009/184).
[13] CA 2006, s1(2).
[14] CBMD, Art 2(1)(b): "a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it...".

shares) for agreeing to the merger. The UK Regulations do not contain such a limitation but the limitation is likely to apply if the law of the other company merging stipulates so.

e. CBMs and companies in liquidation

The UK Regulations expressly exclude companies in liquidation from the scope of the enactment.[16]

f. Geographical scope

The UK Regulations do not apply to cross-border mergers with non-EEA companies.[17]

g. National legislation on cross-border divisions, seat transfers and other cross-border restructurings

There is no provision in UK law expressly concerned with cross-border divisions or other cross-border restructuring. However, there are various other provisions that may be used to effect divisions or restructuring of domestic companies. For example, Section 27 of CA 2006 concerns mergers and divisions of public limited companies although it is seldom used. Section 26 contains provisions on arrangements and reconstructions.

Seat transfers are somewhat more complicated, because there are head offices and registered offices, as well as inbound and outbound transfer possibilities. Although the law does not expressly provide for such movements, it appears that under prevailing case law the EU's right to establishment would allow the transfer without reincorporation into the UK of a head office alone if it is registered as a UK establishment. It is not currently accepted that a company can relocate a registered non-head office without incorporating in the UK; however, the right to establishment would seem to compel the UK to allow such relocations.[18] Outbound transfers of registered office, similarly, are not allowed under current UK law, but might be compelled under EU law. Outbound head office transfers are allowed, but the office would still be bound by UK law under which it is incorporated.[19]

If the above is true, such restructurings would be based on something other than the CBMD, because they are based on applying domestic restructuring law to cross-border transactions based on EU principles. Such restructurings, if they are possible now, may have been possible since the Companies Act 2006 came into effect, or even earlier, since there were similar provisions in effect under the previous UK regime, Section 427A, Companies Act 1985 (which applied to mergers and divisions of public

[15] Art 1, CBMD.
[16] R3(1).
[17] UK Regulations, R. 2.
[18] N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 838 (17.142-145).

companies).[20] However, it was not until the European Court of Justice's decision in *SEVIC*[21] (2005) that the right of establishment was applied in this context.

There is no fast-track route to implement a cross-border merger, for instance as part of a group reorganisation where the transferee and transferor companies are both wholly-owned and have no (or no extra-group) creditors. While the CBMD and the UK Regulations seem, theoretically, to permit the merging companies to avoid the two month waiting period where no members' or creditors' resolution is required, in practice the English High Court cannot sanction avoiding the two month waiting period because there is no express exemption from it and because the timetable does not work without the shareholders' meeting.

1.3. Article 3 – Cooperative Societies and Investment Companies

a. General transposition of Article 3(1) CBMD

Article 3(1) CBMD provides that the CBMD also applies to mergers where the law of one of the state concerned allows the cash payment to exceed 10% of the nominal value (or accounting par value) of the capital of the company resulting from the cross-border merger.

Articles 2(2)(a) and (b) of the CBMD limit the cash payment to "10% of the nominal value ... of those securities or shares." Article 3(1) of the CBMD allows Member States to derogate from that limitation, and the UK Regulations do so.

b. General transposition of Article 3(2) CBMD

Article 3(2) CBMD deals with the position of cooperative societies. Article 3(2) CBMD deals with the position of cooperative societies. The UK Regulations exclude cooperative societies because they are not "a company within the meaning of the Companies Acts".[22] European cooperative societies are, arguably, excluded for the same reason.

c. General transposition of Article 3(3) CBMD

Article 3(3) CBMD deals with the position of investment companies. Article 3(3) CBMD deals with the position of investment companies. Under UK law investment companies are companies "within the meaning of the Companies Acts," and therefore come within the UK Regulations. The UK Regulations may therefore not comply with the CBMD in this respect.

[19] Ibid., p. 839 (17.146 - 149).
[20] Available at www.legislation.gov.UK/UKpga/1985/6/pdfs/UKpga_19850006_en.pdf (last visited 21 August 2013).
[21] *SEVIC Systems AG v. Amtsgericht Neuwied*, (2005) ECR I-10805.
[22] See 2.b., above.

1.4. Article 4 – Stakeholder Protection

a. Transposition of Article 4(1)(a)

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

Article 4(1)(a) provides that cross-border mergers shall only be possible between types of companies that may merge under the national law of the relevant Member States.

The UK Regulations do not contain any provisions specifically addressing Article 4(1)(a) of the CBMD. However, Regulation 16(1)(a) states that the court may make an order approving the completion of a cross-border merger if (among other matters) "the transferee company is a UK company," which by definition implies that the transferee is a type of company "which may merge under the national law" of the UK.

b. Opposition by national authorities in Article 4(1)(b)

In Article 4(1)(b) the CBMD provides Member States with the possibility of enabling national authorities to oppose a cross-border merger on public interest grounds if they have also provided so for domestic mergers.

c. The protection of creditors in Article 4(2)

Article 4(2) CBMD provides Member States with the option to adopt protections for creditors, and debenture and security holders.

Article 4(2) of the CBMD is given effect through Regulations 6 – 15.

The main protection for creditors in the UK Regulations is the right of creditors to petition the court to order a meeting of creditors under Regulation 11. If the court so orders, then the merger can only take place if the draft terms of merger are "approved by a majority in number, representing 75 percent in value, of the creditors ... present and voting" (Regulation 14).

The UK Regulations do not stipulate any explicit time limit as to when creditors must petition the court for a creditors' meeting. The creditors may make such a petition at the time the company applies to the court for approval of pre-merger requirements under Regulation 6, or at a later time, provided the application is made before the merger has been approved or taken effect.[23]

Under Regulation 12(1) of the UK Regulations, the directors of the UK company must deliver certain documents to the registrar "not less than two months before the date of the first meeting of the members," and the registrar must publish such documents in the Gazette or in accordance with Section 1116 of CA 2006. This may give some

indication of how long the process would take.

The creditors may petition the court for a creditors' meeting and continue with the directors of the UK company delivering documents to the registrar and the documents being published.

The procedure under the UK Regulations is broadly similar to the procedure under CA 2006.[24]

Creditors have the power to block the merger by voting against it at a meeting. If the meeting is ordered the merger can only take place if the draft terms of merger are "approved by a majority in number, representing 75% in value, of the creditors... present and voting" (Regulation 14).

Whilst Regulation 11 allowing creditors to seek a meeting has not been used, the availability of this remedy gives rise to significant uncertainty for cross-border mergers as the merging parties may, depending on the circumstances of the merger, need to consider who might object to the merger proceeding.

d. The protection of minority shareholders in Article 4(2)

Article 4(2) CBMD provides each Member State with the option to adopt protections for minority shareholders.

The UK Regulations do not contain provisions specifically aimed at protecting minority shareholders,[25] but UK company law provides some protection, e.g. through the rules against fraudulent or oppressive resolutions.[26] Equity "imposes on majority shareholders an obligation not to use the powers attached to their shares to obtain a benefit at the expense of the company or the minority".[27] Any resolution in pursuance of the UK Regulations would be subject to such rules. The court in exercising its discretion to approve the merger at the sanctions stage would consider the position of minority shareholders.

e. The protection of employees in Article 4(2)

Article 4(2) CBMD provides that Member States may protect employees in ways other than those required by Article 16 of the CBMD. In the UK, there are employment law provisions designed to protect employees in relation to business transfers, e.g. the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).[28] TUPE applies to "a transfer of an undertaking, business... situated... in the United Kingdom

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[23] It is not clear from the Regulations whether the court could review a decision to approve a merger in the time period between the approval and the merger taking effect.

[24] Part 27, CA 2006; N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 832 (17.112).

[25] Ibid., p. 832.

[26] See e.g. *Arrow Nominees Inc. v. Blackledge* [2000] 2 BCLC 167, at 197 *per* Lord Justice Chadwick.

[27] Mayson, French & Ryan, *Company Law*, Oxford University Press, 24th edition, at 384.

[28] See N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 853 (17.210).

to another person where there is a transfer of an economic entity which retains its identity" (Regulation 3(1)(a)). TUPE usually applies to mergers where there is a "transfer of an economic entity which retains its identity"—so it may be applicable to cross-border mergers.[29] TUPE creates certain obligations for employers to consult employee representatives prior to a transfer and contains certain protections of employee rights.

1.5. Article 5 – Common Draft Terms of Cross-Border Mergers

Article 5 CBMD stipulates that the management or administrative organs of the merging companies have to provide for so-called 'CDTMs'. These have the purpose of informing the shareholders, reflect the results of the negotiations between the merging companies and provide a basis for the other required documents, such as the management report. Article 5 CMBD provides for certain particulars that have to be included.

Article 5(a) through (l) of the CBMD has been transposed almost verbatim into the UK Regulations (Regulation 7), with some minor changes.

First, the UK Regulations additionally require disclosure of the law under which the transferor and transferee companies are formed.[30]

The UK Regulations also use the term "rights and restrictions" in place of "rights" in subsection (g).[31]

Second, the UK Regulations omit the disclosure in Article 5 of the CBMD of special advantages granted to the "supervisory or controlling organs of the merging companies." The UK Regulations do require disclosure of benefits to the other named personnel, namely the independent expert, and "any director."[32]

1.6. Article 6 – Publication Procedure

a. Transposition of Article 6(1)

Article 6(1) CBMD provides that the CDTMs have to be published in accordance with Article 3 of the Directive 68/151/EEC (now Directive 2009/101/EC) at least one month prior to the general meeting deciding on the merger.

Article 6(1) of the CBMD has been transposed into the UK Regulations. The UK Regulations also delineate the specific procedures under which UK companies must file documents with the registrar (2 months prior to the meeting) and the registrar's

[29] The Transfer of Undertakings (Protection of Employment) Regulations 2006, r. 3(4)(b) and (c).
[30] UK Regulations, r7.
[31] UK Regulations, r7(g); Article 5(g) CBMD.
[32] UK Regulations, r7.

obligations concerning having such documents published in the Gazette.[33]

However, it is important to point out that the procedure concerning publication of the CDTMs set out in Regulation 12 seems to be conditional upon the court having made an order under Regulation 11.[34] Regulation 11 does not require the court to order a meeting; rather, it "may" do so "on an application under this regulation.[35] If no party listed in Regulation 11(2) makes such an application, or if the court refuses to make an order, then it is uncertain whether the publication requirements in Regulation 12 would apply. Regulation 13, on the other hand, seems to assume that the meeting will take place ("the draft terms must be approved by"), particularly when contrasted with the wording of Regulation 14 ("If a meeting of creditors ... is summoned under regulation 11").

With all due respect to the draftsman behind the UK Regulations, on this point they could have been clearer. If the publication requirements are triggered by the Regulation 11 court order, and if a meeting under Regulation 13 must take place irrespective of whether an order is made under Regulation 11, then in a situation where a court does not make such an order the regular provisions concerning members' meetings under CA 2006 and the company's articles of association would apply to the meeting. Under those rules a publication in the gazette would not, generally, be made, but members would have to be informed of the meeting. In spite of their unclear drafting, therefore, the UK Regulations may still be compliant with directive ("shall be published in the manner prescribed by the laws of each Member State") in this respect.

b. The amendment of Article 6(1) by Article 4(1) of Directive 2009/109/EC

Article 4(1) of Directive 2009/109/EC has amended Article 6(1) CBMD and provides for an exemption from the requirements under Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC). For example, the merging companies can be exempted from certain publication requirements if they make the CDTMs available on their website free of charge.

In the UK Regulations this amendment has been transposed rather simply through Regulation 12A, the effect of which is, broadly, that the CDTMs may be published on the UK company's website instead of by the registrar. However, the registrar must still publish a notice about the merger, which must include the URL of the website containing the CDTMs.

[33] UK Regulations, r12.
[34] "... must deliver to the registrar of companies ... of every meeting summoned under regulation 11 ..." (r12(1)).
[35] The UK Regulations, r11.

c. Transposition of Article 6(2)

Article 6(2) CBMD provides that certain specificities have to be published in the national gazette of the Member State.

Regarding Article 6(2) of the CBMD, the UK Regulations require, where a court order to that effect has been made, that a notice be published "in the Gazette" or in accordance with regulations under Section 1116 of CA 2006.[36] The notice must include the matters listed in Regulation 12(5):

(a) the date of receipt of the documents, referred to in Regulation 12(1);

(b) the particulars referred to in paragraph (1)(c), including the name, registered office, legal form, registered number, and other such particulars, of the company;

(c) in relation to each UK merging company, a statement that information related to the company is kept in the UK register;

(d) a statement that Regulation 10 (inspection of documents) requires copies of the draft terms of merger, the directors' report and, if there is one, the independent expert's report to be kept available for inspection; and

(e) the date, time, and place of every meeting summoned under Regulation 11 (power of court to summon a meeting of members or creditors).

Missing from the UK Regulations is the provision in Article 6(2)(c) of the CBMD concerning disclosure of arrangements made to protect creditors and minority members.[37]

1.7. Article 7 – Management Report

Article 7 CBMD requires the management or administrative organ of each merging company to create a management report. This report is required to explain the legal and economic aspects of the merger and must be made available to shareholders and employees not less than one month before the date of the general meeting referred to in Article 9.

Regulations 8(2) and (3) of the UK Regulations set out what information the report required by Article 7 of the CBMD must contain. The UK Regulations follow, broadly, the language of the directive, but add that the directors must disclose "any material interests" and the "effect of those interests" on the merger. Further, where the merger is expected to affect debenture holders, the report must contain the additional information set out in Regulation 8(3).

The UK Regulations require the management report to be given to employees or

[36] UK Regulations, r12(3).

[37] N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 818 (17.36).

employee representatives no less than two months before the date of the general meeting (as opposed to the CBMD's one-month deadline).[38] Additionally, if employees or representatives issue an opinion on the directors' report at least one month prior to the shareholders meeting, then such an opinion must be appended to "every copy of the report.[39] The directors' report must be made available to shareholders one month prior to the meeting.[40]

1.8. Article 8 – Independent Expert Report

Article 8 CBMD requires an independent expert report to be drawn up for the shareholders in order to receive independent advice on the terms of the merger.

a. Transposition of Article 8(1)

Article 8(1) CBMD requires that such a report is drawn up for each merging company and made available not less than one month before the date of the general meeting.

The UK Regulations are similar to those of Article 8(1) of the CBMD in terms of the requirement of an expert report and the deadline for when the report must be made available.[41] By Regulations 9(1)(a) and 9A, no expert report is necessary if the merger is a "cross-border merger by absorption of a wholly-owned subsidiary" or if it is "a merger by absorption where 90% or more ... of the relevant securities of the transferor company... are held by... the transferee company".[42] These provisions are in accordance with the "simplified formalities" provisions in Article 15 of the CBMD.

b. The independent expert

The UK Regulations refer to sections 1212 and 1214 of CA 2006, which consider a person's eligibility for appointment as a statutory auditor. An "independent expert" under Regulation 9(7) is a person who is so eligible and "is independent." The expert may be an individual or an "entity," provided he (or it) is a member of a recognized body.[43]

c. Transposition of Article 8(2)

Article 8(2) CBMD provides for the possibility to provide one expert report for all companies under certain conditions.

The UK Regulations contain a similar provision to that of Article 8(2) of the CBMD, where the expert has been appointed "for all the merging companies by the court" or

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[38] UK Regulations, r 8(5).
[39] R 8(6).
[40] R 10(2).
[41] See generally, r9.
[42] In the latter case the conditions in r9A(3) and (4) must also be satisfied.
[43] S1212, CA 2006.

by the "competent authority of another EEA State.[44]

d. Transposition of Article 8(3)

Article 8(3) CBMD provides that certain particulars from Article 10(2) of Council Directive 78/855/EEC (now Directive 2011/35/EU) have to be included in this report.

Regarding Article 8(3) of the CBMD, the UK Regulations require the expert report to contain the following:[45] the methods used to arrive at the share exchange ratio; the values arrived at using each such method; a description of any special valuation difficulties that have arisen; an opinion as to whether the methods used are reasonable in all the circumstances of the case; an opinion regarding the relative importance attributed to each method in arriving at the value decided on; and whether the share exchange ratio is reasonable.

e. Access to information

Article 8(3) CBMD provides that the independent experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Regarding Article 8(3) of the CBMD, the UK Regulations confer upon the expert the right to inspect such documents and information from each company participating in the merger as he deems "necessary for the purpose of making his report".[46] The UK Regulations do not impose any penalty for lack of compliance with the expert's requests for information. However, it is unlikely that the court would deem a company to have complied with the pre-merger requirements in circumstances where the expert felt he was not given the information he considered "necessary."

f. Transposition of Article 8(4)

Article 8(4) CBMD provides that the shareholders of all the merging companies can unanimously decide to waive the expert reports.

Article 8(4) of the CBMD is transposed in the UK Regulations in Regulation 9(1)(c).

g. Further exemptions to provide the expert report in Article 15(1) and (2)

According to these provisions, a report is not necessary in a merger by acquisition of a wholly owned subsidiary (Article 15(1) CBMD) or in a merger by acquisition carried out by a company holding 90% or more of its subsidiary shares (Article 15(2) CBMD).

These provisions have been transposed in Regulations 9(1)(a) and 9A.

h. Further exemptions in UK law

The UK Regulations do not appear to provide further exemptions beyond what the

[44] UK Regulations, r9(2) and (3); 'Competent authority' means the authority the other EEA member state has designated under Art 10(1).
[45] The UK Regulations, r9(5).
[46] R9(6).

CBMD stipulates.

1.9. Article 9 – General Meeting

According to Article 9 CBMD, the General Meeting of shareholders of each of the merging companies has to approve the CDTMs.

Article 9 of the CBMD has been transposed in the UK Regulations, which generally require approval by a 75% majority (based on value) in each class for each company, but waive the approval requirement for shareholders of a wholly owned subsidiary, as well as for the shareholders of an acquiring company in cases where the requirements concerning the availability of documents for inspection were met and the shareholders did not exercise their right to call a meeting.[47] The inspection requirements may now be met by making the documents available on the company's website.[48]

a. Procedural requirements including majority, quorum, timing and notarization

In addition to the majority and class requirements, the UK Regulations require the meeting to take place at least 2 months after the documents set out in Regulation 12 have been provided to the registrar, and at least one month after the registrar has published the notice under Regulation 12(5).

b. Amendment of CDTMs by shareholders

The UK Regulations do not contain any provisions enabling the members to amend the CDTMs at the meeting.

c. Exemption for approval under Article 8 of Directive 2011/35/EU

A Member State, under a different directive (Article 8 of Directive 2011/35/EU on mergers within the same Member State), may waive the need for an approval of the merger by the general meeting of the acquiring company under certain conditions.

The UK Regulations do *prima facie* require a meeting, however, except where the exceptions described previously apply.

d. Exemption to shareholder approval under Article 15(1) CBMD

Article 15(1) CBMD provides that in a merger with a wholly owned subsidiary, the approval by the General Meeting of the subsidiary is not required.

Regarding Article 15(1) of the CBMD, the approval of the cross-border merger at a shareholders' meeting (or class meeting) is not required for a merger by absorption of a wholly owned subsidiary (Regulation 13(3)).

[47] R13(3) – (5).
[48] R13(6).

1.10. Article 10 – Pre-merger Certificate

Article 10 CBMD provides for the scrutiny of the cross-border merger by designated national authorities on the level of the merging parties.

a. Transposition of Articles 10(1) and (2)

Regarding Articles 10(1) and (2) of the CBMD, in the UK, the court is responsible for issuing a pre-merger certificate to the effect that any UK merging company has properly completed the pre-merger acts and formalities. This can be done only after the draft terms of merger, directors' report, and independent expert's report have been drawn up and made available for inspection, and the registrar of companies has published notice of receipt of them and of details of any meetings called to approve the merger (Regulation 6).

b. National authority has been designated to scrutinize the legality of the merger

The UK Regulations designate the High Court in England, Wales and Northern Ireland, and the Court of Session in Scotland[49] as the authority to scrutinize the legality of the cross-border merger.[50]

Inasmuch as the UK Courts do not have the express statutory remit to review the price of the deal or the effect on minority shareholders, the review is largely formal rather than substantive.[51]

c. Transposition of Article 10(3)

The UK Regulations transpose Article 10(3) of the CBMD by enabling the members of the UK company to approve the terms subject to "an order of a competent authority of another EEA State ... in accordance with Article 10.3."[52]

1.11. Article 11 – Scrutiny of the Legality

Article 11 CBMD provides for the scrutiny of the cross-border merger on the level of the company resulting from the merger.

a. Transposition of Article 11(1) and (2)

Article 11 was transposed through Regulation 16 of the UK Regulations. Under that regulation the court may approve the merger if it deems all the pre-merger requirements to have been complied with. The review has been said to be largely

[49] R3(1).
[50] Article 10(1) CBMD.
[51] N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 826 (17.82).
[52] R13(2)(b).

formal rather than substantive,[53] but the use of the word "may" in Regulation 16(1) indicates that the court has a degree of discretion. The scope of such discretion has been discussed in case law and the court's role is "to examine the proposed merger with a view to being satisfied that it does not adversely affect any stakeholder in any of the merging companies (whether shareholder, employee or creditor) in any material way, and, further, that there is no other good reason why approval of the proposed merger should be refused."[54] The court could, arguably, refuse to approve the completion of a cross-border merger, e.g. where such a merger would considerably prejudice the rights of minority shareholders or where shareholders, employees and creditors in the merging companies would suffer material detriment.

b. The national authority has been designated to scrutinize the legality of the merger

The courts empowered to approve cross-border mergers are the same as the ones designated to certify compliance with pre-merger requirements. The High Court will exercise its inherent discretion to consider whether it is just to approve the merger and in that sense its review of the legality of the merger is substantive.

1.12. Article 12 – Entry into Effect

Article 12 regulates the date when the merger enters into effect.

a. Transposition of Article 12

Article 12 has been transposed through Regulation 16(2) of the UK Regulations, which stipulates that the court may fix a date "on which the consequences of the cross-border merger ... are to have effect," but "that date must be not less than 21 days after the date on which the order is made."

According to the Directive, the law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect. The effective date of the cross-border merger therefore has to be monitored carefully taking into account particularities of the law of the Member State of the absorbing company (e.g., a minimum 21 day-period applies in the UK between issuing the certificate of legality and the effective date of the merger).

b. Date the cross-border merger takes effect

A cross-border merger only enters into effect on the date set out in the court order, and that date must be no less than 21 days after the date of the order (Regulation

[53] N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 826 (17.82).
[54] *In re Diamond Resorts (Europe) Limited* [2012] EWHC 3576 (Ch).

16(2) of the UK Regulations).

1.13. Article 13 – Registration

Article 13 CBMD regulates the registration procedure.

a. Transposition of Article 13 first sentence

Article 13 first sentence provides that as long as it is in compliance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), each Member State shall determine how the completion of the merger shall be publicized in the public registry in its jurisdiction.

The first sentence of Article 13 provides that each Member State shall determine, in accordance with Article 3 of Directive 68/151/EEC (now Directive 2009/101/EC), how completion of the merger should be publicized in the public registry in its jurisdiction.

Regarding the first sentence of Article 13, the UK Regulations oblige the company to provide copies of the court order to shareholders on request,[55] as well as to file the documents with the registrar of companies.[56] Failure to comply with these provisions constitutes an offence punishable on summary conviction by a fine. Regulations 19(2) and (3) contain a list of the documents to be filed.

b. Transposition of Article 13 second sentence

The second sentence of Article 13 is transposed in Regulation 21 of the UK Regulations, which follows the outline in the directive, albeit in a manner adapted to UK circumstances.

There is some inconsistency in the UK Regulations as to when the notice should be served on the overseas registry by Companies House. Companies House typically notifies the overseas registry after receipt of notice of the court order sanctioning completion of the merger. In that notification, Companies House usually states that the merger will become effective on a particular future date and it does not re-notify the overseas registry once the cross-border merger actually becomes effective (21 days after the court order – see Regulation 16(2)(b)) as Article 13 of the CBMD requires.

1.14. Article 14 – Consequences

Article 14 CBMD provides for the consequences of the merger.

Regulation 17 of the UK Regulations is patterned after Article 14 of the CBMD.

It could be made clearer that Regulation 17(3) is only relevant to situations where

[55] R18.
[56] R19.

formal public registration or perfection (e.g. land registration) is required to make something binding on third parties rather than, for instance, the obtaining of consent from contractual counterparties.

1.15. Article 15 – Simplified Procedure

Article 15 CBMD provides for a simplified merger procedure in two instances: i) where a merger with a whole owned subsidiary is carried out or ii) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at General Meetings of the company or companies being acquired.

a. The transposition of Article 15(1)

Article 15(1) provides that in a merger with a wholly owned subsidiary, several procedural steps shall not apply.

The UK Regulations transpose these provisions through Regulations 7(3),[57] 9(1)(a),[58] and 13(3).[59]

1.16. Article 16 – Employee Participation

Article 16 CBMD regulates the determination of the employee participation system applicable for the company resulting from the cross-border merger. The reason is that in some Member States employees may have a voice in the company's affairs.

a. The system of employee participation applicable in the Member State

The UK Regulations transpose the provisions relating to employee representation in Part 4, through Regulations 22 through 64. UK law does not require companies to have a system of employee participation.[60] Where the provisions of the CBMD and the UK Regulations do not mandate an employee participation scheme, Article 16 of the CBMD becomes irrelevant.

b. Transposition of Article 16(1)

Article 16(1) CBMD provides that the rules in force concerning employee participation will be applicable where the company resulting from the merger has its registered office.

[57] "Particulars of the matters referred to in sub-paragraphs (b), (c) and (e) of paragraph (2) may be omitted in the case of a merger by absorption of a wholly-owned subsidiary."

[58] "A report must be drawn up in accordance with this regulation, unless (a) the cross-border merger is a merger by absorption of a wholly-owned subsidiary..."

[59] "The approval of the members is not required in the case of a transferor company concerned in a merger by absorption of a wholly-owned subsidiary."

[60] N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 840 (17.156).

The UK rules in force concerning employee participation will be valid if the cross-border merger-formed company is registered in the UK. Employee participation rights, where applicable, can considerably extend the timetable. As pre-existing employee participation rights must be maintained, absorbing companies may be required to enter into lengthy negotiations with a special negotiating body (composed of employee representatives from the merging companies and their European subsidiaries) to reach an employee participation agreement. This results in employee participation rights being introduced where they did not previously exist, increasing cost and complexity, and can add several months to the timescale.

c. Transposition of Article 16(2)

Article 16(2) CBMD provides for three exceptions to the rule of Article 16(1) CBMD.

Regarding Article 16(2) of the CBMD, under the UK Regulations, certain rules on employee participation apply where the "transferee company is a UK company" and (i) a merging company that has more than 500 employees has a system of employee participation; (ii) a merging UK company has a "proportion of employee representatives" among the company's directors; or (iii) a merging company has employee representatives on its administrative or supervisory board.[61] Where both limbs of this test are not satisfied the merging companies have no obligation to preserve an employee representation system. Where they are, the resulting merger must accord with the provisions in Part 4 of the UK Regulations.

d. Transposition of Article 16(3)(e)

Transposition of Article 16(3) of the CBMD is in Part 4 of the UK Regulations, along with transposition of Article 16(4) of the CBMD.

e. Transposition of Article 16(4)

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Article 16(4) CBMD provides for further conditions for the procedure and the principles stated in Article 16(3) CBMD. This refers primarily to situations in which the standard rules can be made applicable.

Articles 16(3) and 16(4) of the CBMD are reflected throughout Part 4 of the UK Regulations, which contain rules on constituting a special negotiating body, whose task is to "reach an employee participation agreement with the merging companies."[62] This agreement will then provide the "number of directors of the UK transferee

[61] UK Regulations, r22(1).
[62] R 25(2).

company which the employees will be entitled to elect,"[63] the members of the special negotiating body,[64] standard rules of employee participation, protection of employee representatives,[65] etc.

f. Transposition of Article 16(5)

Article 16(5) refers to the calculation of the workforce giving rise to participation rights under national law and to what extent employees employed in other Member States have to be taken into account.

Article 16(5) has not been transposed into national law because the UK does not have "participation rights under national law."

g. Transposition of Article 16(6)

Article 16(6) CBMD stipulates that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company shall be obliged to take a legal form allowing for the exercise of participation rights.

Article 16(6) has not been transposed explicitly in the UK Regulations. However, there is no need for it to be so transposed because where the "transferee company" (as defined in Regulation 3(1) is a "UK company," then that company would take a legal form "allowing for the exercise of participation rights" by implication.[66]

h. Transposition of Article 16(7)

Article 16(7) provides that if the company resulting from the cross-border merger is governed by an employee participation system as regulated by Article 16 CBMD, the company has to take appropriate measures to ensure that within a period of three years employee participation is protected also in the event of subsequent domestic mergers.

Article 16(7) of the CBMD has been transposed into Regulation 40(1) of the UK Regulations, which, however, seems to limit such protection to "any order made by the court under section 899 of the Companies Act 2006 ... for the purposes of (a) a reconstruction of the company or the amalgamation of the company with another company ... or a merger involving a public company." It seems unlikely, then, that the UK Regulations would prevent a UK private company from doing away with its employee participation system by merging with another UK private company. In this respect, the UK Regulations may be said to be partially noncompliant.

[63] R 29(1)(b).
[64] Chapter 4 of Part 4.
[65] R43 – 52.
[66] Article 16(6) CBMD.

1.17. Article 17 – Validity

Article 17 CBMD deals with the validity of the merger.

Article 17 of the CBMD has not been explicitly stated in the UK Regulations. However, Regulation 16, in which court approval of the merger is "conclusive evidence" that the various pre-merger procedural requirements have been met, may perhaps be considered a transposition of Article 17. It seems likely that a merger induced by fraud could be unwound, but unlikely that mistake or non-fraudulent misrepresentation would constitute sufficient grounds for an unwinding.

1.18. Additional

a. Valuation rules

Valuation only plays a role in the UK Regulations when shareholders vote on the draft merger terms upon having read the expert opinion, which must contain a detailed discussion of the valuation techniques used. There is no right of appraisal or refusal for minority shareholders, although general company law rules would apply to limit abuse of power by the majority.

b. National case-law on provisions transposing the CBMD

There have been a number of UK judgments on the UK Regulations. The most recent of these is In re House-Clean Ltd [2013] WLR (D) 165, in which an English subsidiary and a German parent company were planning to merge. The English subsidiary sought the issue of a pre-merger certificate. The issue before the court was whether it had discretion to refuse to issue the pre-merger certificate because of delay by the subsidiary's board of directors in approving the terms of the merger. Justice Roth said that Regulation 6(2) did not give the court discretion to refuse to certify compliance with pre-merger requirements due to delay. The lack of discretion available to the court within pre-merger requirements was subject to the power in Regulation 11 for the court to summon a meeting of shareholders or creditors.

In re Diamond Resorts (Europe) Ltd [2012] EWHC 3576 (Ch) involved a number of Spanish subsidiary companies merging into an English company (DREL) which was itself a subsidiary of another English company (DRGH). All of the companies were part of the same group and the purpose of the cross-border merger was to simplify the group structure. Once the merger was complete, DREL would take over all of the rights and liabilities of the Spanish companies (which would be dissolved under Spanish law). Justice Sales was concerned about DREL's financial position as it was insolvent on a balance sheet basis and dependent on the support of DRGH to continue as a going concern. This raised the issue of whether the creditors of the Spanish

companies were being adequately protected. The Spanish Commercial Registry had granted a pre-merger certificate. Having been reassured about DREL's restated balance sheet, Justice Sales was satisfied that there would be no significant material detriment to the creditors and he therefore approved the merger.

In the Matter of ITAU BBA International Limited [2012] EWHC 1783 (Ch) of the Chancery Division of the High Court per Justice Henderson. A Portuguese company wanted to merge with a UK company. The UK company had previously been a dormant "shelf company." The merger was to be a "merger by absorption" whereby the UK asset-less company would receive all the Portuguese company's assets through the merger. The underlying motive of the Portuguese company seems to have been to "move" to the UK in an easy and cost-effective manner. The question for the court was whether the definition of "existing transferee company," or "a transferee company other than one formed for the purposes of, or in connection with, a cross-border merger," prevented the merger from taking place. The UK company had been acquired for the sole purpose of the merger and had previously been dormant. The court held the definition to be a drafting error and allowed the merger to go ahead, stating that a careful analysis of the policy underlying the CBMD would justify that outcome. Justice Henderson rewrote the Regulations to ensure that they complied with the CBMD.

The implication of the judgment may be that the UK Regulations can be used to effectively "move" a company (with all its contractual rights and obligations) to the UK from any other member state simply by "merging" with a newly incorporated UK company. By virtue of Article 4(1) of the Council Directive 2009/133/EC, such a move would, moreover, not "give rise to any taxation of capital gains."[67] The judgment could in some cases also be used to avoid tax on asset transfers by structuring such transactions as mergers.

While this seems unintended by the UK Regulations, especially in light of the definition of "existing transferee company," it would have been difficult to determine in borderline cases when the transferee company had not been "formed for the purposes of ... a cross-border merger." Furthermore, if the regulation was taken at face value, it could easily be circumvented.[68]

The CBMD does not shed any light on this issue; it simply requires that the transferee company be an "existing company." Accordingly, a clarification of this point—i.e. the extent to which the "existing company" must be a genuine pre-existing business—

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[67] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, [2009] OJ L 310/34, Article 4(1).

[68] UK Regulations, r11.

would seem desirable.

In re (1) Wood DIY Ltd and (2) Olivero Franco Sarl [2011] EWHC 3089 (Ch) involved the merger by absorption of an Italian transferor company with an English transferee company. The shareholders and creditors of the Italian company had indicated their assent and the Italian notary public (the competent authority) had given its approval. That said, Justice Roth stressed that there was still a residual discretion vested in the English court as to whether to approve the merger and that it should be exercised in line with comparable principles, as applied to schemes of arrangement. The test was whether "the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."

In Re Oceanrose Investments Ltd [2008] EWHC 3475, which concerned a private English single member company and a private company incorporated in Italy, the issue before the court was whether the requirement for approval of the draft terms of merger by members at a meeting under Regulation 11 was necessary where a company has only one member who has formally signified its consent. Relying on the wording of Regulation 13(1) and the analogous jurisdiction under Part 26 of the CA 2006 to sanction schemes of arrangement, Justice David Richards concluded that a meeting was required.

c. Language requirements

The UK Regulations require that documents filed with the court must be in English, or must be accompanied by an English translation. The translation must be certified or accompanied by written evidence that the translation is valid.[69]

1.19. Comparison of Procedure for Cross-Border Mergers with Domestic Mergers

a. The domestic merger procedure

The general procedures for domestic mergers involving a public company are delineated in Part 27 of CA 2006. The process is similar in many ways to the one in the UK Regulations. Domestic mergers require directors' reports, expert reports, approval by 75% in value of the shareholders, and other similar requirements. However, as stated previously, those provisions apply only to public companies and, for tax reasons, are, according to *ITAU BBA International*, a "dead letter."[70]

[69] R. 4; N. Parden et al., in J. Vermeylen and I. van de Velde, *European cross-border mergers and reorganizations*, p. 827 (17.85).
[70] UK Regulations, r 8(5).

b. Comparison

There are differences between the UK Regulations transposing the CBMD and the merger provisions of CA 2006 in that the CA 2006 provisions contain no reference to employee participation and contain fewer protections for creditors. As previously stated, the UK Regulations empower the court to order a meeting for creditors and, where such a meeting is ordered, a merger cannot take place without the approval of 75% (measured in value) of those creditors. No creditors' meeting has yet been called under the UK Regulations.

Inventory of Cross-Border Mergers

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8. Inventory of Cross-Border Mergers

The proper assessment and understanding of the impact of the Directive requires information on its effect on actual cross-border mergers, their volume and their frequency. Furthermore, a deeper analysis of the success, obstacles, and trends in the implementation of the Directive requires data on the types of merges that took place, their relationship to overall M&A activity, and related considerations.

To provide this information, an inventory of cross-border mergers was created. It includes all cross-border mergers that took place between the transposition deadline for the Cross-Border Merger Directive (CBMD)- December 15, 2007- and the current financial year 2013.

The data we sought to obtain was, first and foremost, the number of CBMs that were carried out each year, their dates, the registered seat location of all the companies involved, the names of the companies involved, and other business information (type of company and area of business).

Collecting this data proved extremely challenging, as the information that the national registries keep is partial, and the commercial databases were inconsistent and scarce. Indeed, previous studies on parallel topics encountered the same problems in gathering accurate and quality information.

In the following section, we describe the methodology for obtaining the data, its scope, and its limitations. We then describe the data gathered and provide analysis.

8.1. Methodology & Obstacles

Obtaining the desired data, as recognized by previous studies conducted in this field, is notoriously difficult. Commercial registries often do not keep the data in a friendly format that allows its collection in a consistent fashion; private databases usually do not have all relevant data and its collection methodology is not always transparent; and national surveys are oftentimes limited in their interest and scope.

In light of the above, The Team developed a multi-faceted approach to gather the information. The aim was to create certain "data redundancy" by collecting the same data from different sources, which would allow to cross-reference and verify its reliability as well as offer backup for cases where data was missing. The sources of the information were therefore the following:

- The national commercial or trade registry;[1]

[1] We assigned researchers whose task was to contact the sources we had identified in order to request the information we required. We supplemented this request with a letter of endorsement from the European Commission and the offer to acknowledge individual contribution in our study, so that we might get an initial

- the national gazette;
- the national regulatory authorities;
- commercial databases.

This process required much involvement of The Team's project managers, as many of the entities contacted did not have ready access to the data, were uncooperative, or did not have data at all. The Team invested intensely in making sure that at least one reliable source of data existed for each Member State and was largely successful in this regard.

After gathering all the information possible, a process of quality assurance took place. Said process comprised of a few actions, such as cross-checking results from few sources, conducting sample analysis of many of the merging companies to verify that the reported merger actually took place, and cross-checking with previous relevant studies conducted on national level.

Despite the fact that the data relies on formal responses from national authorities as well as independent data-gathering that underwent rigorous quality assurance, and despite the extreme efforts taken by The Team to validate the reliability of the data, it should nonetheless be taken with some caution. Much of the data was mixed and required discretion in its analysis, and it may be that national authorities under-reported certain mergers. Having said that, the data collected is a strong and close approximation of the actual numbers, and our general approach has been conservative, so it is likely that gaps, if any, would be toward the existence of more mergers than those reported in our study. We believe, in light of the results of the quality assurance, that the findings are sufficiently accurate for analysis of trends presented in the study.

To summarize, our methodology consisted of:

1. reviewing previous studies;
2. directly contacting national trade registries;
3. reviewing national gazettes;
4. reviewing registries and databases and casting a very wide net (i.e., searching for all mergers, not only “cross-border,” and then reviewing results one by one);
5. directly contacting national competition authorities;
6. using private databases;

response to our inquiries. We followed up with phone interviews and email correspondences with officials working for these sources. This provided us with some data; however, in most cases, the results were partial or we did not receive any data at all.

7. contacting law firms in each Member State and asking for information on any CBMs they were involved in;
8. performing in-depth quality assurance.

Main Obstacles in the Inventory-Gathering

1. **Non-cooperative authorities**. Not all the national authorities we have contacted were cooperative, and we therefore had encountered delays in the provision of information, and sometimes information was not provided at all.
2. **Missing or dispersed data in official sources**. In other cases, the data was dispersed among a multitude of local country registries, leading, in some cases, to receiving only partial data even after contacting all relevant sources.
3. **Missing or partial data in private sources.** For commercial databases, it is common to find data pertaining to high-stakes mergers that would be of interest to the business community. Small-scale mergers, however, or those between two companies who belong to the same mother company, are often not reported.
4. **Missing or lack of additional information regarding the CBMs.** National registries usually keep only "core" information—i.e., the names of the companies involved, their country of registration, and the date the merger was approved. Additional information, such as the number of employees, the revenues before and after the merger and so forth are almost always not available.

Methodological Notes

1. **Definition of a CBM in the inventory:** A CBM was classified in the inventory as a merger taking place under the CBMD, completed and registered during the examined period. Some Member States sent information consisting of mergers as well as acquisitions. As acquisitions are not part of the CBMD, they were excluded from the inventory. Quality assurance processes were taken to make sure that mergers alone would be included in the inventory. However, since a large quantity of reported transactions from several sources did mix mergers with acquisitions, minor mistakes in the inventory might arise. These possible minor discrepancies, nevertheless, are too small to affect the inventory conclusions.
2. **Companies involved in more than one CBM:** When a CBM involved more than two companies (e.g., one acquiring company absorbs two or more companies), each merger was registered in the inventory as a separate CMB. As a consequence, the number of companies involved in CBMs, for instance,

includes the total number of companies involved without excluding companies that were involved in more than one CBM (i.e., if company A was involved in a multi-merger, or executed more than one CBM during the examined period, it was counted according to the number of CBMs it had been involved in). This is important due to the fact that the substantial data should refer to the number of CBMs and not to a specific company's CBMs history.

3. **Date of CBM:** The date of the CBM in the inventory was set as the final registration date as recorded by the local Member State authority. Yet, the same CBM can have a different final date in different local authorities, depending on the local Member State's rules and regulation. When facing two different dates for the same CBM received from two different sources, the date reported by the more reliable source was chosen. When both sources were equally reliability, the date chosen was the one from the acquiring company's Member State authority.

8.2. Interim CBM Inventory Results

8.2.1. Sources

The CBM inventory includes all CBMs that entered into effect between December 14, 2007, and March 1, 2013, in the EEA and EU Member States.[2] In total, we identified 1,281 CBMs, reported by 30 local sources (registries, gazettes, etc.) and three private data bases (Zephyr, Epsilon/Corpfin, and Mergermarket).[3]

We obtained data from 30 states (27 EU Member States and 3 EEA States). The quality of the data, however, differs significantly between Member States depending on their level of local data-gathering and level of cooperation. The quality of the data improved when the authority in the Member State was the business registry. However, in some instances, our data only covered information received from the competition authority. As this information was partial, given that these authorities only review certain types of mergers, it was supported by other sources of information in order to maintain a sufficient level of quality to the inventory.

The following table shows the data obtained from our sources. Note that the data is already filtered, hence showing only unique results (e.g., in Zephyr, there were many additional results that were filtered since they already appeared in other sources):

[2] CBMs approved between 14.12.2007 and 31.12.2007 will be considered for this study as if they were approved in the beginning of 2008.

[3] Data for Germany was taken from W. Bayer, Grenzüberschreitende Verschmelzungen im Zeitraum (2013), in a study conducted for the Hans-Böckler Stiftung

Table 1 - Sources Used for the Inventory Study and Their Content

30 sources were analyzed, containing 1,281 unique results overall.

Source	# of CBMs
Luxembourg	262
Germany	235
Netherlands	124
Italy	114
Ireland	59
Lithuania	57
UK	54
Austria	46
Finland	42
Sweden	41
Estonia	36
Norway	35
Spain	28
Zephyr	17
France	17
Poland	16
Malta	15
Latvia	14
Hungary	13
Czech Republic	12
Slovakia	7
Belgium	6
Liechtenstein	6
Portugal	6
Denmark	6
Cyprus	5
Romania	3
Slovenia	2
Grecce	2
Iceland	1
Total	**1281**

8.2.2. Levels of Activity

We define "level of activity" of a Member State as the overall number of CBMs that took place there, both when the acquiring company is registered in the Member State and when the merging company is registered in the Member State. The highest level of activity recorded was Germany's, with 376 reported companies involved in CBMs. Close behind was Luxembourg, with 324 companies involved in CBMs. The countries with the least recorded activity were Greece, with 5 CBMs recorded; Bulgaria, with 3; and Iceland, with only 2 CBMs recorded.

Table 2 – Level of Activity of States Included in the Inventory

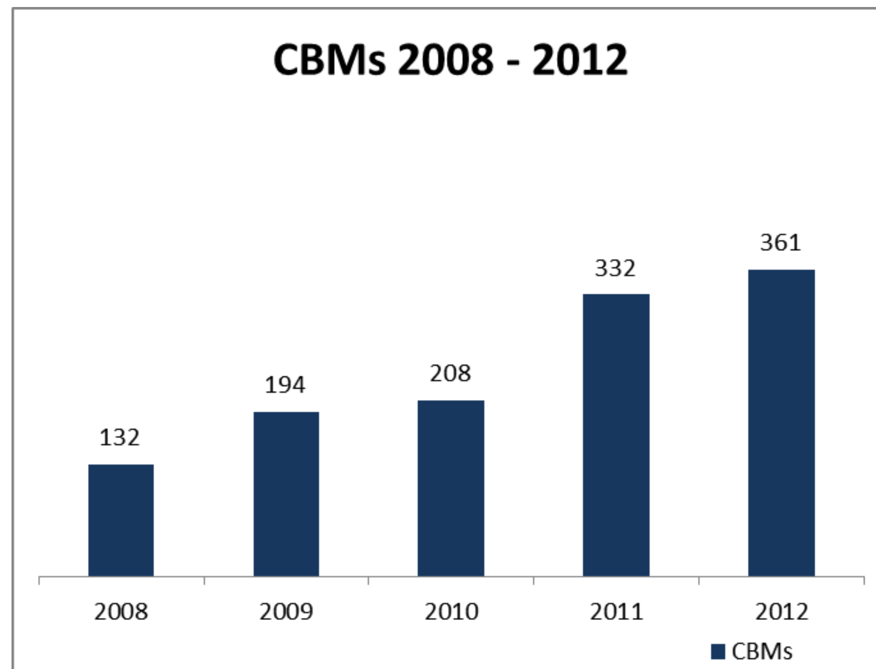
2,562 companies were involved in CBMs, out of which 376 companies were registered in Germany.

Member state	Acquiring companies	Merging companies	Level of activity
Germany	248	128	376
Luxembourg	185	139	324
Netherlands	108	215	323
Italy	173	61	234
UK	93	75	168
Austria	58	73	131
Belgium	27	64	91
Sweden	52	39	91
Ireland	27	51	78
Lithuania	11	67	78
Denmark	39	38	77
France	38	36	74
Spain	16	52	68
Estonia	46	18	64
Finland	33	26	59
Latvia	21	27	48
Norway	21	25	46
Cyprus	24	14	38
Poland	7	28	35
Hungary	1	30	31
Czech Republic	11	18	29
Malta	17	6	23
Portugal	3	17	20
Slovakia	11	9	20
Romania	2	11	13
Liechtenstein	3	4	7
Slovenia	3	3	6
Greece	0	5	5
Bulgaria	2	1	3
Iceland	1	1	2
Total	1281	1281	2562

The following graph, depicting the activity levels per year, reveals an increasing amount of CBMs since the deadline for implementation of the CBMD in December 15, 2007.

Figure 1 – The Number of CBMs Increased from 132 in 2008 to 208 in 2010 and 361 in 2012

Cross-border mergers in EU and EEA from 2008 to 2012[4]



The number of CBMs that have entered into effect each year reveals the level of implementation (and success) of the CBMD, from a low of 132 CBMs in 2008, to 208 in 2010 up until 361 in 2012. This implies an increase of 173 percent within the time range, with an average annual increase of 30 percent. **This suggests that the CBMD has been very effective in promoting economic activity between Member States.**

However, we should note three methodological difficulties in that context. First, it is difficult to know what the expected absolute level of CBMs per year is, as 361 CBMs per year (e.g., 2012's figure) may still be considered low in absolute terms, compared with the potential annual cross-border-mergers. Second, in the years 2008 to 2013, a prolonged recession took place, with a major dip in 2008. This suggests a cautious approach is necessary in the interpretation of these results. Third, it may be that reporting standards have improved over the years and not necessarily that the amount of CBMs has indeed increased so significantly.

Nonetheless, the data strongly suggest the initial success the CBMD has had in promoting cross-border economic activity, and this is further supported by the results of the two other parts of this study, which show that the CBMD has been, for the most part, successfully transposed into national legislation, and that the stakeholders in

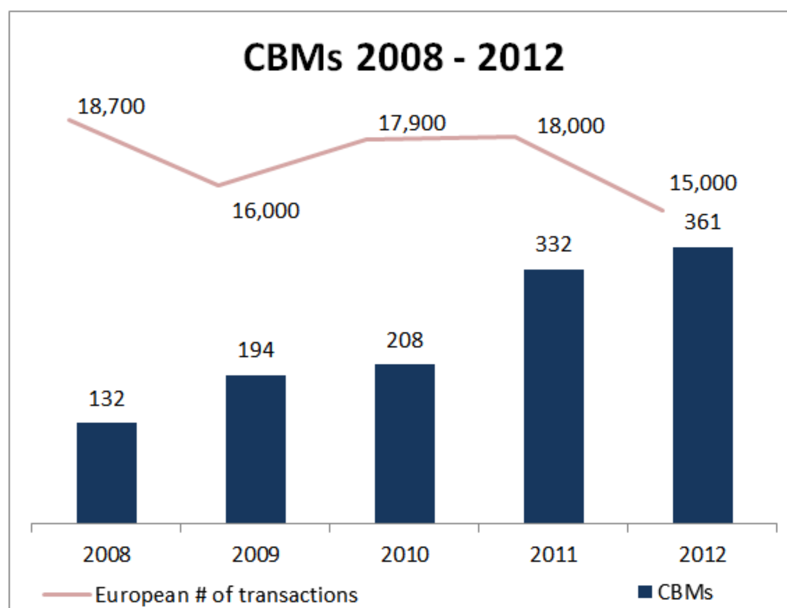
[4] 2013 CBM's were not included in the historic trend analysis, since the results of 2013 are not yet available. The total number of CBMs between 2008 and 2012 amounts to 1,227 vs. the total number of CBMs recorded in the inventory, 1,281.

each Member State view the CBMD as a positive step in the right direction of stimulating cross-border economic activity.

When comparing the trend of CBMs increased activity to the general mergers & acquisitions trend in Europe during the same period[5], we also find that despite a decrease in the general number of transactions in Europe, from c.18,700 transactions in 2008 to c.16,000 transactions in 2009- implying a 15 percent decrease year over year- the number of CBMs increased by 30 percent during the same period:

Figure 2 – The Number of General Transactions in Europe Decreased from 2008 to 2012, while the Number of CBMs Increased

Mergers and cross-border mergers in EU and EEA from 2008 to 2012



8.2.3. Trends in Acquiring Company Seat

Every merger involves at least two companies: an acquiring company and a merging company. The data collected for this study included some "multi" mergers, which involved as many as five companies from different Member States merging into one. An example of this "multi" merger is the Nokia case. Approved on December 31, 2012, Nokia Sales International Oy, a company based in Finland, acquired eight companies from Belgium (Nokia Belgium N.V.), Czech Republic (Nokia Czech Republic s.r.o.), Italy (Nokia Italia S.p.A.), the Netherlands (Nokia Nederland B.V.), Poland (Nokia Poland SP. Z.o.o.), Portugal (Nokia Portugal S.A.), Spain (Nokia Spain S.A.U.), and Sweden (Nokia Svenska AB). However, our research indicates that this was not a frequent trend but rather a sporadic occasion.

Most acquiring companies are German registered companies (248), followed by Luxembourgish and Italian companies (185 and 173 respectively).

[5] Source: IMMA-Institute 2013.

Most Member States follow the same average trend of increasing numbers of CBMs from 2008 to 2012. An exception to this observation is Denmark, having a high amount of CBMs during 2008 (20), but a relatively low amount in the following years (7 in 2009, 5 in 2010, 6 in 2011, and 1 during 2012).

Table 3 – Seat of Acquiring Companies

The data covers 30 Member States in the time range of 2008 to 2013.

EEA/EU Member State of acquiring company	2008	2009	2010	2011	2012	2013	Total
Germany	21	41	48	80	54	4	**248**
Luxembourg	23	27	34	34	57	10	**185**
Italy	6	19	29	67	44	8	**173**
Netherlands	5	23	13	11	48	8	**108**
UK	5	5	12	28	28	15	**93**
Austria	3	2	4	19	28	2	**58**
Sweden	10	6	5	15	16		**52**
Estonia	5	7	15	15	4		**46**
Denmark	20	7	5	6	1		**39**
France	2	4	6	9	15	2	**38**
Finland	9	10	2	1	11		**33**
Belgium	3	7	7	4	6		**27**
Ireland	3	5	10	7	2		**27**
Cyprus	1	6	1	5	11		**24**
Latvia	1	5	4	3	7	1	**21**
Norway	4	4	5	5	3		**21**
Malta	1	2		6	6	2	**17**
Spain	2	2		5	7		**16**
Czech Republic	4	2	1	2	1	1	**11**
Lithuania		3	5	2	1		**11**
Slovakia	1	1		2	7		**11**
Poland	2			4	1		**7**
Portugal		1		1	1		**3**
Slovenia		2			1		**3**
Liechtenstein		1	1	1			**3**
Romania			1			1	**2**
Bulgaria		1			1		**2**
Hungary	1						**1**
Iceland		1					**1**
Total	**132**	**194**	**208**	**332**	**361**	**54**	**1281**

8.2.4. Merging Company Place of Register Trends

Naturally, the merging company usually dissolves after the merger approval. Most merging companies were from the Netherlands (215), Luxembourg (139), Germany (128), and the UK (75).

Table 4 – Seat of Merging Companies

Most merging companies between 2008 and 2013 were registered in the Netherlands (215).

EEA/EU Member State of Merging company	2008	2009	2010	2011	2012	2013	Total
Netherlands	6	41	34	48	78	8	**215**
Luxembourg	30	20	29	30	27	3	**139**
Germany	13	18	11	32	51	3	**128**
UK		14	18	22	20	1	**75**
Austria	1	10	11	30	18	3	**73**
Lithuania	9	14	21	13	9	1	**67**
Belgium	4	7	9	23	18	3	**64**
Italy	3	7	16	21	13	1	**61**
Spain		6	6	13	25	2	**52**
Ireland	3	8	6	21	12	1	**51**
Sweden	7	7	3	9	7	6	**39**
Denmark	13	6	5	4	8	2	**38**
France	3	1	7	9	13	3	**36**
Hungary	4		3	6	15	2	**30**
Poland	3	3	4	3	11	4	**28**
Latvia	2	4	6	12	3		**27**
Finland	3	3	4	9	7		**26**
Norway	7	4	2	7	4	1	**25**
Czech Republic	3	9		1	4	1	**18**
Estonia	1	9	3	1	4		**18**
Portugal	5	1	2	5	3	1	**17**
Cyprus	2	1	3	6	2		**14**
Romania	4			1	3	3	**11**
Slovakia	2	1	3		2	1	**9**
Malta				3	1	2	**6**
Greece	1			1	2	1	**5**
Liechtenstein	2		2				**4**
Slovenia	1			1		1	**3**
Bulgaria				1			**1**
Iceland					1		**1**
Total	**132**	**194**	**208**	**332**	**361**	**54**	**1281**

8.2.5. CBMs Net Balance

We find that some of the Member States involved present substantially different numbers of acquiring versus merging companies under the CBMD. Germany, for instance, has many more acquiring companies than merging ones.

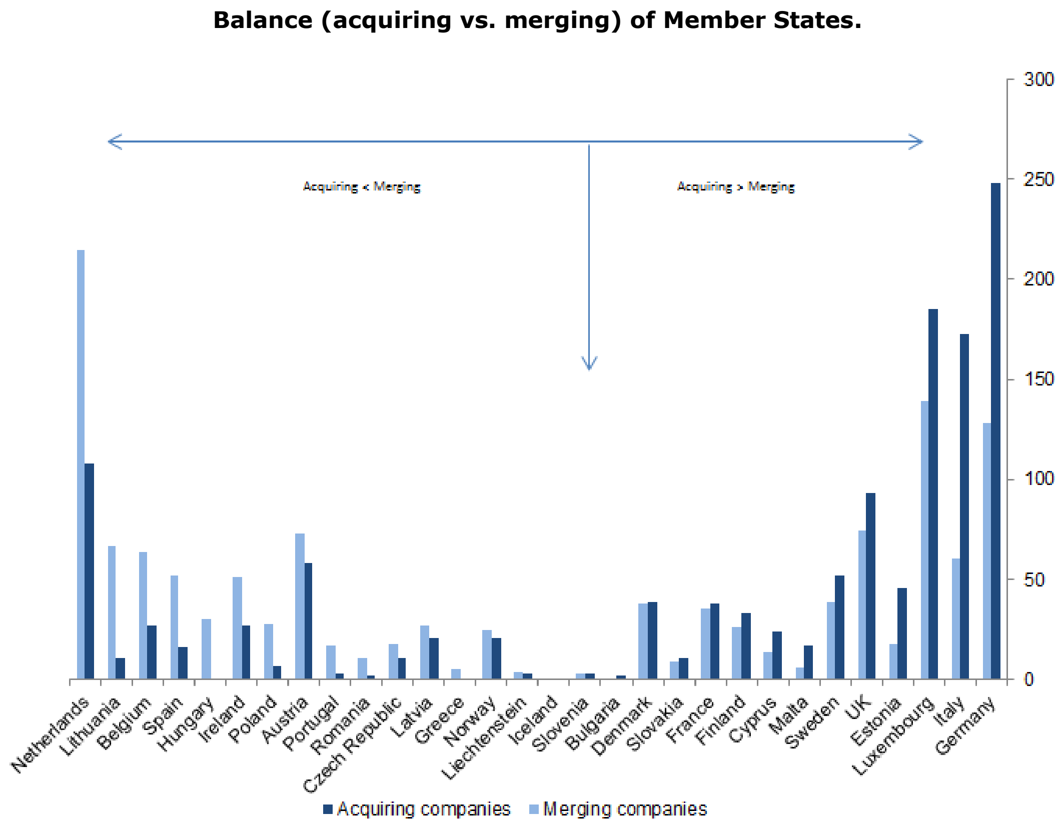
Table 5 – Balance (Acquiring vs. Merging) of Member States

Germany was the state with the highest number of acquiring companies versus merging companies (balance of 120) from 2008 to 2013.

Member state	Acquiring companies	Merging companies	Level of activity
Germany	248	128	120
Italy	173	61	112
Luxembourg	185	139	46
Estonia	46	18	28
UK	93	75	18
Sweden	52	39	13
Malta	17	6	11
Cyprus	24	14	10
Finland	33	26	7
France	38	36	2
Slovakia	11	9	2
Denmark	39	38	1
Bulgaria	2	1	1
Slovenia	3	3	0
Iceland	1	1	0
Liechtenstein	3	4	-1
Norway	21	25	-4
Greece	0	5	-5
Latvia	21	27	-6
Czech Republic	11	18	-7
Romania	2	11	-9
Portugal	3	17	-14
Austria	58	73	-15
Poland	7	28	-21
Ireland	27	51	-24
Hungary	1	30	-29
Spain	16	52	-36
Belgium	27	64	-37
Lithuania	11	67	-56
Netherlands	108	215	-107
Total	1281	1281	0

Figure 3 – Balance (Acquiring vs. Merging) Differs Among Member States. Slovenia Represents a Balanced State, with an Equal Amount of Acquiring and Merging Companies, while Germany has More Acquiring Companies than Merging and the Netherlands has More Merging Companies than Acquiring Ones.

Balance (acquiring vs. merging) of Member States.



8.2.6. Reorganization and Involvement of Publicly Traded Companies

Many stakeholders mentioned in their interviews that the CBMD was especially effective for an internal reorganization of a group of companies. Since companies within a larger corporate structure (group of companies) are usually 100 percent owned, directly or indirectly, by a parent company, the process of merging companies across European borders is relatively easy and cost-effective. This notion is reflected in the inventory analysis as well. We used the names of the acquiring and merging companies as a proxy to determine whether or not the acquiring and merging companies were part of the same corporation.

Despite inaccuracies that may arise from this methodology, a clear trend is revealed, as the amount of reorganization CBMs is significant. Out of the current 1,281 CBMs, 484 were identified as reorganization CBMs, implying that 38 percent of all CBMS in the inventory were of related companies. **It is important to understand that this estimation should be considered as a lower bound**, and that actual reorganizations are most likely even more prevalent than this estimation predicts.

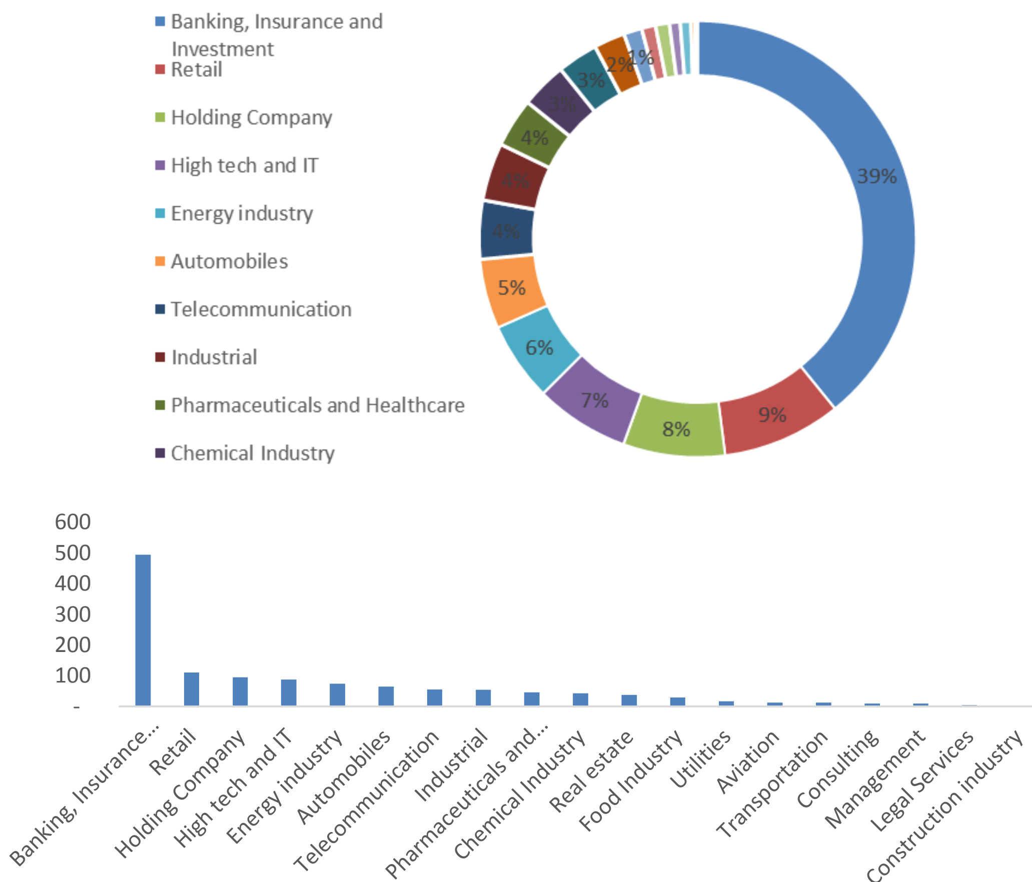
8.2.7. Area of Business

Companies from various business areas participate in CBMs. To gain a deeper understanding of the cross-border activity, we classified all companies according to their main area of business. Such a classification was made for 54 percent of the involved companies, for which data was available. Each company was classified into one business area. When a company was involved in a few business areas, it was defined according to its main activity.

Most companies involved in CBMs were from the Banking, Insurance and Investment sector (39 percent). The second largest business area was Retail, followed by Holding companies (9 and 8 percent, respectively).

Figure 4 & 5– Banking, Insurance and Investment is the Leading Category Among Overall Companies Involved in CBMs.

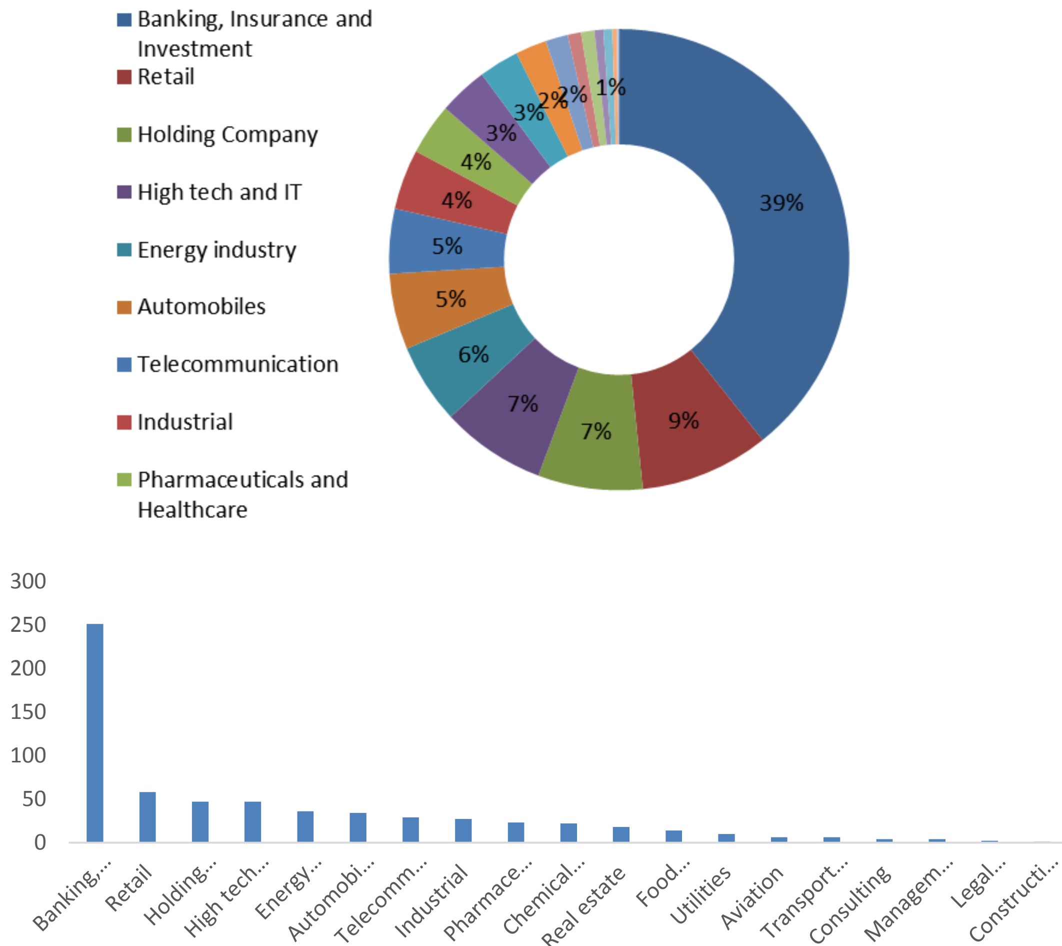
Main areas of business for companies involved in CBMs.



When looking only at the acquiring companies, we find similar results, with 39 percent of the companies engaging in Banking, Insurance and Investments, followed by Retail and Holding companies (9 and 7 percent, respectively).

Figure 6 & 7– Banking, Insurance and Investment is the Leading Category Among Acquiring Companies.

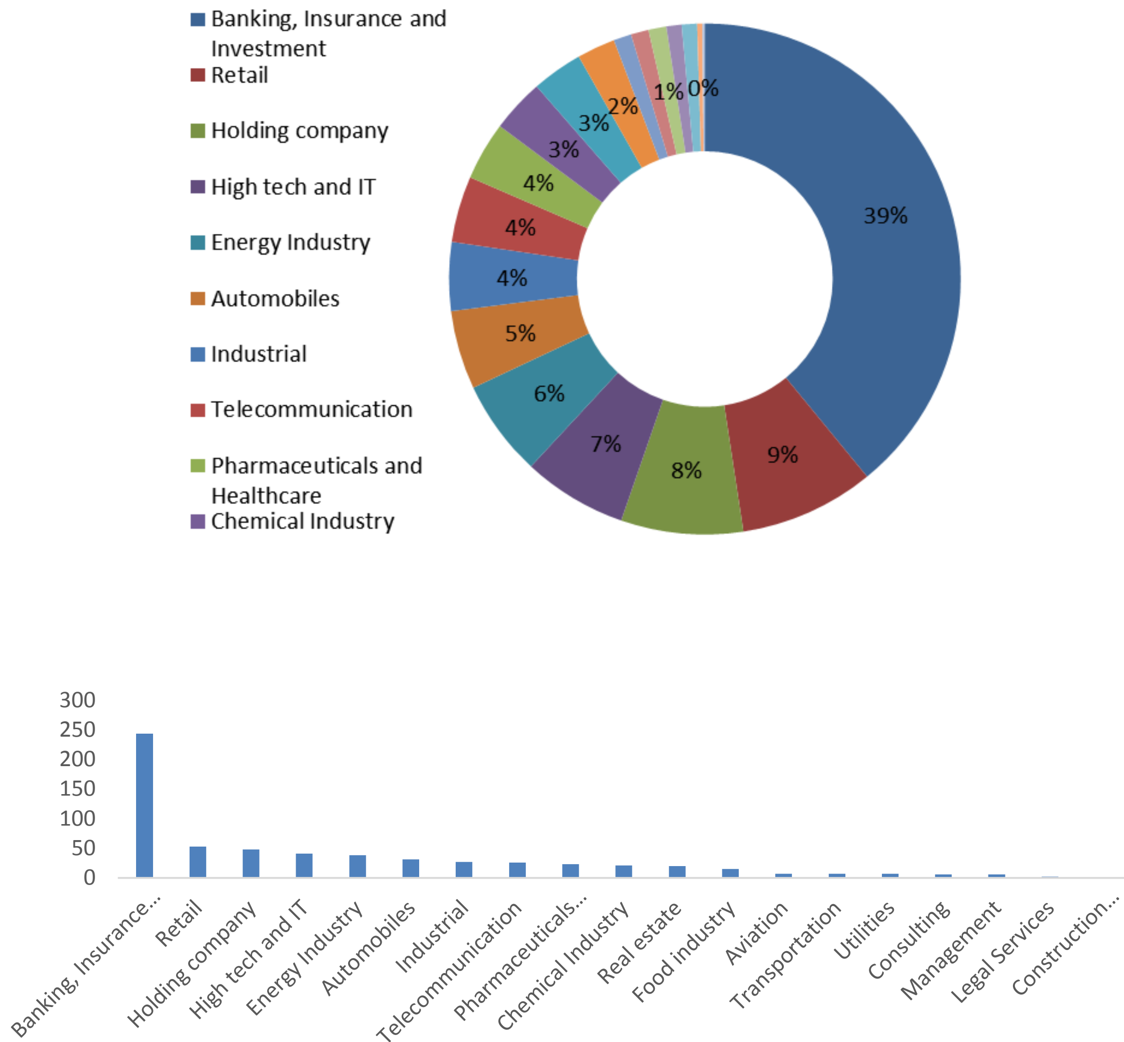
Main areas of business for acquiring companies involved in CBMs.



When looking only at the merging companies, we find Banking, Insurance and Investments companies has the highest portion (39 percent), followed by Retail and Holding companies (9 and 8 percent, respectively).

Figure 8 & 9– Banking, Insurance and Investment is the Leading Category Amongst Merging Companies.

Main areas of business for merging companies involved in CBMs.



8.2.8. Type of Companies Involved in CBMs

Each Member State's company law defines the type of companies that can be merged under the law.

Since the inventory features many different types of companies, we employed a system of clustering these different types. This created a base of comparison on the EU level. The main parameter for clustering was the public (thus named "Plc") or private (thus named "Llc") nature of the company—i.e., whether or not the company offered either debt or equity to the public.

Companies depicted in the charts exhaust, almost entirely, the whole range of company types allowed to participate in CBMs as defined by the transposing legislation of Member States. The only exception is that of the Societas Cooperativa Europaea (SCE), which did not participate in any mergers according to our cross-border

inventory, and its inclusion into the charts was deemed to be unnecessary. Unilateral companies and simplified private limited companies are portrayed in separate categories for the purpose of our research in order to enhance the transparency of our results.

- **Plc**: AG Austria, NV/SA Belgium, AD Bulgaria, plc Cyprus, AS Czech Republic, A/S Denmark, AS Estonia, Oyj Finland, SA France, AG Germany, SA Greece, nyrt Hungary, hf Iceland, plc Ireland, Spa Italy, AS Latvia, AG Lichtenstein, AB Lithuania, SA Luxembourg, NV Netherlands, ASA Norway, SA Poland, SA Portugal, SA Romania, AS Slovakia, d.d. Slovenia, SA Spain, ABp Sweden, plc UK
- **Llc**: GmbH Austria, BVBA/S.p.r.l Belgium, OOD Bulgaria, ltd Cyprus, Sro Czech Republic, Aps Denmark, OÜ Estonia, Oy Finland, SARL France, GmbH Germany, ltd Greece, kft/zrt Hungary, ehf Iceland, ltd Ireland, s.r.l Italy, SIA Latvia, GmbH Lichtenstein, UAB Lithuania, SARL Luxembourg, ltd Malta, BV Netherlands, AS Norway, SPZoo Poland, LDA Portugal, SRL Romania, SRO Slovakia, d.o.o. Slovenia, S.L. Spain, AB Sweden, ltd UK
- **Llp**: limited liability partnership
- **Lp**: limited partnership
- **Coop**: cooperative
- **Gp**: general partnership
- **SAS**: simplified private limited company
- **SE**: Societas Europaea (European Company)
- **UPlc** : unipersonal public limited company
- **ULlc** : unipersonal private limited liability company
- **KGaA**: publicly traded partnership
- **NPO:** nonprofit organization

Figure 10– Most Acquiring Companies Were Private Companies.

Acquiring companies involved in CBMs by type.

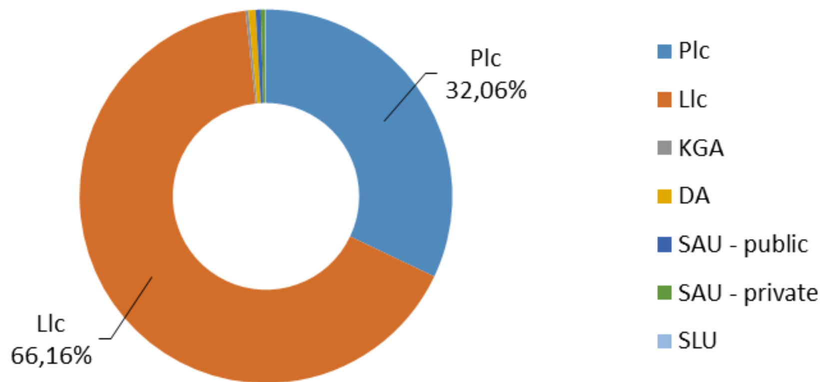
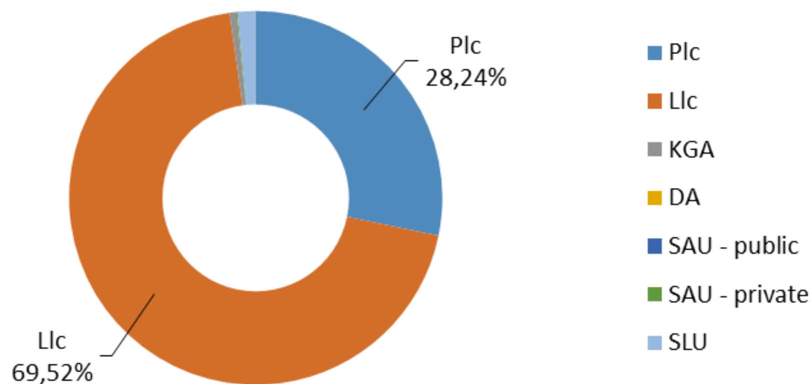


Figure 11– Most Merging Companies Were Private Companies.

Merging companies involved in CBMs by type.



Most acquiring companies, 66 percent, were of Llc type (of private nature), versus 32 percent of Plc type of companies. Within the merging companies we find a similar result, as c. 70 percent of the merging companies were of Llc. type versus 28 percent of Plc. type. Among merging companies, we find a higher proportion of all "other" type of companies. This implies that companies that do not belong to the private or public clusters do not act as acquiring companies. However, they do participate in CBMs as the merging companies.

Alphabetical List of Abbreviations

9. Alphabetical List of Abbreviations

AB- Public Limited Liability Company (Lithuania)

AG–Stock Corporation (Germany)

ArbVG –Labor Constitutional Act (Austria)

AS- Public Limited Companies (Estonia)

AS –Public Limited Companies (Latvia)

BV- Private Company with Limited Liability (Netherlands)

CA – Commercial Act (Bulgaria)

CBMs- Cross-Border Mergers

CBMA- Cross-Border Mergers Act (Hungary)

CBMD- Cross-Border Mergers Directive

CC– Estonian Commercial Code

CDA - Co-Determination Act (Germany)

CDL –Competition Defence Law (Spain)

CDTMs- Common Draft Terms of Cross-Border Mergers

CITA- Corporate Income Tax Act (Bulgaria)

CJEU – Court of Justice of the European Union

CONSOB–Stock Exchange Regulator (Italy)

CPC- Commission for Protection of Competition (Bulgaria)

CPCC- Code of Partnerships and Commercial Companies (Poland)

CXL- Act on Cross-Border Merger of Limited Liability Companies (Hungary)

DA – General Partnership with Apportioned Liability

DCC- Dutch Civil Code (Netherlands)

DD- Joint-Stock Companies (Slovenia)

DSF – Discounted Cash Flow (Bulgaria)

DIP- International Private Law (Italy)

DNO- General Partnership (Slovenia)

DOO- Limited Liability Companies (Slovenia)

ECJ- European Court of Justice

EEA- European Economic Area

EIA- Environmental Impact Assessment Directive

EIA–Employee Involvement Act (Finland)

EMS- European Mutual Company

EPL– Employment Protection Legislation (Spain)

EPPC– The Act on Employee Participation in Cross-Border Mergers (Sweden)

EPS- Employment Participation System

ETUC - European Trade Union Confederation

EWHC – Her Majesty's High Court of Justice in England (United Kingdom)

FCC- French Civil Code (France)

FSC- Financial Supervision Commission

FMG- Limited Liability Companies (Liechtenstein)

GEMH –General Commercial Registry (Greece)

GmbH–Limited Liability Company (Germany)

GMS – General Meeting of Shareholders (Romania)

HLC– Hungarian Labor Code (Hungary)

KD- Limited Partnership (Slovenia)

KDD- Partnership Limited by Shares (Slovenia)

KGA – Publicly Traded Partnership

KGaA –Partnership Limited by Shares (Germany)

LCC- Lithuanian Civil Code (Lithuania)

LLC- Limited Liability Company

NV- Public Limited Liability Company (Netherlands)

OU- Private Limited Companies (Estonia)

P/E – Price to earnings ratio

PGR- Persons and Companies Act (Liechtenstein)

PLC – Public Limited Company

PLLC Act – Private Limited Liability Companies and Public Limited Liability Companies Act (Norway)

PPPCA- Privatization and Post-Privatization Control Agency (Bulgaria)

RA–Reorganization Act (Germany)

SAA- Partnerships Limited by Shares (Italy)

SAU – Unipersonal public limited company (Spain)

SCA– Partnerships limited by shares (Romania)

SCE- European Cooperative Society

SA– French Corporations (France)

SA– Joint Stock Companies (Romania)

SAL– Structural Modifications Law (Spain)

SARL–Limited liability company (France)

SAS–Simplified limited liability companies (France)

SCA–Limited Liability Partnerships (France)

SCS– Companies limited by shares (Romania)

SE- European Company

SE – Societas Europaea

SIA –Private Limited Liability Company (Latvia)

SICAF –Investment Companies with fixed capital (Luxembourg)

SICAR– Investment Companies in risk capital (Luxembourg)

SICAV– Investment Companies with variable capital (Luxembourg)

SLU – Simplified Public Limited Company

SME - Small and Medium-Sized Enterprises

SML –Structural Modifications relating to Commercial Companies Law (Spain)

SNB- Special Negotiation Body

SNC– General Partnerships (Romania)

SPA- Public Limited Liability Company (Italy)

SRL- Private Limited Liability Company (Italy)

SRL– Limited Liability Company (Romania)

TFEU - Treaty on the Functioning of the European Union

TUF – Testo Unico della Finanza (Italy)

TUPE – UK Transfer of Undertakings (Protection of Employment) Regulations

UAB- Lithuanian Private Limited Liability Company

UCITS (Luxembourg) - Undertakings for collective investment in transferable securities

WCCA – Works Council Constitution Act (Germany)

ZGD- Companies Act (Slovenia)

ZGD-1A- Amended Companies Act (Slovenia)

ZMZPP- Private International Law and Procedure Act (Slovenia)

ZSDČZKD- Worker Participation in Decision-Making by Cross-Border Mergers of Limited Liability Companies Act (Slovenian)

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