BUSINESSEUROPE

POSITION PAPER

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CONSULTATION ON MERGERS AND DIVISIONS

Introduction

EU Company Law should strive to improve the legal environment in which European companies are created, operate and exercise their freedom of establishment within the internal market. The adoption, almost 10 years ago, of the Cross-border Merger Directive (CBMD) was an important step to help achieving these goals.

As the 2013 Report on the application the CBMD reported, the new rules '*brought about a new age of cross-border mergers activity*' with stakeholders being generally satisfied about their implementation. However, the study also identified areas for improvement which should guide any future revision of this directive.

With regard to cross-border divisions, Europe still does not have in place a specific framework which we consider to be a barrier for businesses wishing to undergo division operations that involve more than one Member-State.

In this context, BUSINESSEUROPE welcomes the opportunity to provide its input to a possible amendment of the Cross-border Merger Directive and to the possibility to develop new EU rules of cross-border divisions.

BUSINESSEUROPE replies to the consultation

Part II of the questionnaire – cross-border mergers

1. Should the CBMD apply to cross-border mergers of companies that have not been formed in the EU/EEA but have converted into an EU/EEA form?

Yes.

2. Should cross-border mergers be possible between different company types in general, e.g. a merger between a private limited liability company and a public limited liability company?

Yes. In general, what matters when these two types of companies merge is ensuring an appropriate level of creditor and shareholder protection throughout the merger process and the assurance that the surviving company complies with the company law requirements for that particular type of company.

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6. Should the rights of minority shareholders in case of a cross-border merger be harmonised?

BUSINESSEUROPE does not have a clear view on this, however it is our belief that minority rights such as blocking the merger (beyond requiring a certain qualified majority for approving the merger), a right of investigation (beyond the investigation made by the independent expert) and redemption of those shareholders who are outvoted at the general meeting could become disproportionate measures. This is why they should cautiously be considered in a future EU harmonisation exercise.

8. Should the length of the period throughout which the minority shareholders of the merging companies can exercise their rights be harmonised?

Yes.

8.1. How long should this period of protection be?

It is not possible to provide an answer to this question because the duration of this period would depend on the nature of rights awarded to minority shareholders.

9. When a cross-border merger involves the issuance of new shares, the valuation of assets and liabilities may be necessary. Among Member States two different types of valuation methods are used: the fair value method and the book value method. Since the two methods may result in different valuations, should common rules be set across all Member States?

Yes. It is important that equal standards are set across all Member States to avoid discrepancy between the laws of the Member States. Such differences in the valuation of assets and liabilities may cause difficulties in carrying out cross-border mergers.

12. Should, in certain cases, a harmonised "fast track" cross-border merger procedure be introduced?

BUSINESSEUROPE would be strongly in favour of introducing these procedures.

12.1. In what circumstances should such a procedure be available?

When a company has no employees, when all shareholders agree or when a very high percentage of shareholders agree – which could be less than 90% - and when there would be no impact on creditors. However, these circumstances should not be cumulative.

13. Should each of the respective national authorities involved in the cross-border merger only check compliance with the requirements imposed by its own Member State?

Yes.

14. Should the rules currently in force under the CBMD on the employee participation be modified?

The complexity of the rules on employee participation was listed in the Study on the implementation of the CBMD amongst the elements which can hinder the full effectiveness of the directive. Simplifying the rules would be welcome although we acknowledge the political sensitivity of this issue.

Part III of the questionnaire – cross-border divisions

1. Why would a company want to carry out a cross-border division?

For BUSINESSEUROPE, all the reasons listed in the answer options for this question are valid:

- Realise new internal market opportunities;
- Change/simplify its organisational structure;
- Adapt to changing market conditions.

2. How could harmonisation at the EU level of legal requirements concerning cross-border divisions help enterprises and facilitate the increase of cross-border activities of companies within the EU?

In BUSINESSEUROPE's view such a harmonisation exercise should provide for a reduction of regulatory costs (fees) and reduction of the costs directly related with the cross-border division (e.g. cost of translation, advice, etc).

3. What, if any, are the obstacles to the execution of cross-border divisions when compared to national divisions?

The main obstacles identified are:

- Costs of a cross-border division effected via a national division and then a cross-border merger;
- Legal uncertainty because of a lack of European rules;
- Duration and complexity of the current procedures necessary to execute a cross-border division;
- Tax issues.

3.1. Please identify which costs you consider as major.

The two major costs identified are the different rules on valuation of assets and costs of advice. The impact of other items such as registration requirements/fees and reporting requirements greatly depends on the jurisdictions involved.

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