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PROTECTION OF DISSENTING SHAREHOLDERS IN THE EU CROSS-BORDER MERGERS FRAMEWORK: A CALL FOR FURTHER HARMONIZATION?

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Abstract. The European cross-border mergers framework is the most comprehensive to date – transnational mergers are possible following the Sevic case and the freedom of establishment, under a SE structure, and via a transfer of seat, whereas the Cross-Border Mergers Directive has been an overall success in harmonizing the rules on cross-border mergers in the EU. Nonetheless, gaps remain, such as creditor and minority shareholder protection. Dissenting shareholders protection is not harmonized on the European level - implementation of protection mechanisms is at the discretion of the Member States. As a result, certain Member States have decided not to transpose the respective provision in the Cross-Border Mergers Directive in national laws and provide for no special remedies for shareholders in cross-border mergers. The question that arises is whether without further harmonization of protection mechanisms the cross-border merger transaction is rendered dysfunctional.

Keywords: minority shareholders, dissenting shareholders, shareholder voting, cross-border merger, Cross-Border Merger Directive, protection of dissenting minority shareholders

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1. Introduction

A framework approach which has been developed by the European legislator to tackle the issue of protection of dissenting shareholders leaves vast discretionary rights to the Member States. Commission consultations with the stakeholders revealed that whereas a majority favors further harmonization of minority protection mechanisms on the EU level, a high percentage of those consulted would advise against such harmonization. Academics agree with the practitioners on the point that there indeed is no undeniable consensus on the necessity of further harmonization.

The paper raises a question of whether or not the insufficient harmonization of minority protection mechanisms jeopardizes the sound functioning of cross-border mergers. To this end, Part I analyses the role that shareholders play in a company's decision-making and draws a distinction between the notions of dissenting and minority shareholders. Part II outlines the nature of shareholder involvement in a merger transaction as is laid down in the Cross-Border Mergers Directive and inquires whether the cross-border nature of a merger warrants special protection to dissenting shareholders. Part III lays out the current framework of minority protection on the European level and in the Member States' domestic laws and elaborates on whether further harmonization of protection mechanisms is required.

2. The nature of shareholder involvement with a company

It is commonly understood that shareholders are the owners of a company. This, however – as Robert Wearing puts it – is a 'truism' that is little representative of the relationship shareholders have with the company (Wearing 2005:5). It would be more correct to say that shareholders own company shares, which allow them to exercise collective control over the company, whose management is delegated to experts (Cahn and Donald 2010:469). In as much as a distinction between the two definitions is perceptibly small, it is rather instrumental when one thinks about small shareholders. Imagine a company, which is not 100% owned as most companies are; its shares are owned by a large number of shareholders in different proportions. Large publicly traded companies like Apple or Facebook, for example, are characterized as having dispersed ownership – a lot of people own trivial amounts of shares, which could bring individual income to their owners but exercises no influence whatsoever on the workings and the course of business of the company. In case of small shareholders, the ownership and the control over a company attached to it do not go hand in hand. Small shareholders' rights of ownership are often limited to receiving dividends and disposing of shares (Wearing 2005:6).

Companies are managed by directors, who are separate from shareholders. Whereas shareholders 'own' the business, the directors are hired professionals who run it. But while shareholders invest in the company, they have a vested interest in it running successfully, that is – maximizing profits and avoiding decisions and courses of action to the contrary. This is why shareholders shall participate in the decision-making process of the company's business activities. They can do so by voice or exit – the two standard forms of expressing their opinion and reacting to the company's management (Donald 2005:1). Exit is a more radical solution, which means that a shareholder sells out their shares and leaves. Exit allows a shareholder to escape a poorly managed corporation but it does not solve the problem, which can arguably have an effect on the market at large, in which the company operates. It reduces the market efficiency and increases the potential number of corporate failures, which could be avoided by the exercise of a shareholder's voting rights. Therefore, a vote is a more beneficial mechanism to express one's opinion and influence the course of management (Donald 2005:2).

The expression of their vision about the business of the company is the primary reason of why shareholders get to vote, according to the most influential 'economic' theory of voting rights nowadays. Adam Smith explained why interests of the company, and thus of its shareholders, are not always equivalent to that of its directors: 'The directors of such companies [joint-stock], being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own' (Smith 1776). The rights-based theory stipulates that shareholders get to vote because this right is intrinsic in the very nature of membership. Finally, the shareholder democracy theory compares shareholders' individual rights to those of citizens in a democratic state, which allow them to keep the management accountable (Cahn and Donald 2010:473). Regardless of the doctrinal understanding of the nature of shareholders' voting rights, what the theories agree on is that holding shares in a company entitles a shareholder, majority or minority, to express their opinion on the course of company's operations.

The mechanism of voting is such that it increases in proportion to the number of shares that a person owns, that is – the smaller number of shares a shareholder holds, the less influence they have at a shareholder's general meeting, which is correspondent with the principle of one share-one vote. Shareholders vote on various issues that design the company's course of business and particularly on those that affect the constitutional documents, assets and structural integrity of the company (Cahn and Donald 2010:470–8). In the case of a cross-border merger these issues are acutely relevant, which makes the opinion of all shareholders vital. However, as has been earlier noted, company law matters are largely left to the discretion of the Member States: therefore, the matters on which shareholders vote differ across the EU. Apart from the voting rights, information and other rights of shareholders as well as the protection afforded to them are regulated on the national level too. Besides the framework provisions of the SE and Cross-Border Mergers Directive, there is no European instrument harmonizing shareholders' rights and responsibilities in private limited companies, let alone protection of the minority in cross-border mergers.

2.1. Dissenting and minority shareholders – synonymous or divergent?

It is the natural course of business that the views expressed by voting of the majority and minority shareholders may come to a clash. Decisions within a company are taken by majority – it is a rule that secures the effective functioning of a company (Wyckaert and Geens 2008:40). However, the very reason why small shareholders deserve extra protection is that, as parties being in a weaker bargaining position by virtue of the shareholding, they may be subject to abuse by the majority. It is thus instrumental to search for a balance to preserve the legitimate interests of small shareholders while respecting those of the majority (Wyckaert and Geens 2008:40).

It is noteworthy that in absence of a comprehensive framework of protection of minority shareholders, the EU law does not even indicate what minority shareholders are. This could be because 'minority' is a relative concept that is conditional on the presence of a 'majority'. One would think of a 'minority' in connection to voting rights or capital prevalence, which are not necessarily the same thing (Perakis 2004:17). By voting at a general meeting, decisions are usually taken by the majority because imposing a higher quorum requirement may jeopardize the efficient functioning of a company. Majority is any percentage of votes in favor of a decision that is higher than 50–51% is considered a simple majority. Not only do these figures depend on national laws of Member States, they can also be amended at will in the articles of association of a company. Usually, higher quorum is suggested by statute for perceivably more important decisions that significantly alter the business and structure of a company: such, as has been mentioned above, include the amendment of constitutional documents of a company and company restructuring, among others, including a merger. These decisions at a general meeting should be taken by higher majority rates of 2/3 or 3/4 of votes (Perakis 2004:18). In case of a merger the Third Directive prescribes that approval of the general meeting 'shall require a majority of not less than 2/3 of the votes attached either to the shares or to the subscribed capital represented' (Mergers Directive, Article 7(1)). However, if at least half of the subscribed capital is represented at a general meeting, then a simple majority will suffice to adopt the decision (Mergers Directive, Article 7(2)).

Important in the context of voting at a general meeting is that the concept of 'minority' can be loosely defined in national law by reference to the amount of shares that a shareholder holds, that is – for example, anything lower that 10% of the share capital puts the shareholder in a minority. The amount of shares, however, does not necessarily put a shareholder in a position that warrants protection at a general meeting that approves a cross-border merger. Deciding collectively and deciding in favor of merger leaves the majority shareholder satisfied with the course of action and does not demand special treatment. Indeed, it is the minority shareholders that vote against a merger (– the dissenting shareholders) that need the safeguards in a cross-border merger transaction. Ideally, any percentage lower than 51% (majority) could be covered by minority protection rules because once the majority have decided upon a merger, the transaction goes through regardless of the dissenting votes.

3. The nature of shareholder involvement in a cross-border merger transaction

The Cross-Border Mergers Directives reminds in Article 4(1) (b) that a merging company shall comply with the national laws of the Member State to which it is subject. In case of public limited companies some degree of harmonization on a national level is achieved through the Third Company Law Directive. In contrast, private limited companies were introduced only in the context of the Tenth Directive and all unregulated gaps fall back into the safety net of domestic laws. This is the case with the protection mechanisms of dissenting minority shareholders. However, by virtue of the cross-border character of the transaction, the Tenth Directive harmonized its procedural steps. Authors believe it is instrumental in analysis of the preparatory steps leading up to a merger in order to estimate the degree of shareholders' involvement and protection.

For a merger to be initiated, each of the merging companies shall prepare the common draft terms of the merger, which shall include, inter alia, the following: the form, name and registered office of the merging and the resulting company; the share exchange ratio; the potential adverse effects of the merger on employment; the statutes of the resulting company the moment from which the resulting company becomes operational for accounting and other purposes, etc (Mergers Directive, Article 5). The draft terms shall be published by each of the merging companies in accordance with the applicable national law no later than one month before the general meeting, unless they make the draft terms continuously available on their official-web sites free of charge (Mergers Directive, Article 6(1)). Specifically, in case of any arrangements in each of the merging companies for the exercise of rights of minority shareholders – the address shall be published in the national gazette, where the complete information about the arrangements can be obtained (Mergers Directive, Article 6(2)).

Preceding a merger, the management shall prepare a report explaining the legal and economic implications of the cross-border merger for the members, employees and creditors. The report shall be made available at least one month before the date of the general meeting of each of the merging companies (Mergers Directive, Article 7). Further, an independent expert report shall be drawn up, examining the draft terms of a merger, and made available to shareholders no less that one month before the general meeting (Mergers Directive, Article 8). The report shall indicate the methods used to estimate the proposed share exchange ratio as well as whether the ratio is considered fair and reasonable (Mergers Directive, Article 10(2)). The merging companies may forgo the examination and expert report requirements if all the members entitled to cast a vote on the merger so agree (Mergers Directive, Article 8(4)).

The common draft terms of a merger, the management and expert's reports serve to satisfy the right of shareholders to be informed of the merger. Information rights, together with economic and governance rights are vested in the owners of shares (Mäntysaari 2010:164). Information rights ensure that shareholders stay informed in order to take decisions about the business of the company track the performance of their investments and monitor the management of the company. Information rights are instrumental for the exercise of governance rights that entitle shareholders to make decisions on fundamental matters (such as the company's structural transformation in a case of a cross-border merger), capital and ownership structure, and management matters and have access to available remedies. The requirements laid down in the Tenth Directive cater for the information rights of all shareholders, not just the minority. The only specifically designed provision is contained in the Article 6(2), earlier discussed.

The draft common terms of a merger are approved by the general meeting of each merging company (Mergers Directive, Article 9(1)). The general meeting is a corporate body to obtain approval of shareholders about decisions that lie outside of managerial authority (Van der Elst 2012, 46). The EU legislation gives only a brief insight into some issues that are subject to shareholder approval; in cross border merger situations – the approval of the merger (Article 9). Further, it is up to the laws of Member States to regulate, which issues are reserved for the vote of a general meeting and by what quorum. Whereas elections of the board members are a reoccurring item on a general meeting's agenda, they may differ across the EU significantly (Van der Elst 2012:58).

Typically, as the importance of a decision on a general meeting's agenda increases, so does the number of vote's necessary for its adoption. A cross-border merger as a means of altering the structural integrity of a company and the applicable corporate law is a decision hardly to be left for the mercy of the simple majority. Usually, higher thresholds are required in the national laws. At this point of negotiating a merger it could, perhaps, be best to implement the super-majority requirement (Ventoruzzo 2007:11), which by its nature may protect minority shareholders against an unwanted transaction already at the voting stage. It is important to keep in mind, however, that the higher the decision threshold, the more difficult it is to adopt a decision. Whatever the figure required to adopt a decision by majority, it is determined by both its nominator (the required number) and denominator (Cahn and Donald 2010:490). Denominator can be the 'votes present and cast', 'votes of all outstanding shares of the class', 'voting power' or 'capital'. Not all shareholders are present at a general meeting and therefore there are not only 'yea's' or 'nay's', but also those abstaining. Besides, the classes of shares issued in a company differ, some of which do not have voting power, which may also influence the effectiveness of the denominator.

It will become evident in the following that the rights that dissenting minority shareholders could avail themselves of in a cross-border merger transaction are largely remedial (ex-post) rights. Apart from generally available information about a merger at the pre-merger preparatory stages, there is nothing minority shareholders may resort to protect themselves. However, at the preparatory stages the very notion of a 'dissenting minority shareholder' is obsolete because they only begin to 'exist' after the results of the general meeting's vote. Those that find themselves on the other side of the majority and against the impeding transaction will need a remedy to restore the balance.

3.1. Why do minority shareholders need protection in a cross-border merger?

A merger is a stressful transaction that alters many aspects in the structure and business of a company. A cross-border merger is even more complicated because the alteration is usually affected under the laws of a different jurisdiction. The question that arises is whether the cross-border character of the transaction is an enough consideration for the Cross-Border Mergers Directive to introduce a specific exception of minority protection, while otherwise following in the footsteps of the Third Directive? From the historical perspective, as has been earlier discussed, the Tenth Directive was designed in the image of the Third Directive on national mergers. In 1978, when the Third Directive was adopted, minority protection was less of a concern, which, perhaps, explains why there are no protection rules. More interesting is the fact that both instruments currently providing for the possibility of a cross-border merger – the SE Regulation and the Tenth Directive – contain reference to minority protection mechanisms (Wyckaert and Geens 2008:41).

The fact that protection of minority shareholders has been introduced in EU company law in the instruments regulating cross-border mergers suggests that the legislator attributed special significance to the change of applicable company law (Wyckaert and Geens 2008:49). Neither the SE Regulation not the Cross-Border Mergers Directive, however, offers any express rationale for minority protection. According to the Directive, the effects of a merger are such that one or more companies are dissolved without going into liquidation, while their assets and liabilities are transferred to the acquiring company or a newly formed company in exchange for securities, shares or cash payment, offered to their members (Mergers Directive, Article 2(2)(a) and (b)). This means that the transferring company ceases to exist and its shareholders become the shareholders of the acquiring or the new company. In a cross-border transaction the company law, to which the transferring company was subject, changes to the law of the new company. This means that the rights of shareholders will also become subject to the new law. The change of applicable law, thus, presumably affects the dissenting minority shareholders in an adverse manner (Ventoruzzo 2007:11).

Change of applicable law would be a reasonable rationale had it been sufficient. The author agrees that such consideration is limited and does not account for the realities of the modern world's shareholding. Firstly, minority protection in the sole premise of the change of laws caters exclusively for the rights of the shareholders of the company that ceases to exist. So, for example, when a French company is acquired by a German company, it is the dissenting minority shareholders in the French company that will warrant protection because following the merger they will become subject to German law. This is clearly one-sided as the general meeting of the German company has to approve the merger as well, but its dissenting members will not get any special treatment because they stay governed by German law. There may be two possible explanations to this: One can argue that by changing the applicable law, the French company is transferred to an unfamiliar corporate form under the German law. This is correctly rebutted by Wyckaert and Geens suggesting that corporate forms across the EU shall be harmonized by now to be at least minimally comparable (Wyckaert and Geens 2008:50). Another grounds is to suggest that French shareholders would need to familiarize themselves with the German law in order to avail themselves of their rights. This could be a valid argument, given the diversity of company laws in the EU. However, it is common that shareholders come from different jurisdictions, owning shares in companies that are not of the same nationality as themselves. The recognition of this fact is illustrated in the adoption of the Shareholders' Rights Directive, which harmonizes certain rights of shareholders, who hold shares in foreign listed companies (Directive 2007/36/EC: 17–24). Recital 5 of the Directive reads that large proportions of shares are held by shareholders that reside in a Member State other than the one, where the company has its registered office. This should not prevent the shareholders from exercising their information and voting rights. Even though the same matters are not harmonized with regard to non-listed companies, the reality is the same and the change of applicable law affects the shareholder's awareness very little.

There are other scenarios when minority shareholders may need protection in a merger transaction. These include the possibility of challenging the resolution of the general meeting approving the merger; the terms of the merger; the articles of association of the surviving company (Wyckaert and Geens 2008:51). Further, a merger transaction could be considered to have such strong impact on the rights of minority shareholders that they should be afforded the right to sell-out. This is particularly important because usually there will be no possibility for a shareholder, minority or not, to divorce with the company at will and without a loss. Once capital is invested, it is 'locked into' the company indefinitely. The right to exit allows a shareholder to recover the value of the capital invested in a company (Moll 2005:896). Absent an exit right, the abusive conduct by majority shareholders can lead to 'effective confiscation 'of the minority's investment: voting at a general meeting is one example – the dissenting minority shareholders have to follow the lead of the majority, albeit unwelcome, when their investments are utilized for the purposes, to which they have not consented. Therefore, there must be either contractual or legal right to pass a shareholder's shares to the other members at its non-discounted price, that is – a properly executed shareholder's agreement or a statutory provision, or court relief in certain cases. Civil law jurisdictions usually do not provide for exit rights by virtue of the closed nature of a limited company, because of capital maintenance rules or for other reasons (Perakis 2004:62). This is why a cross-border merger is a situation grave enough to allow minority shareholders to be bought-out.

These are scenarios validly calling for the introduction of minority protection rights. However, nothing about them is specific to cross-border mergers. The same considerations are present in the case of a domestic merger. Consequently, exactly why did the European legislator include provisions for the protection of minority shareholders in the cross-border merger instruments is unclear; or rather – why the same provisions are excluded from the Third Directive on national mergers.

4. Current status of minority protection in the EU

On the face of it, there is no pan-European instrument that would specifically cater for the needs of minority shareholders. Their protection could only be inferred from the generally available provisions that cover all shareholders with respect to, for example, information and voting rights. The elaboration of protection mechanisms is left to the Member States. This is the case with mergers and cross-border mergers, too. The national legislation provides for a safety net of remedial and other rights for the minority, which need to be interwoven when a cross-border merger occurs.

Article 4(1) of the Tenth Directive refers the company participating in a cross-border merger transaction to the provisions and formalities of the law of the Member State to which it is subject. The national law is meant to cover, inter alia, the decision-making process relating to a merger and the protection of shareholders as regards the cross-border nature of a merger. Specifically, the Article indicates that for the purpose of affording adequate protection to minority shareholders that opposed a cross-border merger (the dissenting shareholders), Member States may adopt appropriate national provisions. Indicative here is the word 'may', which is expressive of the discretional nature of such protection. As will become evident in the following from the brief analysis of the available relief afforded to minority shareholders across the Member States, the degree and ways of protection differ significantly.

Based on Article 6, the common draft terms of a cross-border merger are to be published in a national gazette of each Member State of the merging companies at least one month before the general meeting, on which the merger is to be agreed. The publication must indicate, among other things, the specific arrangements made in each of the merging companies for the exercise of rights of their minority members as well as the address, where the details of such arrangements can be obtained free of charge. This provision satisfies shareholders' right to information – in order to be able to cast a vote at a general meeting, a shareholder shall be made acquainted in advance with the meeting's agenda and the matters that are up for a vote. This is ever more important when one considers that some shareholders vote distantly by appointing a proxy or electronically.

Further, Article 10(2) provides that when the law of a Member State, to which a merging company is subject, contains a mechanism for compensating minority shareholders that does not prevent the registration of a cross-border merger, such mechanism can only be employed with explicit acceptance of the other merging companies. Specifically, the other companies shall agree by a vote of a general meeting upon approval of the draft terms of the cross-border merger that the members of that merging company can have recourse to such a mechanism and can initiate it before the competent courts. The approval precondition is important because the resulting from a cross-border merger company will bear the results, and costs, of the court proceedings (Wyckaert and Geens 2008:43).

The Tenth Directive minority protection provisions are evidently framework provisions – the substantive decision-making is delegated to the Member States. The Directive, however, indicates some important minimum requirements that the national laws cannot overstep as well as reminds about the compliance of national protection provisions with the freedom of establishment and the free movement of capital.

4.1. Member States without special protection mechanisms

Whereas some States have interpreted the provisions of the Cross-Border Mergers Directive by introducing minority protection provisions in their national laws, some States provide for no such special remedies. For example, no special rights are afforded to minority shareholders in Belgium, Bulgaria, France, and Lithuania (Van Gerven 2011:23).

According to Belgian law, dissenting minority shareholders are bound by the general meeting's decision and must go along with the merger and receive shares in the surviving company (Van Gerven 2010:113). The sole way available to shareholders, whose rights were infringed as a result of a merger, is to argue liability, that is – faulty conduct of the expert or leaders of the company during the merger process (Biermeyer 2013:269). The only exception exists with regard to a merger of cooperatives, when the resulting cooperative is not subject to Belgian law; in this case, the shareholders are entitled to a right of exit.

Absent specific safeguards, Bulgarian law avails shareholders of certain rights that may aid minority shareholders in a case of a cross-border merger transaction. These include the right to bring a claim before a court to inspect whether any violations occurred during the transformation process; the inclusion in the company's articles of association of an increased majority threshold (unanimity instead of 3/4, for example); the right of exit for dissenting shareholders (Van Gerven 2010:295–6). A dissenting shareholder may exit within three months since the merger is carried out, affected by a notarized notification to the company. The exiting shareholder's shares shall then be purchased by the remaining shareholders, a third party or result in a corresponding reduction of capital in case of a private company; and shall be acquired by the company in case of a public company. The same possibility exists in a case of a domestic merger.

In France, for example, only minority protection rules in case of domestic mergers exist. These include information rights and the 'abus de majorité' (Biermeyer 2013:430). Whereas information rights are not minority-specific but pertain to all shareholders, under the abuse of majority right, minority shareholders can nullify before a court the resolution of a shareholder's meeting, the outcome of which, however, is unpredictable.

The United Kingdom, too, does not provide for specific minority protection mechanisms; however, UK company law offers certain safeguards against fraudulent or oppressive resolutions (Van Gerven 2011:943), as well as other instruments aimed at minority protection: the supermajority requirement, action against a general assembly's resolutions.

Hungarian law does not provide for specific protection mechanisms, rather – dissenting shareholders may receive a cash settlement if they decline to accept the shareholding in the resulting company.

4.2. Member States with special protection mechanisms

Those Member States that chose to provide special protection mechanisms often resort to one or two, which usually are a variation of a monetary compensation or a withdrawal right.

For example, Estonia has adopted provisions for the protection of minority shareholders specifically in a case of a cross-border merger (Biermeyer 2013: 386–7). Estonian Commercial Code provides in §433.6 that a partner or shareholder of a merging company has the right to demand a refund from the acquiring company in case the share exchange ratio is too low. If the law of the Member State, where the acquiring company is situated does not provide for such a refund, then the refund can be obtained upon recognition by all merging companies in the merger agreement of the right of a refund (Estonian Commercial Code (Äriseadustik) §433 (1) (2)). Additionally, §433.6(3) provides for a possibility to invalidate the merger agreement if the share exchange ratio is established too low. The second protection mechanism offered by Estonian legislator in §433.7 is monetary compensation of dissenting shareholders. Specifically, if a partner of shareholder of the transferring company does not agree to the merger resolution, they are entitled to transfer their shares or demand the acquiring company to acquire the shares for monetary compensation. In contrast, Estonian law does not allow for the invalidation of a merger resolution of the transferring company on the ground that the share exchange ratio is too low (§ 398(2)). Instead, a partner of shareholder may demand a refund from the acquiring company, failing which the acquiring company will have to pay a fine for the delay of an unpaid refund (§ 398(3) and (4)). Moreover, in case of merger of companies of different types, a dissenting shareholder has the right to demand that the acquiring company purchases the shareholder's exchanged shares for monetary compensation (§ 404(1)).

German law has provided dissenting minority shareholders with three remedies. These include an additional cash payment in case the share exchange ratio is too low; monetary compensation and acquisition of the shares of dissenting shareholders by the transferring company; challenge of the general meeting's resolution that approved of the merger (Biermeyer 2013:454). Additional cash payment is paid out through a special award proceeding in case if becoming a shareholder in the acquiring company is perceived as disadvantageous compared to the shareholding in the transferring company or in case offered monetary compensation is too low. Similar to the Estonian mechanism, this remedy is only available if the law, to which the acquiring company is subject, provides for similar rights, or when all merging companies agree upon recognizing such right in the merger agreement. Unlike in Estonia, the German possibility to challenge the merger resolution is powerful. Dissenting shareholders may challenge the resolution if the general meeting was not properly convened or if information rights of shareholders were not observed. Importantly, until such claims are settled, the merger cannot proceed. Cash payment and resolution challenge are remedies that also exist in German law for domestic mergers.

Cyprus company law has provided for specific minority protection mechanisms in cross-border merger transactions. There are two procedural possibilities that shareholders may avail themselves of. Firstly, the dissenting shareholders of a transferring company may get their shares acquired by the company. Thus, where shares are transferred to another company by approval of holders of at least 9/10 in value of the transferred shares, the transferring company may propose to acquire the dissenting shareholders' shares under the terms of share transfer as agreed for the merger. Secondly, minority shareholders or any member of the company that feel that they are being oppressed by the way the company conducts its affair may lodge a claim with a court; the court may order an exit of the oppressed shareholder and reduction of the company's capital. Court relief is indicated as an alternative to the winding up of the company in case of oppression (Van Gerven 2011:142 and 319).

The Czech Republic has also provided for minority shareholder protection in its national law. There are three possible routes that shareholders can benefit from in a cross-border merger, as is provided for in the Czech Transformation Act. Firstly, shareholders of a public company merging with a foreign private company have the right of exit, subject to the corresponding rules on domestic mergers. In case of a foreign public company, the common draft terms of a merger must indicate mutual consent that Czech shareholders are entitled to a sell-out as against the resulting company. The second route allows shareholders to sue the resulting company in case of dissatisfaction with the share exchange ratio; the court's decision will bind the resulting company to provide compensation. This right may only be invoked if the same provisions apply in all the Member States involved or when each of the merging companies expressly agrees to the availability of such right for the Czech shareholders. Finally, shareholders have the right to bring action for damages, arguing that the company's management and/or experts broke their respective obligations during the merger process (Van Gerven 2010:161–2).

The Danish law provides shareholders of a disappearing company with a right of share redemption in a case of both domestic and cross-border merger. The right is fast lived compared to the other available mechanisms – notice must be given to the company no later than four weeks after the general meeting, when the merger was approved (Biermeyer 2013:370).

The Maltese law provides for the similar to Danish share redemption mechanism for dissenting shareholders. The terms of redemption are agreed upon as between the shareholders and the company, failing which a court will decide on the matter (Van Gerven 2011:109–110). The period within which the application may be filed with the court is three months since the approval of a merger at the general meeting. In case one or more companies participating in the merger come from Member States, where such protection is absent, the common draft terms of the merger shall contain explicit consent of each company that Maltese shareholders may redeem their shares (Biermeyer 2013:690).

Yet another Member State providing dissenting shareholders with the right to redeem their shares both in national and cross-border mergers is Finland. The resulting company shall cover the redemption price, which is the market price of the share at the time the merger is approved. In case an agreement cannot be reached regarding the terms of the redemption, the issue is resolved through arbitration.

Greece has transposed the Cross-Border Merger Directive minority protection provisions in national law that affords two ways of recourse for dissenting shareholders. Firstly, if the resulting company is registered in another Member State, dissenting shareholders may file a petition in court for the Greek company to purchase their shares. Secondly, in case the share exchange ratio is considered inadequate, the shareholders may claim compensation, without suspension of the merger process.

In Italy, the law offers relief in the form of right of withdrawal not only to dissenting but also to abstaining shareholders, when the resulting company is registered in another Member State. The withdrawal procedure is governed by the rules applicable to domestic mergers, and therefore, the time period for the submission of a withdrawal request varies according to the type of a limited liability company and the corresponding rules (Biermeyer 2013:555).

The Latvian law has also provided for specific protection mechanisms in cross-border merger transactions. Unlike Italian law, only the shareholders present at the general meeting and voting against the merger may avail themselves of the right of share redemption. Within a period of two months since the day the merger is approved, the resulting company shall redeem the dissenting shareholders' shares for compensation in the amount equal to what the shareholder would receive should the company be liquidated at the time the decision to merge was made. The dissenting shareholders that choose not to demand redemption may alienate their shares regardless of any provision to the contrary in law or the company's articles of association.

The law of the Netherlands has also transposed the provisions of the Cross-Border Mergers Directive relating to minority protection in the Dutch Commercial Code. If the company resulting from a merger is subject to foreign law, the dissenting shareholders are entitled to receive compensation (except when a SE or SCE is formed), the amount of which is determined by independent experts. Dissenting shareholders may file the request for compensation within one month since the date the merger is approved. Notably, if there two or more shareholders requesting compensation and the amount of compensation has not been settled, the merger cannot proceed.

Finally, the Spanish law provides dissenting shareholders with the right of exit. The same right is not afforded in the case of national mergers unless provided for in the bylaws or if the company is being transformed. The written application indicating the wish to leave shall be submitted within one month since the notice of the merger is received. The merger process is not compromised since the time limit for the exercise of the exit right is one month (Biermeyer 2013:900).

The familiarity with the protection mechanisms employed in the Member States allows to arrive at two conclusions. Firstly, the specter of the remedies that dissenting shareholders may have recourse to is limited. Whereas providing for one or several protection mechanisms, the Member State national laws provide for the same options: the right of withdrawal; repurchase or redemption of shares; monetary compensation in case of inadequacy of the share exchange ration; judicial remedy in case of procedural flaws and liability of the responsible company members, management and experts.

Secondly, the common denominator amongst the available rules in the Member States is that they can only be applied in two cases: if the laws of the Member States, to which the merging companies are subject, provide for similar protection rights, or in case of a Member State with no specific protection rules - if the protection rights are agreed upon by the general meetings of all the merging companies. This illustrates that even though the European legislator did not provide for a system of substantive rules applicable in cross-border merger transactions, there is a basic coordination platform that merging companies can fall back onto. There is only a handful of States that did not introduce specific provisions in their national laws. So, if a company governed by the laws of the State with minority protection merges with a company from, for example, France, where protection mechanisms in case of cross-border mergers are absent, an unobtrusive transaction is still possible because appropriate treatment of dissenting shareholders can be mutually agreed upon. Perhaps, in this context one may wish to ask why the acquiring company, which is not subject to obligatory compensation laws, would wish to undertake a binding obligation. The reasoning may come down to the very motives that underlie a merger. For example, the forerunner of merger activity is the desire for expansion. Besides growing within an industry, the company can wish to expand into another line of business or geographically, this being another motive for mergers – diversification (Moeller and Brady 2007:117). Another important factor that makes mergers happen is synergies. It is commonly understood that when two (or more) businesses join forces they are likely to create more shareholder value than if they worked separately. Yet another driving force to merge is strategic realignment, which suggests that companies engage in merger activity because it helps them quickly react to changes in the external environment (regulatory environment and technological innovation) (DePamphilis 2007:7–9). Further, the benefits for companies wishing to merge with a foreign partner include speedy access to a new market with an established distribution and marketing framework (Rusu 2006:15). In tune with reaping the benefits of technological advancement and securing the know-how, cross-border mergers are also motivated by accessing proprietary assets (patents, brand names, licenses and alike), which are not available on domestic markets. Whatever motivates a company to merge, it is motivated by strategic business planning, which is a strong argument when considering affording minority shareholders special remedies for the sake of preserving the transaction.

In September 2014 the Commission launched a consultation with the stakeholders on the effectiveness of the EU rules relating to cross-border mergers and divisions (European Commission Press Release, Daily News 08.09.2014). The summary of the consultation, which returned 151 contributions, was published in October of 2015. The responses came from scholars, practitioners, public authorities, chambers of commerce, business organizations and others, which aid in identifying the general attitudes regarding the proposed questions. The most noteworthy are the three questions relating to minority shareholder protection: the Commission inquired whether the rights of minority shareholders in cross-border mergers shall be harmonized; whether the date when minority shareholders can start exercising those rights shall be harmonized; and whether the period of time when minority shareholders may exercise those rights shall be harmonized. The majority of responses reacted positively to all the three questions (over 60%). The author, however, wishes to point out that a considerable number of stakeholders were against such harmonization (35%, 25% and 31%, respectively), which illustrates that the issue of minority protection in cross-border mergers is a rather debatable and multifaceted concern. The feedback obtained during the consultation and disclosed in the summary supports the main spirit of the thesis in many respects.

Firstly, no harmonization is required because the protection provided for in the national law was already sufficient. Whereas the opinion was expressed about one particular Member State, it is true that the majority of states have transposed the respective provision of the Cross-Border Mergers Directive in the national laws. Despite the fact that the specific mechanisms are up to the States to establish, the procedure for aligning them among the different States, where the merging companies are registered, exists – their application is subject to the consent of each of the merging companies in the common draft terms of the merger.

Secondly, some shareholder rights, such as a right to block a merger, may become disproportionate measures. Indeed, the rights afforded to minority shareholders must be weighed against the extent of worsening of their position as a result of a merger, and must be balanced with the best interests of the company. This is why particular constraints were suggested as favorable regarding other rights commonly available to shareholders – such as the right to compensation or the right to challenge the share exchange ratio – in order for them to restore balance but not to be able to take aggressive action against the merger decision.

Thirdly, no specific protection is required in a case of a cross-border merger as there is perceivably no difference between domestic and transnational mergers regarding minority protection. Such was the response to the Commission consultation from the Council of Bars and Law Societies of Europe (CCBE) that answered ‘No’ to all the three questions regarding harmonization. Indeed it has been elaborated earlier in the thesis that there is no justified need for introducing specific minority protection mechanisms on the European level. It does not mean, however, that minority protection shall be abandoned as far as European company law is concerned and be left solely to the Member States' initiative.

In light of the existing domestic rules and the umbrella provision in Article 4(2) of the Cross-Border Mergers Directive, authors submit that no further harmonization of substantive rules regarding minority shareholder protection shall be introduced by the European legislator. However, mindful of the variety of national laws, of the importance of a shareholder's right to be heard, of the importance of further integration of the common market and the role that freedom of establishment plays in pursuing this goal, the author realizes that minority protection rights may be brought to the spotlight in ways other than full or partial harmonization.

7. Conclusion

Shareholders are the owners of the company's shares, with the decision-making rights attaching to them. Shareholders have reasonable expectations to believe that in the course of the company's business their rights would not be so impaired as to leave the owners at a grave disadvantage. A merger is a transaction that leads to a change in company structure and in case of a cross-border merger – in applicable law. The merger transaction is grave enough to anticipate associated risks and warrant protection in particular to those parties that are in the weaker bargaining position and eventually on the wrong side of the negotiations table – the dissenting shareholders. Because of the disparities in national company laws and the conditions of the surviving company, dissenting shareholders may feel that their position is worsened against their consent.

The issue of dissenting minority shareholders protection is well-recognized but like with many other areas of European various company laws, the consensus as to how the issue shall be resolved is lacking. The existing European regulation is concentrated exclusively within the Cross-Border Mergers Directive, which provides for a framework approach for the Member States to implement domestically. This results in the variety of national laws elaborating on the minority protection mechanisms, or the absence of them. Arguably, and popularly so, such disparate attention to minority shareholders' rights is insufficient and detrimental to the cross-border merger process. Indeed, it is consistently expressed that minority protection shall enjoy more attention in the framework of European company law. In as much as it is correct that greater legal certainty as to minority shareholders rights would aid them in claiming those rights, the question is whether the situation as it persists now is detrimental, beneficial or neutral to a cross-border merger transaction. That is, whether the transaction is at risk of being postponed till such time as the minority rights are satisfied or whether it could proceed regardless of the perceived under-harmonization and varying national provisions.

The current approach to minority shareholders protection does not jeopardize the viability of cross-border mergers – the mechanisms provided for in the national laws of the Member States is a sufficient safety-net. From the perspective of a company's interests, that is – expansion, cooperation and access to foreign markets, among others – dissenting minority shareholders do not constitute an obstacle that could stagnate or cancel a cross-border merger transaction. From the perspective of shareholders, there exists a framework of remedial rights on the European level and a fallback system of protection mechanisms in the Member States, to the laws of which shareholders are subject. In fact, full harmonization would be considered as rather unwelcome, and so would partial harmonization aligned by a common denominator.

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