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

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

## **Conditions relating to cross-border mergers**

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

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

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

# Creditor protection: dangers.

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

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

## **Creditor protection: the current regime.**

Art. 4 (2) focuses, among others, on creditor protection. This provision allows Member States to adopt **protection mechanisms for creditors.** **There is not a single procedure for creditor protection at EU level.** Member States adopt **different procedural requirements**, such as creditor meetings, asking and providing for guarantees and separate management of assets and liabilities.

## **Creditor protection: the current regime.**

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

-On the one hand, the **ex ante protection** offers the possibility to creditors to exercise their rights against the **merging company.**

-On the other hand, the **ex post protection** offers the possibility to creditors of the merging companies to exercise their rights against the company **resulting** from the merger, which might be located abroad.

## **Creditor protection: Comments**

Creditor protection in cross-border mergers at EU level is characterized by **wide legal diversity**.

**Only further harmonization** of creditor protection could mitigate the externalities of the complicated national legal regimes and could contribute to legal certainty at EU level.

# **Protection of minority shareholders: dangers**

Various **dangers** threaten minority shareholders in cross-border mergers. Some of the dangers are: divergences in the valuation of assets and liabilities and of the merger ratio, proposed amendments to the company's articles of association and restriction of the shareholders' rights under a new national regime. Both the duration and the date when the protection commences may vary.

## Protection of minority shareholders: the current regime

The CBMD does not have special rules for the protection of minority shareholders. Art. 4(2) provides the **option** to Member States to adopt national rules on the protection of minority shareholders. **The minority shareholders' protection** is deemed to be essential for the facilitation of cross-border mergers. This results in a **wide diversity of minority shareholders' protection** regimes among Member States. Hence, **harmonization** of the mechanics for the protection of minority shareholders appears to be the best solution.

# Proposal for amendments

In April 2018, the European Commission issued a Proposal for a Directive of the European Parliament and of the Council amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions.  
COM/2018/241 final, 2018/0114 (COD).

## Proposals for creditor protection.

This proposal also enhances creditor protection. **The proposal suggests a system of creditor protection empowering creditors to ask for adequate safeguards from the competent authority.** The new Art. 126b of the proposal states: “The new Article 126b provides for **safeguards for creditors.** First, Member States may require management or administrative organ of the merging company to make **a declaration** stating that they are not aware of any reason why the company resulting from the merger should not be able to meet its liabilities. Secondly, creditors who are dissatisfied with the protection offered to them in the draft terms of merger shall have the right **to apply to the competent authority for adequate safeguards.** However, the competent authority shall apply a **rebuttable presumption** that the creditors are not prejudiced by the cross-border merger if the company has offered a right to payment (against a third party guarantor or the company resulting from the merger) of the equivalent value to their original claim which may be brought before the same jurisdiction as the original claim, or if the independent expert report, which was disclosed to creditors, confirmed that the company would be able to satisfy its creditors. The provisions on creditor protection shall be without prejudice to the application of national laws concerning the satisfaction or securing of payments owed to public bodies.”

## Proposals for the protection of minority shareholders.

One of the most important innovations of this proposal for reform of the CBMD is the provision of **exit rights to minority shareholders, who disagree with the cross-border merger.** Dissenting minority shareholders could leave the company by selling their shares for adequate cash compensation.

**Shareholders remaining in the company have also the right to challenge the share-exchange ratio.**

## Proposals for the protection of minority shareholders.

The new Art. 126a of the proposal states: “The new Article 126a provides for **safeguards for members**. It establishes **an exit right** for those members that oppose the merger. This applies for either those who did not vote for the approval of the cross-border merger or those that do not agree with the merger but do not have voting rights. **The company, remaining members, or third parties in agreement with the company must acquire the shares of the members exercising the exit right in exchange for adequate cash compensation.** Since the existing rules on cross-border mergers already provide for the **appointment of an independent expert** (Article 125), this expert shall also review the **adequacy of the cash compensation**. If the members consider that the offered cash compensation has been inadequately set, they are entitled to demand for its **recalculation by the national court**. Members wishing to remain in the company have also right to **challenge the share-exchange ratio...**”

# **A FEW CONCLUDING REMARKS**

- Multilevel regulatory system. Reference to national law.
- National law includes autonomous national provisions and national provisions implementing the European company law directives.
- Wide diversity among Member States.
- The Bech-Bruun and Lexidale Study and other studies and reports assist us in identifying the strengths and the weaknesses.
- Strengthening of the procedural framework for the protection of creditors and minority shareholders (appraisal rights) in cross-border mergers through more harmonization is essential.

## Sources

- This presentation derives from the following book chapter, where the relevant references to sources are available in footnotes:  
Thomas Papadopoulos “Reviewing the implementation of the Cross-border Mergers Directive” in Thomas Papadopoulos (ed) *Cross-border Mergers Directive: EU perspectives and national experiences* (Springer-forthcoming 2019)
- Bech-Bruun and Lexidale (2013) Study on the Application of the Cross-Border Mergers Directive, Directorate General for the internal market and services of the European Commission (MARKT/2012/031/F).
- European Company Law Experts (ECLE) (2012) The Future of European Company Law, Response to the European Commission’s Consultation.
- Kurtulan G (2017) Minority Shareholder Protection in Cross-Border Mergers: A Must for or an Impediment to the European Single Market? *European Business Organization Law Review* 18 (1): 101-121.
- Proposal for a Directive of the European Parliament and of the Council amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions. COM/2018/241 final, 2018/0114 (COD).
- Raaijmakers G T M J, Olthoff T P H (2008) Creditor Protection in Cross–Border Mergers: Unfinished Business. *European Company Law* 5 (6): 305–308.
- Schmidt J (2016) Cross-Border Mergers and Divisions, Transfers of Seat: Is there a Need to Legislate? Study for the JURI Committee, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament.
- Truli E (2016) Ex-post analysis of the EU framework in the area of cross-border mergers and divisions: European Implementation Assessment, Study, European Parliamentary Research Service (EPRS), (Authors of the introduction: Reynolds S, Scherrer A) Ex-Post Impact Assessment Unit, Directorate for Impact Assessment and European Added Value, Directorate–General for Parliamentary Research Services (DG EPRS), Secretariat of the European Parliament (PE 593.796).
- Ventoruzzo M (2007) Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law. *European Company and Financial Law Review*, 4(1): 47–75.
- Wyckaert M, Geens K (2008) Cross–Border Mergers and Minority Protection: An Open–ended Harmonization. *European Company Law* 5(6): 288–296.