NOM 540 DISSERTATION PAPER

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Cross-border mergers of limited liability companies in the European Union

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Abstract:

The dissertation paper analyses cross border mergers of limited liability companies in the European Union. The importance of the freedom of establishment for cross-border mobility is emphasized with reference to relevant CJEU case law. A review is made of the existing legal framework governing cross-border mergers of limited liability companies with extensive critical analysis of the amendments to this legal framework pursuant to Directive (EU) 2019/2121. According to these amendments, an examination is made of the goals of the EU legislator to provide further harmonisation of the legal framework governing cross-border mergers, while ensuring protection of the stakeholders involved. Challenges in achieving these goals are identified and a few suggestions for possible solutions are made. The dissertation paper will further analyse the advantages and disadvantages of the existing cross-border merger legal regime as well as whether uniform application of EU law on Cross border Mergers has been achieved.

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1. INTRODUCTION:

The European Union promotes cross-border mobility of limited liability companies incorporated under the laws of Member States through the exercise of the freedom of establishment. The Freedom of establishment is considered one of the fundamental EU freedoms which "*lies at the very heart of […] EU law."*[1] It allows legal entities to carry out activities and thus business development in other Member States, which subsequently leads to development of the Internal Market. Cross border mergers of limited liability companies in the European Union, is an example of such cross-border mobility of EU companies, as an exercise of their freedom of establishment. A cross-border merger (hereinafter referred to as 'CBM') means a transaction between limited liability companies incorporated and subject to the laws of different Member States, which decide to combine their businesses and merge. The company being acquired, transfers all its assets and liabilities to the acquiring company, known alternatively as the resulting company, for exchange and acquisition for its members of percentage in the share capital of the acquiring company. Subsequently, the acquired company is dissolved, without going into liquidation.

CBMs have been a popular choice of corporate restructurings by business operators in the European Union for the past twenty years approximately. For this purpose, consideration is given to some statistical data regarding the CBMs of companies in the European Union. The 'Empirical Findings report'[2], an empirical study published in 2020, contacted by Mr. Biermeyer and Mr. Meyer on cross-border mobility of companies in the European Union, states

[1] Nicola de Luca, '*European Company Law-Text, Cases and Materials'*, Cambridge University Press, 2017, Chapter 5, p.85

[2] Thomas Biermeyer and Marcus Meyer, '*Cross-border Corporate Mobility in the EU: Empirical Findings 2020 (Edition 1)*', (August 15, 2020), Empirical Findings 2020- 1st Edition, 14 Sep 2020, available at SSRN: <https://ssrn.com/abstract=3674089 or http://dx.doi.org/10.2139/ssrn.3674089>, accessed 13/06/2021

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the results on monitoring and collection of data on the mobility of companies registered in the EU and EEA between the years 2000 until 2020. The data collected by Mr. Biermeyer and Mr. Meyer regarding the number of CBMs for each year is as follows; "*17 CBMs for 2007, 166 CBMs for 2008, 245 CBMs for 2009, 314 CBMs for 2010, 380 CBMs for 2011, 453 CBMs for 2012, 463 CBMs for 2013, 381 CBMs for 2014, 362 CBMs for 2015, 478 CBMs for 2016, 574 CBMs for 2017, 620 CBMs for 2018 and 357 CBMs for 2019 […] The number for 2019 will still increase significantly as many mergers are still in progress*."[3] This indicates that there has been a steady increase in the number of CBMs over the years. The authors further state that between 2008 and 2012, "*there has been an increase of 84,72% in the number of CBMs in the period of 2013 to 2018 compared to the period 2008 to 2012*."[4] This increase proves that more and more business operators engage in CBMs as a form of corporate re-structuring, a topic which has attracted much attention from academia over the past few years.

Chapter I of this dissertation paper will analyse the freedom of establishment as the foundation of EU company law. An analysis will be made of the academic literature and the Court of Justice of the European Union (the 'CJEU') case law, to highlight how the freedom of establishment of EU legal persons has been protected over the years. The Sevic case[5] will be analysed further as the landmark case indicating that the freedom of establishment is exercised through CBMs. Lastly, a brief reference will be made to the importance of Polbud case[6] for cross-border mobility of EU companies and specifically, for the introduction of cross-border conversions as an exercise of the freedom of establishment.

[3] Thomas Biermeyer and Marcus Meyer, Ibid, p. 24

[4] Ibid.

[5] Case C-411/03 SEVIC Systems [2005] ECR I-10805, ECLI:EU:C:2005:762

[6] Case C-106/16 Polbud – Wykonawstwo sp. z o.o., Judgment of the Court (Grand Chamber) of 25 October 2017, ECLI:EU:C:2017:804

Chapter II aims to provide an analysis of the legal framework governing CBMs of limited liability companies in the European Union so as to provide the legal background for the discussion which will follow. A brief reference will be made to the overview of the existing CBM legal regime. The focus point will be the new amendments to the CBM regime pursuant to Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amended Directive 2017/1132 with regards to cross-border conversions, mergers and divisions (hereinafter the 'Directive (EU) 2019/2121'). Directive (EU) 2019/2121, is considered a "*major milestone in the area of corporate mobility*"[7]. The new provisions will be critically analysed to highlight the goals of the EU legislator to provide further harmonisation of the laws applicable to CBMs, while at the same time offering increased protection of shareholders, creditors and employees of the companies involved in the CBM, collectively referred to as the stakeholders. Some challenges in achieving these goals will be identified and a few suggestions for possible solutions to these will be examined. Particularly, on the transposition of Directive (EU) 2019/2121, few suggestions for the implementation of the new provisions on CBMs by Member States will be made, in order to tackle some shortcomings of the existing regime. Finally, consideration and analysis of the advantages and disadvantages of the existing CBM legal regime will be made.

Lastly, Chapter III will scrutinise the harmonisation of EU company law on CBMs by examining the implementation of the existing legal regime on CBMs by Member States. For this purpose, some common parts of national company laws governing CBMs of three Member States will be examined, as common variables for the purpose of this analysis. The three Member States examined are the Republic of Cyprus, Germany and the Netherlands, only to conclude that harmonisation of EU law on CBMs is only achieved to a certain extent.

[7] Thomas Biermeyer and Marcus Meyer, supra note 2, p. 2

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2. CHAPER I: FREEDOM OF ESTABLISHMENT- THE FOUNDATION OF EUROPEAN COMPANY LAW

What is "*crucial for the internal market is the correlation of the 'company' as a subject of freedom of establishment*".[8] The general perspective evident from the CJEU case law is that any restriction to the freedom of establishment of companies across the EU is prohibited, unless is justified for some type of public interest objective and is proportional to meeting such end. For this purpose, reference will be made to the following cases: Daily Mail[9], Centros[10], Überseering[11], Cartesio[12], Vale[13], Sevic[14], and Polbud[15]. Particular emphasis will be made on the SEVIC judgement as it clarified that legal persons from different Member States exercising the freedom of establishment in the European Union, have a right to engage in CBMs. As CBM transactions are a fragment of the Internal Market, "*all the corporate financial mechanisms of this market must comply with the EU fundamental freedoms*." [16]

[8] Lampros E. Kotsiris, '*Ευρωπαϊκό Εμπορικό Δίκαιο'*, 2nd Edition, Sakkoula Publications S.A., (2012), p. 950

[9] Case C-81/87, The Queen v. Treasury and Commissioners of Inland Revenue, Ex Parte Daily Mail and General Trust PLC, 27 Sept. 1988, ECLI:EU:C:1988:456

[10] Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, 9 Mar. 1999, ECLI:EU:C:1999:126

[11] Case C-208/00, Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), 5 Nov. 2002, ECLI:EU:C:2002:632

[12] Case C-210/06, Cartesio Oktató és Szolgáltató bt., 16 Dec. 2008, ECLI:EU:C:2008:723

[13] Case C-378/10 VALE Építési kft. [2012] ECR on-line, ECLI:EU:C:2012:440

[14] Case C-411/03 SEVIC Systems [2005] ECR I-10805, ECLI:EU:C:2005:762

[15] Case C-106/16 Polbud – Wykonawstwo sp. z o.o., Judgment of the Court (Grand Chamber) of 25 October 2017, ECLI:EU:C:2017:804

[16] Thomas Papadopoulos, '*The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive*', (2012), 23, European Business Law Review, Issue 4, 517, p. 517, available at <https://kluwerlawonline.com/JournalArticle/European+Business+Law+Review/23.4/EULR2012029 >, accessed on 03/04/2021

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A. FREEDOM OF ESTABLISHMENT AND THE INTERNAL MARKET

Firstly, "[t]*he cornerstones of the single market are often said to be the 'four freedoms'"* [17], one of which is the freedom of establishment. Dr. Binard and Dr. Schummer emphasise that *"[t]he right of establishment provided for by the Treaty of Rome of 1957, one of the founding principles on which the European Union was built, consists in the abolition of restrictions to the freedom of nationals of a Member State to create a business activity on the territory of any Member State including by establishing a company or a branch or subsidiary of a company there."* [18]

In the current EU primary law, the freedom of establishment is defined in articles 49[19] and 54[20] of the Treaty of Functioning of the EU (the 'TFEU') and is applicable to both physical and legal persons. Two elements are of vital importance for legal persons to be able to exercise the freedom of establishment. Firstly, the companies must be incorporated in a Member State of the European Union and secondly, they must have their registered office, central administration or place of business in an EU Member State. The registered office, that is its

[17] Nicola de Luca, supra note 1, p.9

[18] Sébastien Binard and Laurent Schummer, *'The Case for Further Flexibility in Matters of Cross-Border Corporate Mobility*', (2019), 16, European Company Law 31, Issue 1, p. 31, available at <https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019005> accessed on 26/04/2021

[19] Consolidated Version of the Treaty on the Functioning of the European Union of 13 December 2007, (2016) OJ C 202/01, Article 49 reads: *"(1) Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. (2) Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."*

[20] Ibid., Article 54 reads: *"(1) Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. (2) 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."*

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statutory seat, is usually determined in the founding documents of each company, such as a Memorandum and Articles of Association at the time of its incorporation. This is known as the 'Incorporation theory' or Statutory Seat theory. However, in case the registered office is not determined in these founding documents, the place of the central administration of the company determines the real seat of the company, as it is the place where the management of the company takes place. This is known as the 'Real Seat Theory'. Dr. Kotsiris explains that "*[i]n case there is difference between statutory company seat and actual registered office, the former applies. The company seat is the connecting element for the determination of the applicable law*" .[21] He further explains that different Member States apply differently each theory: countries such as Greece, Germany and Hungary apply the Real Seat Theory, whereas common-law countries apply the Statutory Seat Theory.[22] Similarly, as stated by Dr. Papadopoulos and Dr. Ortino, "*[w]ith regards to a company, it is its corporate seat that serves as the connecting factor with the legal system of a particular State, like nationality is the case of a natural person."* [23]

Irrespective however of the place where the 'Real Seat' or the 'Statutory Seat' of an EU company is located, it may exercise the freedom of establishment which is fundamental for its cross-border operations and economic activity. This is because *"the principle of freedom of establishment enables an economic operator to carry out an economic activity in a stable and continuous way in one or more Member States.*" [24] Thus, it is considered as "*[o]ne of the*

[21] Lampros E. Kotsiris, supra note 8, p. 952

[22] Ibid.

[23] Thomas Papadopoulos & Federico Ortino '*Article 49 TFEU on Freedom of Establishment; Relationship with Freedom of Movement of Capital and Payments*', in Smit Hans, Herzog Peter, Campbell Christian and Zagel Gudrun (eds), 'Smit & Herzog on The Law of the European Union', Vol. 1 & (sec no.49.01) (Matthew Bender, Rev.Ed), Centre of International Legal Studies, Chapter 49, p. 49-4

[24] Nicola de Luca, supra note 1, p. 9

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most important principles in EU"[25] law, allowing companies to operate freely across the Union and has been one of the most important factors for developing and strengthening the Internal Market. To analyse further this statement, reference is made to Dr. Papadopoulos who states that "*[o]nly an integrated financial market could respond effectively to an economic crisis affecting EU corporations. If EU corporations could exercise freely their EU fundamental freedoms, the EU market in Mergers and Acquisitions which constitutes part of the internal market would gain benefits."*[26] One may strongly agree with this, as companies are able to utilise the safeguards included in the TFEU, by exercising the freedom of establishment through all kinds of corporate transformation, such as through a CBM. They are able to utilise and integrate in the economy of another Member State with the target of profit making, corporate restructuring and expansion, and while being successful in doing so, contribute to the development of a stronger Internal Market.

To this end, as Dr. De Luca states, "*the freedom of establishment stimulates a competition among Member States to create the best economic and legal conditions for companies or individuals to operate.*"[27] Thus, as freedom of establishment essentially creates an "*economical choice of location*"[28] as described by Dr. Andenas and Dr. Wooldridge, while companies are searching for the most fertile ground for their business. This creates regulatory competition among Member States to create favourable legal regimes to aid such business. Although this regulatory competition may on the one hand encourage more business operators

[25] Daniele Fabris, *'European Companies' 'Mutilated Freedom'. From the Freedom of Establishment to the Right of Cross-Border Conversion*', (2019), 16 European Company Law 106, Issue 4, p. 106, available at <https://kluwerlawonline.com/JournalArticle/European+Company+Law/16.4/EUCL2019016>, accessed 24/04/2021,

[26] Thomas Papadopoulos, '*The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive*', supra note 16, p. 518

[27] Nicola de Luca, supra note 1, p. 88

[28] Mads Andenas and Frank Wooldridge, '*European Comparative Company Law'*, Cambridge University Press (2009), p.10

to utilise the markets of Member States with favourable legal regimes, which may lead to economic development and growth in the Internal Market, on the other hand however, this may also create a 'race to the bottom' culture. This is created when the freedom of establishment steers competition among Member States "*to create the best economic and legal conditions for companies or individuals*" [29]. The risks associated with such competition is that Member States may be pushed to pass less strict rules which may put the rights of employees and consumers at stake. Less regulations binding business operators to take consideration of employees and consumers' rights, in an effort to attract such business operators, may lead to unwanted compromises in Labor and or Consumer Law for example.

B. CJEU CASE LAW ON FREEDOM OF ESTABLISHMENT & CROSS-BORDER MERGERS

Having analysed the importance of the freedom of establishment as a fundamental principle of EU law as exercised by EU companies in CBM transactions, it is important to analyse also how the CJEU has preserved it through the years over the course of the examination of requests for preliminary rulings before it regarding its interpretation. Specifically, the CJEU has generally "*declared that companies should be allowed to carry out cross-border transactions as a consequence of their right to freedom of establishment*."[30]

Firstly, in the case of Daily Mail[31], Daily Mail and General Trust PLC being an English Company, wanted to transfer its residence in the jurisdiction of the Netherlands, viz. transfer

[29] Nicola de Luca, p. 88

[30] Segismundo Alvarez, '*The cross border operations Directive: wider scope but more restrictions'*, 10 July 2019, European Law Blog, <https://europeanlawblog.eu/2019/07/10/the-cross-border-operations-directive-wider-scope-but-more-restrictions/>, accessed 19/09/2021

[31] Case C-81/87, The Queen v. Treasury and Commissioners of Inland Revenue, Ex Parte Daily Mail and General Trust PLC, 27 Sept. 1988, ECLI:EU:C:1988:456

its management and control outside of the United Kingdom, but without having to acquire the consent under the tax legislation of the United Kingdom in that regard. However, the CJEU refused the said transfer of residence stating that EU Laws "*confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State*"[32]. Specifically, *"[t]he United Kingdom was not preventing the Daily Mail from emigrating and becoming a Dutch company, if it so wanted. Rather, the Mail wanted to remain a UK company, while moving its headquarters abroad, whereas UK law said that to be a UK company entailed that its headquarters were in the United Kingdom.*"[33] Thus, the CJEU in the Daily Mail case affirmed that the real seat theory is consistent with the exercise of the freedom of establishment, a view shared by many commentators. Specifically, Dr. Fabris stated that "*the CJEU de facto acknowledged that the application of the real seat theory is consistent with the freedom of establishment*"[34] while Dr. Fillers likewise stated that the "*case created an impression that the real seat theory was respected by the CJEU*."[35] Dr. Fillers refers to an 'impression' as this understanding regarding the real seat theory, was not explicitly stated by the CJEU in the Daily Mail case, but rather an assumption made based on an evaluation of the judgement.

The findings of the Daily Mail case were challenged in the case of Centros[36], where *"the court seems to have endorsed the opposite view."*[37] In Centros, two Danish nationals

[32] Case C-81/87, ibid., at par. 1 of the operative part of the Judgment of the Court of 27 September 1988

[33] Damian Chalmers, Gareth Daviews & Goprgop Monti, '*European Union Law: Cases and Materials*', (2nd edn Cambridge University Press) (2010), p. 862

[34] Daniele Fabris, supra note 25, p.108

[35] Aleksandrs Fillers, '*Free Movement of Companies After the Polbud Case*', (2020) 21 European Business Organization Law Review volume 571, p. 583, available at <https://doi.org/10.1007/s40804-020-00178-9>, accessed on 24/04/2021

[36] Case C-212/97, Centros, supra note 10

[37] Thomas Papadopoulos & Federico Ortino '*Article 49 TFEU on Freedom of Establishment; Relationship with Freedom of Movement of Capital and Payments'*, supra note 23, p. 49-8

having incorporated a company in the United Kingdom, due to its absence of minimum share capital requirement, which remained dormant, wished to open a branch of the company in Denmark, however, the Danish Department of Trade refused to register such branch. The CJEU decided[38] that there should be no refusal by a Member State to register a branch of a company incorporated in another Member State where it has its registered office or statutory seat, and that such branch should be recognised. "*Whilst a company retains corporate status within its home Member State, other Member States must recognise it as validly incorporated under Article 54 and therefore entitled to the benefits of Article 49.*"[39] The CJEU confirmed the right of EU companies to secondary establishment through branches, as an exercise of the freedom of establishment. More in detail, the CJEU stated that "*[t]he right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.''*[40]

The issue also arose in Überseering[41], a Company registered in the Netherlands, where its statutory seat was located, and which had its central administration in Germany. The issue arose when Überseering sought to bring a legal action before the German Courts, however, under German law, its existence was not recognised. The CJEU held that when there is a difference between the statutory and the real seat of an EU company, the Member State where the central administration of the company is located has to recognise the existence and legal capacity of the company, even if its statutory seat is located in another Member State.[42] The

[38] Case C-212/97, Centros, supra note 10 operative part

[39] Damian Chalmers, Gareth Daviews &Goprgop Monti, supra note 33, p. 864-865

[40] Case C-212/97, Centros, supra note 10, par. 27

[41] Case C-208/00, Überseering, supra note 11

[42] Case C-208/00, Überseering, supra note 11, operative part point 1

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CJEU once again highlighted the companies' right to operate across the Internal Market. The choice between legal regimes of different Member States which best meet the companies' business needs was encouraged, as the possibility of them having their real seat located in one Member State and their statutory seat being located in another was confirmed. Similarly, in the cases of Cartesio[43] and Vale[44] which, respectively, dealt with transfer of the real seat and in – bound cross-border conversions, the CJEU confirmed that such cross-border operations were compatible with the freedom of establishment.

Having examined the abovementioned case law of the CJEU, the importance of the freedom of establishment has been emphasized in all kinds of scenarios of corporate cross-border operations. These included the establishment of branches in other Member States, the recognition by the courts of a Member State of the legal capacity of a company whose central administration is in that Member State but was incorporated under the laws of a different Member State, as well as in cases where companies wish to transfer their seat, that is their administration in another Member State as well as when they engage in cross-border conversions. However, the most important analysis for the purpose of this dissertation paper relates to the SEVIC case,[45] in which the CJEU emphasized the importance of the exercise of the freedom of establishment in any kind of company transformation and especially in the case of CBMs.

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[43] Case C-210/06, Cartesio, supra note 12

[44] Case C-378/10 VALE, supra note 13

[45] Case C-411/03 SEVIC Systems [2005] ECR I-10805, ECLI:EU:C:2005:762

C. INFLUENCE OF THE SEVIC JUDGEMENT ON CROSS-BORDER MERGERS

Many commentators have pointed their fingers at the SEVIC case[46] as the landmark case regarding CBMs of limited liability companies in the European Union. Mr. Biermeyer and Mr. Meyer have stated that *"[w]ith the case SEVIC, the CJEU has also impacted the area of CBMs by obliging Member States to allow such transactions if their legislation permits domestic mergers."* [47]

Firstly, it is important to point out that "*SEVIC [was] the first case dealing with a cross border merger*", [48] and the judgement of the CJEU was rendered on the 13th of December 2005. As will be further examined in the following Chapter II, prior to the 26th of October 2005, when the EU legislator adopted the 10th Company Law Directive on CBMs which had to be implemented into national law by the end of 2007 or earlier, there was absence of a legal framework on CBMs.[49] Thus, shortly after the preliminary ruling in the SEVIC case, the "*EU legislator adopted a legislative act which was intended to solve formal and legal problems related to cross-border mergers.*"[50] The SEVIC judgement was delivered by the CJEU at a time before the actual transposition of the first legal framework on CBMs into national law, and is thus of crucial importance since it was the first judgement to shed light upon the practise

[46] Ibid.

[47] Thomas Biermeyer and Marcus Meyer, supra note 2, p. 15

[48] Schindler, Clemens Philipp, '*Cross-Border Mergers in Europe - Company Law is Catching Up - Commentary on the ECJ's Decision in SEVIC Systems AG'*, (2006), 3 (1) European Company and Financial Law Review, 109, p.110

[49] Ibid.

[50] Brzezinski Mateusz, *'Cross-Border Mergers: A Missed Opportunity and Ways to Improve the Procedure'*, (2019) 3 Eur Competition & Reg L Rev 280, p. 283, referring to *Directive 2005 / 56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.*

of CBMs of limited liability companies in the EU. In this manner, SEVIC prepared the ground for the harmonisation of EU laws on CBMs.

i. Overview of the SEVIC judgement and its importance

The SEVIC[51] case involved an intended CBM between a company incorporated in Germany, SEVIC with a company incorporated in Luxembourg, namely Security Vision. Security Vision would be absorbed by SEVIC, transferring the whole of its assets to SEVIC, and then dissolved without going into liquidation. The issue arose upon the refusal of the Neuwied District Court in Germany (the 'Amtsgericht Neuwied') to register the said merger in the national Commercial Register on the ground that German law regarding company transformations only applied to mergers of companies incorporated in Germany. In other words, in case a German company merged with a company of another Member State, that merger was not recognisable for the purpose of registration in Germany. SEVIC brought an action before the Koblenz District Court (the 'Landgericht Koblenz'), against the decision of Amtsgericht Neuwied to reject its application for registration of the CBM with Security Vision.

However, Landgericht Koblenz considered that the matter depended on "*the interpretation of Articles 43 EC and 48 EC in the context of mergers between companies established in Germany and companies established in other Member States ('cross-border mergers')"*[52], and that "*resolution of the dispute before it depended on the interpretation of those EC Treaty provisions*"[53]. Consequently, Landgericht Koblenz requested a preliminary ruling by the CJEU on the interpretation of Articles 43 EC and 48 EC, now Articles 49 and 54 of the TFEU, requesting whether it was "*contrary to freedom of establishment for companies if a foreign*

[51] Case C-411/03 SEVIC Systems, supra note 45

[52] Case C-411/03 SEVIC Systems, supra note 45, par. 9

[53] Ibid., par. 10

European company is refused registration of its proposed merger with a German company in the German register of companies" under the German Law of transportation, on the ground that such Law only provides for company transformations through mergers of companies incorporated and established in Germany. [54]

The CJEU examined, first of all, whether the freedom of establishment indeed applied in the *SEVIC* case, secondly, whether the fact that the German legislation refused to register such CMB constituted a restriction of this freedom and, thirdly, whether such a restriction could be justified. With regard to the applicability of the freedom of establishment, the CJEU clearly stated that "*Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market*."[55]

While analysing whether a restriction to the freedom of establishment would be justifiable, the CJEU pointed out that German Law made a distinction between internal mergers and CBMs, as only internal mergers were registrable in the German Commercial Register.[56] The CJEU pointed out that "[*s]uch a difference in treatment […] is contrary to the right of establishment and can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest*."[57] The CJEU concluded

[54] Ibid., par. 10

[55] Ibid., par. 18 & 19

[56] Ibid. par. 20

[57] Ibid., par. 23

that there is no justification for the restriction of the freedom of establishment and refusal to register a CBM when both participating companies are established in Member States.[58]

With the SEVIC case the CJEU clarified the meaning of the freedom of establishment as it highlighted that it is also applicable in CBMs. Specifically, *"[w]ith the decision of the ECJ it is now clarified that both the transferring company as well as the acquiring company enjoy the protection of the freedom of establishment*."[59] The reception of the case by academia is positive since it is considered as a "*landmark judgement for companies' freedom of establishment*"[60]. Dr. Papadopoulos is also a firm believer of this, having stressed that "[*i]n SEVIC, the ECJ stressed the importance of mergers as a method of corporate restructuring and as an exercise of the freedom of establishment, declaring that a merger such as that at issue in the main proceedings constituted an effective means of transforming companies.* […and that*] the ECJ found that cross-border mergers are a corporate restructuring activity covered by the freedom of establishment*."[61] This right includes all measures which allow legal persons to have access and pursue economic activity in another Member State, thus, participating in its economic life.[62]

More broadly, the SEVIC judgement encouraged the exercise of cross-border operations and corporate transformations. When assessing the impact of the SEVIC

[58] Ibid., par. 15 stating that "*Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State."*

[59] Clemens Philipp Schindler, supra note 48, p. 113

[60] Gert-Jan Vossestein, *'Companies' Freedom of Establishment after Sevic*', (2006), 3 (4), European Company Law, 177, p.177

[61] Thomas Papadopoulos, 'The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive', supra note 16, p. 525

[62] Case C-411/03 SEVIC Systems, supra note 45, par. 18 & 19

judgement, Dr. Vossestein claimed that the said judgement "*increase[d] the possibilities of existing companies to reincorporate in other Member States.*"[63] Similarly, Dr. Armour and Dr. Ringe argued that *"[c]onsideration of SEVIC, of course, reveals that "reincorporation" may already be achieved quite readily by means of a cross-border merger*."[64] since company conversions or re-incorporations could occur through CBMs.

D. THE SIGNIFICANCE OF POLBUD

One may point out that SEVIC had an impact on cross-border conversions which were not regulated at the time, however, the case of Polbud[65], was the landmark case establishing and confirming that EU companies also exercise the freedom of establishment through cross-border conversions. Cross-border conversion as defined under Directive (EU) 2019/2121 "*means an operation whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality*;"[66] In Polbud, a Polish company wished to convert into a Luxembourg company, by transferring its statutory seat or incorporation seat to Luxembourg while retaining its legal personality, viz. without having to be liquidated in Poland. While interpreting the exercise of the freedom of establishment under Articles 49 and 54 TFEU in a cross-border conversion, the CJEU confirmed that the freedom of establishment implicates that all the companies incorporated in

[63] Gert-Jan Vossestein, supra note 60, p.182

[64] John Armour and Wolf-George Ringe, '*European company law 1999–2010: Renaissance and crisis*', (2011), 48, Common Market Law Review, Issue 1, 125, p. 141

[65] Case C-106/16 Polbud, supra note 15

[66] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance), [2019] OJ L 321, Article 1(5), stating the amendments to Directive (EU) 2017/1132, with the addition under Title II, of the provisions of cross-border conversions to be inserted before Chapter I, Article 86b (2)

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any EU Member State have the right to convert into a company governed by the laws of another Member State.[67]

The Polbud case prepared the ground for the harmonisation of EU laws on cross-border conversions through Directive (EU) 2019/2121 which included for the first time EU legislative provisions on cross-border conversions. Specifically, Dr. Frazzani and others have stated that *"[i]n the aftermath of the Polbud decision, the Commission published a proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions."* [68] The impact of the Polbud case is also highlighted by Dr. Steef who stresses its importance for EU corporate restructuring in general. Specifically, Dr Steef stated that the Polbud judgment "*allowing an EU cross-border transfer of statutory seat (conversion) without transferring the company's real seat, triggered the European Commission to come up speedily with a proposal for cross-borders conversions, mergers and divisions, in an attempt to finally get some level of harmonisation in place as regards all said forms of company restructuring within the EU."*[69]

Lastly, having analysed the CJEU case law on the exercise of the freedom of establishment in cases of corporate cross-border transformations, one can certainly state that the Court stresses the importance of the exercise of this fundamental freedom in any kind of corporate restructuring. Specifically, it has been emphasized that any company incorporated

[67] Case C-106/16 Polbud, supra note 15, par. 33

[68] Simona Frazzani, Carlo Angelici, Jochen Hoffmann, Silvia Medici, Francesco Sciaudone, '*The Polbud judgment and the freedom of establishment for companies in the European Union: problems and perspectives'*, (October 2018), European Parliament, p. 15, available at < https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608833/IPOL_STU(2018)608833_EN.pdf>, accessed 07/11/2021, p.25

[69] Bartman M. Steef, *'Editorial: The Adopted Proposal for an EU Directive on Cross-Border Operations: A Realistic Compromise*', (2019), 16 European Company Law 140, Issue 5, p. 140, available at, <https://kluwerlawonline.com/JournalArticle/European+Company+Law/16.5/EUCL2019021> accessed 07/11/2021

under the laws of a Member State, has the right to access the economy of another Member State and be recognised and treated in the same manner as a legal person incorporated and regulated in that Member State. Dr. Kotsiris argues in this regards that the "*Court, through its case law, defends the freedom of establishment of the companies.*" [70] SEVIC is particularly important for the purposes of this dissertation paper as it affirmed that companies from different Member States, who decide to merge, exercise the freedom of establishment and are protected in doing so.

3. CHAPTER II: THE LEGAL FRAMEWORK GOVERNING CROSS-BORDER MERGERS OF LIMITED LIABILITY COMPANIES IN THE EUROPEAN UNION

A. THE LEGAL FRAMEWORK AS AMENDED BY DIRECTIVE 2019/2121

i. Overview of the CBMs regime

Prior to the establishment of the legal framework for CBMs, some provisions for regulating these, had previously been incorporated by Council Regulation on the SE statute[71]. Moreover, by examining the CJEU case law as per the previous Chapter, it is evident that the CJEU has provided rulings emphasizing the importance of the cross-border mobility of companies in the EU and specifically that, EU legal persons by entering into CBMs exercise the freedom of establishment.[72]

Despite these provisions however, adoption of a common legal text governing CBMs in the EU was of vital importance, as harmonised legislation would lead to clear rules on CBMs, which would be easily followed and applied by all Member States. As a group of academics

[70] Lampros E. Kotsiris, supra note 8, p. 960

[71] Consolidated Version of the Council Regulation (EC) No 2157/2001, of 8 October 2001, on the Statute for a European company (SE), OJ L 294, 10.11.2001

[72] Particularly Case C-411/03 *SEVIC Systems AG* [2005] ECR I-10805

has rightly pointed out, *"[w]ithout any doubt, the ECJ's judgments by themselves cannot solve all the practical problems connected to issues of cross-border mobility […] the Court's decisions on freedom of establishment of companies identify the role for Community secondary legislation rather than remove the need for it.*"[73]

Therefore, for this purpose, the first Directive on CBMs, known as the 10th Company Law Directive[74] and alternatively as the 'Cross-Border Mergers Directive' (hereinafter referred to as the 'CBRD'), was finally adopted by Member States in 2005, after approximately twenty years of negotiations.[75] The reason behind the delay in its implementation, was the "*strong opposition on grounds of employee protection*" [76], especially by Germany Also, the European Parliament blocked a draft of the Directive in 1985 and the Commission abandoned it in 2001[77]. Finally in 2003, the European Commission drafted a new proposal for CBMs. With the Employee participation Directive[78] supporting the SE statute and claims that this would also aid the CBMs, German reactions were mitigated and the CBMD was finally adopted[79]. In

[73] Paul Davies, Susan Emmenegger, Eilís Ferran, Guido Ferrarini, Klaus Hopt J., Niamh Moloney, Adam Opalski, Alain Pietrancosta, Markus Roth, Rolf Skog, Martin Winner, Jaap Winter and Eddy Wymeersch, (European Company Law Experts (ECLE)), '*The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment'* (2019) 16 (1-2) European Company and Financial Law Review 196

[74] Worker-participation.eu, <https://www.worker-participation.eu/Company-Law-and-CG/Company-Law/Cross-Border-Mergers/Frequent-Questions-10th-company-law-directive>, accessed on 24 September 2021, referring to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, (2005) OJ L 310

[75] Thomas Papadopoulos, '*The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive*', supra note 16, p. 521-522, referring to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/ 1-9

[76] Bech-Bruun and Lexidale, "Study on the Application of the Cross-Border Mergers Directive" (2013) Directorate General for the internal market and services of the European Commission (MARKT/2012/031/F), p. 3

[77] Thomas Papadopoulos, '*The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive*', supra note 16, p. 521-522

[78] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

[79] Thomas Papadopoulos, '*The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive*', supra note 16, p. 522

2005, Charlie McCreevy who served as the European Commissioner for Internal Market and Services between the years 2004 to 2010, stated that the CBMD opened new ground for European companies to efficiently develop on a cross-border level and enjoy the benefits of the EU Single Market. [80] Also, Dr. Papadopoulos stated that the goal of the CBMD was the exercise of the freedom of establishment by EU companies in the Internal Market, as any "*harmonising legislation in the field of company law must eliminate obstacles to cross-frontier business activities, mobility, expansion and investment and/or eliminate appreciable distortions of competition"* [81]

Therefore, the revolutionary nature of the CBMD is undoubtable. It offered a harmonised legal framework governing the procedure for CBMs of limited liability companies in the European Union. In this way, the EU aimed to enable legal persons to expand their business in other Member States by carrying out a CBM. Thus, they would establish a firmer position in the EU Single Market through the utilisation of the (then) newly established and regulated CBM procedure. However, the CBMD is now repealed and Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law[82], codified all the rules applicable to CBMs in the EU (hereinafter referred to as the 'Directive (EU) 2017/1132 as amended').

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[80] European Commission, '*Statement by Charlie McCREEVY, European Commissioner for Internal Market and Services, on the adoption of the European Parliament opinion on the Cross-Border Mergers Directive'*, Press release IP/05/551, Brussels, 10 May 2005, available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_05_551>, accessed on 26/09/2021

[81] Thomas Papadopoulos, 'The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive', supra note 16, p. 518

[82] Consolidated Version of the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46, as amended by OJ L 020, 24.1.2020, p. 24 (2019/2121)

Despite the overall positive assessment of the established CBM regime, the European Commission detected some problems which make the full effectiveness of the existing rules questionable. Specifically, the European Commission in 2018 published the proposal for amendment of the Directive (EU) 2017/1132 in an effort to address the shortcomings of the then CBM regime in place and improve the legislative framework on CBMs[83].

Specifically, the main obstacles identified by the Commission were firstly, the lack of harmonisation of existing rules on CBMs regarding creditor and minority shareholder protection[84], so the Commission's proposal called for harmonised rules on the protection of creditors and shareholders. Secondly, a lack of fast-track simplified procedures regarding simpler cases of CBMs was identified.[85] Thirdly, the Commission criticised the lack of digital procedures during the process of finalisation of a CBM and the exchange of information between the business registers of the Member States.[86] Finally, the lack of sufficient information provision to employees as to the implications of the CBM which the company employing them engages into was identified as a problem with which the EU legislator was called to deal with.[87] On the one hand, the Commission's proposal tried to strike a balance between the exploitation of the Single Market by establishment of clear rules on cross-border mobility of legal persons in the EU in order for them to better enjoy the benefit of the Single Market and on the other hand, achieve better protection of stakeholders.[88] As specifically

[83] European Commission, '*Proposal for a Directive of The European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions*', 25.4.2018, COM/2018/241 final - 2018/0114 (COD)

[84] European Commission, ibid., p. 6

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Luca JAHIER, President of the European Economic and Social Committee, '*Opinion of the European Economic and Social Committee on (a) Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (COM(2018) 239*

stated in the proposal "*it is important to unleash the potential of the Single Market by breaking down barriers to cross-border trade, facilitating access to markets, increasing confidence and stimulating competition while offering effective and proportionate protection to stakeholders. […] Such action forms part of creating a deeper and fairer Single Market, which is one of the priorities of the current Commission.*" [89] The European Economic and Social Committee strongly supported the proposal of the European Commission[90] calling for reform of the CBM regime.

Also, Dr. Papadopoulos commenting on this proposal and on the goals of the EU Commission for reform of the CBM regime, stated that *"it is obvious that the proposal contributes significantly to the protection of minority shareholders. The proposal does not only reinforce the rights of shareholders disagreeing with the cross-border merger, but also the right of shareholders, who conceded the cross-border merger, but were not satisfied with the share exchange ratio. The proposal ensures a fair treatment for both categories of shareholders, who either agreed or disagreed with the cross-border merger."*[91] This statement highlights the goal of the EU commission for increased protection of minotiry shareholders. The aim is to give consideration to all the members of the merging companies so that they can benefit accordingly, either through cash compensation for the shares disposed of in case they want to opt out, or by enjoying the prospects of the CBM.

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final — 2018/0113 (COD)) and on (b) Proposal for a Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (COM(2018) 241 final — 2018/0114 (COD))', 15.02.2019, Official Journal of the European Union (2019/C 62/24), at par 3.6.1., available at < C_2019062EN.01002401.xml (europa.eu) >, accessed on 23/10/2021

[89] European Commission, supra note 83

[90] Luca JAHIER, President of the European Economic and Social Committee, supra note 88, at par 3.6.1.

[91] Thomas Papadopoulos T., '*Reviewing the Implementation of the Cross-Border Mergers Directive*', in Papadopoulos T. (ed), 'Cross-Border Mergers: EU Perspectives and National Experiences' Cham: Springer (Studies in European Economic Law and Regulation), (2019), p. 27, available at: < https://link.springer.com/book/10.1007%2F978-3-030-22753-1 >, accessed 25 September 2021

Thus, taking into consideration the necessity for reform of the existing legal framework on companies cross-border mobility, the EU legislator finally passed Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amended Directive 2017/1132 with regards to cross-border conversions, mergers and divisions[92] (hereinafter the 'Directive (EU) 2019/2121'). Directive (EU) 2019/2121, also referred to as the "*Mobility Directive*",[93] came into effect on the 01/01/2020 and the date of its transposition into national law by the Member States, is the 31/01/2023[94]. Directive (EU) 2019/2121 has made significant changes to the CBM regime as shall be examined below.

ii. **Directive (EU) 2019/2121-an introduction**

Directive (EU) 2019/2121 aims to offer harmonisation of the rules governing cross-border mobility of companies in the EU while ensuring the legal protection of stakeholders. As analysed in Chapter I, Directive (EU) 2019/2121is an important piece of EU legal text, as it provides for the first time, rules on cross-border conversions. It also improves the provisions on CBMs to make it easier for companies to abide by more clear rules. Therefore, the goal of the EU is twofold. This was explained by Mrs. Anna-Maja Henriksson, the Finnish Minister of Justice who stated in 2019 that the "*new rules enable EU companies to make the best out of the single market so that they remain competitive globally. At the same time, the directive provides for appropriate safeguards that discourage abuses and protect the legitimate interests of*

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[92] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance), [2019] OJ L 321

[93] Antigoni Alexandropoulou, in '*Protection of members and creditors after the Mobility Directive: challenges in the implementation'*, (2021) 22(1) ERA Forum, 9, p. 10, available at: <https://search.ebscohost.com/login.aspx?direct=true&db=edb&AN=149808718&site=eds-live>, accessed: 1st of August 2021

[94] Directive (EU) 2019/2121, Document information, available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32019L2121>, accessed on 30/04/2021

workers, minority shareholders and creditors."[95] In order for companies operating in the EU to remain competitive globally, they need to flourish and operate with ease in the Internal Market. As stated by the European Commission, "*healthy and flourishing companies […] play a crucial role in promoting economic growth, creating jobs and attracting investment in the European Union. They help to deliver greater economic as well as social value for society at large. To achieve this end, companies need to operate in a legal and administrative environment which is both conducive to growth and adapted to face the new economic and social challenges of a globalised and digital world*"[96]

It seems that these goals of the EU legislator for facilitating companies to utilize the internal market by having a clear comprehensive legislation in place, adopted accordingly with the needs of the time, have remained the same as the ones which the EU legislators had in mind when passing the CBMD back in 2005. The only difference which may be detected by examining the new amendments, is the additional goals for protecting the stakeholders involved in the procedure. Dr. Chirieac has stated that Directive (EU) 2019/2121 "*was generally well acclaimed by scholars.*" [97] Taking into consideration the above statements made by academics and politicians, the general understanding is that the Directive (EU) 2019/2121 is welcomed, even though it has not yet been implemented by Member States and it does not come without its limitations regarding the provisions on CBMs, as shall be examined further below.

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[95] Council of the EU, '*EU makes it easier for companies to restructure within the single market*.', Press release 18 November 2019, <https://www.consilium.europa.eu/en/press/press-releases/2019/11/18/eu-makes-it-easier-for-companies-to-restructure-within-the-single-market/>, accessed 15th September 2021

[96] European Commission, supra note 83

[97] Roxana Maria Chirieac, *'The Future of Cross Border Mergers in the Light of the New European Union Provisions. Their Implementation in Romania*', (2020) 10 Juridical Tribune 279, p. 282, referring to 'Jessica Schmidt, "*Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package*", (2019), 16(1-2) European Company and Financial Law Review

The focus point of this dissertation paper will be an analysis of the provisions relevant to '*Cross-border mergers of limited liability companies'* under Articles 118-134, Title II, Chapter II of Directive (EU) 2017/1132 as amended. Particularly, Article 118 asserts the scope of Chapter II of Directive (EU) 2017/1132 as amended, stating that that this "*shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union, provided at least two of them are governed by the laws of different Member States (hereinafter referred to as 'cross-border mergers').*"[98] It seems that the scope of the application of the CBM regime remains the same as before. This means that there are two pre-requisites. Firstly, these regulations apply to only one type of company, that is limited liability companies and the second pre-requisite, is that these companies must be incorporated and registered in the EU Member States. This means that this legislation cannot be used for CBMs of any type of companies other than limited liability companies, which are registered outside the European Union.

Many scholars and commentators have criticised these limitations of the scope of the CBMs framework. Particularly, that this is restricted to limited liability companies only and that other types of companies such as partnerships, public companies, foundations, cooperatives etc, are excluded from its scope of application.[99] However, this is just a mere

[98] Article 118, Directive 2017/1132 as amended by Directive (EU) 2019/2121.

[99] See Emmanuela Truli, '*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)*', (2016) (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), p.15, Jessica Schmidt, '*Cross-border mergers and divisions, transfers of seat: is there a need to legislate?*', Study for the JURI Committee, European Parliament (2016), p.16, available at: <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU(2016)556960_EN.pdf > , accessed on 25/09/2021, and Thomas Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive'*, supra note 91, p. 7 -8

observation for the purposes of this Chapter, and no further analysis will be made regarding this point.

iii. Four Different types of Cross-Border Mergers

The meaning of a merger and the four different methods which companies in the European Union may utilise to enter one, are stated under Article 119 (2) of Directive (EU) 2017/1132 as amended. The first method of merger, is an operation whereby *"(a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares;"*[100] The second method, similar yet different to the first, applies when two or more companies which are dissolved without being liquidated, form a new company which acquires them and to which they transfer all their assets and liabilities. Thus, rather than being acquired by an existing company as in the first method, these companies exchange for shares and securities in the newly formed acquiring company[101]. The third method, unlike the previous two, applies to only one company, that is the parent company, which on being dissolved, *"transfers all its assets and liabilities to the company holding all the securities or shares representing its capital."*[102] that is to its subsidiary. Finally and most importantly for the purpose of the current analysis, is the addition of a fourth type of merger with the addition of subclause d under Article 119 (2*)*

[100] Article 119 (2)(a), Directive 2017/1132 as amended by Directive (EU) 2019/2121

[101] Article 119 (2)(b), Directive 2017/1132 as amended by Directive (EU) 2019/2121, stating that a merger is an operation whereby *"(b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares*;"

[102] Article 119 (2)(c), Directive 2017/1132 as amended by Directive (EU) 2019/2121

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which provides that *"one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, without the issue of any new shares by the acquiring company, provided that one person holds directly or indirectly all the shares in the merging companies or the members of the merging companies hold their securities and shares in the same proportion in all merging companies."*[103]

This is an important alteration brought by Directive (EU) 2019/2121, as it results in the expansion of the merger definition. It proves the goal of the EU legislator, to further aid companies in the European Union to grow, by offering them greater pool of options to choose from for entering into a CBM, which may better suit their business model. The fourth type of merger allows the acquired company or companies to transfer their assets and liabilities in the acquiring company without the issuance of new shares to its members, provided that the companies entering in the CBM, "*are owned by the same person or the ownership structure in all merging companies remains identical after the completion of the operation.*"[104] This simplified option, would greatly ease the procedure for the merging companies belonging in the same corporate group. This is also stated by Dr. Chirieac who states that the new type of CBM, "*brings certain ease to the procedure, as it allows companies that are owned by the same shareholders to easily transfer their assets, usually, without having to pay much taxes on the transaction.*"[105] This proves that the legal framework on CBMs as amended, provides revolutionary new ways for corporate restructuring which further facilitates the business

[103] Article 119 (2), Directive 2017/1132 as amended by Directive (EU) 2019/2121

[104] European Commission, supra note 83, with reference to the Section titled 'Detailed explanation of the specific provisions of the proposal', regarding the provisions proposed for the Cross-border mergers

[105] Roxana Maria Chirieac, supra note 97, p. 282

operators in the European Union which wish to enter in CBMs, to do so with greater ease and choose the option which best suits their business interests.

iv. Directive (EU) 2019/2121 and the amendments to the Cross-Border Merger Regime benefiting the stakeholders

In addition to providing an additional type of merger, Directive (EU) 2019/2121 brought further amendments to the legal framework governing CBMs which reflect the goals of the EU legislator. The enhanced protection of the stakeholders in the procedure is of paramount importance and this includes both the information requirements and compensation to shareholders and the requirement to acquire the employees' opinion on the CBM which the company employing them enters into.

1) Transparency

Firstly, with reference to the procedure and the stages of the CBM process, provisions for the common draft terms of CBMs as amended, will be examined. The common draft terms of CBM procedures must be prepared by the management or administrative organ of each company which engages in the CBM procedure[106]. Article 122 of the Directive 2017/1132 as amended provides several elements to be included in the common draft terms. These include inter alia the legal form, name and location both of the merging companies and the proposed details of the resulting company from the CBM, the terms of the allotment of the shares or securities in the resulting company, the instrument of constitution and the statutes of the resulting company, as well as information on the involvement of employees and on the evaluation of assets and liabilities being transferred to the resulting company[107]. Directive

[106] Article 122 of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[107] Article 122 (a), (c), (i), (j) and (k) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

(EU) 2019/2121, made some important additions to the common draft terms of CBMs by inserting provisions for requiring details in the draft terms of the cash compensation to be provided to members not agreeing with the CBM[108] as shall be examined below, as well as provision of the details of the safeguards offered to the creditors of the merging companies.[109] These alterations have been described by Dr. Schmidt *as "minor, but nonetheless significant modifications with respect to the draft terms for cross-border mergers*"[110] with whom one may agree. This is because they offer further safeguards to creditors and members of the merging companies.

Further, Article 123 of the Directive (EU) 2017/1132 as replaced by Directive (EU) 2019/2121, provides that the common draft terms of CBM must be made publicly available through publication in the register of each Member State's register of the merging companies, along with notice to stakeholders of each merging company.[111] Stakeholders may submit their comments regarding the draft terms of the CBMs at least five working days before the general meeting.[112] This alteration is also important for the protection of shareholders and creditors as *"[i]t allows them to assess the terms of the operation on time before the general meeting, to evaluate how the operation will affect their rights and to pursue adequate safeguards, if necessary."*[113] Therefore, not only transparency is key, but the opportunity given to stakeholders to voice their opinion proves the intention of the EU legislator, to set up a

[108] Article 122 (m) of Directive 2017/1132 as inserted by Directive (EU) 2019/2121

[109] Article 122 (n) of Directive 2017/1132 as inserted by Directive (EU) 2019/2121

[110] Roxana Maria Chirieac, supra note 97, p. 282, referring to 'Jessica Schmidt, "*Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package*", (2019), 16(1-2) European Company and Financial Law Review

[111] Article 123 (1) of Directive 2017/1132 as replaced by Directive (EU) 2019/2121

[112] Article 123 (1) (b) of Directive 2017/1132 as replaced by Directive (EU) 2019/2121

[113] Antigoni Alexandropoulou, supra note 93, p. 11

procedure whereby the opinion of everyone who is affected is heard. Subsequently, the possible objections will be made within the said timeframe, which will help the companies involved in the CBM to avoid any possible subsequent delays in the procedure caused by anyone objecting this transaction on a later stage.

Thus, by examining the aforesaid alterations, the aim of the EU legislator to protect the members and employees of a company involved in a CBM is evident, by virtue of the obligation of that company to inform them of the details and consequences of the CBM procedure. Additionally for this purpose, the replaced Article 124 (a) states that a report must be prepared by the administrative or management body of a company addressed to members and employees with the purpose of "*explaining and justifying the legal and economic aspects of the cross-border merger, as well as explaining the implications of the cross-border merger for employees. It shall, in particular, explain the implications of the cross-border merger for the future business of the company*."[114] Such report shall be made available electronically, along with the common draft terms of the CBM to the members and employee representatives of the merging companies, or in case these do not exist, directly to the employees, within and not less than six weeks prior to the general meeting where the shareholders approve the merger, or in case such general meeting is not required, the report to the members and employees shall be provided at least six weeks prior to the general meeting of the merging company.[115] Dr. Alexandropoulou, also making reference to this report, states that *"[t]his rule offers the*

[114] Amended Article 124 (1), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[115] Article 124 (6) Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121, with reference also to Article 126, stating that "*However, where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available at least six weeks before the date of the general meeting of the other merging company or companies*."

members the possibility to acquire all the necessary information that will allow them to make an informed decision about the operation itself."[116]

Therefore, transparency is of essence. All the members of the company as well as the employees, will undoubtedly be affected in one or more ways by a CBM transaction, irrespective of the type of merger which their company engages in. This entails inter alia, a probable change of jurisdiction, possibly different types of shares acquired in the acquiring or new company, possible physical relocation of the employment premises in another Member State, different company and employment laws governing stakeholders' rights. The effect on them is significant and they have a right to understand the terms of the CBM beforehand and the extent to which these will affect them. By being well informed, employees and members will be given the opportunity to express their opinion. This necessity on the opinion of employees and members being expressed is also made by Dr. Papadopoulos.[117] Therefore, the aforementioned electronic report which will be provided, along with the draft terms of the CBM, will hopefully suffice for the provision of all the required information to members and employees on the CBM.

2) Protection of Shareholders- informative report on cash payment & exit right

An independent expert report shall be provided to the members of the merging companies, at least one month before the general meeting.[118] Such report must include the "*expert's opinion as to whether the cash compensation and the share exchange ratio are adequate. When assessing the cash compensation, the expert shall consider any market price*

[116] Antigoni Alexandropoulou, supra note 93, p. 13

[117] Thomas Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive'*, supra note 91 p. 28-29

[118] Article 125 (1) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

of the shares in the merging companies prior to the announcement of the merger proposal or the value of the companies excluding the effect of the proposed merger, as determined in accordance with generally accepted valuation methods."[119] After taking into consideration the aforementioned report, the decision on whether to proceed with a CBM, lies within the hands of the shareholders of the companies involved in the CBM, as "*the general meeting of each of the merging companies shall decide, by means of a resolution, whether to approve the common draft terms of the cross-border merger and whether to adapt the instrument of constitution, and the statutes if they are contained in a separate instrument*."[120]

Further, the 'exit right' provided to minority shareholders who disagree with the CBM transaction which their company wishes to engage, is considered as *"[o]ne of the most important innovations*"[121] of Directive (EU) 2019/2121. Thus, Directive (EU) 2019/2021, has added rules aiming the increased protection of shareholders as explained below, with the addition of Article 126 (a) "*Protection of members"*.[122] Firstly, an exit right is given to shareholders who oppose the common draft terms of the CBM, who are to dispose of their shares for adequate cash compensation.[123] Secondly, in case they consider that the said cash compensation is not adequate, they have the right to "*claim additional cash compensation before the competent authority or body mandated under national law.*"[124] This right is an indication of shareholders' empowerment, as they have the option to be compensated if they disagree with the CBM of their company. Such an empowerment is further proven by the fact

[119] Article 125 (3) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[120] Article 126 (1) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[121] Thomas Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive*', supra note 91, p. 27

[122] Article 126 (a) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[123] Article 126 (a)(1) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[124] Article 126 (a)(4) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

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that the remaining shareholders who did not "*exercise the right to dispose of their shares, but who consider that the share exchange ratio set out in the common draft terms of the cross-border merger is inadequate, may dispute that ratio and claim a cash payment*."[125] This emphasizes the intention that every opinion of the shareholder of the merging companies is voiced and heard as the "*[t]he EU legislator provides in that way a possibility for those members who do not agree with the transaction because they consider it eg a bad business decision or who do not want that their rights and obligations from the shares are governed by a different company law, to exit the company without losing the value of their shares."* ***[126]***

Therefore, the amended EU legal framework on CBMs is "*based on the "information model" (protection by means of information)."*[127] The obligation of the administration body of the company engaging in a merger transaction, to inform the members of the implications of the CBM[128], the draft terms, the report and the expert's report may be sufficient provision of the required information to the stakeholders, for them to have a well-rounded acknowledgement of the CBM procedure. Such information model reflects the goals of the EU legislator to protect the stakeholders by making them more aware of their rights and how to claim them.

3) <u>Protection of creditors and consultation to employees</u>

The protection of stakeholders is further enhanced by Directive (EU) 2019/2121 with the insertion of articles 126(b) and 126(c) under Directive (EU) 2017/1132. Article 126 (b) (1)

[125] Article 126 (a)(6) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[126] Antigoni Alexandropoulou, supra note 93, p. 14

[127] Roxana Maria Chirieac, supra note 97, p. 284

[128] Article 124 (3)(d) of Directive 2017/1132 as amended by Directive (EU) 2019/2121

provides that "*Member States shall provide for an adequate system of protection of the interests of creditors whose claims antedate the disclosure of the common draft terms of the cross-border merger and have not fallen due at the time of such disclosure*."[129] The Member States further have to ensure that the creditors who disagree with the safeguards offered in the common draft terms of the CBM, within three months from their publication, can apply "*to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly demonstrate that, due to the cross-border merger, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the merging companies*."[130] With reference to this provision, "[*c]learly, the EU legislator wants to give the creditors a protective measure before the operation is completed.*"[131] One may express the opinion that this provision aims to protect the creditors whose interests may be at stake if the company to whom they provided credit, engages in a CBM which is not beneficial for its business and the creditors lose the money which they have lent to this company. Although Directive (EU) 2019/2121 does not specify the kind of creditor protection measures which Member States must adopt, leaving much discretion to them regarding this matter, this is an important addition to the CBM regime, ensuring the protection of creditors, revolutionary in a sense, as such provision did not exist before. To ensure the adequate protection of creditors in practise, one may suggest that on the initial implementation of Directive (EU) 2019/2121 by Member States, they should include under their national laws, specific provision that in case creditors raise an objection to the CBM before courts or corporate registrars of the merging companies responsible for checking and confirming the finalisation of the CBM. Due to the objection raised by creditors, and upon careful consideration of such objection, the relevant

[129] Article 126 (b)(1) of Directive 2017/1132 as inserted by Directive (EU) 2019/2121

[130] Article 126 (b) of Directive 2017/1132 as inserted by Directive (EU) 2019/2121

[131] Antigoni Alexandropoulou, supra note 93, p. 17

authorities may order that the CBM procedure is paused, until the merging companies provide adequate safeguards to the creditors. The template of the objection application by creditors, may also be specified under national laws. Then, the CBM procedure may only be resumed, if provision of a written declaration by creditors for example is provided to the relevant authorities that they have received the relevant safeguards.

The same benefit of protection is given to employees as well, with the addition of Article 126 (c) which states that "*Member States shall ensure that employees' rights to information and consultation are respected in relation to the cross-border merger and are exercised"*[132]. Similarly, as in the case of members, although much discretion is left to Member States to decide on the exact ways which the employees will be informed and consulted, this provision highlights that the rights of employees to be well informed about the CBM which the company which employs them will engage into, are respected. One may suggest that the authorities governing the merging companies responsible for approving the CBM, may only be satisfied that the employee's rights are adequately respected, upon receiving a statement executed by all or the majority of employees or their representatives confirming the said. The percentage constituting such majority, may also be specified by Member States. Lastly, the template for such employees' statement may also be provided under national law, ensuring further clarity of these provisions.

4) <u>Pre-Merger Certificate</u>

Another important amendment brought by Directive (EU) 2019/2121, is on the provisions on the issuance of the pre-merger certificate specified under Articles 127 and 128 of Directive (EU) 2017/1132 as amended. As per Article 127 regarding the pre-merger certificate "*Member States shall designate the court, notary or other authority or authorities competent to scrutinise*

[132] Article 126 (c) of Directive (EU) 2017/1132 as inserted by Directive (EU) 2019/2121

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the legality of cross-border mergers as regards those parts of the procedure which are governed by the law of the Member State of the merging company and to issue a pre-merger certificate attesting to compliance with all relevant conditions and to the proper completion of all procedures and formalities in the Member State of the merging company ('the competent authority')."[133] Also, Article 128 (4) has been inserted by Directive (EU) 2019/2121 which states that the relevant authority "*shall approve the cross-border merger as soon as it has determined that all relevant conditions have been fulfilled*[134]*"* and that such approval of the pre-merger certificate, will serve as evidence of the " *completion of the applicable pre-merger procedures and formalities in its respective Member State, without which the cross-border merger cannot be approved*."[135] One may emphasize the discretion given to Member States to determine the approval of the CBM procedure as they think best. Although this amendment on the one hand is considered to clarify the rules on whether the merging companies meet all the pre-requisite conditions and formalities for the completion of the CBM, this is also criticised for the discretion given to the relevant authorities of the Member States who may abuse such discretion to object a CBM on grounds of public interest for example, without giving sufficient explanation to the merging companies. An outcome which would greatly disadvantage the merging companies both money and time wise.

5. Registration and consequences of the cross-border merger

The established procedure of registration of the CBMs upon their completion has faced criticism. With reference to the CBMD, Dr. Papadopoulos states that "*registration of the merger suffers from a lack of clear and standardized system of communication between*

[133] Article 127 (1) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[134] Article 128 (4) of Directive (EU) 2017/1132 as inserted by Directive (EU) 2019/2121

[135] Article 128 (5) of Directive (EU) 2017/1132 as inserted by Directive (EU) 2019/2121

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registries. This problem could be solved through the adoption of a standardized system with clear deadlines, which also deals with linguistic differences. Generally, the CBMD is characterized by problems relating to documentation and communication. […] Moreover, documentation is not harmonized. As a result, diverse documentation creates lots of procedural and bureaucratic barriers and increases the cost of the procedure. Hence, the relevant documentation needs to be standardized."[136] However, one may identify an improvement in the specification of the information required, as Article 130 of Directive (EU) 2017/1132 has been replaced. It now provides for the detailed information that should be entered in the registers of the Member States governing the merging companies, upon completion of the CBM. Firstly, Article 130 (1) of Directive (EU) 2017/1132 states on the disclosure of the completion of the CBM that "*[t]he laws of the Member States of the merging companies and of the company resulting from the merger shall determine, with regard to their respective territories, the arrangements […] for disclosing the completion of the cross-border merger in their registers."*[137] Although this gives the Member States discretion as to deciding the arrangements and information to be included in the registers in order to indicate completion of the CBM, the amended provisions specify the minimum information which needs to be included in the registers, which may limit such discretion. The amended legal text provides specifications that "*in the register of the Member State of the company resulting from the merger*, [it must state] *that the registration of the company resulting from the merger is the result of a cross-border merger*"[138] and it must also state the date of such registration[139]. Also, the registers of the Member States of each of the acquired companies, must state "*that the*

[136] Thomas Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive*', supra note 91, p. 17-19

[137] Article 130 (1), Directive (EU)2017/1132 as amended by Directive (EU) 2019/2121

[138] Article 130 (2)(a), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[139] Article 130 (2)(b), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

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striking off or removal of the merging company from the register is the result of a cross-border merger;" [140] and the date of such strike off or removal[141] must also be specified. The EU legislator has also further specified some common details that ought to be included in the registers of the Member States of both the acquired companies and the resulting companies. The details to be included in both registers are "*the registration number, name and legal form of each merging company and of the company resulting from the merger*." [142]

The above alterations introduced by the EU legislator in specifying the information required to be included in the registers of both the Member State of the company resulting from the CBM and the Member State of the acquired company, clarify the legal rules on the registration of CBMs, which hopefully upon implementation, will reduce diversity between the national laws of Member States and will result in achieving a harmonised procedure of registration.

Regarding the provisions on the communication between the registries of Member States on the registration of the CBM, an improvement of these has also been identified. Directive (EU) 2017/1132 specifies that the above information included in the registers must be made "*publicly available and accessible through the system of interconnection of registers*."[143] Communication between the Member States is further reinforced with provision of Article 130 (3) which states that "*Member States shall ensure that the register in the Member State of the company resulting from the cross-border merger notifies the register in the Member State of each of the merging companies, through the system of interconnection of registers, that the*

[140] Article 130 (2)(c), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[141] Article 130 (2)(d), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[142] Article 130 (2)(e), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[143] Article 130 (2), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

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cross-border merger has taken effect. Member States shall also ensure that the registration of the merging company is struck off or removed from the register immediately upon receipt of that notification."[144] Although the wording of this article provides clarity as to the communication between registries when compared to previous legal text, it still may not serve particularly as a solution to the problem identified by Dr. Papadopoulos, regarding the lack of clarity and a standardised system in place for of communication between the Member States' registries. The notification process is still unclear and left for Member States to decide. Essentially, this is an aspect which causes problems in practise as different Member States may put in place different rules for such notification to the other registries. That is, regarding the finalisation of the CBM procedure, diversity in the procedure of registration of CBMs in the relevant registries and subsequently different deadlines and timeframes, may disable the companies involved to better understand the procedure, prepare their business plan and avoid uncalculated costs and delays.

Regarding the consequences of a CBM Article 131 (1) as amended, states that "*(a) all the assets and liabilities of the company being acquired, including all contracts, credits, rights and obligations, shall be transferred to the acquiring company; (b) the members of the company being acquired shall become members of the acquiring company, unless they have disposed of their shares as referred to in Article 126a(1); (c) the company being acquired shall cease to exist.*"' [145] Although this provision already existed, the amendment has provided further clarity as the merging companies must have a clear understanding of the consequences of the CBM operation. The EU legislator has served well this purpose of clarifying the existing rules by

[144] Article 130 (3), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[145] Article 131 (1), Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

amending Article 131 which enables the business operators to fully understand the consequences of the CBM and thus the extent of their actions.

B. ADVANTAGES OF THE CROSS-BORDER MERGER REGIME

Having presented and analysed the amendments to the legal framework governing CBMs in the European Union pursuant to Directive (EU) 2019/2121, as well as the benefits for stakeholders deriving from such amendments, this part will examine some advantages of the existing CBM regime.

i. Harmonised legal framework

Regardless of the challenges which stakeholders face derived from the procedure of completing a CBM, the existence of a harmonised legal framework in place governing CBMs, aids the mobility of companies across Member States. This was expressed by Mr. Charlie McCreevy in 2005, who served as the European Commissioner for Internal Market and Services between the years 2004 to 2010, when he was referring to the CBMD and said that "*[i]t will now be much easier for Europe's companies to cooperate and restructure themselves across borders. This will make Europe more competitive and enable businesses further to reap the benefits of the Single Market.* "[146] Thus, it is clear that the motive of the EU legislator when passing the first piece of legislation on CBMs, was the encouragement of companies in the EU to expand their operations in different Member States. With unified set of rules in place, this

[146] European Commission, '*Company law: cross-border mergers Directive adopted and published*', Press release IP/05/1487, Brussels, 29 November 2005, available at < https://ec.europa.eu/commission/presscorner/detail/en/IP_05_1487>, accessed on 26/09/2021

became easier to do so, which resulted in an expansion of the business of these companies in the Internal Market.

The harmonised legal framework on CBMs as amended, further encourages legal entities to exercise their freedom of establishment through cross border transactions. This is explained by Dr. De Luca who commenting on the CBMD has characterised it as a "*legal tool […* which*] has clarified, simplified and developed a framework fundamental for the enforcement of the freedom of establishment within the EU"*[147] Dr. Schmidt also states that *"[t]his 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"*[148] Therefore, despite its amendments and the challenges it has faced through time, the harmonised legal framework on CBMs, facilitates EU companies to follow clear rules and pre-requisites when completing a CBM. This offers them security for the outcome of their cross border transaction and thus reduced transaction costs, while they exercise the freedom of establishment.

ii. Corporate restructuring

According to J. C. Coates IV, restructuring can be defined as "*a deliberate, significant and unusual alteration in the organization and operations of a business, commonly in times of financial or operational distress, typically accompanied by changes in ownership or finance, as when a company merges two divisions, or sells off a business unit."*[149] EU business operators have the ability and power to choose which legal framework of Member States best

[147] Nicola De Luca, supra note 1, p.113

[148] Jessica Schmidt, '*Cross-border mergers and divisions, transfers of seat: is there a need to legislate?*', Study for the JURI Committee, European Parliament (2016), p. 16., available at: <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU (2016)556960_EN.pdf >, accessed on 25/09/2021

[149] Thomas Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive*', supra note 91, p. 5

suits their business needs, when engaging in corporate restructuring. CBMs are considered a type of corporate restructuring. Thus, CBMs enable EU entrepreneurs to re-organize their business accordingly, by merging with another company incorporated in a different Member State perhaps with more favorable company laws, and by merging their operations, assets and liabilities, they enlarge their business, become more competitive and establish a firmer position in the Internal Market. Therefore, it is very important that "*EU companies must have the possibility of choosing whichever corporate structure fits their needs and is economically efficient. There must be no barriers to the freedom of EU companies to re-organise and reshape their structure and their activities*." [150] This is the essence of the CBM legal regime, as it has been included in the goals of the EU legislator since passing the first piece of legislation on CBMs. Dr. Papadopoulos is a firm believer of this argument. He claims that CBMs constitute actions which abolish the obstacles in the Internal Market and contribute to the effective allocation of resources,[151] with whom one may agree. He states that "*Cross-border mergers are a very important source of external growth. External growth is vital for EU corporations which are seeking to penetrate into new markets and to become more competitive on a global level against non-EU corporations*."[152] Therefore, CBMs are an excellent example of corporate re-structuring in the European Union. By entering into CBMs, business operators have the ability to expand in different Member States, by choosing the corporate structure which suits their business needs, and in this way achieve competitive growth not only in the European Union but on a global level as well.

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[150] Thomas Papadopoulos, '*EU Regulatory Approaches to Cross-Border Mergers: Exercising the Right of Establishment*', European Law Review, Sweet & Maxwell-Thomson Reuters- London (2011) 71, p.73

[151] Ibid.

[152] Ibid., p. 72

iii. A tool for conversions and re-incorporations

Due to the absence of a relevant legal regime governing cross-border conversions prior to 2019, it has been discussed by some academics such as Dr. Mucciarelli, that the legal framework of CBMs came to the rescue, by providing an option for corporate re-domiciliation through the type of CBM, whereby a subsidiary is created in the Member State whose laws are preferred by the shareholders, and then the parent company is absorbed by it.[153] He states that this is possible when "*a company that aim[s] at re-registering under the law of a different jurisdiction without liquidation can incorporate a new wholly owned subsidiary in the 'target' State and then merge into it; in practice, the outcome is that the company is reincorporated into the Member State of the subsidiary.*"[154] In essence, absence of harmonized laws on cross border transfers of seat of EU legal persons, meant that this option was available through CBMs.

However, as stated by Dr. Papadopoulos, *"the alternative way of conducting seat transfers through cross-border mergers cannot efficiently cover the gap caused by the absence of harmonization."*[155] Thus, eventually the ground-breaking change which Directive (EU) 2019/2121 has introduced to EU legislation, is the provisions for cross-border seat transfers as previously examined under Chapter I of this dissertation paper. It has established the legal framework, the procedure and the validity for cross-border conversions[156]. Thus, although the

[153] Federico M. Mucciarelli, '*Cross-Border Mergers and Reincorporations in the EU: An Essay on the Uncertain Features of Companies*' Mobility', in Papadopoulos T. (ed), 'Cross-Border Mergers: EU Perspectives and National Experiences' Cham: Springer (Studies in European Economic Law and Regulation), (2019), at p. 56

[154] Federico M. Mucciarelli, Ibid.

[155] Thomas Papadopoulos, Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive*', supra note 91, p. 23

[156] Directive (EU) 2019/2121, Article 1(5), stating the amendments to Directive (EU) 2017/1132, with the addition under Title II, of the provisions of cross-border conversions to be inserted before Chapter I, see Articles 86a- 86t before Chapter I, under title II, of Directive (EU) 2017/1132

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possibility for re-incorporations through CBM still exists[157] when two or more companies form a new subsidiary which absorbs their assets and liabilities, the option for this corporate re-structuring may no longer serve the objective of cross-border conversion. Despite this, it is worth highlighting the importance of providing this option to EU companies for many years. However, the argument that this is still an option can now be challenged, in light of the fact that cross-border conversions are currently also regulated.

iv. Modernisation of the procedures and use of digital tools

With Directive (EU) 2019/2121, the EU legislator encourages cross-border transactions to be completed online. This marks a shift to the modernisation of the procedures and the use of technology to aid EU companies in these transactions. Specifically, the preamble of Directive (EU) 2019/2121 states that "*Member States should ensure that the completion of certain procedural steps, namely, the disclosure of the draft terms, the application for a pre-operation certificate as well as the submission of any information and documents for the scrutiny of the legality of the cross-border operation by the destination Member State, can be completed fully online, without the necessity for the applicants to appear in person before a competent authority in the Member States."*[158] Also, the competent authorities of the Member States dealing with the application for the pre-merger certificates issuance, as well as receipt of all the documents and information, should be able to receive the said online.[159] This encouragement for Member States to provide online procedures, comes at no surprise taking into consideration the advancements in technology and the speed of completing any business operation online with the use of a single 'click'. The EU legislator is trying to keep up with

[157] Article 119 (2) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

[158] Recital 41, Council Directive (EU) 2019/2121

[159] Recital 41, Council Directive (EU) 2019/2121

these advancements of technology and the online developed operations. The European Council in a press release in 2019, stated that the Directive (EU) 2019/2121 "*encourages the use of digital tools throughout the cross-border operation. It will be possible to complete formalities such as the issuance of the pre-operation certificate, online. All relevant information will be exchanged through existing, digitally interconnected, business registers."*[160] When analysing the publication of the draft terms of the CBMs, Dr. Alexandropoulou comments that the "*publication in the register has been simplified since the Directive dictates that it should be made possible to complete the publication in the register fully online without the need of the physical presence of any representative of the company before the registrar"* [161] and she further suggests that such publications should be made on the merging companies' websites. This will allow online access to the registers by stakeholders and such publication will be made *"easily and cost free."* [162] It, therefore, seems that the modern approach of the EU legislator has been welcomed by academics and European institutions alike, and one may express the opinion that with these provisions, the EU is keeping up well with the pace of the times. Simpler online procedures will further aid the merging companies engaging in CBMs to complete online the requirements leading to quicker finalisation of the procedure and with less costs.

C. CHALLENGES AND DISADVANTAGES OF THE CROSS-BORDER MERGER REGIME

Despite the numerous advantages examined above, the CBMs regime faces criticism for the following reasons.

[160] Council of the EU, '*EU makes it easier for companies to restructure within the single market.*', supra note 95

[161] Antigoni Alexandropoulou, supra note 93, p. 11, making reference to reference to Article 123 of Directive (EU) 2017/1132 as amended

[162] Antigoni Alexandropoulou, Ibid.

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i. Harmonisation of the EU legislation on CBMs limited by renvoi technique

Harmonisation of the EU legislation governing CBMs of private limited liability companies in the European Union, may be limited by the renvoi technique. Renvoi technique is when a specific provision for a legal matter is not dealt with clearly in EU legislation and referral for the matter is made to the national laws of each Member State called to decide on more detailed specifications of the provisions when transposing the EU law into national law. This creates many problems stemming from the different interpretations which Member States may give to EU legal provisions. Different interpretations of EU legal text, lead to different provisions under national laws of Member States regarding the same matter, leading to uncertainty and confusion across the Union, resulting in uneven implementation of EU law.

In the case of CBMs for example, "*the idea of circumvention of national or EU law is vague and gives a wide margin of discretion to the national authorities"* [163] as stated by Dr. Alvarez. For example, Dr. Mucciarelli explains how the different jurisdictions interpret differently the meaning of a merger under their national laws and that "*[v]ery similar wordings (albeit in different languages) can lead to diverging interpretations and operational rules across Member States. This does not make cross-border mergers unfeasible as a matter of their practical results, yet merging companies can not be reasonably sure of all legal outcomes that their decision shall produce in each of the jurisdictions involved in the operation."* [164] This is a very valid argument. Different interpretations of EU law may create uncertainty and unpredicted impediments for the stakeholders involved in the CBM procedure. Thus, *"[i]n practical terms, differences as to regulatory frameworks and language-specific discrepancies risk to reduce legal certainty and increasing transaction costs"* [165], which emphasises the

[163] Segismundo Alvarez, supra note 30

[164] Federico M. Mucciarelli, supra note 153, p. 62-63

[165] Ibid.

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negative aspect of the renvoi technique. Limiting harmonisation of EU laws disadvantages the companies involved in a CBM, as they have increased costs and timeframes in an effort to comply with the different practical issues of the different regimes of the Member States governing each of the merging companies.

Furthermore, one may criticise the excessive discretion provided to the national authorities of each Member State to deny and prevent an intended CBM. Article 121 (1)(b) of Directive 2017/1132 as amended is relevant which states that "*[t]he laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State*."[166] This emphasizes how much discretion is given to public authorities of each Member State to decide as they best believe whether to accept a CBM or not pursuant to public interest. This creates inconsistency and lack of uniformity across the Union regarding the implementation of EU laws on CBMs.

ii. Practical difficulties challenging uniformity, increased costs and scrutiny on the legality of the CBM

Similar concerns have been raised by authors, such as Mr. Kyriakides and Mrs. Fournari, commenting that in practise, the lack of uniformity in the procedural framework of each Member State regulating the CBMs, has created many practical problems throughout the years of implementation of the legal framework governing CBMs in the Union.[167] Specifically,

[166] Article 121 (1) (b), Directive 2017/1132 as amended by Directive (EU) 2019/2121

[167] Michael Kyriakides and Fryni Fournari, '*Procedural Harmonisation in Cross-Border Mergers'*, in Papadopoulos T. (ed), 'Cross-Border Mergers: EU Perspectives and National Experiences' Cham: Springer (Studies in European Economic Law and Regulation), (2019), p. 210, available at: < https://link.springer.com/book/10.1007%2F978-3-030-22753-1 >, accessed: 26 September 2021

regarding the service of proceedings for the issuance of the pre-merger certificate, they argue that *"[t]here are substantial differences in EU Courts in relation to the persons who need to be served with an application regarding the issuance of a pre-merger certificate or regarding the completion of the cross-border merger procedure under the Directive. For instance, in Cyprus it is imperative that the Registrar of Companies and Official Receiver is served with the proceedings, although it rarely appears before the Court. The overall framework would benefit from specific provisions on which persons need to be served with any proceedings filed before the Court in relation to the Directive*." [168] Therefore, different authorities, different timeframes and practical procedures, create uncertainty for the stakeholders of the merging companies.

Also, Dr. Papadopoulos, commenting on the CBMD, identified a challenge associated with the then existing regime relevant the scrutiny given to the Member State's authority to judge the legality of the CBM as "*competent authorities are reported to verify whether all companies involved in a cross-border merger comply with the legal regime of this Member State*"[169]. In practise, the fact that different Member States are called to scrutinise the legality of a CBM based on whether it has fulfilled the obligations specified under the national laws of another Member State, is a problem that still exists today as the legal regime has remained unchanged. Article 128 of Directive (EU) 2017/1132 provides that "*[e]ach Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger."* [170] Dr. Papadopoulos explains that this *"might surprise companies,*

[168] Michael Kyriakides and Fryni Fournari, ibid., p. 211

[169] Thomas Papadopoulos, Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive*', supra note 91, p. 16

[170] Article 128(1) of Directive (EU) 2017/1132 as amended by Directive (EU) 2019/2121

which would have to comply with the requirements of another Member State and not only with the requirements of their home Member State, where compliance is already certified by the pre-merger certificate." [171] To solve this, "*a parallel track procedure where each authority only reviews whether the company belonging to its jurisdiction has complied with all rules and formalities*" [172] is proposed. However, the reform brough to the CBM regime by Directive (EU) 2019/2121, had unfortunately left this issue intact.

Additionally, the diversity of the authorities responsible for scrutinising the legality of a CBM may also prove problematic. As hereinabove, in the case where approval from both the authorities of the Member States responsible for each of the merging companies must be acquired in practice, this leads to further problems and uncertainty for the companies involved. This is because it will be difficult to comply with the requirements of the different national authorities. Mrs. Fournari and Mr. Kyriakides, state that this creates confusion for the parties involved, as *"the implementing provisions of EU Member States sometimes differ regarding technical issues. […*meaning that a*] company participating in a cross-border merger remains subject to various provisions and formalities of the autonomous national law which have not yet been harmonised."* [173] Therefore, this provision on CBMs proves particularly challenging for the companies involved, as it creates the problem of double standards in cases where both authorities of the Member States of the merging companies need to scrutinise the merger. The merging companies end up having to spend more money in legal fees for examining which are

[171] Thomas Papadopoulos, Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive*', supra note 91, p. 17

[172] Thomas Papadopoulos, Papadopoulos, '*Reviewing the Implementation of the Cross-Border Mergers Directive*', supra note 91, p. 16-17

[173] Michael Kyriakides and Fryni Fournari, supra note 167, p. 210

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the relevant authorities governing both merging companies and what are the requirements set by them.

iii. Different timeframe and legal regimes affecting stakeholders

Directive (EU) 2017/1132 as amended, does not provide specific timeframes for the completion of the general procedure of a CBM, or for the completion of specific procedures, such as the issuance of the pre-merger certificate. Dr. Mateusz explains that "*because the Cross-border Mergers Directive does not contain any provision concerning this matter, Member States have adopted different timelines, eg for filing merger documentation and for accepting a merger. Therefore, concerned companies should consider several legal perspectives and several timelines.*"[174] Thus, the timeframe of the CBM procedure is also uncertain, because it is unclear how much time the treatment by the different authorities of member States will require. If the governing authority is a court, it might need more time to examine whether all the requirements and formalities of a CBM have been met, compared to the timeframe of a corporate registrar. The overall uncertainty might stem from unexpected delays and costs which may jeopardise the economic interests of the companies involved in the CBM.

This proves problematic for innovative merging companies which have to deal with different timeframes, which may lead to delays causing the negative result of them losing their position in the market. This is because, the target of their economic operations is very specific and they must follow a very tight timeframe. This requires swift and well-planned business moves to complete a CBM swiftly, in order for them to achieve their target and establish successfully their place in the Internal Market. This seems to be the opposite of the goals of

[174] Brzezinski Mateusz, supra note 50, p. 288

the EU legislator regarding the CBM regime, which aims at aiding business operators to expand their business in the Internal Market as efficiently as possible. Uncertainties in the timeframe as well as the general procedure of CBMs, leads to confusion which may discourage stakeholders from proceeding to engage in a CBM transaction.

Furthermore, upon completion of the CBM, stakeholders have to deal with a different legal regime which may lead to confusion and uncertainty. For example, the shareholders of the merging company, which have acquired shares in the resulting company upon the completion of the CBM, are now subject to the new applicable legislation of the other Member State which has absorbed their company. As Dr. Alexandropoulou explains, "*[o]ne of the risks that members may face in connection with a cross border operation is that as a result of the operation they might become members of a company governed by a different law than before the operation and therefore their rights might be negatively affected*."[175] Although the draft terms of the merger must serve the purpose of fully informing the shareholders of the merging companies of the full extent of the consequences of CBMs, there is still the risk that their rights will be at stake under the new legal regime.

Similarly, the creditors of the Company engaged in a CBM may also be negatively affected viz. their rights may be threatened under the new legal regime. Particularly, "*the creditors of a company could also see their claims affected by a cross border operation especially since the laws of the [*Member States*] vary when it comes to recovery or satisfaction of claims (recital 22). Further, their claims can be affected due to the fact that the composition of assets and creditors changes after the operation […] the operation itself might turn out to be a bad business decision and the change of the company's seat could also mean a change of*

[175] Antigoni Alexandropoulou, supra note 93, p. 10

jurisdiction as well as of applicable insolvency law in case of an insolvency of the company."[176] Thus, creditors may face these dangers during a CBM. Although, Article 126 (b) of Directive 2017/1132 as amended, provides for safeguards protecting the creditors of companies involved in CBMs, including the right to apply for safeguards[177], the problem arises after the completion of the CBM operation, when the true consequences of this procedure come to the surface. If the CBM has been a bad business decision by the business operators, which will cause the business to fail, then the creditors of the merging companies may find themselves unprotected under the regime of the resulting from the merger company. Thus uncertainty, may jeopardise the rights of creditors although this risk is part of the game. However, as previously examined, the Member States may find ways to provide further safeguards for creditors, when implementing the new provisions on CBMs as per Directive (EU) 2019/2121.

4. CHAPTER III: HAS UNIFORM APPLICATION OF EU LAW ON CROSS BORDER MERGERS BEEN ACHIEVED?

A) CASE STUDIES OF THE REPUBLIC OF CYPRUS, GERMANY AND THE NETHERLANDS

[176] Antigoni Alexandropoulou, supra note 93, p. 10- 11

[177] Article 126 (b) of Directive 2017/1132 as amended by Directive (EU) 2019/2121 stating that "*1. Member States shall provide for an adequate system of protection of the interests of creditors whose claims antedate the disclosure of the common draft terms of the cross-border merger and have not fallen due at the time of such disclosure."*

Member States shall ensure that creditors who are dissatisfied with the safeguards offered in the common draft terms of the cross-border merger, as provided for in point (n) of Article 122, may apply, within three months of the disclosure of the common draft terms of the cross-border merger referred to in Article 123, to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly demonstrate that, due to the cross-border merger, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the merging companies."

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In an effort to evaluate whether uniform application of EU law regarding CBMs has been achieved, a brief analysis of the national laws and procedures of three Member States will be made. The three Member States this Chapter focuses on are the Republic of Cyprus, Germany and the Netherlands. The reasons behind the choice of these case studies are the following. Firstly, the Republic of Cyprus is generally considered as a Member State whose national laws attract foreign corporations and support business operators in achieving corporate restructuring and growth. As stressed by Dr. Papadopoulos, "*Cyprus is an investor friendly destination."*[178] This makes Cyprus an interesting case study in order to determine whether it has created clear provisions under its national law governing CBMs in order to attract foreign investment. Secondly, Germany and the Netherlands, are considered as the Member States where most of the CBM activity takes place. On their fifth report discussing cross-border mobility in the EU, Mr. Biermeyer and Mr. Meyer have stated that between 2007 and 2019, Germany and the Netherlands, were two of the three countries accounting for the majority of the CBMs during that period[179], the third country being Luxembourg. Specifically, they state that "*[c]ompanies governed by the laws of Germany were most often involved in CBMs and were involved in 1,517 out of the total of 9,618 CBMs that were collected for the 2000-2019 period (a total of 15,8% of all CBMs). The country with the second highest number of CBMs was the Netherlands, with 1,264 companies having been involved in a CBM (13,1%), followed by Luxembourg, with 1,093 companies having been involved in a CBM (11,4%).*"[180] Therefore, these two Member States are interesting to consider for their implementation of EU laws on

[178] Thomas Papadopoulos, '*Reincorporations: A Comparison Between Greek and Cyprus Law'* (2018), Vol. 60 Issue: 3 International Journal of Law and Management (Emerald), 901, p. 907, available at SSRN: <https://ssrn.com/abstract=3280380>, accessed on 01/05/2021, p. 916

[179] Thomas Biermeyer and Marcus Meyer, supra note 2, p. 32, stating that "*for the period between 2007 and 2019, there have been three countries individually accounting for more than 1,000 CBMs of the overall 9,618 CBMs, whereas five countries individually totalled less than 25 CBMs. Germany, the Netherlands and Luxembourg belong to the first category*."

[180] Thomas Biermeyer and Marcus Meyer, supra note 2, p. 32

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CBMs, because as statistics prove, they are a popular choice for EU business operators deciding to enter into CBMs. However, none of the three jurisdictions to be examined under this Chapter has yet taken any national transportation measures concerning Directive (EU) 2019/2121[181]. Therefore, the following analysis will be based on the implementation of the now repealed CBMD by each Member State, as well as on the rules applicable to CBMs in the EU[182] .

An important contribution to the evaluation of the transposition and implementation of the CBMD in the EU Member States and the EEA countries, is the report published by a research team led by law firms Bech-Bruun and Lexidale in 2013[183] who have gathered information from lawyers practicing CBMs in different Member States, stakeholders' opinion, and feedback from national authorities. They stated overall that their "*analysis shows unequivocal evidence that the CBMD has brought about a new age of cross-border mergers activity. Stakeholders across the continent have consistently reported their satisfaction with the CBMD and its transposition, and consider it to be a vital step in creating a more vibrant and robust market environment within the EU and EEA.*"[184] For the purpose of comparing the transposition and implementation of EU law on CBMs by the three jurisdictions, the following common variables will be examined, as they are considered important and relevant to the commencement and finalisation of the CBM procedure: meaning of limited liability companies

[181] Document 32019L2121, '*National transposition measures communicated by the Member States concerning: Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance)*', PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44, available at <https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32019L2121>, accessed on 25/11/2021

[182] As codified by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law

[183] Bech-Bruun and Lexidale, "Study on the Application of the Cross-Border Mergers Directive" (2013) Directorate General for the internal market and services of the European Commission (MARKT/2012/031/F)

[184] Bech-Bruun and Lexidale, Ibid., p. 2

and merger, scope of application, legality matters pertaining to completion of the CBM and registration formalities.

i. The Republic of Cyprus

Regarding the Republic of Cyprus, the CBMD was implemented by Law N. 186 (I)/2007, which amended the Company Law Cap. 113[185] (the 'Cyprus Companies Law') with the addition of the provisions governing CBMs. The "*policy of the Cyprus legislature is to incorporate the various EU company law directives into Cyprus Companies Law (Chapter 113) and not to adopt separate implementing Laws*."[186] Currently, Articles 201 I until 201 X[187] of the Cyprus Companies Law govern CBMs of limited liability companies.

1. Scope of application and definitions

Firstly, the definition of CBMs of limited liability companies as stated under Article 201 (I) of Cyprus Companies Law is "*the merger of limited-liability companies, which have been incorporated in accordance with the legislation of a member state and which have their registered office, their central administration or their principal place of business within the Community, provided that at least two of such companies are governed by the law of different member states*"[188]. The definition applies only to companies with share capital, which are

[185]Cyprus Companies Law (Cap 113) (1968) as amended, available at <http://www.cylaw.org/nomoi/enop/non-ind/0_113/full.html > accessed on 22/11/2021

[186] Thomas Papadopoulos, '*Experiences from the Implementation of the Cross-Border Mergers Directive in Cyprus*', in Papadopoulos T. (ed), 'Cross-Border Mergers: EU Perspectives and National Experiences' Cham: Springer (Studies in European Economic Law and Regulation), (2019), available at: < https://link.springer.com/book/10.1007%2F978-3-030-22753-1 >, accessed 25 September 2021, p. 245-246

[187] The number of the Cyprus Companies Law (Cap. 113) Articles is made with reference to the consolidated Cyprus Companies Law Cap 113 as translated in the English language provided by the Office of the Law Commissioner, Nicosia, Cyprus, September (2012) GEN (A)—L.111, available at <https://www.companies.gov.cy/en/knowledgebase/legislation/the-companies-law>

[188] Article 201 (I), Cyprus Companies Law (Cap 113) (1968) as amended

limited by shares and does not apply to those which are limited by guarantee.[189] Interestingly, this definition also applies to cooperative societies, as long as these are considered limited liability companies.[190]

Further, Article 201 (I) of Cyprus Companies Law provides three methods with which CBMs may be carried out. The first method provides that one or more limited liability companies on being dissolved, not liquidated, will transfer their assets and liabilities to the acquiring company already existing, in exchange for issuance to their members of shares in the acquiring company and in case this is applicable, in exchange of a cash payment no more than 10% of the nominal value or in case this does not exist, of the accounting value of the shares.[191] The second method is similar to the first. What differs is that it applies to two or more companies on being dissolved without going into liquidation, transferring their assets and liabilities to a new company that they form and not to an existing one as in the first method.[192] The third method applies when a limited liability company on being dissolved, not liquidated, transfers its assets and liabilities to a limited liability company which holds the shares representing its capital[193]. One may express the opinion that the Cyprus Companies Law has transposed well the definition of CBMs as stated under the CBMD, but pursuant to the new amendments of Directive (EU) 2019/2121 as examined under Chapter II, Cyprus will have to add the new and fourth type of CBM in its legislation.

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[189] Peter Pafitis, '*Company Law & Law of Partnership in the Republic of Cyprus'*, CHRISTODOULOS G. VASSILIADES & CO. LLC, (2016), p.75

[190] See Bech-Bruun and Lexidale, supra note 183, p. 313 and Thomas Papadopoulos, '*Experiences from the Implementation of the Cross-Border Mergers Directive in Cyprus*', supra note 186, p. 246

[191] Article 201 (I)(a), Cyprus Companies Law (Cap 113) (1968) as amended

[192] Article 201 (I)(b), Cyprus Companies Law (Cap 113) (1968) as amended

[193] Article 201 (I)(c), Cyprus Companies Law (Cap 113) (1968) as amended

Further, on the scope of application of the Cyprus Companies law on CBMs, Art. 201J (1) states that "*Sections 201K–201X shall apply to cross-border mergers of limited liability companies, provided that at least one of the merging limited-liability companies is a Cyprus company or the company resulting from the cross-border merger is a Cyprus company*."[194] It is important to mention that Article 201 K of the Cyprus Companies Law specifically states the conditions relevant for a CBM. Specifically, that this is possible for types of companies allowed to merge under the national law of the Member States involved and any Cypriot Company may participate in a CBM, except companies limited by guarantee and companies under liquidation.[195] The report of Bech-Bruun and Lexidale in 2013 state that the scope of application of the Cyprus Companies Law, "*is consistent with the provisions of the CBMD*."[196]

2. Legality matters pertaining to the completion of the CBM

In case the resulting company from the CBM is governed by Cypriot legislation, the national authority which has been designated by Cyprus to have jurisdiction to decide on the legality of the completion of the CBM and where it applies, on the formation of the resulting company, is the District Court with jurisdiction in the district where the registered office of the resulting company is located at.[197] "*In circumstances where the District Court shall determine that the relevant procedure pertaining to the completion of the cross-border merger meets the 'legality' requirement under S.201 R CAP 113, an order to this effect will be issued accordingly. This will reflect the Court's approval of the completion process and will essentially signal the formal implementation of the merger with effect from the operative date*

[194] Article 201 (J) (1), Cyprus Companies Law (Cap 113) (1968) as amended

[195] Article 201K (1), Cyprus Companies Law (Cap 113) (1968) as amended

[196] Bech-Bruun and Lexidale, supra note 183, p. 312

[197] Article 201R (1), Cyprus Companies Law (Cap 113) (1968) as amended

stipulated therein."[198] The effective date of the CBM is the date specified in the District Court's decision. Alternatively, in case the competent authority to scrutinise the legality of the completion of the CBM is that of another Member State, then the effective date for the CBM is determined by such competent authority of the other Member State [199].

3. Registration formalities, finalisation and enforceability of the CBM

As provided under Article 201 (T) of the Cyprus Companies Law, the decision of the District Court must be filed with the Cyprus Registrar of Companies, which in turn will have to inform the registries of the other Member States where each merging company involved in the CBM "*was required to file documents that the cross-border merger has taken effect*"[200]. Such information will have to be inserted by the Cyprus Registrar of Companies in the system interconnecting the registries of the Member States. Once the Cyprus Registrar of Companies receives the confirmation of approval by the other Member State's registry, that the CBM is considered as having been completed, it then proceeds to register and publish to the official gazette of the Republic of Cyprus the CBM and also with the subsequent deletion from its records of the acquired Cypriot companies. With regard to the enforceability of a CBM under the Cyprus Companies Law, the 2013 report of Bech-Bruun and Lexidale, states, that "*a cross-border merger is enforceable by the resulting company against third-parties as from the date on which a copy of the court order approving completion of the merger is published in the official Government Gazette*."[201]

[198] Peter Pafitis, supra note 189, p. 82, referring to Article 201 R of Cyprus Companies Law

[199] Article 201 S, Cyprus Companies Law (Cap 113) (1968) as amended

[200] Article 201 T (2), Cyprus Companies Law (Cap 113) (1968) as amended

[201] Bech-Bruun and Lexidale, supra note 183, p. 327

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With regards to a general evaluation of the CBM provisions under Cyprus national law, one may express the opinion that these are coherent and generally reflect the EU legislation on CBMs. Dr. Papadopoulos had stated that, "[t]*he implementation of the CBMD in Cyprus law would definitely enhance the attractiveness of Cyprus as an already popular destination to establish a company. After the implementation of the CBMD, Cyprus companies have at their disposal an additional cross-border corporate restructuring mechanism, which strengthens cooperation and consolidation of companies in the internal market.* "[202] One may agree with Dr. Papadopoulos and further state that the existing coherent rules of the Cyprus Companies Law on CBMs, also aid Cyprus in attracting foreign limited liability companies to engage in CBMs. When the resulting companies are established in Cyprus, this further enhances the Cyprus economy. Clear rules under Cyprus Companies law, provide confidence to business operators to restructure their business and enter into a CBM.

ii. Germany

The CBMD was transposed in German national law in 2007 "*by the Second Act on the Amendment of the German Merger and Reorganisation Act (RA) dated April 19, 2007*"[203] (the 'German law'). Prior to that, German national law had no provisions in place governing CBMs.[204] Both Germany and the Republic of Cyprus, implemented the CBMD in 2007.

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[202] Thomas Papadopoulos, '*Experiences from the Implementation of the Cross-Border Mergers Directive in Cyprus*', supra note 186, p. 272

[203]Bech-Bruun and Lexidale, supra note 183, p. 449

[204]Bech-Bruun and Lexidale, supra note 183, p. 449

1. Scope of application and definitions

In comparison to the Republic of Cyprus, Germany adopted a more strict approach regarding the scope of application of the provisions governing CBMs, so that these could apply only to limited liability companies known as corporations under German law, and not be applicable to cooperatives, partnerships and certain investment vehicles.[205] This is stressed by Dr. Mock who explains that in implementing the CBMD, "*the German legislator followed a rather strict 1:1 approach by basing the new rules on crossborder mergers only on the provisions provided by the Cross-Border Mergers Directive (2005/56/EC). As a consequence, these provisions apply only—from a German perspective—to corporations (the stock corporation [Aktiengesellschaft], the limited joint-stock corporation [Kommanditgesellschaft auf Aktien] and the closed corporation [Gesellschaft mit beschränkter Haftung]) excluding all other forms of companies (§ 122b subs. 1 German Transformation Act).*"[206] Similarly, as stated by Bech-Bruun and Lexidale, the German law is "*only applicable to corporations (or, in the terminology of the CBMD, to limited liability companies). If one of the involved entities (domestic or foreign) involved in the merger is not a corporation, the merger cannot be consummated.*"[207] Defending this, Dr. Mock states that the "*German legislator explicitly limited the scope of application to corporations by stating that a general application to all forms of companies was not required by European law and would be almost impossible since its regulation would have to deal with a countless number of scenarios involving companies*

[205] Bech-Bruun and Lexidale, supra note 183, p. 449 & 450 &452

[206] Sebastian Mock, '*The Implementation of the Cross-Border Mergers Directive (2005/56/EC) in Germany: A Story of Insufficiencies and (Better) Alternatives*', in Papadopoulos T. (ed), 'Cross-Border Mergers: EU Perspectives and National Experiences' Cham: Springer (Studies in European Economic Law and Regulation), (2019), p. 327, available at: < https://link.springer.com/book/10.1007%2F978-3-030-22753-1 >, accessed 25 September 2021

[207]Bech-Bruun and Lexidale, supra note 183, p. 449

from all other Member States."[208] This differentiates Germany from Cyprus, as in the case of the latter, cooperative societies may engage in CBMs as long as these are considered limited liability companies. This proves that there is a difference between Member States' national legislation regarding which companies may engage in a CBM, and such difference renders the uniform application of EU law questionable.

However, despite these differences, similarities are also detected. Like the Republic of Cyprus, the German law also "*clarifies that a cross-border merger involves at least one corporation that is subject to the law of a Member State other than Germany*" [209] and provides that all the companies involved in the CBM, must be incorporated in a Member State and have their registered office, central administration or principal place of business in any Member State. [210]

2. Legality matters pertaining to the completion of the CBM and registration formalities

Under German law, there is a differentiation in the procedure of completion of the CBM in case the German company is being acquired by a company subject to the laws of another Member State, that is a merger out of Germany, compared to the case of a German company acquiring a company of another Member State, meaning a merger into Germany.[211] In the first case, an application is made by the German company being acquired at the "*register kept at the registered seat of* [that] *company for entry in [*in that register*] of the fact that the pre-*

[208] Sebastian Mock, supra note 206, p. 327

[209]Bech-Bruun and Lexidale, supra note 183, p. 449

[210]Bech-Bruun and Lexidale, supra note 183, p. 450

[211] Section 122k and 122I of the German Transformation Act

requisites for the cross-border merger relevant to said company have been met."[212] The Registry Court with jurisdiction at the registered office of the German company being acquired, is responsible to review whether all the pre-requisites for a CBM have been met by the German company, and in case this court is satisfied to this end, a merger certificate is issued by this court, and the notification that the CBM has been entered into the register, is deemed a merger-certificate.[213] The entry in the Commercial Register will be made with a note that a condition applies for the CBM to enter into force, only when the pre-requisites of the law governing the acquiring company are met. [214] The company must within six months submit this merger certificate along with its draft terms to the competent authority of the Member State governing the acquiring company.[215]

Dr. Wuesthoff criticises this procedure stating that the "*German approach of considering the notification of the entry of the merger in the trade register to constitute a merger certificate is not without problems. The notification is a simple computer print-out and may not be accepted by all foreign authorities as a merger certificate. A German transferring company is therefore well advised to obtain an additional order from the trade register court confirming the fulfilment of the requirements for a crossborder merger pursuant to German law*."[216] This highlights that with the difference in the national laws of Member States governing CBMs being apparent, doubts arise regarding the acceptability by different Member States, of the procedure confirming that all pre-requisites have been met, for the issuance of

[212] Section 122k (1) – 'Merger certificate', of the German Transformation Act

[213] Section 122k (2)- 'Merger certificate', of the German Transformation Act

[214] Section 122k (2) of the German Transformation Act

[215] Section 122k (3) of the German Transformation Act

[216] Andreas Wuesthoff, "*Germany*" in Dirk Van Gerven (ed), Cross-Border Mergers in Europe, vol 1 (Cambridge University Press 2010), p. 203

the merger certificate by other Member States. For the finalisation of the CBM in its records, Germany relies on the acceptance of its procedure by the other Member State. This is because, once the Registry court in Germany receives a notice from the registrar of the Member State of the acquiring company, that the CBM has entered into force, the registry court must then note the date of the CBM.[217] This is an issue in case the other Member State refuses to accept the merger certificate issued by the German company. In this case, the German company being acquired is advised to proceed and acquire further confirmation from the trade registrar court regarding the fulfilment of the CBM requirements under German law which creates extra costs and uncertainty as to the fulfilment of the CBM. Thus, the problem of lack of uniformity of EU law on what constitutes confirmation of the legality of a CBM, entails that such provisions may not be acceptable by the other Member States involved in the CBM, which is against the mutual recognition principle.

In case a German company is the acquiring company, that is the case of a merger in Germany, the authority responsible for examining the application filed by such company for the entry and registration of the CBM in the same, is the Company Register of the area where the registered office of the German acquiring company is located at.[218] The Register court examines whether all formalities and pre-requisites for entry of the CBM in the Commercial Register have been met, and if this is the case then the "*cross-border merger into Germany enters into effect when the merger is registered in the Commercial Register of the German acquiring company.*"[219]

[217] Section 122k (4) of the German Transformation Act

[218] Section 122l (1)- (Entry in the Register of the Cross-Border Merger) of the German Transformation Act

[219] Bech-Bruun and Lexidale, supra note 183, p. 463

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One may point out that the differentiation in the procedure to scrutinize the legality of a merger in Germany for the purpose of its completion, versus a merger out of Germany as previously examined, may be considered differential treatment between the two types of mergers. However, this may not be the case, taking into consideration, that in both types of mergers, the authority designated to judge on the legality of the CBM is the same, that is the regional Register Court having jurisdiction at the registered office of both the German acquired company, and the German acquiring company. Thus, same regulatory standards of scrutinizing the legality of the CBM may apply.

Very importantly, for the legalization and finalisation of the CBM in Germany, as explained by Dr. Wuesthoff, once registration of the CBM is made in the German Commercial Register, the CBM cannot be declared void by a court.[220] Thus, in the case of Germany the registration of the CBM in the Commercial Register, creates a shield of protection for the CBM and serves as proof of its finalization. This is unlike the Republic of Cyprus where the publication of the court order confirming the completion of the CBM being published in the Gazette of the Republic of Cyprus, serves as the protection shield of the CBM and is enforceable by the resulting company against third parties[221]. In comparison, under German law, the publication of the CBM does not constitute effective protection of the legalization of the CBM. As stated by Dr. Wuesthoff, the "*trade register court will publish the registration of the merger, but the publication is not a requirement for the merger to take effect.*" [222]

Comparing the requirements of Cyprus and Germany on the finalisation, registration and effectiveness of the CBM, differences are identified. This leads to the conclusion that uniform

[220] Andreas Wuesthoff, supra note 216, p. 204

[221] Bech-Bruun and Lexidale, supra note 183, p. 327

[222] Andreas Wuesthoff, supra note 216, p. 204

application of EU law on CBM is achieved only to a certain extent. This is because the discretion provided to Member States to decide on certain matters, leads to differences in the established procedures leading to the completion of CBMs. This results to increased costs for the companies entering in the CBM to determine such procedures, as well as uncertainty as to the requirements for legalization of the CBM by each Member State involved.

3. The Netherlands

In comparison to the jurisdictions of Cyprus and Germany, the Netherlands delayed the implementation of the CBMD which was implemented in 2008. Dr. Verbrugh characterizes such implementation as delayed and explains that "*[t]he Act amending Book 2 of the Dutch Civil Code (DCC) in connection with the transposition of the CBMD entered into force on 15 July 2008. Before that date, Dutch statutory law did not expressly deal with cross-border mergers and most legal scholars were of the opinion that cross-border mergers were not permissible*."[223] It is surprising how a jurisdiction which was late to transpose the CBMD, now thrives as a popular choice for CBMs, thus it is interesting to be considered for the purposes of this analysis.

1. Scope of application and definitions

Dutch entities which may enter into a CBM, as per the Dutch Civil Code are the following: a public limited liability company ('NV'), a European Company with corporate seat in the Netherlands ('SE'), a private limited liability company ('BV') and a European Cooperative Society with corporate seat in the Netherlands ('SCE')[224]. With reference to the

[223] Verbrugh M. A., '*Implementation of the Cross-Border Merger Directive in the Netherlands*', in Papadopoulos T. (ed), 'Cross-Border Mergers: EU Perspectives and National Experiences' Cham: Springer (Studies in European Economic Law and Regulation), (2019), p.411, available at: < https://link.springer.com/book/10.1007%2F978-3-030-22753-1 >, accessed 25 September 2021

[224] See Paul van der Bijl and Frits Oldenburg, '*The Netherlands'* in Dirk Van Gerven (ed), Cross-Border Mergers in Europe, vol 1 (Cambridge University Press 2010), p.228 & Verbrugh M. A., supra note 223, p.412, referring to Art. 2:308(3) of the Dutch Civil Code

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2013 report of Bech-Bruun and Lexidale, the scope of application under the Dutch Law and definition of the kind of companies which can engage in CBMs is described as 'narrow' compared to the scope of application under the CBMD. As they explain, "*the CBMD refers to limited liability companies formed in accordance with the law of a Member State and headquartering their registered office, central administration, or principal place of business within the community, whereas Dutch law refers only to limited liability companies incorporated under the laws of a Member State. However, another provision has voluntarily been included in the DCC that does not follow from the Directive and gives a broader regulatory scope: Articles 2:333(c)1 and (c)2 facilitate mergers between foreign entities as disappearing entities, and the surviving entity is a newly incorporated NV, SE, BV, or SCE.*"[225] This shows the Netherlands both limit and expand the scope of application of the Dutch national law regarding CBMs. From an EU law perspective, the Netherlands has the possibility to do that pursuant to the discretion Member States are given to apply EU Directives into their national laws as they best deem appropriate. Also, cooperatives do not fall under the definition of the Dutch law as entities eligible for CBM as they do not have share capital.[226] This is similar to the German law but differs from the case of Cyprus. As aforesaid, "*Cyprus did not exercise the option provided by Art. 3(2) of the CBMD to exclude cooperative societies [*and hence*], Cyprus provisions on cross-border mergers also apply to cooperative societies."*[227]

This proves that each Member State has discretion to decide what type of companies are considered limited liability companies for the purpose of being allowed to enter into CBMs.

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[225]Bech-Bruun and Lexidale, supra note 183, p. 711

[226] See Paul van der Bijl and Frits Oldenburg, supra note 224, p.229, & Verbrugh M. A., supra note 223, p.412, referring to Art. 2:308(3) of the Dutch Civil Code

[227] Thomas Papadopoulos, '*Experiences from the Implementation of the Cross-Border Mergers Directive in Cyprus*', supra note 186, p. 246

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Thus, comparing the scope of application of the national laws of the three jurisdictions on CBMs, several differences emerge. One may highlight that uniform application of EU law regarding scope of application and definition of limited liability companies eligible to engage in CBMs has been achieved to a limited extent.

2. Legality matters pertaining to completion of the CBM and registration formalities

Unlike Cyprus and Germany, in the Netherlands, the authority designated to examine whether the formalities for the CBM have been met and are indeed satisfied, to confirm the legality and completion of the CBM, is the notary.[228] In case the acquiring company is Dutch, Dr. Verbrugh explains that "*the notary shall certify at the end of the notarial deed of merger that is has appeared to him that the procedural requirements have been complied with, and that the disappearing companies have passed a resolution on the same merger proposal, and that the arrangements relating to employee participation are adopted."* [229] Such merger becomes effective the day after the execution by the notary of the deed of merger, and such execution must be made within six months from the announcement of the state gazette.[230]

Thus, in case the acquiring company is Dutch, the notary legalizes the CBM. As examined earlier, in Germany, where the acquiring company is German, the Register Court that has jurisdiction in the area where the seat of such company is located at, is responsible for scrutinizing the legality of the CBM. In Cyprus, where the resulting company from the CBM is governed by the laws of Cyprus, the District Court with jurisdiction in the district where the registered office of the resulting company is located at, has jurisdiction to decide on the CBM's legality. Each Member State has chosen an authority to decide on the legalization of the CBMs.

[228] Bech-Bruun and Lexidale, supra note 183, p. 728-729

[229] Verbrugh M. A., supra note 223, p.416

[230] Paul van der Bijl and Frits Oldenburg, supra note 224, p.242-243

Each authority has its own procedures on legalization. This leads to differentiation in the rules and timeframes for the legalization of CBMs and hence to lack of uniformity of EU law application on the matter.

B. EVALUATION ON THE EXTENT OF UNIFORM APPLICATION OF THE EU LAW ON CROSS BORDER MERGERS

On the one hand, the CBMD and the EU legal provisions on CBMs in general, constitute the common legal text guiding Member States on the application of legal provisions governing CBMs. Commenting on the effects of transposition of the CBMD Dr. Truli has explained that with its "*transposition throughout the EU (and EEA) Member States, a new legal channel has opened, which harmonised to a certain extent the cross-border merger legal provisions and increased legal certainty for the related transactions*."[231] On the other hand however, the phrase 'to an extent' is important for the purpose of this evaluation, as the full uniform application of EU legal provisions has in reality not been achieved.

5. CONCLUSION

Through analysing the freedom of establishment of companies engaging in CBMs in the European Union, and more importantly the amendments to the CBM regime as per the new provisions laid down by Directive (EU) 2019/2121, it can be concluded that these amendments reflect the goals of the EU legislator. These include establishing more clear rules on CBMs and provision of further protection of stakeholders, while still safeguarding and promoting the

[231] Emmanuela Truli, '*Ex-post analysis of the EU framework in the area of cross-border mergers and divisions: European Implementation Assessment'*, (2016) 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), p. 24

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exercise of the freedom of establishment of companies in the European Union. Also, CBMs as a means of corporate restructuring, helps EU companies to achieve growth and expansion in the Internal Market. Whether there will be achievement of these goals to further facilitate limited liability companies to engage in CBMs, will be evaluated upon the transposition of Directive (EU) 2019/2121 into national law by Member States. However, the new provisions are considered a positive development of the EU company law, as they are very important for generally improving the CBM regime by providing further harmonisation of the legal framework. Concluding, although the existing legal regime on CBMs has provided harmonisation of the rules and procedures applicable to CBMs, such uniform application of EU law has been achieved only to a certain extent. The maximum uniformity is prevented by the discretion given to each Member State to put in place particular provisions on the legality and procedures to be followed for the finalisation of the CBMs, as well as for the stakeholder's rights. If maximum harmonisation of EU law were to be achieved by Member States, then the procedures in place for the completion of the CBMs would be the same for all Member States, which would result in legal certainty for the companies involved. This is the ideal scenario regarding the implementation of Directive (EU) 2019/2121. Also, the discretion provided to Member States when implementing the Directive (EU) 2019/2121, can be used wisely by them to provide under national laws further safeguards for stakeholders. However, this scenario is highly unlikely simply because of the institutional and procedural autonomy of each Member State, even though a thorough evaluation on this, could be made on a later stage, upon the transposition of Directive (EU) 2019/2121 by Member States and upon availability of more statistical data on the implementation of the new provisions.

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