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Reviewing the implementation of the Cross- border Mergers Directive

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AIMS

- The experiences so far from the application of the Cross-border Mergers Directive (CBMD).
- Findings of the **“Study on the Application of the Cross-Border Mergers Directive”** (hereinafter ‘Study’) prepared by Bech-Bruun and Lexidale for the European Commission, which reveal the advantages and the disadvantages of the CBMD.
- Case law of the CJEU.
- Proposed amendments to cross-border mergers by the Proposal for a Directive amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions.

-Directive 2005/56/EC was repealed

-Codified and consolidated in Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law

The main benefits

The Study concluded some very interesting findings regarding the benefits of the Cross-border Mergers Directive. The benefits of the Cross-border Mergers Directive are the following:

- Opening the Internal Market,*
- Reducing Organizational & Operational Costs,*
- Reducing Regulatory Costs,*
- Lowering Agency Costs and Procedural Simplification.*

More specifically, the main benefits, as identified by the Study, are the following:

- Harmonization of Conflicting Laws,
- Overcoming Stalemates Caused by Shareholder Unanimity Requirements,
- Establishing Protection for Creditors and Minority Shareholders,
- Simplified Procedure,
- Efficiency Gains through Group Reorganization,
- Special Advantages for the Banking Sector,
- Facilitating Cross-Border Company Seat Transfers,
- New Tax-Planning Opportunities through the Directive and
- Cutting through Red Tape.

Obstacles to Cross-border Mergers and various drawbacks.

The Study identified various categories of obstacles:

- Under-Harmonization of Rules,
- Absence of Clear Standards on Inter-Agency Communications,
- Obstacles Pertaining to Safeguards for Stakeholders and
- a Need for a Fast Track.

Obstacles to Cross-border Mergers and various drawbacks.

More specifically, barriers include:

- Complexities with Creditor Protection,
- Date When Creditor Protection Commences,
- Duration of the Creditor Protection,
- Consequences of Creditor Protection,
- the Different Procedures for Creditor Protection and

The Study also specified gaps and potential inconsistencies of the Directive and showed the way towards trends and developments

WEAKNESSES BROUGHT TO SURFACE BY CASE LAW

Case C-635/11 *Commission v Netherlands* (employee participation)

Case C-483/14 *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group* (applicable law to contracts after the cross-border merger-holders of securities, other than shares)

Proposal for amendments

In April 2018, the European Commission issued a Proposal for a Directive amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions. It was part of the Company Law Package.

PROPOSALS FOR REFORM-A FEW POLICY CONSIDERATIONS

ENHANCEMENT OF THE PROCEDURAL FRAMEWORK- MORE HARMONIZATION

Merger=fundamental change=revolution

The relationships among the participants in the company can be revolutionized by a merger

The amendments give emphasis on the **enhancement of the procedural rules** of cross-border mergers, because **procedural deficiencies** constitute a potential source of uncertainty and complexity.

**Protection of creditors and
minority shareholders (appraisal rights) in
cross-border mergers**

Proposed reforms

Article 121 of Directive 2017/1132 (ex Article 4 of the CBMD)

Conditions relating to cross-border mergers

1. Save as otherwise provided in this Directive,[...]

(b) a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject.[...]

2. The provisions and formalities referred to in paragraph 1(b) shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, **the protection of creditors of the merging companies, debenture holders and the holders of securities or shares**, as well as of employees as regards rights other than those governed by Article 16. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure **appropriate protection for minority members who have opposed the cross-border merger.**

Creditor protection: dangers.

A cross-border merger could endanger the creditors' rights:

- 1) **assets** of the acquiring company could be exceeded by its **liabilities** and,
- 2) **the new law** applicable to the resulting company could **affect adversely** the rights of creditors (e.g. insolvency legislation and the danger of forum-shopping).

Creditor protection: the current regime.

-Article 121 (ex Art. 4 (2)) focuses, among others, on creditor protection.

-This provision allows Member States to adopt **protection mechanisms for creditors.**

-**There is not a single procedure for creditor protection at EU level. Member States adopt different procedural requirements.**

Creditor protection: the current regime

Creditor protection could be offered through two mechanisms on the basis of the beginning of the protection period: **either through an ex ante (against the merging company) or an ex post protection system (against the resulting company).**

Wide legal diversity among EU Member States

Solution: further harmonization

Protection of minority shareholders: dangers

- Divergences in the valuation of assets and liabilities and of the merger ratio,
- Proposed amendments to the company's articles of association,
- Restriction of the shareholders' rights under a new national regime
- The duration and the date when the protection commences may vary.

Protection of minority shareholders: the current regime

- No special rules for the protection of minority shareholders.
- Art. 4(2) provides the **option** to Member States to adopt national rules on the protection of minority shareholders.
- Wide diversity of minority shareholders' protection regimes** among Member States.
- Solution: **more harmonization**

Proposals for creditor protection.

The new Art. 126b enhances creditor protection:

- Declaration by the board of the merging company about its creditworthiness.**
- A system of creditor protection empowering creditors to ask for adequate safeguards from the competent authority.**
- The competent authority shall apply a rebuttable presumption that the creditors are not prejudiced by the cross-border merger if the company has offered a right to payment or if the independent expert report, which was disclosed to creditors, confirmed that the company would be able to satisfy its creditors.**
- Securing of payments owed to public bodies.**

Proposals for the protection of minority shareholders.

New Art. 126a:

- The provision of exit rights to minority shareholders, who disagree with the cross-border merger.**
- Dissenting minority shareholders could leave the company by selling their shares for adequate cash compensation.**
- Independent experts could review the adequacy of the cash compensation.**
- recalculation of the offered cash compensation by the national court.**
- Shareholders remaining in the company have also the right to challenge the share-exchange ratio.**

A FEW CONCLUDING REMARKS

- More than 10 years had passed since the adoption of the Cross-border Mergers Directive on 26 October 2005. This period of time allows us to critically evaluate the implementation of the Cross-border Mergers Directive and to assess the experience from its implementation.
- The Bech-Bruun and Lexidale Study and other studies and reports assist us in identifying the strengths and the weaknesses.
- The Directive could be assessed positively. However, certain procedural amendments could take place.
- Strengthening of the procedural framework through more harmonization is the answer.

A FEW CONCLUDING REMARKS

- Multilevel regulatory system. Reference to national law.
- National law includes autonomous national provisions and national provisions implementing the European company law directives.
- Wide diversity among Member States.
- Strengthening of the procedural framework for the protection of creditors and minority shareholders (appraisal rights) in cross-border mergers through more harmonization is essential.

Thomas Papadopoulos (ed) *Cross-border Mergers
Directive: EU perspectives and national experiences*
(Springer-forthcoming 2019)