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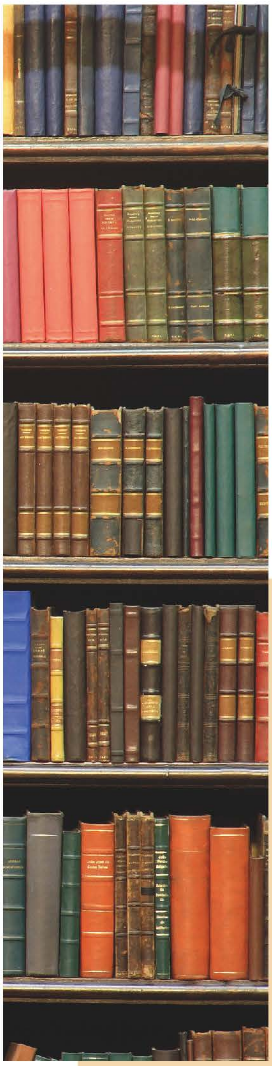

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Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?

STUDY FOR THE JURI COMMITTEE

EN

WORKSHOP ON THE FUTURE OF EUROPEAN COMPANY LAW

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?

STUDY

Abstract

Upon request by the JURI Committee, this briefing note analyses whether and to what extent there is a need to legislate with respect to cross-border mergers, cross-border divisions and cross-border transfers of seat (cross-border conversions).
Affirming a clear need for such legislation, it is recommended to extend the Cross-Border Mergers Directive into a single Cross-Border Mobility Directive encompassing revised rules on cross-border mergers as well as new rules on cross-border divisions and cross-border transfers of seat for all legal entities within the meaning of Art. 54 TFEU.

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CONTENTS

LIST OF ABBREVIATIONS

AG	Die Aktiengesellschaft [journal]
AMF	Autorité des Marchés Financiers
Art.	Article
BRIS	Business Registers Interconnection System
BeckRS	Beck-online Rechtsprechung
BT-Drs.	Bundestagsdrucksachen [documents of the German Bundestag]
CBMD	Cross-Border Mergers Directive
CJEU	Court of Justice of the European Union
C.M.L. Rev.	Common Market Law Review
Co Law	The Company Lawyer [journal]
CLD	Company Law Directive
D.	Recueil Dalloz [journal]
DCF	Discounted Cash Flow
DStR	Deutsches Steuerrecht [journal]
EAVA	European Added Value Assessment
EBLR	European Business Law Review
EC	European Communities
ECFR	European Company and Financial Law Review
ECL	European Company Law [journal]
ECLI	European Case Law Identifier
ed.	editor/edition
eds.	editors
e.g.	exempli gratia (for example)
EEA	European Economic Area
E. L. Rev.	European Law Review

EP	European Parliament
EU	European Union
EU-VerschG	EU-Verschmelzungsgesetz [Austrian EU Merger Law]
EuZW	Europäische Zeitschrift für Wirtschaftsrecht [journal]
f.	following (page)
ff.	following (pages)
FS	Festschrift
GbR	Gesellschaft bürgerlichen Rechts
GeS	Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht
GmbH	Gesellschaft mit beschränkter Haftung
GmbHR	GmbH-Rundschau [journal]
IDW	Institut der Wirtschaftsprüfer (Institute of Public Auditors)
i.e.	id est (that is)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts [journal]
IStR	Internationales Steuerrecht [journal]
JCP G	La Semaine juridique - Edition générale [journal]
KG	Kammergericht
KG	Kommanditgesellschaft
n.	note
NewCo	New Company
NJW	Neue Juristische Wochenschrift [journal]
No	number
NZG	Neue Zeitschrift für Gesellschaftsrecht [journal]
OGH	Oberster Gerichtshof
OJ	Official Journal
ÖJZ	Österreichische Juristenzeitung [journal]
OLG	Oberlandesgericht [Higher Regional Court]

para.	paragraph
paras.	paragraphs
r.	regulation
RIW	Recht der Internationalen Wirtschaft [journal]
RNotZ	Rheinische Notar-Zeitschrift [journal]
RWZ	Zeitschrift für Recht & Rechnungswesen [journal]
S.à.r.l.	Société à responsabilité limitée
S.a.s.	società in accomandita semplice
SCE	Societas Cooperativa Europaea (European Cooperative Society)
SE	Societas Europaea (European Company)
SI	Statutory Instrument
SME	small and medium-sized enterprises
ss.	sections
TFEU	Treaty on the Functioning of the European Union
UCITS	Undertakings for Collective Investment in Transferable Securities
UK	United Kingdom
UmwG	Umwandlungsgesetz [German Transformation Act]
ZEuP	Zeitschrift für Europäisches Privatrecht [journal]
ZEW	series of papers of the Zentrum für Europäisches Wirtschaftsrecht
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht [journal]
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [journal]
ZIP	Zeitschrift für Wirtschaftsrecht [journal]

LIST OF TABLES

LIST OF FIGURES

EXECUTIVE SUMMARY

KEY FINDINGS

- Although the **CBMD** has created a legal framework for cross-border mergers which works reasonably well, there are still many problems and difficulties remaining. The required **revision** of the CBMD should address in particular the following issues
  - extension of the scope to all legal entities within the meaning of Art. 54 TFEU;
  - further harmonisation of the rules on creditor protection (*ex post* protection system);
  - harmonisation of minority shareholder protection (exit right against adequate compensation and right to get additional compensation in case of an inadequate exchange ratio);
  - certain exemptions from the requirement of a merger report;
  - harmonisation of the rules on the accounting date and on valuation;
  - standard forms for the relevant documentation and communication and in particular also the pre-merger certificate; in addition, possibly also a single language requirement.
  - Due to the political sensitivity of the issue of employee protection, this area should be omitted from any short-term revision (and reserved for a general review of the employee protection regimes in the various EU legal acts).
- There is a real and urgent need for a special EU framework on cross-border divisions. They should generally be governed by rules reflecting those on cross-border mergers; different rules should only apply where the specific characteristics of cross-border divisions so require. The new rules on cross-border divisions should be included into the (revised) CBMD.
- There is also a **real and urgent need for a special EU framework on cross-border transfers of seat (cross-border conversions).** This should be based on the same procedural framework as the CBMD (the so-called 'European model for structural changes') and included into the (revised) CBMD.
- Hence, the CBMD should be expanded into a real **cross-border mobility directive**, which covers not only **cross-border mergers**, but **also cross-border divisions** and **cross-border conversions** of all legal entities within the meaning of Article 54 TFEU.

Background

De lege lata, EU law provides a specific legal framework only for certain types of cross-border mergers, namely for limited liability companies in the Cross-Border Mergers Directive (CBMD) and for UCITS in the UCITS Directive. Moreover, there is no specific legal framework for cross-border divisions and cross-border transfers of seat, they are only specifically regulated for SEs and SCEs.

The question of a reform of the CBMD and new legislation with respect to cross-border divisions and cross-border transfers of seat (cross-border conversions) has been on the EU agenda for quite a while now. The aim of this briefing note is to analyse whether and to what extent there is a need to legislate and to provide recommendations for future legislative measures.

1. CROSS-BORDER MERGERS, DIVISIONS AND TRANSFERS OF SEAT: THE *STATUS QUO* OF THE EU LEGAL FRAMEWORK

Currently, EU law provides a specific legal framework only for certain types of cross-border mergers (1.1), but none for cross-border divisions (1.2); cross-border transfers of seat are only specifically regulated for SEs and SCEs (1.3).

1.1. Cross-border Mergers

1.1.1. Limited liability companies

Cross-border mergers of limited liability companies have been harmonised by the **Cross-border Mergers Directive (CBMD)** of 2005[1], which has been implemented in all EU and EEA[2] Member States[3].

1.1.2. UCITS

Cross-border mergers of UCITS – which are excluded from the scope of the CBMD (*cf.* Article 3(3) CBMD) – have been regulated in Chapter VI (Articles 37-48) **UCITS Directive**[4] since 2009. These provisions have been implemented in all EU Member States.[5]

1.1.3. Other legal entities within the meaning of Article 54 TFEU

Currently, there is **no specific legal framework** for cross-border mergers of other legal entities within the meaning of Article 54 TFEU (e.g. partnerships, limited partnerships, cooperatives, foundations).

However, according to the leading opinion in academic literature[6], they enjoy **'freedom to merge' as an inherent aspect of the freedom of establishment** granted to them by Art. 49, 54 TFEU based on the CJEU's decision in the *Sevic* case[7]. In *Sevic*, the CJEU explicitly and unequivocally held that 'Cross-border merger operations, like other company transformation operations, constitute particular methods of exercise of the freedom of establishment,

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, OJ L 310, 25.11.2005, p. 1.

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

3 See in detail: *Bech-Bruun/Lexidale,* Study on the Application of the Cross-border Mergers Directive, 2013 (<http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf>).

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

5 See: <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32009L0065>. The UCITS Directive has not (yet) been extended to the EEA Member States.

6 *Bayer,* Grenzüberschreitende Mobilität europäischer und nationaler Rechtsformen – aktuelle Entwicklungen und Perspektiven, in: Bergmann et. al (ed.), 10 Jahre SE, 2015, p. 230, 238; *Bayer/J. Schmidt* ZIP 2006, 210, 212; *Bayer/J. Schmidt* ZHR 173 (2009) 735, 765; *Doralt* IPRax 2006, 572, 576; *Drygala* in: Lutter, UmwG, § 1 para. 12; *Hansen* EBLR 2007, 181, 188; *Herrler* EuZW 2007, 295, 299; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 5th ed. 2012, 6.72; *Marsch-Barner* in: Kallmeyer, UmwG, Vorbem. §§ 122a ff. paras. 9 f.; *Menjucq* in: Conac (éd.), Fusions transfrontalières de sociétés, 2011, p. 15, 17; *Papadopoulos* (2011) 36 E. L. Rev. 71, 87; *Papadopoulos* EBLR 2012, 517, 530; *Roelofs*, Grensoverschrijdende juridische splitsing kapitaalvennootschappen, 2014, p. 585 ff.; *Teichmann* in: Gebauer/Teichmann (eds.), Enzyklopädie Europarecht. Band. 6. Europäisches Privat- und Unternehmensrecht, 2016, 6.249.

7 CJEU, judgment of 13.12.2005, *Sevic*, case C-411/03, ECLI:EU:C:2005:762.

important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment'[8]. Moreover, the court emphasised that the lack of specific harmonisation measures does not justify restrictions.[9]

Contrary to some scholars[10], this 'freedom to merge' is not limited to inbound mergers, but covers equally both inbound and outbound mergers.[11] This position has been corroborated by the CJEU's judgment in the *VALE* case[12] (and its earlier *obiter dictum* in the *Cartesio* case[13]) in which the court – building upon the *Sevic* decision – held that cross-border transfers of seat (cross-border conversions) are protected by the freedom of establishment; both *Cartesio* and *VALE* were 'outbound cases'.[14]

However, in practice, the lack of a clear and secure EU legal framework makes this 'freedom to merge' largely illusory: The uncertainty of the procedural rules applicable, the risk of the merger ultimately failing because of some kind of (real or even only alleged) procedural 'defect' and the high costs for legal advice generally deter legal entities from even trying it.[15]

1.1.4. Formation of an SE or SCE by means of a cross-border merger

Finally, EU law provides for the formation of a Societas Europaea (SE) and a Societas Cooperativa Europaea (SCE) by means of a cross-border merger, *cf.* Articles 2(1), 17-31 SE-Regulation[16] (formation of an SE by means of a cross-border merger of public limited liability companies) and Art. 2(1), 19-34 SCE-Regulation[17] (formation of an SCE by means of a cross-border merger of cooperatives).

1.2. Cross-border divisions

Currently, **EU law does not provide a specific legal framework** for cross-border divisions. The 1982 Divisions Directive[18] covers only national divisions of public limited liability companies; moreover, it does not obligate Member States to permit divisions, but applies only where Member States do so (*cf.* Article 1(1)[19]).

However, the majority opinion in academic literature convincingly argues that cross-border divisions are also **protected by freedom of establishment**.[20] In the *Sevic* judgment, the

[8] CJEU, judgment of 13.12.2005, *Sevic*, case C-411/03, ECLI:EU:C:2005:762, para. 19.
[9] CJEU, judgment of 13.12.2005, *Sevic*, case C-411/03, ECLI:EU:C:2005:762, para. 26.
[10] See e.g. *Kindler* in Münchener Kommentar zum BGB, 6th ed. 2015, IntGesR paras. 847 ff.; doubtful also e.g. in: *Brasseur/Vermeylen* in: Vermeylen/Van Velde (eds.), European Cross-Border Mergers and Reorganisations, 2012, 2.219 ff.
[11] *Bayer* (n. 6), p. 230, 239; *Bayer/J. Schmidt* ZHR 173 (2009) 735, 765; *Drygala* (n. 6), § 1 paras. 12, 15; *Hansen* EBLR 2007, 181, 188; *Lutter/Bayer/J. Schmidt* (n. 6), 6.72; *Marsch-Barner* (n. 6), Vorbem. §§ 122a ff. paras. 9 f.
[12] CJEU, judgment of 12.7.2012, *VALE*, case C-378/10, ECLI:EU:C:2012:440.
[13] CJEU, judgment of 16.12.2008, *Cartesio*, case C-210/06, ECLI:EU:C:2008:723, paras. 111-113.
[14] *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 6.72 with further references.
[15] *Cf. Bayer* (n. 6), p. 230, 239; *Bayer/J. Schmidt* ZHR 179 (2009) 735, 766; *Bungert/Schneider* FS Gruson, 2009, p. 37, 51; *Lutter/Bayer/J. Schmidt* (n. 6), 6.39.
[16] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1.
[17] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1.
[18] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Art. 54 (3) (g) TEC, concerning the division of public limited liability companies, OJ L 378, 31.12.1982, p. 47.
[19] *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 22.3 with further references.
[20] *Bayer* (n. 6), p. 230, 240; *Bayer/J. Schmidt* ZHR 173 (2009) 735, 768; *Drygala* (n. 6), § 1 para. 20; *Decher* Der Konzern 2006, 805, 810; *Doralt* IPRax 2006, 572, 576; *Hansen* EBLR 2007, 181, 195; *Herrler* EuZW 2007, 295, 299 f.; *Kallmeyer/Kappes* AG 2006, 224, 234 ff.; *Krause/Kulpa* ZHR 171 (2007) 38, 46 f.; *Leible/Hoffmann* RIW 2006, 161, 165; *Lutter/Bayer/J. Schmidt* (n. 6), 6.76; *Marsch-Barner* (n. 6), Vorbem. §§ 122a ff. para. 11;

CJEU did not limit the scope of freedom of establishment to cross-border mergers, but explicitly extended it to 'other company transformation operations'[21]. Specifically referring to this very passage in the *Sevic* judgment, the CJEU then held in the *VALE* case that cross-border conversions are also protected by freedom of establishment. In light of this, cross-border divisions – as a further type of 'company transformation operation' – must be protected by freedom of establishment as well. Consistently, this protection extends to both inbound and outbound divisions of all legal entities within the meaning of Art. 54 TFEU.[22]

Yet, in practice, this **'freedom to divide'** – just like the 'freedom to merge' of legal entities not covered by the CBMD (*cf.* 1.1.3) – is largely illusory: the legal uncertainty and the high risk of failure are deterring companies.[23]

1.3. Cross-border transfers of seat (cross-border conversions)

Currently, **EU law does** also **not provide a specific legal framework** for cross-border transfers of seat (cross-border conversions) of national legal entities. There are only special rules for the cross-border transfer of seat of SEs (Art. 8 SE-Regulation) and SCEs (Article 7 SCE-Regulation).

However, as already mentioned, the CJEU indicated *obiter* in the *Cartesio Case*[24] and then held explicitly in the *VALE* case[25] that cross-border transfers of seat (cross-border conversions) are protected by the **freedom of establishment** pursuant to Articles 49, 54 TFEU.

Moreover, in these two judgments, the CJEU has also set out some important guidelines with respect to the scope of this **'freedom to convert'**:[26]

- The **Member State of origin** must not generally prevent a company from converting itself into a company of another Member State (in particular, it must not require the winding-up or liquidation of the company); it may only impose restrictions to the extent that such restrictions are justified by overriding requirements in the public interests in accordance with to the so-called '*Gebhard* formula'[27].
- The **host Member State** has to permit cross-border conversions if and to the extent that it permits national conversions.[28]
- In light of the absence of relevant EU rules, the **conversion procedure** is governed by **national law**, i.e. the national rules on the conversion of national companies and on the incorporation and functioning of national companies **of the Member State of**

Meilicke/Rabback GmbHR 2006, 123, 126; *Papadopoulos* (2011) 36 E. L. Rev. 71, 83 f.; *Roelofs* (n. 6), p. 589; *Roelofs* (2010) 7 ECL 142, 144; *Rønfeldt/Werlauff* (2006) 3 ECL 125, 127; *Simon/Rubner* in: Kölner Kommentar zum UmwG, 2009, Vor §§ 122a ff. para. 53; *Storm* (2006) 3 ECL 130, 134; *Vossestein* (2006) 3 ECL 177, 179.

[21] CJEU, *Sevic*, ECLI:EU:C:2005:762, para. 19.

[22] *Bayer/J. Schmidt* ZHR 173 (2009) 735, 768; *Lutter/Bayer/J. Schmidt* (n. 6), 6.76; *Roelofs* (n. 6), p. 590.

[23] *Bayer/J. Schmidt* ZHR 173 (2009) 735, 768; *Lutter/Bayer/J. Schmidt* (n. 6), 6.76; *Roelofs* (n. 6), p. 598 f.

[24] CJEU, *Cartesio*, ECLI:EU:C:2008:723, paras. 111-113.

[25] CJEU, *VALE*, ECLI:EU:C:2012:440.

[26] *Cf. Bayer/J. Schmidt* ZIP 2012, 1481, 1490; *Bayer/J. Schmidt* BB 2013, 3, 9.

[27] Named after the seminal judgment CJEU, judgment of 30.11.1995, *Gebhard*, case C-55/94, ECLI:EU:C:1995:411, para. 37. Since then it has been settled case-law that restrictions cannot be justified unless they serve overriding reasons relating to the public interest, are suitable for securing the attainment of the public interest objective which they pursue and do not go beyond what is necessary in order to attain it. *Cf.* e.g. CJEU of 27.2.2014, *OSA*, case C-351/12, ECLI:EU:C:2014:110, para. 70; CJEU, judgment of 23.2.2016, *Commission v Hungary,* case C-179/14, ECLI:EU:C:2016:108, para. 166. On the '*Gebhard* formula' in general: *Lutter/Bayer/J. Schmidt* (n. 6), 15.18 ff.

[28] CJEU, *VALE*, ECLI:EU:C:2012:440, paras. 33 ff.

origin and of the host Member State, which apply consecutively to this legal operation.[29]

- However, it follows from Art. 49, 54 TFEU that these national rules must be applied in line with the principle of equivalence and the principle of effectiveness, i.e. (i) cross-border conversions must not be treated less favourably than national conversions (**principle of equivalence**), and (ii) cross-border conversions must not be rendered impossible or excessively difficult in practice (**principle of effectiveness**).[30] Both the Member State of origin and the host Member State may only impose special rules or restrictions for cross-border conversions if and to the extent that such rules or restrictions: (i) are permitted by the TFEU derogations (in particular: Articles 51, 52 TFEU), (ii) are justified by overriding requirements in the public interests pursuant to the so-called '*Gebhard* formula'[31], or (iii) if there is a rare case of actual abuse of the freedom of establishment.[32]

There has been some controversy on whether this 'freedom to convert' also encompasses **isolated transfers of the registered office** (i.e. cross-border conversions where only the registered office, but not the head office is moved to the host Member State). Although this is disputed by many academic commentators[33], it is more convincing to interpret the *VALE* judgment to the effect that the 'freedom to convert', on principle, also encompasses such isolated transfers of the registered office.[34] At least in cases where the host Member State permits 'its' companies to have their head office outside its territory, the Member State of origin must not prevent the isolated transfer of the registered office to that host Member State.[35] Restrictions in order to prevent abuse can only be justified in cases of 'wholly artificial arrangements' within the meaning of the *Cadbury Schweppes*-judgment[36].[37]

Overall, the CJEU's landmark decisions *Cartesio* and *VALE* have indeed resolved the essential questions of principle with respect to the 'freedom to convert' as an aspect of freedom of establishment. However, there is still a myriad of open und unsettled questions and issues remaining[38]: Which exact requirements and limits result from the principles of equivalence and effectiveness? What happens when the requirements imposed by the national legal systems involved are irreconcilable? Which special requirements for cross-border conversions are the Member State of origin and the host Member State allowed to impose?

The resulting uncertainty poses an effective deterrent for legal entities to even try it.[39] Admittedly, there are a few published cases of companies which have actually tried (and

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[29] CJEU, *VALE*, ECLI:EU:C:2012:440, paras. 43 f.; *Bayer/J. Schmidt* ZIP 2012, 1481, 1487; *Bayer/J. Schmidt* BB 2013, 3, 10.
[30] CJEU, *VALE*, ECLI:EU:C:2012:440, paras. 48 ff.
[31] See n. 27.
[32] See in more detail *Bayer/J. Schmidt* ZIP 2012, 1481, 1486 ff.
[33] See e.g. *Kindler* EuZW 2012, 888, 891 ff.; *König/Bormann* NZG 2012, 1241, 1243; *Mörsdorf/Jopen* ZIP 2012, 1398, 1399;*G. H. Roth* ZIP 2012, 1744 f.; *W.-H. Roth* FS Hoffmann-Becking, 2013, p. 965, 989 ff.
[34] See in detail *Bayer/J. Schmidt* ZIP 2012, 1481, 1486 f., 1490; see further *Bayer* (n. 6), p. 230, 241 f.; *Bayer/J. Schmidt* BB 2013, 3, 9; likewise ultimately *Behme* NZG 2012, 936, 939; Drygala EuZW 2013, 569, 570 f.; *Schaper* ZIP 2014, 810, 816; *Schön* ZGR 2013, 333, 358 ff.; *van Eck/Roelofs* (2012) 9 ECL 319, 321. See further also *Teichmann* DB 2012, 2085, 2088; *Teichmann* (n. 6), 6.60.
[35] *Cf. Bayer* (n. 6), p. 230, 241; *Bayer/J. Schmidt* ZIP 2012, 1481, 1486; *Bayer/J. Schmidt* BB 2013, 3, 9; *Schaper* ZIP 2014, 810, 816; *Schön* ZGR 2013, 333, 358 ff.
[36] *Cf.* CJEU, judgment of 12.9.2006, *Cadbury Schweppes*, case C-196/04, ECLI:EU:C:2006:544, paras. 51 ff., 68, 72, 75.
[37] *Cf. Bayer* (n. 6), p. 230, 241 f.; *Bayer/J. Schmidt* ZIP 2012, 1481, 1486 f., 1490; *Bayer/J. Schmidt* BB 2013, 3, 9.
[38] *Cf. Bayer/J. Schmidt* ZIP 2012, 1481, 1491; see also *Schön* ZGR 2013, 333, 356 f.
[39] *Cf. Baert* EBLR 2015, 581, 599 ff., 611; *Bayer/J. Schmidt* ZIP 2012, 1481, 1491; *Behme* NZG 2012, 936, 939; *Biermeyer* (2013) 50 C.M.L. Rev. 571, 589; *Böttcher/Kraft* NJW 2012, 2701, 2704; *Conac* D. 2012, 3009, 3012 f.; *Hansen* ECFR 2013, 1, 17; *Heckschen* ZIP 2015, 2049, 2062; *Hübner* IPRax 2015, 134, 139; *István Nagy* IPRax 2014, 582, 584; *Krarup* EBLR 2013, 691, 697 f.; *Mörsdorf/Jopen* ZIP 2012, 1398, 1401; *Schaper* ZIP

some of them even successfully completed) a cross-border conversion on the basis of the *VALE*-principles (e.g. the *Moor Park*[40] case of the OLG Nuremberg, a case decided by the Austrian OGH[41] and a recent decision by the KG Berlin[42]) – but these cases are also vivid illustrations of the immense practical hurdles and difficulties they have encountered. Hence, overall, 'freedom to convert' is – just like the 'freedom to merge' of legal entities not covered by the CBMD (*cf.* 1.1.3) and the 'freedom to divide' (*cf.* 1.2) – still largely illusory in practice.

1.4. The *status quo* at a glance

Table 1: Cross-border mergers, divisions and transfers of seat (conversions): The status quo of the EU legal framework

Type of company	cross-border mergers	cross-border divisions	cross-border transfers of seat (conversions)
limited liability companies	CBMD	freedom of establishment, Articles 49, 54 TFEU (*argumentum e Sevic, Cartesio, VALE*)	freedom of establishment, Articles 49, 54 TFEU (*Cartesio, VALE*)
UCITS	UCITS Directive		
other legal entities within the meaning of Article 54 TFEU	freedom of establishment, Articles 49, 54 TFEU (*Sevic*)		
SE/SCE	formation of an SE/SCE: SE/SCE-Regulation	-	Art. 8 SE-Regulation/ Art. 7 SCE-Regulation

Source: Prof. Dr. Jessica Schmidt, LL.M.

2014, 810, 816; *Schönhaus/Müller* IStR 2013, 174, 179; *Teichmann* DB 2012, 2085, 2092; *Verse* ZEuP 2013, 458, 477; *Weller/Rentsch* IPRax 2013, 530, 535; *Wicke* DStR 2012, 1756, 1759.

40 OLG Nuremberg, decision of 13.2.2012 – 12 W 2361/11, NZG 2012, 468 ('Moor Park I'); OLG Nuremberg, decision of 19.6.2013 – 12 W 520/13, NZG 2014, 349 ('Moor Park II'). See in detail on both decisions: *Bayer* (n. 6), p. 230, 243 ff. with further references. A Luxembourg S.à.r.l. wanted to transfer its registered office to Germany and convert into a German GmbH. In the first decision of 13.2.2012, the court held that a cross-border conversion was not possible. In a second decision (after *VALE*), the court held that on the basis of *VALE,* a cross-border conversion was, on principle, possible; but it referred the case back to the lower court for further determinations.

41 OGH, decision of 10.4.2014 - 6 Ob 224/13, ÖJZ 2014, 917 with case note by *Rauter*. An Italian S.a.s. wanted to transfer its seat to Austria and convert into an Austrian KG. The OGH held that, on the basis of *VALE*, a cross-border conversion was, on principle, possible. However, the court also decided it was necessary that the legal entity fulfilled all the requirements for an Austrian KG and this had not been sufficiently demonstrated; moreover, it had not been sufficiently demonstrated that Italian law permitted a cross-border conversion without liquidation in the circumstances in question.

42 KG, decision of 21.3.2016 – 22 W 64/15, BeckRS 2016, 2016, 09583. A French S.à.r.l. wanted to convert into a German GmbH. The court decided that, on the basis of *VALE*, a cross-border conversion was, on principle, possible. However, it referred the case back to the lower court because it found that the statutes were currently insufficient and that there was a number of further (though remediable) obstacles.

2. REFORM CONTEMPLATIONS

2.1. Cross-border mergers and divisions

In its **2012 Action Plan**[43], the European Commission – building upon the 2011 recommendations of the Reflecting Group[44] – announced that it was contemplating a reform of the CBMD as well as an initiative to establish a special framework for cross-border divisions.

The EU Commission then mandated a **study** on the application of the CBMD[45], which was published in September **2013**.

In **2014**, the European Commission launched a public **consultation** on cross-border mergers and divisions; a feedback statement was published in October 2015.[46]

2.2. Cross-border transfers of seat (conversions) and law applicable to companies

The project of a directive on cross-border transfers of seat (cross-border conversions) – which is strongly supported not only by many practitioners and academics[47], but also by the European Parliament[48] – has been on and off the Commission's agenda[49] since a first **pre-proposal of 1997**[50] and was again revived in the 2012 Action Plan[51].

In 2013, the Commission conducted another public consultation on the topic[52], and in **2015**, it mandated a study on the **Study on the law applicable to companies**[53], which will, inter alia, also cover the transfer of seat.

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

44 Report of the Reflection Group on the Future of EU Company Law, 5.4.2011 (<http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf>).

45 *Bech-Bruun/Lexidale* (n. 3).

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

47 See (with comprehensive references until mid-2011): *Lutter/Bayer/J. Schmidt* (n. 6), 32.22 ff. See further e.g. Bayer (n. 6), p. 330, 249 f.; *Bayer/J. Schmidt* ZIP 2016, 841, 849; *Biermeyer* (2013) 50 C.M.L. Rev. 571, 589; *Bungert/de Raet* DB 2014, 761, 766; *Hansen* ECFR 2013, 1, 15; *Heckschen* ZIP 2015, 2049, 2062; *István Nagy* IPRax 2013, 582, 584; *Menjucq* JCP G 2012, note 1089, p. 1034, 1040; *W.-H. Roth* FS Hoffmann-Becking, 2013, p. 965, 995; *Schön* ZGR 2013, 333, 365; *Teichmann* DB 2012, 2085, 2092; *van Eck/Roelofs* (2014) 11 ECL 210, 213; *Verse/Wiersch* EuZW 2016, 330, 338.

48 See e.g. EP resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company, P6_TA(2009)0086; EP resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats, P7_TA(2012)0019; European Parliament resolution of 14 June 2012 on the future of European company law, P7_TA(2012)0259. Upon request of the EP, there has also been an EAVA: *Lehne/Regner,* Directive on the cross-border transfer of a company's registered office 14th Company Law Directive, EAVA 3/2012, PE 494.460.

49 See in detail on the 1997 pre-proposal and on the developments until the end of 2011: *Lutter/Bayer/J. Schmidt* (n. 6), 32.1 ff. with further references.

50 Proposal for a Fourteenth European Parliament and Council Directive on the transfer of the registered office of a company from one Member State to another with a change of applicable law, YV/D2/6002/97-EN REV. 2.

51 Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740, 4.1.

52 Consultation document, contributions and feedback statement available at <http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm>.

53 Contract award notice. 2015/S 095-171730.

3. EVALUATION OF THE CURRENT EU LEGAL FRAMEWORK FOR CROSS-BORDER MERGERS – IS AMENDING LEGISLATION NEEDED?

3.1. Special rules in the UCITS Directive, the SE-Regulation and the SCE-Regulation

The special rules on cross-border mergers in the UCTIS Directive, the SE-Regulation and the SCE-Regulation concern very special subject matters which are **outside the scope of this briefing paper** and the current reform considerations. However, it should be noted that any substantial reform of the CBMD would necessarily raise the questions of an alignment of the corresponding provisions in the UCITS Directive, the SE-Regulation and the SCE-Regulation.

3.2. CBMD

3.2.1. Achievements of the CBMD

Cross-border mergers of limited liability companies have been harmonised by the **CBMD** of 2005, which has been implemented in all EU and EEA Member States (*cf.* 1.1.1).

The CBMD requires all EU and EEA Member States to permit cross-border mergers of limited liability companies. This **harmonised legal framework** does not only provide a clear, predictable and structured framework – and thus the **legal security** essential for such complex transactions –, but also leads to a significant **reduction of the transactions costs** for cross-border mergers[54].

Since the implementation of the CBMD, an **increasing number of** companies have effected **cross-border mergers**. According to a study mandated by the European Commission, 1227 cross-border mergers took place within the EU and EEA between 2008 and 2012, with the numbers constantly increasing (from 132 in 2008 to 361 in 2012).[55] For Germany alone, studies by an institute of the University of Jena identified 381 cross-border mergers involving German companies between April 2007 and the end of 2012.[56]

3.2.2. Problems and difficulties of the CBMD framework

However, practitioners and scholars have identified a number of problems and difficulties of the CBMD framework, which still pose significant obstacles for cross-border mergers. They can be grouped into three categories: (i) problems relating to the scope of the CBMD framework, in particular the limitation to limited liability companies (3.2.2.1) (ii) problems relating to the protection of stakeholders (creditors, minority shareholders and employees) (3.2.2.2), and (iii) problems relating to procedure and practical obstacles (3.2.2.3). The following overview lists the most important of these problems and difficulties and analyses possible solutions.

3.2.2.1. Problems relating to the scope of the CBMD framework

[54] *Bech-Bruun/Lexidale* (n. 3), Executive Summary 7 f.
[55] *Cf. Bayer/J. Schmidt* NJW 2006, 401; *Stiegler* GmbHR 2016, 406, 409.
[56] The studies were conducted by the Institut für Rechtstatsachenforschung zum Deutschen und Europäischen Unternehmensrecht an der Friedrich-Schiller-Universität Jena; see *Bayer/J. Schmidt/Hoffmann* Der Konzern 2012, 225 ff.; *Köstler/Pütz* AG 2013, R180 f.

A first significant drawback is the **limitation of the scope of the CBMD to limited liability companies** (*cf.* Articles 1, 2(1) CBMD).[57] The historic reasons for this restriction were two-fold: On the one hand, the need of providing cross-border mobility for non-limited liability companies was perceived to be less pressing from an economic perspective; on the other hand, extending the scope to partnerships, cooperatives, etc. would have made it necessary to include special rules addressing the specific issues associated with the participation of such entities[58]. However, the limitation to limited liability companies obviously conflicts with the fact that *all* legal entities within the meaning of Art. 54 TFEU enjoy freedom of establishment, and hence – pursuant to the *Sevic* judgment – 'freedom to merge' (*cf.* 1.1.3).[59] Yet, under the *lex lata*, this freedom is largely illusory for those entities not covered by the CBMD due to the lack of a clear and secure EU legal framework.[60] Unquestionably, including them into the framework of the CBMD will pose some legislative challenges. But this is not a valid argument for *de facto* denying them the possibility to make effective use of their 'freedom to merge' – which is only really possible on the basis of a clear and secure EU legal framework. Admittedly, non-limited liability companies might not typically be the real economic 'heavy-weights'. But they play an extremely important economic and societal role in the SME sector. In light of this, a considerable number of Member States have already expanded the scope of their national legislation implementing the CBMD to non-limited liability companies[61] – which not only vividly demonstrates the economic need for effectively enabling such cross-border mergers, but also shows that the legislative challenges are evidently surmountable.

Recommendation: ***The scope of the CBMD should be extended to all legal entities within the meaning of Article 54 TFEU.***

3.2.2.2. Problems relating to the protection of stakeholders (creditors, minority shareholders, employees)

3.2.2.2.1. Protection of creditors

The protection of creditors is addressed in **Art.4(1)(b) first sentence and Art.4(2) first sentence CBMD**. The general rule in Article 4(1)(b) first sentence CBMD provides that a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject (so-called principle of subsidiary applicability of national law[62]). Art. 4(2) first sentence CBMD then specifies that the provisions and formalities referred to in Article 4(1)(b) 'shall, in particular, include … taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders …'.

57 With respect to the reasons see *Lutter/Bayer/J. Schmidt* (n. 6), 23.11 with further references.

58 *Cf.* recital 1 CBMD and *Lutter/Bayer/J. Schmidt* (n. 6), 23.11.

59 *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 23.11; *Stiegler* GmbHR 2016, 406, 410.

60 *Cf. Bayer/J. Schmidt* ZHR 179 (2009) 735, 766; *Lutter/Bayer/J. Schmidt* (n. 6), 6.39.

61 According to the study by *Bech-Bruun/Lexidale* (n. 3), p. 99 f. eight EU and EEA Member States (Belgium, Czech Republic, Italy, Slovakia, United Kingdom, Iceland, Luxembourg, Denmark) have expanded the scope of the implantation legislation beyond limited liability companies, with most of them applying the rules also to general/limited partnerships. In the UK, for example, r. 46 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (SI 2009/1804), provides that the Companies (Cross-Border Merger) Regulations 2007 (SI 2007/2974, these implement the CBMD) apply to LLPs with certain modifications. In Belgium, as another example, the provisions on cross-border mergers apply to all companies with legal personality regulated in the Code de Sociétés, except agricultural societies and economic interest groupings (Article 670 Code des Sociétés); hence, they apply also e.g. to sociétés en commandite simple (limited partnerships) and sociétés cooperatives (cooperatives), *cf.* Article 2(2) Code de Sociétés.

62 *Cf. Bayer/J. Schmidt* ZIP 2016, 841, 846; *Hansen* EBLR 2007, 181, 186; *Lutter/Bayer/J. Schmidt* (n. 6), 23.27 with further references.

The meaning of these provisions has been a source of controversy. Some commentators[63] and national legislators (e.g. the German[64] and Austrian[65]) have construed them as empowering the Member States to adopt special provisions for the protection of creditors in case of cross-border mergers (i.e. different from those applying to national mergers). On the contrary, others[66] interpreted them as mere references to the provisions governing the protection of creditors in case of national mergers in Articles 13-15 Merger Directive[67]. This dispute has only recently been resolved by the CJEU in its judgment in the case *KA Finanz*, where the court sided with the latter opinion, holding that the relevant provisions in Art. 4 CBMD mean that Member States must adhere to **Art. 13-15 Merger Directive**.[68] As a consequence, those Member States which had previously interpreted Art. 4(2) first sentence CBMD as an empowerment, will have to change their national legislation.[69] Thus, at least one source of disparity will (hopefully) disappear in the near future.

However, other problems remain. Articles 13-15 Merger Directive do not provide for full harmonisation of creditor protection, but only establish certain minimum standards.[70] Hence, there is still considerable leeway for diverging national implementations. In particular, Article 13 and Article 14 Merger Directive require that 'regular' creditors and debenture holders shall at least be entitled to obtain adequate safeguards; but the timeframe for the provision of these adequate safeguards is not harmonised.[71] Apparently, the resulting **diverging national regimes and timeframes** have proved to be a major obstacle in practice.[72] Hence, the 2014 Commission consultation returned a clear majority for a harmonisation.[73]

One option would be to give the right creditors the **right to block the merger**. However, giving a single creditor the right to block the entire merger seems **excessive** (hence, it was rejected by the overwhelming majority of respondents to the consultation[74]). The creditors are not the owners of the company, but have a financial interest. This financial interest can be protected sufficiently by a right to obtain adequate safeguards, in particular security for their claims – in line with the protection standard currently laid down in Article 13 and Article 14 Merger Directive.

With respect to the problem of the diverging timeframes, there are two basic models for harmonisation: Commencement of the protection period before *(ex ante)* or after *(ex post)* the merger has taken effect.[75] *Ex ante* protection has the advantage that creditors and debenture holders can exercise their rights against the respective merging company, whereas *ex post* protection means that they have to exercise their rights against the company resulting from the merger, i.e. potentially abroad. However, the argument that the risk of having

[63] See e.g. *Andenas/Wooldridge*, European Comparative Company Law, 2012, p. 497; *Ugliano* EBLR 2007, 585, 607 f.

[64] *Cf.* the special rule for creditor protection in § 122j UmwG (see on this the explanatory notes in BR-Drs. 548/06, p. 36).

[65] *Cf.* the special rule for creditor protection in § 13 EU-VerschG (see on this the explanatory notes, 171 d.B. (XXIII. GP), p. 15).

[66] See already *Bayer/J. Schmidt* NJW 2006, 401, 405; further e.g.: *Grunewald* Der Konzern 2007, 106, 107; *Ratka* GeS 2006, 52, 54; *Lutter/Bayer/J. Schmidt* (n. 6), 23.143; *Raaijmakers/Olthoff* (2008) 5 ECL 305, 307 f.; *Rønfeldt/Werlauff* (2006) 3 ECL 125, 128.

[67] Originally Directive 78/855/EEC; since 1 July 2011 codified as Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, OJ L 110, 29.4.2011, p. 1.

[68] CJEU, judgment of 7.4.2016, *KA Finanz*, case C-483/14, ECLI:EU:C:2016:205, paras. 60-62.

[69] See in detail *Bayer/J. Schmidt* ZIP 2016, 841, 846 ff.

[70] See in detail: *Lutter/Bayer/J. Schmidt* (n. 6), 21.117 ff.

[71] See in detail: *Lutter/Bayer/J. Schmidt* (n. 6), 21.120, 21.122

[72] *Cf.* Action Plan 2012, 4.2.; *Bech-Bruun/Lexidale* (n. 3), Main Findings 32; *Reflection Group* (n. 44), 2.6.

[73] 80 % of respondents were in favour of harmonisation of creditors' rights, and 75 % were in favour of harmonisation of the protection period, *cf.* Feedback Statement (n. 46), p. 7 f.

[74] Only 12 % of respondents were in favour of giving creditors' the right to block the merger, *cf.* Feedback Statement (n. 46), p. 6 f.

[75] Opinions of the respondents to the consultation were divided on this issues, *cf.* Feedback Statement (n. 46), p. 8 f.

to enforce their claims abroad would be too burdensome for creditors is not fully convincing; after all, the Brussels Ibis Regulation[76] ensures that claims can be enforced throughout the entire EU.[77] Moreover, the disadvantage of *ex ante* protection is that the protection period would presumably have to be rather short; otherwise, there would be the risk that creditor protection could considerably delay the merger process or even thwart the entire merger[78]. In light of these drawbacks, a system of ***ex post*** **protection** seems **preferable**: On the one hand, creditors could be given a reasonable period (e.g. 6 months) after the merger has taken effect to lodge their request to obtain adequate safeguards; on the other hand, the merging companies would not have to be afraid that creditors could considerably delay or even block the merger completely.

Recommendation: ***Despite the clarification by the CJEU's KA Finanz judgment, further harmonisation of the rules on creditor protection is clearly desirable. However, creditors should not be able to block the merger. Sufficient protection can be guaranteed by an ex post protection system giving the creditors the right to obtain adequate safeguards from the company resulting from the merger.***

3.2.2.2.2. Protection of minority shareholders

A further neuralgic issue is the protection of (minority) shareholders.[79]

Like the Merger Directive, the CBMD is based on the 'information model' (protection by means of information): (Minority) shareholders are protected primarily through the (formal) right to vote on the resolution of the general meeting which approves the merger; in order to make sure that they can make an informed decision, the CBMD sets out extensive information requirements (in particular: draft terms of the mergers, merger report, experts' report).[80]

But the CBMD does not provide any further special protection rights for minority shareholders. Instead, Art. 4(2) second sentence CBMD empowers each Member State, with respect to companies participating in a cross-border merger and governed by its law, to 'adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger'. The result has been a wide-ranging spectrum of very different protection regimes, ranging from no special rules (e.g. in UK[81]) to rather elaborate protection systems (e.g. in Germany, where minority shareholders have an exit right against cash compensation and a right to additional cash compensation if the share exchange ratio is not adequate[82]).[83] The hodgepodge of diverging national rules is further complicated by Article 10(3) CBMD, which provides that procedures to scrutinise and amend the share exchange ratio as well as procedures to compensate minority shareholders without preventing the registration of the merger (in particular: 'Spruchverfahren' pursuant to German and Austrian law) shall apply only under specified circumstances.[84] This has turned out to be a major

[76] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p.1.
[77] *Cf. Bayer/J. Schmidt* NZG 2006, 841, 843; *Handelsrechtsausschuss des DAV* NZG 2006, 737, 742; *Louven* ZIP 2006, 2021, 2028.
[78] *Cf.* also *Bech-Bruun/Lexidale* (n. 3), Main Findings 9.
[79] *Cf. Bech-Bruun/Lexidale* (n. 3), Main Findings 47; Feedback Statement (n. 46), p. 9.
[80] *Lutter/Bayer/J. Schmidt* (n. 6), 23.130
[81] *Cf. Bech-Bruun/Lexidale* (n. 3), UK-10; *Snaith* in: Van Gerven (ed.), Cross-Border Mergers in Europe, Vol. I, 2010, 17.35; see also *Palmer's Company Law* Ch. 12.4.
[82] For an overview see *Bech-Bruun/Lexidale* (n. 3), DE-8 ff.; *Lutter/Bayer/J. Schmidt* (n. 6), 23.140 with further references.
[83] For an overview see *Bech-Bruun/Lexidale* (n. 3), Main Findings 47 ff. (and individual country reports); see further also: Van Gerven (ed.), Cross-Border Mergers in Europe, Vol. I, 2010.
[84] For an overview see *Lutter/Bayer/J. Schmidt* (n. 6), 23.135 ff. with further references.

stumbling block in particular for cross-border mergers involving German and Austrian companies (although it has to be conceded that the problems encountered do not result exclusively from the EU rules, but are also to a major part due to the intricacies of the German minority protection system).[85]

In light of this rather unsatisfactory situation, **further harmonisation** is **clearly warranted**. Indeed, 65 % of respondents to the 2014 Commission Consultation favoured further harmonisation – although opinions were then rather divided on the specific design of the protection regime.[86]

The 2013 study had suggested the option to simply no longer allow Member States to adopt any special protection rules.[87] Yet, while this option might seem simple it would completely ignore the fact that cross-border mergers entail significant risks for minority shareholders (becoming a shareholder of a foreign company with different rights, decreasing share value, etc.). Thus, there are sound reasons for implementing special rules for the protection of minority shareholders.

As regards the level of harmonisation, **full harmonisation** seems to be the best option: It would guarantee that minority shareholders of all merging companies enjoy the same level of protection. If this solution should not prove to be feasible, a two-option approach (i.e. choice of Member States between two options) might be a workable alternative. By contrast, the option of an 'open menu approach' suggested in the 2014 Commission consultation seems to be more than suboptimal: If Member States were free to choose between several different protection mechanisms and were not even obligated to provide any protection at all, the end result would probably be not much different from the current situation of vastly diverging rules.

The specific protection rights should cater to the major risks faced by minority shareholders. The first of these is the danger that, after the cross-border merger, they end up as shareholders of a company of which they do not want to be a shareholder of, but do not have the possibility to sell their shares at a fair price (or even at all). This danger can be avoided by granting minority shareholders an **exit right** against adequate compensation. Such exit rights not only have a long tradition in many Member States[88], but they are also established legal instruments of EU law (*cf.* in particular Art. 28 of the Merger Directive, Article 16 Takeover Directive[89] and Art. 5(2) Division Directive[90]).

The second major danger for minority shareholders is that the share exchange ratio is not determined adequately. Hence, they should have the **right to get additional compensation in case of an inadequate share exchange ratio**. Since additional cash payments might be an issue for companies with respect to liquidity, it would seem sensible to allow them to instead provide additional shares.[91]

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85 See in detail: *Lutter/Bayer/J. Schmidt* (n. 6), 23.135 ff. with further references.

86 *Cf.* Feedback Statement (n. 46), p. 9.

87 *Bech-Bruun/Lexidale* (n. 3), Main Findings 48 f. However, it is rather doubtful whether this could be achieved by simply deleting Article 4(2) second sentence CBMD as the authors of the study seem to suggest. After all, the Merger Directive also does not contain any special empowerment for Member States to adopt special provisions to protect minority shareholders, but there is general consensus that Member States are free to do so (*cf. Lutter/Bayer/J. Schmidt* (n. 6), 21.113

88 Several Member States have also implemented an exit right specifically in case of cross-border mergers, e.g. Austria (§ 10 EU-VerschG); Denmark (Art. 285 f. Lov om aktie- og anpartsselskaber (selskabsloven)); Finland (16 luku § 13 Osakeyhtiölaki); Germany (§ 122i UmwG), the Netherlands (Art. 2:333h Burgerlijk Wetboek).

89 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4.2004, p. 12.

90 Sixth Council Directive 82/891/EEC of 17 December 1982 concerning the division of public limited liability companies, OJ L 378, 31.12.1982, p. 47.

91 The mandatory cash compensation required by German law entails significant liquidity risks for companies; hence, many practitioners and scholars have been calling for the possibility to grant additional shares as an

Recommendation: ***The area of minority shareholder protection should be fully harmonised (alternatively, Member States should only have the choice between two options). Minority shareholders should be given an exit right against adequate compensation and the right to get additional compensation in case of an inadequate share exchange ratio*.**

3.2.2.2.3. Protection of employees

Since employee participation had been one of the thorniest issues of the entire legislative process, the result was the establishment of a rather complex compromise solution in Art.16 CBMD. In a nutshell, the starting point is the application of the law of the Member State of the registered office (Art. 16(1) CBMD); however, if one of the conditions set out in Art. 16(2) CBMD is fulfilled, the negotiation model set out in the SE Directive[92] is applicable (albeit with a number of modifications).

Apparently, companies and practitioners have learned to make do with these rules[93], especially since they are somewhat more flexible than those applicable to the SE[94]. Nonetheless, they are widely seen as overly complex, burdensome, protracted and costly[95]. Moreover, there are many points which are unclear and/or controversial.[96] Hence, it would seem desirable to subject these rules to a thorough review and, subsequently, reform.

However, it must be borne in mind that the employee protection rules now enshrined in Article 16 CBMD are a very fragile compromise. Undoing this carefully balanced legislative compromise package could open the ‘box of the Pandora’ and could potentially block any reform for years to come. Moreover, since the rules are so closely intertwined with the employee participation rules in the SE Directive and the SCE Directive[97], any kind of reform would necessarily also affect these related legal instruments. In light of this, it would seem advisable to omit the employee protection rules from the presently contemplated reform of the CBMD. Notwithstanding this, a thorough review of the employee participation rules in the SE Directive, the SCE Directive and the CBMD is – at least in the mid- to long-term – indeed imperative and of critical importance if one wants to avoid key legislative projects (like e.g. the Societas Europaea Privata[98]) failing due to the apparent impossibility to reach a consensus on this issue.

Recommendation: ***Although the rules on employee protection are in need of reform, this area should be omitted from any short-term reform. Notwithstanding, a critical review of the employee protection regimes not only in the CBMD, but also in the closely connected SE Directive and the SCE Directive is imperative at least in the mid- to long-term.***

alternative (*cf.* e.g. *Bayer/J. Schmidt* NZG 2006, 841, 843; *Handelsrechtsausschuss des DAV* NZG 2006, 737, 738; *Handelsrechtsausschuss des DAV* NZG 2013, 694, 698; *J. Vetter* AG 2006, 613, 625).

92 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22.

93 *Cf. Bech-Bruun/Lexidale* (n. 3), Main Findings 51.

94 For an overview of the most important differences see *Lutter/Bayer/J. Schmidt* (n. 6), 23.151.

95 *Cf. Bech-Bruun/Lexidale* (n. 3), Main Findings 52; *Stiegler* GmbHR 2016, 406, 412; *Wooldridge* (2006) 27 Co Law 309, 310; *Wooldridge* (2007) 28 Co Law 118.

96 *Cf. Bech-Bruun/Lexidale* (n. 3), Main Findings 52.

97 Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.8.2003, p. 25.

98 The 2008 proposal (COM(2008) 396) was withdrawn by the Commission in 2014 because it was not possible to reach a consensus especially with respect to employee participation; *cf. Bayer/J. Schmidt* BB 2015, 1731.

3.2.2.3. Problems relating to procedure and practical obstacles

3.2.2.3.1. Exemptions from to the requirement of a merger report

De lege lata, Art.7 CBMD does not provide for any exceptions to the requirement of a merger report (which is not only time-consuming, but also very costly). In particular, there is – in contrast to Article 9(3) Merger Directive – no express provision allowing for a waiver of the requirement of a merger report by the shareholders. Moreover, many commentators argue that the purpose of the merger report to protect and inform also the employees[99] excludes the possibility of such a waiver.[100] However, one may raise some doubts whether this is really the case.[101] At any rate, the employee protection purpose cannot exclude a waiver by the shareholders if the company does not have any employees[102] or if the employee side consents to the waiver[103]; hence, many commentators argue that a waiver must at least be possible under these conditions. This should be clarified by amending Art. 7 CBMD correspondingly.

Moreover, *de lege lata* it is unclear whether a merger report is dispensable in case of an upstream merger of a 100%-subsidiary. The dispensation provision for intra-group mergers in Article 15 CBMD does not explicitly exempt such mergers from the requirement of a merger report. However, if one considers the genesis of the provision, this might be a simple drafting error.[104] On the other hand, the absence of such an exemption may also be due to the refocussing of the merger report as an instrument also protecting the employees.[105] Given the importance of such intra-group mergers, this question should, at any rate, be clearly regulated. Weighing the interests involving it seems reasonable to exempt such intra-group mergers from the requirement of a merger report.

Recommendation: ***Art. 7 CBMD should explicitly allow a waiver of the requirement of a merger report by the shareholder at least in cases where the company does not have any employees or where the employee side consents to the waiver.***
Art. 15 CBMD should exempt upstream mergers of a 100%-subsidiary from the requirement of a merger report.

3.2.2.3.2. Diverging accounting rules

A further source of practical problems is that the Member States' rules on the decisive accounting date within the meaning of Article 5(f) CBMD (i.e. the date from which the transferor company's transactions are treated for accounting purposes as those of the transferee/new company) diverge: Under some national laws, the accounting date may precede the date when the merger takes legal effect, other national laws require the two dates to coincide,

[99] With respect to this see *Lutter/Bayer/J. Schmidt* (n. 6), 23.52 with further references.

[100] See *Beutel,* Der neue rechtliche Rahmen grenzüberschreitender Verschmelzungen in der EU, 2008, p. 183; *Drinhausen/Keinath* RIW 2006, 81, 83; *Heckschen* DNotZ 2007, 444, 459; *Kallmeyer/Kappes* AG 2006, 224, 232; *Holzborn/Mayston* ZIP 2012, 2380, 2383; *Krause/Kulpa* ZHR 171 (2007) 38, 62; *Mader* RWZ 2011, 99, 104; *Müller* NZG 2006, 286, 288.

[101] *Cf. Bayer* in: Lutter, UmwG, 5th ed. 2014, § 122e para. 13; *Bayer/J. Schmidt* NJW 2006, 401, 403; *Bayer/J. Schmidt* NZG 2006, 841, 842; *Frenzel* RIW 2008, 12, 17 f.; *Lutter/Bayer/J. Schmidt* (n. 6), 23.64; *Vetter* AG 2006, 613, 620 f.

[102] *Bayer* (n. 101), § 122e para. 13; *Drinhausen* in: Semler/Stengel, UmwG, 3rd ed. 2012, § 122e para. 13; *Herrler/Schneider* GmbHR 2011, 795, 798; *Lutter/Bayer/J. Schmidt* (n. 6), 23.64; *Müller* ZIP 2007, 1081, 1084 f.; *Vetter* AG 2006, 613, 620 f.

[103] *Bayer* (n. 101), § 122e para. 13; *Drinhausen* (n. 102), § 122e para. 13; *Kiem* in: Habersack/Drinhausen, SE-Recht, 2012, § 122e UmwG para. 23; *Lutter/Bayer/J. Schmidt* (n. 6), 23.64; *Weyde/Hafemann* FS Meilicke, 2010, p. 779, 814.

[104] *Bayer* (n. 101), § 122e para. 14; *Frenzel* RIW 2008, 12, 18; *Lutter/Bayer/J. Schmidt* (n. 6), 23.65.

[105] *Bayer* (n. 101), § 122e para. 14; *Behrens*, Die grenzüberschreitende Verschmelzung nach der Richtlinie 2005/56/EG (Verschmelzungsrichtlinie), 2007, p. 102 f.; *Lutter/Bayer/J. Schmidt* (n. 6), 23.65.

and still others accept both alternatives. This can lead to frictions and significant practical problems.[106] Hence, **harmonisation** is also **warranted** in this respect. In order to avoid the described frictions, it would be sufficient to ensure that the merging companies can freely determine the decisive accounting date; this would, at the same time, provide companies with flexibility to take into account the specific characteristics of the individual merger.

Recommendation: ***The rules on the determination of the accounting date should be harmonised in the sense that the merging companies can freely determine the decisive accounting date.***

3.2.2.3.3. Diverging valuation rules

Another significant practical obstacle is the divergence of the valuation rules. This is problematic with respect to two different – though related – issues: the merger ratio and the transfer value.

On the one hand, the valuation of the merging companies is of crucial importance because it forms the basis for the determination of the **merger ratio** and thus the share exchange ratio. Logically, this can only work properly if both companies are valued pursuant to the same standards. However, the national rules and traditions vary tremendously in this respect. In Germany, for example, the law does not provide any valuation rules; but – in line with industry standards[107] – the *Ertragswertverfahren* ('capitalised earnings method') has become the prevailing method.[108] In France, by contrast, the Autorité des Marchés Financiers (AMF) requires an *approche multicritères* (multiple-criteria approach).[109] These are but two examples out of an entire panoply of very different national standards[110] which often render reaching a common valuation base an (almost) impossible task.[111]

On the other hand, valuation difficulties are relevant with respect to **transfer value**, i.e. at which value the assets and liabilities are transferred to the transferee company (on which information has to be included in the draft terms of the merger pursuant to Art. 5(k) CBMD). In this regard, there are basically two competing approaches in the different Member States: transfer at book value or transfer at fair value.[112] But it is logically imperative that the merging companies use the same transfer value – which the different national approaches can, here again, render an (almost) impossible task.

Hence, both of these aspects are in need of harmonisation. In this respect, different options seem possible. One could either prescribe common EU rules (but given the vastly diverging national approaches, reaching a consensus on this question might prove to be very hard) or one could let the companies choose from a 'menu' of standards which the Member States would have to accept.

Recommendation: ***The rules on valuation with respect to the determination of the merger ratio and the transfer value should be harmonised.***

3.2.2.3.4.

[106] *Cf. Bech-Bruun/Lexidale* (n. 3), Main Findings 42 ff.
[107] The IDW S 1 (WPg Supplement 3/2008, p. 68 ff., FN-IDW 7/2008, p. 271 ff.), which have been published by the Institut der Wirtschaftsprüfer (Institute of Public Auditors), provide the use of either the *Ertragswertverfahren* ('capitalised earnings method') or the Discounted Cash Flow (DCF)-method (para. 101).
[108] See e.g. *Drygala* (n. 6), § 5 para. 52; *Kiem* ZGR 2007, 542, 543, 551.
[109] Position – recommandation AMF n° 2011-11. Opérations d'apports ou de fusion.
[110] For a complete compilation see the individual country reports in the study by *Bech-Bruun/Lexidale* (n. 3).
[111] See in detail: *Adolf* ZHR 173 (2009) 167; *Kiem* ZGR 2007, 542 ff.
[112] *Cf. Bech-Bruun/Lexidale* (n. 3), Main Findings 45.

3.2.2.3.5. Problems relating to documentation and communication

Companies and practitioners also frequently complain about delays, uncertainties and additional costs due to varying documentation requirements, the need for translations and communication problems.[113]

One way to solve the **language** problem would be to require all documentation and communication relating to cross-border mergers to be in one single language, preferably English as the business *lingua franca*.[114] However, given the general sensitivity of language issues, this might not be politically feasible.

Another way to considerably streamline and facilitate communication and documentation would be the adoption of **standard forms**, preferably in electronic form. Such standard forms have become the standard in the area of EU civil procedure law (e.g. Brussels Ibis Regulation, EU Service Regulation[115], EU Succession Regulation[116], EU Insolvency Regulation recast[117]) and have proven to be an effective instrument to facilitate and standardise documentation and communication. Moreover, if it should not be possible to reach a political consensus on the use of a single language, such standard forms would at least considerably alleviate the language problem.

Apart from this, a significant improvement is to be expected at any rate once the new Business Registers Interconnection System (**BRIS**)[118], which is currently being set up, will go into operation on 8 July 2017. Themodified Art. 13(2) CBMD will finally take effect, requiring the register of the company resulting from the cross-border merger to notify the registers of the other participating companies without delay via BRIS once the merger has taken effect (and those registers to delete – where appropriate – the old registration upon receipt of that notification). The new Article 5a Branches Directive[119] provides corresponding requirements with respect to any branches affected by the cross-border merger.

Recommendation: ***Some communication problems will be abolished once the new BRIS is operational. Moreover, standard forms should be adopted for the relevant documentation and communication. In addition, it should be considered to require all documentation and communication to be in one single language (preferably English).***

[113] *Cf.* also *Bech-Bruun/Lexidale* (n. 3), Main Findings 57 f.
[114] *Cf.* also the suggestion of a standardised language by *Bech-Bruun/Lexidale* (n. 3), Main Findings 42.
[115] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10.12.2007, p. 79.
[116] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107.
[117] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5.6.2015, L 141/19.
[118] See Articles 3a ff. Publicity Directive (Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, OJ L 258, 1.10.2009, p. 11) and Commission Implementing Regulation (EU) 2015/884 of 8 June 2015 establishing technical specifications and procedures required for the system of interconnection of registers established by Directive 2009/101/EC of the European Parliament and of the Council, OJ L 144, 10.6.2015, p. 1.
[119] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, OJ L 395, 30.12.1989, p. 36.

3.2.2.3.6. Problems relating to the legal scrutiny procedure

Furthermore, there also seem to be significant problems with the procedure of legal scrutiny of the merger set out in Articles 10 and 11 CBMD.

Firstly, the form and content of the **pre-merger certificate** required by Art. 10(2) CBMD varies significantly from Member State to Member State. In Ireland[120] and the UK[121], for example, it has the form of a formal court order. By contrast, German law provides that the notification that the cross-border merger has been entered into the registered shall be deemed to be the pre-merger certificate[122] (although it is very doubtful whether this is in conformity with Article 10(2) CBMD[123]). This problem could be easily resolved by providing a standard form for the pre-merger certificate.

Secondly, some national competent authorities apparently do not adhere to the work-sharing principle inherent in the **two-step model of legal scrutiny**[124] pursuant to Articles 10 and 11 CBMD, but instead check *compliance* of *all* merging companies with *all* requirements of the national law of the Member State of the national authority. This means that companies are suddenly asked to comply with the requirements of a foreign legal system – although they have already complied with the requirements of their 'home' national law (as mandated by the CBMD) and this has been conclusively attested to in the pre-merger certificate. This, of course, completely thwarts the system of the CBMD which has been deliberately based on the principle of subsidiary applicability of national law and a corresponding work-sharing with respect to legal scrutiny. However, this is actually not a problem of the CBMD rules, but rather of their implementation and enforcement in the Member States. Hence, the only sensible remedy would seem to be an information campaign, and – as a last resort – action by the Commission against non-compliant Member States.

<u>Recommendation:</u> ***A standard form should be adopted for the pre-merger certificate pursuant to Art. 10(2) CBMD.***
The Commission should start an information campaign regarding the operation of the two-step model of legal scrutiny.

[120] *Cf.* r. 13 European Communities (Cross-Border Mergers) Regulations 2008 (SI 157/2008); Rules of the Superior Courts, Appendix No. 11.

[121] *Cf.* r. 6 The Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974); Civil Procedure Rules, Part 49, Practice Direction 49A, r. 23.

[122] *Cf.* § 122k(2) sentence 2 UmwG.

[123] See *Bayer* (n. 101), § 122k para. 21 with further references.

[124] Articles 10 and 11 CBMD set out a two-step model: (i) Legal scrutiny as regards the part of the procedure which concerns each merging company by the competent authority of the Member State of the respective merging company (Article 10(1) CBMD); if all pre-merger acts and formalities have been complied with, the respective authority issues a pre-merger certificate (Article 10(2) CBMD); (ii) legal scrutiny as regards that 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-border merger (Article 11(1) CBMD). See in more detail: *Lutter/Bayer/J. Schmidt* (n. 6), 23.91 ff. with further references.

4. THE NEED FOR AN EU LEGAL FRAMEWORK FOR CROSS-BORDER DIVISIONS AND ITS KEY FEATURES

4.1. The need for an EU legal framework for cross-border divisions

As shown above (1.2), the right to effect a cross-border division ('freedom to divide') is protected as an inherent aspect of the freedom of establishment (Art. 49, 54 TFEU) enjoyed by all legal entities within the meaning of Art. 54 TFEU. But without a clear and secure EU legal framework, this 'freedom to divide' is largely illusory (*cf.* 1.2). Hence, the need to **enable legal entities to effectively exercise their 'freedom to divide'** demands the adoption of a special EU legal framework for cross-border divisions.

Over and above, there are also sound **economic reasons** for establishing an EU legal framework for cross-border divisions. Cross-border divisions offer legal entities a further **attractive tool for cross-border reorganisations**. They are an important tool for changing and/or simplifying the organisation structure, for adapting to changing market conditions and for realising new market opportunities.[125] Divisions can be used to create smaller independent units for the purpose of isolating liability risks, in order to sell them ('carve out'), for an isolated IPO of the separated part or to transfer the separated part upon other companies belonging to the same group ('sidestream', 'upstream' or 'downstream' merger).[126] Moreover, a 'carve out' of ailing sectors by way of a division can be a very important restructuring tool.[127] Furthermore, divisions can be used to apportion different sectors of an undertaking between different heirs, family lines or quarrelling shareholders.[128]

Admittedly, all of these reorganisations could also be achieved by other means. Instead of 'carving out' a sector by way of a cross-border division, it would e.g. be possible to create a NewCo in the other Member State and transfer all the assets (and liabilities) to that NewCo – or to set up a NewCo A in the home Member States, transfer all the relevant assets (and liabilities) to it and merge that NewCo A upon a NewCo B established for that purpose in the other Member State. However, such 'detours' are time-consuming and costly. An individual transfer of all the relevant assets and liabilities is not only cumbersome (especially in a cross-border context), there is also the problem of having to obtain the consent of the affected creditors. By contrast, a division has the **crucial advantage** of a (partial) **universal transfer of all assets and liabilities** *uno acto* (without the need to obtain the consent of the creditors).

There have been concerns that cross-border divisions may be abused to selectively divide assets and liabilities to the detriment of creditors and employees.[129] However, as the experience from divisions on the national level shows, these **risks can be tackled by implementing an appropriate legal framework**. Some isolated instances of abuse may nevertheless occur. But they can be addressed by the general principles on abuse of rights and are, at any rate, no justification to deny the vast majority of law-abiding companies the opportunity of executing cross-border divisions.

Another objection sometimes raised against the creation of an EU legal framework for cross-border divisions is that it would lack the necessary 'foundations' because the Division Directive harmonised only national mergers of public limited liability companies, and, more

[125] *Cf.* Feedback Statement (n. 46), p. 19.
[126] *Cf.* with respect to divisions in general: *Teichmann* in: Lutter, UmwG, 5th ed. 2014, § 123 UmwG para. 36.
[127] *Cf.* with respect to divisions in general: *Stengel* in: Semler/Stengel, UmwG, 3rd ed. 2012, § 123 UmwG para. 7; *Teichmann* (n. 126), § 123 UmwG para. 35.
[128] *Cf.* with respect to divisions in general: *Stengel* (n. 127), § 123 UmwG para. 7; *Teichmann* (n. 126), § 123 UmwG para. 33.
[129] *Cf.* Feedback Statement (n. 46), p. 19.

importantly, does not obligate Member States to permit divisions at all. While this argument cannot be dismissed outright, it should be put into perspective. First of all, many Member States do have rules on national divisions (and not only for public limited liability companies), e.g. Austria[130], Belgium[131], Finland[132], France[133], Germany[134], Ireland[135], Luxembourg[136], Malta[137], the Netherlands[138], the UK[139]. Some Member States have even adopted special rules for cross-border divisions (e.g. Denmark[140], Finland[141]). Secondly, given that divisions can be characterised as the 'mirror image' of mergers (they are sometimes even called 'partial merger' or 'demerger') the basic procedural structure and the concept of the universal transfer of assets and liabilities is by no means completely foreign even to those Member States whose national law does not know divisions (yet). Finally, the introduction of new rules always entails some teething problems and the objection that one has so far been doing well without something has in and of itself never been a valid argument.

4.2. Key features of an EU directive on cross-border divisions

4.2.1. General principles: correspondence with rules on cross-border mergers

Given that divisions can be characterised as the **'mirror image' of mergers**, they should generally be governed by rules reflecting those on mergers. This principle has already been followed by the Division Directive (whose rules substantially correspond with those of the Merger Directive)[142] and it should also be the basic principle of a new EU legal framework on cross-border divisions[143]. Different rules should only apply where the specific characteristics of cross-border divisions require it.

4.2.2. Scope

Hence, with respect to scope, the new EU legal framework on cross-border divisions should – in line with the scope of the 'freedom to divide' as an inherent aspect of the freedom of establishment (*cf.* 1.2) and the recommendation for a reform of the CBMD (*cf.* 3.2.2.1) – cover **all legal entities within the meaning of Art. 54 TFEU**.

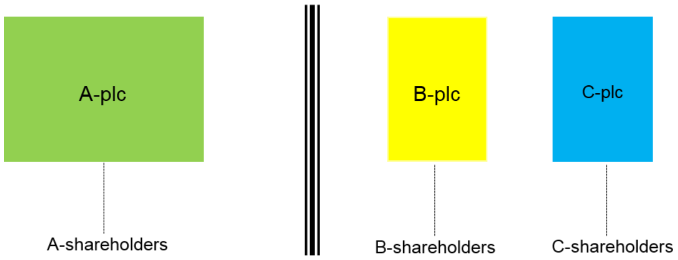
4.2.3. Types of division

The Division Directive covers only divisions in the form of a complete **split-up (*Aufspaltung*)**, i.e. operations whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation of shares of the receiving companies to the shareholders of the company being divided (*cf.* Art. 2(1) and Art. 21(1) Division Directive).[144] Such a split-up can be effected

[130] §§ 1 ff. Bundesgesetz über die Spaltung von Kapitalgesellschaften (SpaltG).
[131] Articles 673 ff. Code des Sociétés.
[132] 17 luku Osakeyhtiölaki.
[133] Articles L236-1 Code de Commerce.
[134] §§ 123 ff. UmwG.
[135] Ss. 485 ff. Companies Act 2014.
[136] Art. 285 ff. Loi du 10 août 1915 concernant les sociétés commerciales.
[137] Ss. 360 ff. Companies Act (Act XXV of 1995).
[138] Artikel 2.334a ff. Burgerlijk Wetboek.
[139] Ss. 919 ff. Companies Act 2006.
[140] §§ 291 ff. Lov om aktie- og anpartsselskaber (selskabsloven).
[141] 17 luku §§ 19 ff. Osakeyhtiölaki.
[142] *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 22.2 with further references.
[143] See also *Roelofs* (n. 6), p. 599.
[144] *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 22.19 f.

either as a division by acquisition or as a division by the formation of new companies (*cf.* Articles 1, 2(1), 21(1) Division Directive).

Figure 1: split-up (*Aufspaltung*) by formation of new companies

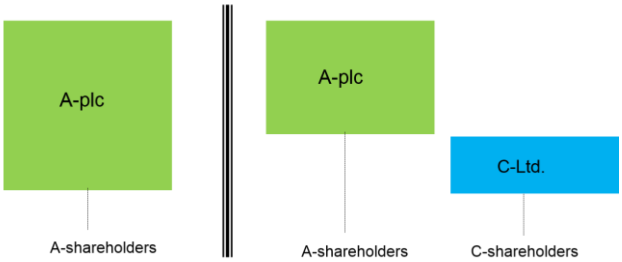


Source: Prof. Dr. Jessica Schmidt, LL.M.

The restriction to split-ups seems to be unfortunate, since it excludes other types of divisions which can serve as attractive reorganisation instruments. German law, for example, provides for two other types: spin-off (*Abspaltung*) and hive-down (*Ausgliederung*).[145] Both types can be effected as a division by acquisition or a division by the formation of one or more new companies.

In case of a **spin-off (*Abspaltung*)** a company spins off a part (or several parts) from its assets by transferring this part (or these parts), in each case as a whole, to one or several companies in return for shares in this company or these companies being allocated to the owners of the shares in the company transferring assets.[146] Hence, in contrast to a split-up (*Aufspaltung*), the 'original' company continues to exist.

Figure 2: spin-off (*Abspaltung*) by formation of a new company

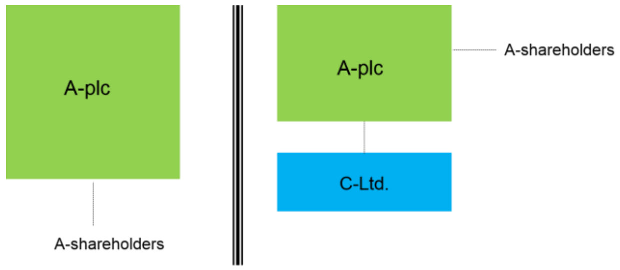


Source: Prof. Dr. Jessica Schmidt, LL.M.

A hive-down (*Ausgliederung*) means that a company hives down a part (or several parts) of its assets by transferring this part or these parts, in each case as a whole, to one or several companies in return for shares in this company or these companies being allocated to the company transferring assets.[147] The crucial difference to a spin-off (*Abspaltung*) is that the shares of the company or companies to which assets are transferred are allocated to the company transferring assets (and not to its shareholders).

[145] *Cf.* § 123(1)-(3) UmwG.
[146] *Cf.* § 123(2) UmwG.
[147] *Cf.* § 123(2) UmwG.

Figure 3: hive-down (*Ausgliederung*) by formation of a new company



Source: Prof. Dr. Jessica Schmidt, LL.M.

In order to enable entities to enjoy a wide range of reorganisation options, the **EU legal framework on cross-border divisions should cover** all three types of division, i.e. **split-up** (*Abspaltung*)**, spin-off** (*Aufspaltung*) and **hive-down** (*Ausgliederung*) – all of them either as division by acquisition or division by formation of a new company or new companies.

Moreover, in line with the Division Directive[148], the EU legal framework should permit both **proportionate divisions** (i.e. the shares in the recipient or new legal entities are allocated in proportion to the shareholding in the transferring legal entity) **and disproportionate divisions** (i.e. the shares in the recipient or new legal entities are allocated disproportionate to the shareholding in the transferring legal entity). In particular, a 'division to zero' (i.e. no allocation of shares in the recipient or new legal entity) should be permitted, because this provides an attractive reorganisation tool. In line with the Division Directive, the dangers which disproportionate divisions entail for minority shareholders should be addressed by ensuring transparency by way of the requirement to state the allocation of shares and the relevant criteria in the common draft terms (*cf.* Article 3(2)(i) Division Directive) and the requirement to explain these criteria in the merger report (*cf.* Article 7(1) Division Directive). With respect to an exit or veto right for minority shareholders see also *infra* 0 (Article 5(2) Division Directive provides only a Member State option).

4.2.4. Principle of subsidiary applicability of national law

Like the CBMD (*cf.* Article 4(1)(b) first sentence CBMD, *cf.* 3.2.2.2.1), the EU legal framework for cross-border divisions should be based on the **principle of subsidiary applicability of national law**, i.e. to the extent that EU law does not establish special rules, a legal entity taking part in a cross-border division shall comply with the provisions and formalities of the national law to which it is subject.

4.2.5. Division procedure

The procedural framework for cross-border divisions should be based on the established and proven **'European model for structural changes'**[149], which has been set out for the first time in the Merger Directive and has subsequently been adopted in the Division Directive, the rules on cross-border mergers in the SE-Regulation, the SCE-Regulation and in the CBMD.

This means that the key procedural elements should be:

[148] *Cf.* Articles 3(1)(i), 5(2) and 17(1)(b) Division Directive) and see *Lutter/Bayer/J. Schmidt* (n. 6), 22.15 ff.
[149] See on this *Lutter/Bayer/J. Schmidt* (n. 6), 21.3, 22.2, 22.23; 23.3, 23.26, 41.50, 42.22

- common draft terms of the cross-border division (*cf.* Article 5 CBMD);
- publication of the common draft terms and additional information (*cf.* Article 6 CBMD);
- report of the management or administrative organ (*cf.* Article 7 CBMD);
- independent expert report (*cf.* Article 8 CBMD);
- approval by general meeting (*cf.* Article 9 CBMD);
- two-step legal scrutiny (*cf.* Articles 10, 11 CBMD).

4.2.6. Protection of creditors, minority shareholders and employees

4.2.6.1. Protection of creditors

Given the wide freedom of the participating legal entities to allocate the assets and liabilities, divisions entail a high element of risk for creditors, necessitating special rules for their protection.[150]

With respect to national divisions, Article 12 Division Directive requires Member States to adopt one (or both) of two different protection regimes: (i) right of the creditors to obtain adequate safeguards and joint and several default liability of all recipient companies if the company to which the relevant obligation has been transferred in accordance with the draft terms of division does not satisfy the creditor, and/or (ii) joint and several liability of all recipient companies for the obligations of the transferring company.[151]

One option would be to simply apply this protection system *mutatis mutandis* to cross-border divisions by way of a reference to the Division Directive (like the reference to the Merger Directive in the CBMD, *cf.* 3.2.2.2.1). However, in case of cross-border divisions, the existence of three different levels of creditor protection is likely to lead not only to considerable frictions (like currently experienced in the context of the CBMD), but would open the door for regulatory arbitrage, i.e. there would be a considerable incentive for companies to structure division operations in way to limit their liability to creditors as much as possible.

Hence, there are sound reasons for a fully harmonised protection regime for creditors. In this respect, it would seem sensible to adopt one of the protection regimes already laid down as possible options in the Division Directive. In light of the fact that the risks for creditors inherent in any division are exponentiated in case of cross-border divisions, it is recommended to adopt the combination of the two protection regimes set out in the Division Directive as the general model for the EU framework on cross-border divisions. However, corresponding with the recommendations made above with respect to the CBMD (*cf.* 3.2.2.2.1), a system of *ex post protection* seems preferable. Hence, the harmonised protection system should consist of a **right of the creditors to obtain adequate safeguards *(ex post*)** combined with a **joint and several liability of all recipient companies for the obligations of the transferring company**.

[150] *Cf. Grundmann*, European Company Law, 2011, § 28.45; *Lutter/Bayer/J. Schmidt* (n. 6), 22.87.
[151] See in more detail *Lutter/Bayer/J. Schmidt* (n. 6), 22.87 ff.

4.2.6.2. Protection of minority shareholders

In line with the recommendation made above with respect to the CBMD (*cf.* 3.2.2.2.2) the area of minority shareholder protection should also be fully harmonised for cross-border divisions: Minority shareholders should be given an **exit right against adequate compensation** and the **right to get additional compensation in case of an inadequate share exchange ratio**.

Special protection is required in case of **disproportionate divisions**, because they entail the danger of minority shareholders being squeezed-out. Hence, it would seem sensible to either require the consent of all shareholders (i.e. *de facto* give minority shareholders a veto right, like e.g. under German law[152]) or at least a 90 %-majority (by way of analogy to the squeeze-out rules in Art. 15 Takeover Directive and Article 28 Merger Directive).

4.2.6.3. Protection of employees

Given the comparability of the situation with that in the case of a cross-border merger, protection of employees should be **aligned with the rules in the CBMD** (with respect to the need to reform these see 3.2.2.2.3).

4.2.7. Special rules for intra-group divisions

Finally, there should be special rules for intra-group divisions. However, given the special risks for minority shareholders associated with divisions, they should (like in Art. 20 Division Directive) be **restricted to cases of 100 %-upstream-mergers** and should generally only mirror Art. 15 CBMD insofar as this is compatible with the special characteristics of divisions.

[152] *Cf.* § 128 UmwG; see on this *Lutter/Bayer/J. Schmidt* (n. 6), 22.84

5. THE NEED FOR AN EU LEGAL FRAMEWORK FOR CROSS-BORDER TRANSFERS OF SEAT (CROSS-BORDER CONVERSIONS) AND ITS KEY FEATURES

5.1. The need for an EU legal framework for cross-border transfers of seat (cross-border conversions)

As outlined above (1.3), the CJEU's jurisprudence (*Cartesio*[153]*, VALE*[154]) has firmly established the right of legal entities within the meaning of Art. 54 TFEU to effect a cross-border transfer of seat (cross-border conversion); this right is protected as an inherent aspect of the freedom of establishment pursuant to Articles 49, 54 TFEU ('freedom to convert'). But without a clear and secure EU legal framework, this 'freedom to convert' is largely illusory (*cf.* 1.3). Hence, the need to **enable legal entities to effectively exercise their 'freedom to convert'** requires the adoption of a special EU legal framework for cross-border transfers of seat (cross-border conversions).

Moreover, since cross-border transfers of seat (cross-border conversions) constitute an **attractive tool for cross-border reorganisations**, there are also **well-founded economic arguments** for establishing a special EU legal framework for them. Cross-border conversions allow legal entities to switch to a company law regime which they view as better suited for their specific structure and needs (e.g. with respect to the corporate governance structure, the capital structure, limitation of liability, statutory freedom, disclosure requirements, investor protection, rights of minority shareholders, employee participation, etc.).[155] This can not only help to reduce costs and improve efficiency, but can also be vital to attract investors and lenders[156]. Further important motives for cross-border conversions can be a higher efficiency of the judicial system of the Member State of the new registered office[157], but also factors like a generally more favourable economic environment[158], the wish to be closer to important clients[159], or to facilitate market entry by using a legal form of the host Member State[160].

The **other options** currently available to 'move' the registered office to another Member State are in fact **not really equivalent alternatives** since they have significant drawbacks in comparison to a cross-border conversion:

- Winding-up in the Member State of origin, **incorporation of a new company** in the host Member State and individual transfer of all the assets and liabilities: This is not only cumbersome and costly, but there is also no continuity of the legal personality and there may be some assets and liabilities which cannot be transferred.
- Cross-border merger by acquisition upon a company in the host Member State on the basis of the **CBMD**: This has the advantage of a universal transfer of all assets and liabilities *uno acto*, but it requires the formation (or acquisition) of a company in the

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153 CJEU, judgment of 16.12.2008, *Cartesio*, case C-210/06, ECLI:EU:C:2008:723, paras. 111-113.
154 CJEU, judgment of 12.7.2012, *VALE*, case C-378/10, ECLI:EU:C:2012:440.
155 *Cf.* SEC(2007) 1707, 3.3.1.; Feedback Statement (n. 52), p. 8; EAVA 3/2012, p. 35; *Behme*, Rechtsformwahrende Sitzverlegung und Formwechsel von Gesellschaften über die Grenze, 2015, p. 286; *Grundmann*, European Company Law, 2011, § 27.3; *Hushahn* RNotZ 2014, 137, 138 f.; *Weller/Leuering* ZEW 198 (2012), p. 15.
156 *Cf.* SEC(2007) 1707, 3.3.1., 3.3.2.; EAVA 3/2012, p. 36; *Behme* (n. 155), p. 286; *Grundmann*, European Company Law, 2011, § 27.3; *Hushahn* RNotZ 2014, 137, 138 f.
157 *Cf.* SEC(2007) 1707, 3.3.3.; *Grundmann*, European Company Law, 2011, § 27.3; *Hushahn* RNotZ 2014, 137, 139.
158 *Cf.* SEC(2007) 1707, 3.3.4.; Feedback Statement (n. 52), p. 8; *Grundmann*, European Company Law, 2011, § 27.3; *Hushahn* RNotZ 2014, 137, 138 f.
159 *Cf.* SEC(2007) 1707, 3.3.4.
160 *Cf.* SEC(2007) 1707, 3.3.4.

host Member State – which not only entails costs and efforts, but is also not really what the parties involved want.[161]

- Converting the company into an **SE** (or an SCE) and then effecting a cross-border transfer of seat pursuant to Article 8 SE-Regulation (or Article 7 SCE-Regulation): This method preserves the legal identity; but it is also complex and costly, especially for SMEs; moreover, often the parties involved do not really want an SE (or SCE) as the end result (making a further conversion into a national legal form necessary)[162]

Cross-border transfers of seat (cross-border conversions) entail **risks for stakeholders**, in particular minority shareholders, creditors and employees. Moreover, there have been concerns that they could be used for insolvency forum shopping. However, the problem of insolvency forum shopping must be tackled in the context of insolvency law and it has actually already been addressed by the recast of the European Insolvency Regulation[163]. As regards the protection of minority shareholders, creditors and employees: These issues are actually not an argument against, but in favour of establishing a harmonised EU legal framework for cross-border transfers of seat (cross-border conversions). Currently, the national rules with respect to the protection of minority shareholders, creditors and employers are very different and, moreover, often rather unclear; furthermore, there is considerable insecurity as to which protection rules would be accepted by the CJEU as being justified on grounds of overriding public interests. Hence, an EU legislative framework is imperative to create a **level playing field** and to establish clear and harmonised standards with respect to the **protection of minority shareholders, creditors and employees**.[164]

5.2. Key features of an EU directive on cross-border transfers of seat (cross-border conversions)

5.2.1. Scope

5.2.1.1. Subjective scope (legal entities covered)

In line with the scope of the 'freedom to convert' as an inherent aspect of the freedom of establishment (*cf.* 1.3) – and in line with the recommendation for a reform of the CBMD (*cf.* 3.2.2.1) and the new rules for cross-border divisions (*cf.* 4.2.2) – the EU legal framework for cross-border transfers of seat (cross-border conversions) should cover **all legal entities within the meaning of Art. 54 TFEU**.

5.2.1.2. Objective scope ('transfer of seat')

In the interest of legal certainty, it seems imperative to lay down a clear definition of the objective scope.

However, this is **complicated by the fact that there is still no EU legal act harmonising the rules on the law applicable to companies**. Basically, Member States still follow two different approaches: (i) according to the incorporation theory, the applicable law is determined by the place of registration, (ii) according to the real seat theory, the applicable law

[161] *Cf. Arbeitskreis Europäisches Unternehmensrecht* NZG 2011, 98; EAVA 3/2012, p. 27, 31 ff., 37, II-52; *Hushahn* RNotZ 2014, 137, 139; *Reflection Group* (n. 44), 2.3.2.; *Weller/Leuering* ZEW 198 (2012), p. 16 f.

[162] *Cf.* SEC(2007) 1707, 3.2.; EAVA 3/2012, p. 26 f., 37, II-51 f.; *Hushahn* RNotZ 2014, 137, 139; *Weller/Leuering* ZEW 198 (2012), p. 16 f.

[163] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5.6.2015, p. 19. See on this in detail: *Mankowski/Müller/J. Schmidt,* EuInsVO 2015, 2016.

[164] *Cf. Arbeitskreis Europäisches Unternehmensrecht* NZG 2011, 98. See further also *Baert* EBLR 2015, 581, 607 ff.

is determined by the 'real seat' (place where the centre of administration and control is located).[165] This means that, from the perspective of an 'incorporation theory'-Member State, only a move of the registered office could lead to a change of the applicable company law, whereas from the perspective of a 'real seat theory'-Member State, only a move of the 'real seat' could lead to a change of the applicable law.[166]

In light of this conundrum, the **ideal solution** would be to couple the adoption of an EU legal framework on cross-border transfers of seat (cross-border conversions) with a **harmonisation of the rules on the law applicable to companies**.[167] Preferably, the common standard should be the **incorporation theory**. In fact, the jurisprudence of the CJEU (*Centros*[168] – *Überseering*[169] – *Inspire Art*[170]) has already *de facto* established the 'home country principle' or 'EU incorporation theory' with respect to inbound cases: If a company moves its head office to another Member State, that Member State has to recognise the company as a company governed by the law of the Member State of incorporation.[171] Hence, adopting the incorporation principle as the general rule with respect to the law applicable to companies is only logical. Moreover, the incorporation theory has two important advantages: On the one hand, the registered office as the connecting factor can be determined easily; on the other hand, it provides founders with the freedom to choose the applicable law via their choice of the place of registration.[172]

But even in the absence of a general adoption of the incorporation principle, at least for the purposes of an EU legal framework for cross-border conversions, the decisive operation should generally be a 'transfer of seat' in the sense of a **transfer of the 'registered office'**. Without a transfer of the registered office, a change of the governing law is hardly conceivable: Both Member States following the incorporation theory and those following the 'real seat' theory require a registered office in their territory for their law to apply. In light of this, the 2004[173] and 2013[174] Commission consultations, the EAVA mandated by the European Parliament[175] as well as recommendations by expert groups[176] have all been based on a transfer of the registered office.

The **determination of the registered office** will be unproblematic for most legal entities within the meaning of Article 54 TFEU. With respect to companies covered by the Publicity Directive[177], the registered office can be easily determined[178].[179] The same should be true for other registered companies. However, there are also some legal entities within the meaning of Art. 54 TFEU which are not registered (e.g. the German Gesellschaft bürgerlichen Rechts

[165] *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 6.4 ff. with further references.

[166] Besides, before *VALE*, many Member States did not accept a cross-border conversion at all, but generally required winding-up in the Member State of origin and re-incorporation in the host Member State; *cf.* SEC(2007) 3.1.2., 3.1.3.; with respect to situation in Germany see *Bayer/J. Schmidt* ZHR 173 (2009) 735, 761 with further references.

[167] As to the need for such harmonisation see already: *Bayer/J. Schmidt* ZIP 2012, 1481, 1492; *Bayer/J. Schmidt* BB 2013, 3, 15; *Lutter/Bayer/J. Schmidt* (n. 6), 6.83.

[168] CJEU, judgment of 9.3.1999, *Centros*, case C-212/97, ECLI:EU:C:1999:126.

[169] CJEU, judgment of 5.11.2002, *Überseering*, case C-208/00, ECLI:EU:C:2002:632.

[170] CJEU, judgment of 30.9.2003, *Inspire Art*, case C-167/01, ECLI:EU:C:2003:512.

[171] *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 6.6

[172] *Cf. Bayer/J. Schmidt* ZHR 173 (2009) 735, 739; *Lutter/Bayer/J. Schmidt* (n. 6), 6.49 with further references.

[173] Consultation document, contributions and feedback statement available at <http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm>.

[174] N. 52.

[175] See EAVA 3/2012.

[176] See in particular: *Arbeitskreis Europäisches Unternehmensrecht* NZG 2011, 98 f.; *Reflection Group* (n. 44), 2.3.2.

[177] N. 118.

[178] Among the documents and particulars required to be disclosed pursuant to Article 2 Publicity Directive are: (a) instrument of constitution, and the statutes if they are contained in a separate instrument; and (g) (any change of the registered office of the company).

[179] As to the relevance of the Publicity Directive see also *Arbeitskreis Europäisches Unternehmensrecht* NZG 2011, 98.

(GbR)). It would be necessary to include a special definition of what the term 'registered office' should mean with respect to such legal entities.

5.2.2. Effects

The effect of a cross-border transfer of seat (cross-border conversion) should be an **identity-preserving conversion**: A legal entity governed by the Member State of origin is converted into a legal entity governed by the law of the host Member State, but it retains its legal identity.[180]

5.2.3. No requirement to transfer also the head office

The EU legal framework should **not** impose a **requirement to move** also **the head office** to the host Member State. As outlined above (1.3), the 'freedom to convert' encompasses also the isolated transfer of the registered office.

However, as long as there is no harmonisation of the rules on the law applicable to companies, a requirement to move also the head office can result from the law of the host Member State: If the host Member State requires companies governed by its law to have their head office within its territory, a cross-border conversion into a legal entity governed by the law of the host Member State will necessitate to also move the head office to the territory of the host Member State.

5.2.4. Conversion procedure

The procedural framework for cross-border conversions should be based on the established and proven **'European model for structural changes'**[181], which has been set out for the first time in the Merger Directive and has subsequently been adopted in the Division Directive, the rules on cross-border mergers in the SE-Regulation, the SCE-Regulation and in the CBMD (and is also the foundation for the procedural rules on cross-border transfers of seat in Article 8 SE-Regulation and Art. 7 SCE-Regulation[182]).

This means that the key procedural elements should be:

- draft terms of the conversion (*cf.* Article 5 CBMD);
- publication of the draft terms and additional information (*cf.* Article 6 CBMD);
- report of the management or administrative organ (*cf.* Article 7 CBMD);
- independent expert report (*cf.* Article 8 CBMD);
- approval by the general meeting (*cf.* Article 9 CBMD);
- two-step legal scrutiny (*cf.* Articles 10, 11 CBMD).

[180] *Cf.* also EP resolution of 2 February 2012 (n. 48), recommendation 2(1).

[181] See on this *Lutter/Bayer/J. Schmidt* (n. 6), 21.3, 22.2, 22.23; 23.3, 23.26, 41.50, 42.22 , *Arbeitskreis Europäisches Unternehmensrecht* NZG 2011, 98 f.

[182] *Cf. Lutter/Bayer/J. Schmidt* (n. 6), 41.171, 42.107.

5.2.5. Protection of creditors, minority shareholders and employees

5.2.5.1. Protection of creditors

Since the legal entity will be governed by a different company law regime (which maybe offer less protection for creditors) after the conversion, a cross-border transfer of seat (cross-border conversion) may also pose dangers for creditors. Since the situation and the interests involved are very similar to that in the case of cross-border mergers (see on this 3.2.2.2.1), it is recommended to establish a similar protection system, i.e. to grant the creditors the **right to obtain adequate safeguards from the converted legal entity (*ex post*)**.

5.2.5.2. Protection of minority shareholders

In line with the recommendation made above with respect to the CBMD (*cf.* 3.2.2.2.2), the area of minority shareholder protection should also be fully harmonised for cross-border transfers of seat (cross-border conversions).[183] In case of a cross-border transfer of seat (cross-border conversion), the dangers for minority shareholders are very similar to those in the case of a cross-border merger[184]: They can end up as shareholders of a type of legal entity (governed by a different company law) of which they do not want to be a shareholder of, but do not have the possibility to sell their shares at a fair price (or even at all). Hence, they should also be granted an **exit right against adequate compensation** in case of a cross-border conversion (cross-border transfer of seat).

5.2.5.3. Protection of employees

Given the comparability of the situation with that in the case of a cross-border merger, protection of employees should be **aligned with the rules in the CBMD** (with respect to the need to reform see 3.2.2.2.3).

5.2.6. Tax neutrality

Since exit taxation can pose a major obstacle[185], the cross-border transfer of seat (cross-border) conversion should be tax-neutral analogous to the tax-neutrality of a cross-border transfer of seat of an SE or SCE pursuant to Articles 12-14 of Directive 2009/133/EC[186].[187] This directive should be amended accordingly.

[183] *Cf.* also *Arbeitskreis Europäisches Unternehmensrecht* NZG 2011, 98, 99.
[184] However, since there is no share exchange in case of a cross-border conversion, there is also no danger of an inadequate share exchange ratio (and thus no need to protect minority shareholders in this respect).
[185] *Cf.* EAVA 3/2012, p. 17 and Annex I, p. 50; *Arbeitskreis Europäisches Unternehmensrecht* NZG 2011, 98, 99; *Grundmann*, European Company Law, 2011, § 27.30 f.; *Leible* FS G.H. Roth, 2011, p. 447, 459 f.
[186] 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, OJ L 310, 25.11.2009, p. 34.
[187] *Cf.* EP resolution of 2 February 2012 (n. 48), recommendation 2(5); EAVA 3/2012, p. 12.

6. LEGISLATIVE IMPLEMENTATION

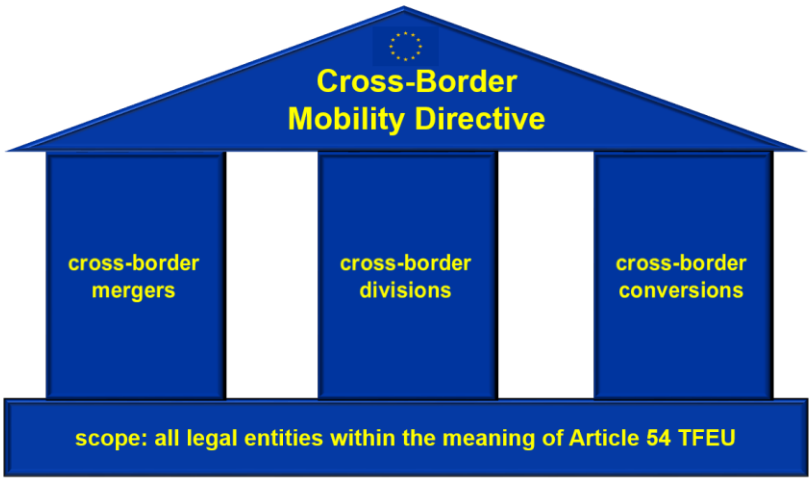
One option would be to merely amend the CBMD and adopt a separate directive on cross-border divisions and a separate directive on cross-border transfers of seat (cross-border conversions). However, in light of the 'mirror image'-relationship between cross-border mergers and divisions and the many parallels with respect to cross-border transfers of seat (cross-border conversions) this seems to be a rather suboptimal solution. It not only entails the existence of many actually superfluous and redundant provisions, but also a high risk of frictions.

In light of this, the option of including the new EU legal framework on cross-border divisions and on cross-border transfers of seat (cross-border conversions) into the (revised) CBMD seems clearly preferable. The CBMD should be expanded into a real **cross-border mobility directive**, which not only covers **cross-border mergers**, but also **cross-border divisions** and **cross-border conversions** of **all legal entities within the meaning of Art. 54 TFEU**.[188] Given the many parallels of cross-border mergers, divisions and conversions, it seems only logical to include all three types of company transformation operations into one single piece of legislation.

Ideally, the **CBMD** should be **restructured** so as to contain one 'general part' with common rules for all three types of company transformation operations, and then sections with rules specific to cross-border mergers, cross-border divisions, and cross-border conversions, respectively. The result would be an efficient, lean and consistent legal framework encompassing all three of these very closely related company transformation operations in one single piece of legislation.

Such a real cross-border mobility directive – covering cross-border mergers, cross-border divisions and cross-border conversions – would finally provide **complete corporate mobility for all legal entities within the meaning of Art. 54 TFEU** and thus open up enormous new economic opportunities within the internal market.

Figure 4: Cross-Border Mobility Directive



Source: Prof. Dr. Jessica Schmidt, LL.M.

[188] *Cf.* (building upon the suggestions of the Reflection group): *Bayer/J. Schmidt* ZIP 2012, 1481, 1492; *Bayer/J. Schmidt* BB 2013, 3, 15; *Lutter/Bayer/J. Schmidt* (n. 6), 6.84; *J. Schmidt* GmbHR 2011, R177; and recently *Bayer/J. Schmidt* ZIP 2016, 841, 849. Approving: *Stiegler* AG 2016, R48, R50; *Stiegler* GmbHR 2016, 406, 413. See further also *Hansen* ECFR 2013, 1, 15.

In this context, the recent proposal for a codification of the key company law directives in one general **'Company Law Directive' (CLD)**[189] should be noted. If this project will indeed be realised, it would seem expedient to include the new combined EU legal framework on cross-border mergers, cross-border divisions and cross-border conversions of all legal entities within the meaning of Article 54 TFEU directly into this new general 'Company Law Directive' – and thus transforming a politically questionable codification exercise into a real and valuable reform.[190]

Finally, to really 'complete the picture' the rules on the **law applicable to companies** should be **harmonised by way of a special 'Rome Regulation'**.[191] Preferably, the common standard should be the incorporation theory (*cf.* 5.2.1.2).

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

[190] *Cf. Bayer/J. Schmidt* ZIP 2016, 841, 849.

[191] *Cf. Bayer/J. Schmidt* ZIP 2012, 1481, 1492; *Bayer/J. Schmidt* BB 2013, 3, 15; *Lutter/Bayer/J. Schmidt* (n. 6), 6.83.

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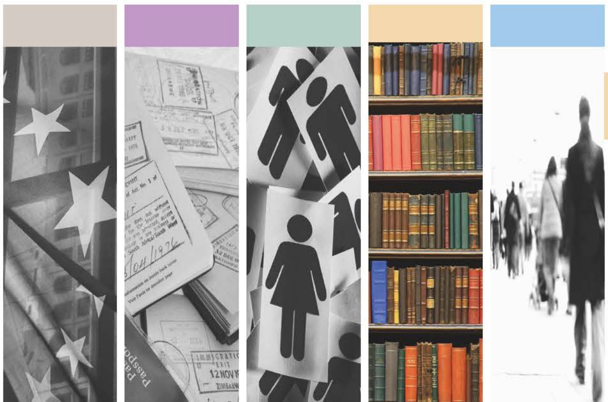

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