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INTRODUCION

The European Union, as a united economic, social and political subject of international relations, consisting of sovereign states, is in the process of developing the complicated system of interactions in order to guarantee the fundamental rights to its citizens. Furthermore, the essential part of functioning of EU is close economic cooperation between Member States, as well as cooperation between business entities inside and outside MS on the territory and under the jurisdiction of EU.

The basic principle, that creates one the most powerful economic in the world is called Internal Market. This principle touches the great number of aspects of most of the citizens of EU and legal entities existing and is divided into so called "Four Freedoms":

- Free movement of goods.
- Free movement of capital.
- Freedom to establish and provide services.
- Free movement of persons.[1]

This system of freedoms gives an opportunity for using diverse economic and legal instruments for development of business through the EU. And one of the sufficient instruments for economic development is merger of companies. This tool allows companies to develop, concentrate their resources, both technical, human and intellectual to become more competitive, create better product and service.

According to the statistics the notified cases of merger in the European Union for the period from September 1990 to April 2020 are estimated at the number of 7721 deals[2]. The overall value of this operations from 2007 to 2019 is about 883 billion Euros. The biggest merger transaction in EU is estimated at 204 billion Euros[3]. This numbers creates the understandings of the importance of merger operations in economy of EU.

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[1] BARNARD C. *Competence Review: the internal market* [interactive] [reviewed in 11 March 2020] Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf > Page 3

[2] Merger statistics for the period from 21st September 1990 to 30th April 2020, published by Directorate-General for Competition [interactive] [reviewed in 01 May 2020] Available at: <https://ec.europa.eu/competition/mergers/statistics.pdf>

[3] James Cherowbrier *Mergers and acquisitions in Europe - Statistics & Facts* [interactive] [reviewed in 11 March 2020] Available at: <https://www.statista.com/topics/3339/mergers-and-acquisitions-in-europe/#dossierSummary__chapter1>

At the same time the remark should be made that merger is an object to special regulations and examinations, in order to prevent the possible negative effect from the merger. Usually every merger operation is extensively examined by respect authorities from the perspectives of antimonopoly, corporate, taxation and other aspects. Unproper regulation of such global processes may lead to creating a monopoly, violation of rights of stakeholders, employee or creditors, tax frauds with all threatened outcomes.

The more problems in regulation appears when it concerns the cross-border mergers. The local legislation is usually ready for the inbound mergers, but what if the companies in different states are willing to acquire. In this case number of issue arises, different from interstate problems, such as conflict of laws, jurisdictional disputes, necessity to provide better protection of sensitive participants of the process and others.

The European Union, understanding the value of mergers in scope of freedom of capital, freedom of movement, that is guaranteed to its citizens, has chosen the way of harmonization of EU legislation in order to solve the main problems arises from the cross-border mergers in different Member States.

The work is aimed to analyze the cross-border merger as an essential part of realization of freedom of establishment, and how the European Union legislation is balancing between the global economic interest of cross-border merger and the protection of rights of participants in the merger.

The objective of the work is to compare the procedure that was originally implemented in order to facilitate the cross border merger and the further development of the process of cross border merger in the the scope of freedom of establishment and the further development of regulation of cross border merger. In order to have a full understanding of regulation of cross border merger and its development the number of tasks should be done.

The first task of the work is to analyze the problem of freedom of establishment and the transfer of registered office and why it is important in the scope of cross border merger. To this task also refers the analysis of respective case law of European Court of Justice, first of all the Sevic case. The second task is to analyze what should be considered as merger under EU legislation, the general mechanism of cross border merger and the evolution of regulation of cross border merger.

The next task is to analyze the protection of dissenting groups, that participates in cross border merger, namely the stakeholders, creditors and employees, compare the provisions of the Directive 2005/56/EC . The basis procedure for the analysis on this issue is taken

from the Directive 2005/56/EC, as it established the fundamental approaches on this matter, with further comparison to the changes according to Company law package and Directive 2019/2121.

During the work while analyzing the issues of freedom od establishment in the scope of cross border merger, definition of cross border merger, evolution of regulation and general mechanism of cross border merger and the logical analysis method and historical comparison method are used.

In the sections regarding the protection of dissenting groups of workers the legal comparative method, historical comparative and logical analysis method are used.

The pepper relies on the Lexidate Bech Brunn "Study on application of the cross-border merger Directive", works of Dr. Thomas Papadopoulos , Harm Van den Broek, Mathias M. Siemens, Vertuzo, Dr. Erica Kovac and others written materials.

The work is in a considerable part is dedicated to the analysis of the EU Directives and Regulations. In the work the further Directives are analyzed: Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law, Directive (EU) 2019/2121 of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and others EU legislative acts.

The work also analyzes the fundamental decisions of European Court of Justice regarding the freedom of establishment: Daily Mail case (Case 81/87 ECJ), Cartesio case (Case 210/06 ECJ), Vale case (Case 378/10 ECJ) and Sevic case (Case 411/03) .

The originality of the work constitutes the analyze of past regulation of cross border merger in comparison with recently applies new mechanisms and harmonization in this sphere. The Member States are now at the stage of implementing novels, so now new provisions do were not so intensively analized, as the mechanisms, that were implemented fifteen years ago.

Also it should be noted, that the work is dedicated to cross-border merger from the scope of European Company law. Therefore, the analysis is mostly related to the corporate

legislation and corporate law generally and is not related to antimonopoly or taxation issues.

PART 1. FREEDOM OF ESTABLISHMENT AND THE ROLE OF CROSS BORDER MERGER IN ITS IMPLEMENTATION

The freedom of establishment is fundamental right that was provided to its citizens by the European Union. Actually, it is part of complicated system of EU functioning, calling "the freedom of movement", that includes free movement of persons, services and capital.

The principal of freedom of establishment was firstly enshrined in Article 53 of Treaty establishing the European Economic Community.

"Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty."[4]

From that time, it has not changed dramatically. At present freedom of establishment is essential part of Treaty on Functioning of the European Union. Article 49 of this document states, that

"*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".*

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".[5]

Several conclusions can be made from given provision. Firstly, article has restrictive character. It does not provide us exactly what freedom of establishment is, but forbid any restriction of it. Secondly, it has a blanket provision. Article 54 here performs two main

[4] 31 August 1992 Treaty establishing the European Community CODIFIED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY *Official Journal C 224* [interactive]. [reviewed in 13 March 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11992E%2FTXT> Article 53

[5] 26 October 2012 Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal of the European Union. No. C 326/47*. [interactive]. [reviewed in 13 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

functions – it expands the freedom of establishment on legal entities and sets up what is a company in the meaning of EU legislation. At the same time it does not exhaust the term, as it could be a subject of national legislation.

Article 54 states:

"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 Section, be treated in the same way as natural persons who are nationals of Member States.

'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."[6]

Both provisions give us reasons to conclude, that EU Company Law still has more national level of regulation. Article 54 only establish what connections company should have within EU to enjoy freedom of establishment, stating that company is a firm constituted under national legislation.

As for the basic concept of freedom of establishment, the aim is to create a flexible system of corporate mobility in European Union in a way of providing a kind of competition between states to implement the most favorable provisions for development of business. Due to its global meaning, in practice corporate mobility in EU suffers with complicated issues, basically deals with its practical realization.

TFEU does not pay much attention to detailing the complex of rights which refer to freedom of establishment. It should be a subject of further regulations and Court practice. And here we come to the issue of factual impossibility of direct implementing of fundamental rights of legal entities on the territory of European Union. It is a known fact, that EU consists from a number of sovereign states. In the area of corporate law it means that every country has its own legislation, legal traditions and doctrines related to the legal entity, its basis and its place in state's legal system.

[6] Ibid Art. 54

Part I. Chapter 1. Problem of transfer of registered office

To understand the importance of cross border merger in scope of freedom of establishment it is needed to have a brief look on the basic problem of EU company law – direct cross border conversion. The deep meaning of freedom of establishment is maximum liberalization of movement of companies inside the EU. It means that every company incorporated under the law of a Member State has a right to change it so called "corporate passport" and subordinate itself to the jurisdiction of another Member Sate. In fact from the time the first Treaty of Rome entered into force up to date the described mechanism cannot be considered as effective or even executable.

The basic approach was set up in Daily Mail case (Case 81/87) by the European Court of Justice (further –"*ECJ", "the Court"*). In paragraph 19 of its decision, the Court stated:

"In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law . They exist only by virtue of the varying national legislation which determines their incorporation and functioning."[7]

The consequences of such decision were in fact blocking the possibility of cross border conversions and recognition of dominance of internal MS's law over the issues of Company law and especially over the corporate mobility.

From that time not one decision was provided by ECJ on that topic. In order not to deeper into the specific circumstances of each case, the attention will be paid to the conclusions made by court and the visible evolution of approach on the topic of cross boarder conversions.

Therefore, we can observe a kind of evolution of practice in the scope of corporate mobility. The biggest attention should be paid to the Centros Case, **Cartesio**, Uberseering, Inspire Art and **Vale**.

To demonstrate briefly the problematic issues of corporate mobility in EU it is enough to consider two of them: Cartesio case and Vale case. They are similar as the ECJ was to decide if refusal of one state to register or convert company from another state breaks the freedom of establishment rule.

[7] EU court of justice. *12 September 1988. Daily mail judgement C-81/87 European Court Reports 1988 -05483 [*interactive*]* [reviewed in 13 March 2020]. *Available at: <* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0081> §19

In *Cartesio case* Hungarian company decided to change its registered office to Italian one, at the same time remaining the status of a company, incorporated under Hungarian law[8].

The main conclusion of the Court:

"as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation."[9]

This means that ECJ recognized the right of MS not to allow the transfer of register office abroad even on the territory of another MS.

In Vale case the issue arises between the same Member States, but here Italian company decides to convert itself into Hungarian (not just to move a registered office, but to change "the corporate passport"). The Italian authorities deleted the Company from Italian register but Hungarian officials refused to registered Vale as converted firm with Italian predecessor. [10]

The question was if such refusal breach the freedom of establishment and the Court here stated:

"Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company."[11]

By that mean, ECJ in fact concluded that the refusal to register company as a predecessor of another MS is the breach of freedom of establishment[12]. At the same time, the Court confirmed that such a mechanism should be properly formulized. In the absence of harmonized EU legislation on that matter, it would be inappropriately to consider that all

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[8] EU court of justice. *16 December 2008.Cartesio judgement C-210/06 Reports of Cases 2008 I-09641 [*interactive*]* [reviewed in 13 March 2020]. *Available at:* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=76078&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1382933>

[9] Ibid §124

[10] EU court of justice*. 12 July 2012. Vale judgement C-378-10 EU:C:2012:440* [interactive] [reviewed in 13 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0378>

[11] Ibid §1 Conclusion

[12] Ibid § 49;59

Member States would implement the proper legislation that provides a procedure in accordance with the basic principle of freedom of establishment.

At the present time the problem that was formed in previous paragraphs is to be solved with the help of new Directive. On 25th April 2018 European Commission published so called Company law package[13] that, inter alia, includes proposal for the Directive 2017/1132 as regard cross boarder conversion, mergers and division.

The result of this proposal was the implementing of Directive 2019/2121 of 27 November 2019[14]. All member states are obliged to implement provisions of this Directive their local legislation. This is the first time attempt to establish a direct mechanism of freedom of establishment, in particular cross-border conversions through the legislation of EU.

Part 1. Chapter 2. Freedom of establishment and cross border merger

All mentioned has its fundamental meaning for the topic of the work, as in its basis legislation on the cross border merger in European Union was aimed to fill the gap in factual realization of rights to the companies, provided by the principle of freedom of establishment.

In the scope of freedom of establishment and cross-border merger one of the fundamental cases that should be considered is Sevic case[15].

The background of the case is two companies, Sevic Systems AG, established on Germany, and Security Vision Concept SA, incorporated under the legislation of Luxembourg, trying to merge by the dissolution of latter company with transferring all asserts to Sevic AG.[16] It means that Security Vision Concept SA while merging does not go through the liquidation process in host country.[17]

The problem raised when Security Vision, during the merger process, applied for registration in German commercial register. The point is that according to German

[13] Justice and consumers. *Company Law package. First published on 25 April 2018* [interactive] Available at: <https://ec.europa.eu/info/publications/company-law-package_en>
[14] European Parliament and Council Directive (EU) 2019/2121 of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. *OJ L 321, 12.12.2019, p. 1–44.* [interactive] [reviewed in 13 March 2020]. Available at: <https://eur-lex.europa.eu/eli/dir/2019/2121/oj>
[15] EU court of justice. *13 December 2005.Sevic judgement C-411/03 European Court Reports 2005 I-10805 [*interactive*]* [reviewed in 13 March 2020] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0411.
[16] Ibid § 2
[17] Ibid § 6

legislation, the only acceptable mergers were inbound, meaning the merger between the companies established under German jurisdiction. As a result, German authorities refused in registration acts regarding the Security Vision application. [18]

ECJ was to decide whether the refusal to register a company from another Member State for the purpose of merger considered as the breach of Articles 43 and 49 EC, or, in other words, principal of freedom of establishment.[19]

Briefly, ECJ concluded the breach of freedom of establishment by following the next logic. German legislation provided unequal conditions to German companies and companies of other Member States by accessing a merger of German companies and, in fact, forbidding the cross-border merger.[20]

Mergers are the essential part of business activities, making possible for companies from different Member States to enjoy economic benefits of each other, opportunity provided by European Internal Market. This difference in treatment the Court stated as the violation of freedom of establishment.[21]

The next question ECJ faced with is whether this breach was justified. Here the Court recognizes that in "in certain circumstances and in some cases" such a refusal can be reasonable, first of all in order to protect the right of creditors, minority shareholders, employees and to ensure the effectiveness of fiscal supervision.[22] At the same time no exact example was provided.

The Court also did not establish any understanding of how should such a merger be held. On that time Mathias M. Siemens in his article[23] analyzed the main suggestions on that matter: using the domestic law or using the respect Directive 78/855/EEC on regulation of domestic mergers.

In the first case author turns out attention to the possible conflict of laws. Different legislation could be a problem during the process of registration of merger (as in Sevic case), cross border transfer of asserts, court's jurisdictions in case disputes.[24]

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[18] Ibid §7
[19] Ibid §1
[20] Ibid §22
[21] Ibid §19
[22] Ibid §28
[23] MATHIAS M. SIEMENS . SEVIC: Beyond cross-border merger; *European Business organization Law Review 8, 2007* [interactive] [reviewed in 13 March 2020]. Available at: <https://link.springer.com/content/pdf/10.1017/S1566752907003072.pdf>
[24] Ibid p. 309

As for the use of Directive 78/855/EEC, Mathias M. Siemens points on the general differences in approach to domestic legislation, regulating the local inbound processes and international processes, inter alia regarding cross-border merger. The point is that cross-border merger touches the rights of persons of different states, therefore, domestic legislation or even Directive on the regulation of domestic operation cannot guarantee the proper respect of rights of involved participants. It refers first of all to minority shareholders, creditors and employees, as they become not only a shareholders/creditors/employee of another company (in case of merger by acquisition as in Sevic), but of the company under the jurisdiction of another state. Therefore, they need another level of protection, that could not be provided by domestic law.[25]

Here we come to the main value of Sevic case. The ECJ in its decision made a few essential conclusions that influenced further development of EU Company law. Firstly, although the Court did not stated that cross-border merger is directly a part of freedom of establishment, ECJ considered that in some cases prohibition of this operation may entail the breach of this fundamental principle and violation of the rules of Internal Market of EU.

Secondly, as it was mentioned, the Court did not establish the procedure of how it should happen, as it is not the competence of ECJ. At the same time, the decision and the case itself raised the question of harmonization necessity on the matter. It became obvious, that to provide the freedom of establishment through the cross-border merger and to protect the rights of participants from different Member States during the process EU needs a kind of codification in form of Directive. It would establish the mechanism and guarantee the equal treatment of companies under EU jurisdiction in cross-border merger.

Generally, Sevic case, as a part of ECJ practice related to Company law, made a step in development of corporate mobility in EU, that is a not an easy and unanimous process.

As a result of the accumulated problematic, the biggest outcome of which was Sevic case, the European Parliament and Council adopted the new Directive 2005/56/EC on cross-border merger of limited liability companies, that became one of the grounds for adopting the Directive 2019/1132 of 27 November 2019[26] relating to certain aspects of company law, where the regulation of cross border mergers is a part of complicated Company Law system in EU and is in the process of improve.

[25] Ibid 309

PART 2. THE DEFINITION OF CROSS BORDER MERGER, THE EVOLUTION OF ITS REGULATION IN EUROPEAN UNION AND THE MECHANISM OF ITS REGULATION

Part II. Chapter I. Definition of cross border merger

First of all it should be noted that the whole concept of mergers is mostly refers to business sphere[27]. The scope of business operations, that are done under the merger concept is wide, so the general found term, explaining what M&A, and the merger as a part of this service. The definition is rather, more explaining the aim of the operation, without deepen in details.

"M&A is a deliberate transfer of control and ownership of a business organized in one or more corporations."[28]

But it should be noted, that given definition is much wider, than the merger, that is an research subject of this work. M&A includes such operation as assert purchase[29], that can be the case to transfer control of business but has nothing similar to the corporate merger.

So we are coming to the legal meaning of the merger. When the question rises about the legislative meaning of the merger, the legislative acts can not provide us with such diverse approach, so we need to narrow the meaning to make it as certain as it possible. Regarding the EU legislation, the references should be made to the respect directives.

The basic concept of definition of merger in EU legislation was established in Directive 78/855/ECC. Article 3 and 4 of this Directive differentiate two types of merger: merger by formation of a new company and merger by acquisition with the next definitions:

"merger by acquisition" shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10

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[27] JOHN C. COATES IV. Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice. *Harvard John M. Olin Discussion Paper Series Discussion Paper No. 781, July 2014, Oxford Handbook on Corporate Law and Governance* [interactive] [reviewed in 20 March 2020]. Available at: <https://dash.harvard.edu/bitstream/handle/1/20213003/Coates_781.pdf?sequence=1&fbclid=IwAR1jUzPP7I-EKvdFTK0PN3yBLsVKmBmKb9uUlzJ_jdlmXXvD2epsjuoz-oo> p. 2

[28] Ibid

[29] Ibid p. 3

% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value".

"merger by the formation of a new company" shall mean the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value"[30].

Special attention should be paid to Art. 24 of the Directive, that in fact provide us with special third type of merger, regarding the merger of subsidiary company, when the principle company holds all the shares of such company. This was done in order to provide simplified procedure. At the same time it could be doubtable that this can be considered as separate kind of merger. Some scholars express their concerns on that matter[31].

Analyzing the Tenth Directive, it could be found that the EU legislation maintains its unity and provides legal certainty, as the definition and types of merger are almost identical to the Directive, adopted in 1978. Part 2 of Article 2 of Directive 2005/56/EC contents three points (a, b, c) with the definition of merger. In comparison with the Directive concerning the domestic merger, despite some insufficient differences in wordings, two main features of the operation, that is considered by the EU as a merger, can be allocated:

- The companies should be dissolved (wound up in domestic merger Directive);
- The companies do not go into liquidation process.

It makes possible to increase the effectiveness of the merger operation and decrease costs spend on the merger. In fact, this is the feature that differentiate merger from just liquidation with transferring all the asserts to another company.

The mergers should also be separated from the takeovers. Takeovers are the corporate operations, when the investor makes an offer to the shareholders personally to acquire their

[30] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies. *OJ L 295, 20.10.1978, p. 36–43.* [interactive] [reviewed in 13 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31978L0855> Article 3, 4

[31] HARM VAN DEN BROEK. Cross-Border Mergers within the EU: Proposals to Remove the Remaining Tax Obstacles. Kluwer Law International B.V. 2011 P.51

part in the company. It is a different corporate process, that has its own legislative regulations (Takeover Bids Directive 2004/25/EC)[32].

Special attention should be paid to the formation of SE Company. One of the basis for the establishment of SE company is its formation by merger. As it is mentioned in the separate EU legislative act (Regulation on SE Company)[33], contains special requirements for such operation and procedure, this merger could be considered as separate kind in the meaning of EU legislation. At the same time, by its form and substance this type of operation could be classified as the merger by the formation of a new company.

So, in summary the types of merger can be divided in:

- Merger by formation of a new company.
- Formation of SE Company by merger (in fact a kind of merger by the formation of a new company).
- Merger by acquisition.
- Merger of sub-holding company (in fact a kind of merger by acquisition).

Part 2. Chapter II. The evolution of cross border merger regulation in European Union

The history of the regulation of cross border merger, actually starts from the end of 70th, when the Commission decided to harmonize domestic mergers. The result was the adoption of Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited companies (so called Third Company Law Directive)[34].

In order to maintain and develop the success the Commission made the proposal of Tenth Directive concerning the cross-border merger of the public limited liability companies

[32] CREMERS, JAN M. B. Worker rights under the Cross-border Mergers Directive 2005/56/EC:an introduction. In *Exercising voice across borders: workers' rights under the EU Cross-border Mergers Directive ETUI series -Workers' rights in company law, 2019.* [interactive] [reviewed in 13 March 2020]. Available at: <https://www.academia.edu/38938616/Exercising_voice_across_borders_workers_rights_under_the_EU_Cross-border_Mergers_Directive_ETUI_series_-Workers_rights_in_company_law?email_work_card=view-paper> p. 32

[33] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). *OJ L 294, 10.11.2001, p. 1–21.* [interactive] [reviewed in 20 March 2020] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001R2157>

[34] Third Company Law Directive (no. 29)

submitted in 1985. In the introduction of the Proposal the Commission directly mentions that as far as Directive 78/855/EEC regulates the operations, governed by one state, the necessity appears to give a legal basis for the regulation of operations with the participants under the jurisdiction of different Member States[35].

Eventually the proposal did not turn into the Directive in force and this issue was not an object of consideration by legislative bodies of European Union, except some negotiations. As it can be understood from the Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital'[36], one of the man "stumbling block" was the participation of employees in the process (the Committee pays much attention in differences of proposal, especially in the spheres of employee protection in point 1.3.3)[37].

The status quo has being holding until on 2001 the Regulation concerning the European Company Statute was adopted[38]. It gave a legal opportunity to create SE by the means of merger of companies from different Member States.

In order to provide the further development of corporate mobility of EU and extend the opportunities of the companies, Commission made the "Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital"[39] in 2003, that eventually leaded to the final Directive 2005/56/EC.

The fundamental thing that should be noted from the Directive 2005/56/EC[40] (further – "Cross-border Directive" or "CDC") is the reference to the Article 44 of Treaty establishing

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[35] Proposal for a Tenth Council Directive based on Article 54 (3) (g) of the Treaty concerning cross-border mergers of public limited companies, submitted by the Commission to the Council on 14 January 1985. *OJ EC 25.1.85 No C23/11* [interactive] [reviewed in 13 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51984PC0727&from=EN> paragraph 5 of the preamble

[36] Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital'. *OJ C 117, 30.4.2004, p. 43–48* [interactive] [reviewed in 13 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004AE0664>

[37] Ibid point 1.3.3.

[38] SE Regulation (n. 32)

[39] Proposal for a Directive of the European Parliament and of the Council on cross border mergers of companies with share capital. *COM/2003/0703 final - COD 2003/0277 */* [interactive] [reviewed in 20 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52003PC0703>

[40] Consolidated text: Directive 2005/56/EC of 26 October 2005 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. OJ L 310, 25.11.2005. p.1. [interactive] [reviewed in 20 March 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02005L0056-20140702

the European Community[41]. This Article is dedicated to freedom of establishment and this creates an inextricable link between this principle and the institute of cross-border merger, as the respective Directive is a logical result of development of freedom of establishment.

In 2017 the provisions of the Directive 2005/56/EC became a part of the first attempt to make a kind of codification, that resulted in implementing of the Directive 2017/1132 of 14 June 2017 relating to certain aspects of company law[42] with further Company Law package and Directive 2019/1132.

Part II. Chapter III. General mechanism of cross border merger

The basis for the procedure of cross-border merger was the mechanism of forming of SE company by merger. At the same time, due to the certain features of cross-border merger, the procedure was modified and consolidated in the Cross-border merger Directive.

In a consolidated manner the CBMD considers the next mechanism of cross border merger:

1. Common draft terms drawn up (Art 5).
2. Prior publication of Common draft terms (Art 6).
3. Report of management and administrative organ (Art 7).
4. Report of independent expert (Art. 8).
5. Approval of Common draft terms on General meeting (Art. 9).
7. Scrutiny the legality of the merger by national authorities and providing with pre-merger certificate (is held during other stages) (Art. 11, 10).
8. Entering into effect the cross-border merger (Art. 12).
9. Registration (Art. 13).

The first thing the companies should do after the decision to merge is to draw up the common draft terms on the merger. It should contain the information from the list in Article 5 of the Directive, such as the name of the companies, form, ratio applicable to exchange of shares and others.[43]

[41] Ibid. 1st sentence of preamble
[42] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. *OJ L 169, 30.6.2017, p. 46–127.* . [interactive] [reviewed in 20 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L1132>
[43] CBMD (n. 39) Article 5 CBMD

Next this common draft term are to be published in accordance with the local legislation of each Member State. The main requirement of the Direct is the term of publication – one month before the general meeting, where the decision to merge will be considered. It is made in order to guarantee the rights of the involved participants.[44]

The next step is report by the management or administrative organ, established by Article 7. The aim is to explain the legal and economic consequences of cross border merger for involved participants, mainly creditors, employee and minority shareholders.[45]

Also, one month before the general meeting for the members of the companies the report of independent expert should be available. The report should be individual for each merging company with the exception that report can be single for all members of merger with the permission of authorities for the request of all companies. The permission can be given from the authorities of any merging company, or from the authorities of state, where companies create a new one.[46]

The next step is approval of the merger by the general meeting. The approval should be given by the general meetings of all participating companies.[47] The only exception can be given to the necessity of approval by the acquiring company in case of specific requirements, provided in Article 8 of the SE Directive.

The stakeholders should be informed with report on the merger one month before the meeting on draft common terms, be able to inspect all merge documentation and the minority shareholders should be given a right to decide if to call the general meeting on the approval of the merger.[48]

Each national authority, where the merging companies are situated, scrutinizing the legality of the merger under their national law. The Directive does not provide with the exact scope of the examination, giving the discretion to national legislation. At the same time the Directive states that the approval on the national level should be given by the notary, court or other competent authorities.[49]

In order not to increase the timeline of the merger, the pre-merger certificate in certain cases, regarding the protection of minority shareholder, can be given even if the approval

[44] Ibid Article 6 CBMD
[45] Ibid Article 7 CBMD
[46] Ibid Article 8 CBMD
[47] Ibid Article 9 CBMD
[48] SE Regulation (n. 32) Article 8 SE Directive
[49] CBMD (n. 39) Article 11 CBMD

by the local authorities, including court proceedings, is pending, but this should be noted in the certificate.[50] The companies are given six months to submit the pre-merger certificate to the respective authorities.[51]

The CMBD provides members of the merger to decide when the cross-border merger enters into force. At the same the entry into force cannot occurs before the scrutiny of legality. The merger is also should be and object to registration in local public registers of the countries, where the registered office of formed company is situated, where every merging companies should file a documents, that the cross-border merger has taken effect.[52]

The Company law package proposed some amendments in the procedures of cross-border merger, that was implemented in Directive 2019/2121. At the same time, it did not change it dramatically. The Company law package is more intended to the target clarifications and the improvement of existing mechanism, rather then the radical reformation of the whole system. This improvements refer to a specific provisions, regarding the certain aspects of CBM regulation, generally to the protection of dissenting groups, participating in the operation. Therefore, the Company law package and the Directive 2019/2121 will be a subject of further research in the definite scope of protection of stakeholders, employees and creditors.

Part II. Chapter IV. Conclusions on the related issues

Form the business view, the merger is just another type of procedure, allowing the deliberate of the control between the companies. The legal meaning of the merger is much more complex and certain, as it requires the detailed procedures in order to guarantee the rights of different participants in different spheres of the law.

In EU the basis forms of merger are merger by acquisition and the merger by formation, where the main differences are if the merger leads to formation of a totally new company or not. All other subtypes, that from the legal point of view are the types of merger by formation or merger by acquisition, such as the formation SE company or acquiring the subsidiary.

[50] Ibid Article 10 (3) CBMD
[51] Ibid Article 11 (2) CBMD
[52] Ibid Article 13 CBMD

The evolution of cross border merger in European Union is a long process, continuing for more then thirty years. Notwithstanding the difficulties the CMB regulation faced before, from the start of 2000s the cross-border merger is an essential point of developing of the corporate mobility in the European Union. It should be stressed out that now the Union is in the process of improving cross-border merge, while twenty years ago the possibility to make this operation was doubtable.

A regulation of cross-border merger mechanism, established in CBMD and recently improved by the Company law package, was based on the procedures of SE formation. General purpose of establish mechanism is to launch the cross-border activity in EU, and to protect the dissenting groups, at the same time not to loose the flexibility and to avoid unnecessary burdens of the participants.

PART III. PROTECTION OF STAKEHOLDERS' RIGHTS AND THE RIGHTS OF CREDITORS IN CROSS BORDER MERGER

Part III. Chapter I. Protection of creditors

Sub-Chapter I of Chapter I. General approach in protection of creditors. Ex-ante and ex-post mechanisms.

Creditors are placed among the most sensitive group of persons, accumulating risks from the cross border merger. Mostly these risks refer to the creditors of the company, that is acquired due to the increase of risks of change of the jurisdiction.. At the same time the protection should be granted to all creditors of participating company.

The risks the creditors can face with usually are formulated as *"merging company could exceeds its asserts"*[53] and risks relating to unpleasant legislation of new State of incorporation that could lead to so called "*forum-shopping*"[54]. In this case the whole merger can be aimed to cause complications to creditor in its lawful requirements.

Paragraph 2 of Article 4 of CBMD states:

"The provisions and formalities referred to in paragraph 1(b) shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the ***protection of creditors*** *of the merging companies"*[55]

However, the CBMD does not indicate exactly the mechanisms of such protection. The Member States are in the law to establish their own mechanisms to solve the problem of reasonable taking into account the interests of creditors.

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[53] TRULI E (2016) Ex-post analysis of the EU framework in the area of cross-border mergers and divisions: European Implementation Assessment, Study, European Parliamentary Research Service (EPRS). *Secretariat of the European Parliament (PE 593.796), 2016* . [interactive] [reviewed in 21 March 2020]. Available at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/593796/EPRS_STU(2016)593796_EN.pdf> p. 37

[54] PAPADOPOULOS T. Reviewing the Implementation of the Cross-Border Mergers Directive. In *Cross-Border Mergers: EU Perspectives and National Experiences, 2019.* [interactive] [reviewed in 21 March 2020]. Available at: <https://link.springer.com/book/10.1007%2F978-3-030-22753-1#about> p. 10

[55] CBMD (no. 39) Article 4 (2)

Usually two approaches distinguish on that matter of the time of such protection ("*whether the creditor protection date begins prior to the general shareholders meeting, or thereafter*"[56]).

Ex ante protection is designed to create conditions for creditors to protect their interests in the company that is going to merger. ***Ex post*** protection is aimed to regulate the relations between the creditors and the newly formed company.[57]

Both approaches have their benefits and disadvantages at the same time. During the ex ante approach the most important factor that should be noted is terms while creditor has the right to claim. In case of absence of such terms or too long-established terms the possibility of the abuse by the creditor increases. Such loophole can lead to unreasonable exceed of the merger period or even delay of the process.[58]

At the same time ex ante principle also accumulates some difficulties, *inter alia* regarding the jurisdictional problems. The specific feature of cross-border merger is that often the liabilities transfer to new company, incorporated abroad. Therefore, the creditor can be put in the position of necessity of court claiming in the other Member State to the foreign company. More difficulties appeared when the new company was incorporated outside the Member States of availability of Brussels Ibis Regulation.[59]

Regarding the jurisdictional problems, the opinion that was met in the respect literature, is that since the Brussels II Regulation harmonize the judicial issues and allow to claim in courts in all Member State, it is not to burden for the creditors.[60] At same time not only the formal ability to file a claim should be taken into account.

The creditor while making a decision to invest is in most cases aware of the company's plan to merger. Initiating and supporting legal procedure abroad in any way does not comply with the legal expectations of creditor and are connected with extra expenses at least on legal support of foreign. Therefore it would not be correctly to assume that in this exact situation the creditors rights should not be considered.

Another "sticking point" of Member States discretion on the issue of creditor's protection is veto rights. This implies the right of creditors to delay or even block the merger before all the debts would be paid. The veto right is mostly referred to ex ante approach. In ex post

[56] TRULI E (no. 51) p. 38
[57] Ibis
[58] Ibis
[59] PAPADOPOULOS T. (no. 52) p. 11
[60] TRULI E (no. 51) p. 42

approach the creditor is given a right to claim the debt from the company formed after the general meeting. Therefore, the veto right in such legislation does not have such level of necessity. In this case the merger interest "prioritized" in some way before the creditors right.

The respective research shows that among the "ex post states camp" most of the countries does not apply the veto right (Denmark, Luxemburg, Belgium). The exceptions are Italy and Spain. And vice versa, the ex ante approach Member States in most cases have established merger veto right in their legislation (United Kingdom, Netherlands, Austria).[61]

Other essential thing should be noted in the term of the protection of creditors is different authorities, regulating and accepting that protection. The research, made by TruliI E,, shows that in some Member Sates the protection is granted by local court (France, Luxemburg, Poland), while in others by local company registers, common for Scandinavian countries (Finland, Norway, Sweden)[62].

On the one side the EU legislation does not harmonize cross-border merger in this sphere. On the other side, talking about international operations, such a difference while not been critical, establishes extra complications and put under the question the providing of effectiveness principle of the merger under such conditions.

The next quite important issue is terms, while the creditor have a right to express their concerns and the starting point of that terms. The Truli E. in the research notes that the Member States imply the great diversity of such terms. The initiate point could be the publication of common draft terms, before general meeting or after them. The duration of such protection differs from one month to not established terms.[63]

The great attention is made on the situation when one company gets its merging certificate and another company from other Member State has not done it yet. The Article 11 of CBMD establish the exact deadline of registration within 6 month, so in specific cases creditors are able to prevent merger by abusing their protective rights.[64] This situation is unacceptable and can effect the whole merger market in European Union.

The other issue arises from the actual scope of harmonization of creditor protection under Article 4 (2). The point is that this question was also touched in the Third Company Law

[61] Ibid p. 40
[62] Ibid p. 39
[63] Ibid p. 38
[64] Ibid p. 39

Directive in Articles 13-15 regarding domestic mergers. At the same time domestic mergers and cross-border mergers are different operations with different specifties and could not be considered to be regulated by the same provisions. So could the Article 4 (2) CBMD refer to the Articles 13-15 of Directive 78/855/EEC.

Papadopaulos on this regard put our attention on the decision the European Court of Justice in *KA Finanz case*[65]. In p. 60 the Court stated:

"As regards the protection of the interests of creditors in the case of a cross-border merger, on which Sparkasse Versicherung relies in its claim in the alternative, the Court notes that recital 3 and Article 4 of Directive 2005/56 state that a company participating in a cross-border merger remains subject, as far as, inter alia, the protection of its creditors is concerned, to the provisions and formalities of the national law ***which would be applicable in the case of a national merger****."*[66]

By this formulation ECJ in fact exceed the scope of the protection, granted in cross-border merger procedure with the legislation of domestic mergers. Therefore, the Domestic Merger Directive is applicable.

"In so far as, in the case of a national merger, the Member States must act in accordance with Articles 13 to 15 of Directive 78/855 in relation to the protection of creditors, ***they must therefore also adhere to those provisions in the case of a cross-border merger****."*[67]

At the same time this position could not be considered as the direct reference to Article 13-15 of Domestic Merger Directive. In fact the use of CBMD sends us to the national legislation, that is, for its part, should be in accordance with Directive 78/855. As a result, creditors, as far as all other groups that are provided with special protection in cross boarder merger, enjoy the provisions of at least Articles 13-14 of The Third Company Law Directive.

The thing that should be noted here is that Directive 78/855 establishes the minimum harmonized provisions, and the biggest part of the Member States has a considerable amount of optional creditor protentional mechanism. That brings us back to differences of

[65] PAPADOPOULOS T. (no. 52) p. 11-12
[66] EU Court of Justice. *7 April 2016. KA Finanz decision C-483/14. EU:C:2016:205* . [interactive] [reviewed in 21 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0483> §60
[67] Ibid § 62

creditor protection in Member States with the aim to understand difficulties, that merging company could face with.

To achieve this aim, I am going to use an example, provided by Truli E, that gives a good practical example how different approaches in different countries could complicate the cross border merger operation. The Dutch company wants to merger with the Italian company. Briefly the main point is that two Member States applies different creditor protection mechanism. As for Netherland it is ex-ante system, since the Italia uses ex post system. [68]

Therefore, the creditors in Netherland have legal mechanism to block the process before the merger after the publication pf merger in national newspaper (they can obtain the special form security from the local district court). And, accordingly to the circumstances, the block can be rather time-consuming. [69]

While in Italia the creditors can initiate the protection procedure after recording of cross border in register. They have 60 days to bring the claim, during this time the merger is suspended. This can also lead to considerable delay of cross border merger operation.[70]

I need to put the attention, that this example is not aimed to show that creditors do not deserve the reasonable protection. All issues on this matter are to illustrate that effectiveness of merger process, as one the main objective of Cross Border Merger Directive, suffer from the procedural differences applied in different Member Sates. What is more, this differences do not have deep reasonable legal justification and comes from the Company Law traditions in certain country, usually to those applied to the local domestic merger. Therefore, the more complex harmonization in the sphere of the protection of creditors seems to be a necessity of further EU Company legislation.

[68] TRULI I (no. 51) p. 40-41
[69] Ibid
[70] Ibid

Sub-Chapter II to chapter I. Protection of creditors and company law package

The problems with the protection of creditors rights, raised while implementing the CBMD, forced the EU for the further harmonization in this sphere. The Commission in the scope of Company law package recognize the issues that creditors faced because of the cross-border merger.

The Proposal on the amendments to the Directive 2017/1132[71] mentions the next:

"Concerning the protection of creditors and minority shareholders, the existing rules on cross-border mergers lay down minimum, mainly procedural rules and leave the substantive protection to national laws. Therefore, the differences between Member States laws persist. For example, the Directive only lays down that creditors shall be protected subject to national rules, without further specifications."[72]

Moreover, the Proposal not only admit the problem with harmonization in the sphere of protection of creditors, but also propose some novels in order to improve the level of protection of regarding group. The Proposal established the Article 126b, that is fully dedicated to the protection of creditors.

The mechanisms the Proposal contains are the optional for MS declaration by the management and the administrative body about the financial status of company before the merger, that is to be a part of draft common terms[73], the right for the creditors to apply to the competent authorities or court during one month after the disclosure of draft common terms. The last is an example of ex ante approach in protection of stakeholders, as month after the disclosure of daft common agreement is the term for general meeting where the decision to merger is voted.

The draft common terms itself should contain the "details of the safeguards offered to creditors"[74] in order the creditor could get the information about the rights that are given in the circumstances of cross border merger.

The Proposal also contains the mechanism how company could ensure that creditors would not decelerate of terminate the process. To prevent such situation the company should

[71] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 April 2018 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. *COM/2018/241 final - 2018/0114 (COD).* [interactive] [reviewed in 21 March 2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A241%3AFIN>

[72] Ibid. Context

[73] Ibid. Article 126b (1) Proposal

[74] Ibid. Article 122 (7) (n) Proposal

disclose the independent expert record where it would be stated that the creditors rights are protected. The expert should be appointed by local authorities.[75]

The other case could apply when the creditor can claim against the new company or against the guarantor in the jurisdiction of original claim (where the creditor had a right to claim before the merger)[76]. This situation is mere based on the local legislation, then on the company's abilities, so here only the local legislator can provide the necessary provisions in order to facilitate cross-border mergers.

The finally implemented article 126a of Directive 2019/2121 narrows the scope of protection, proposed earlier. At the same time the Directive provides the more precise explanation of who can enjoy the provided protection. In Proposal it is dissatisfied with draft common terms creditors[77], while the Directive obliges the Member States to protect the creditors, whose claims were not satisfied at the time of disclosure of draft common term.[78]

This group of creditors have 3 month for bringing the claim[79], and it is rather interesting, as it provided creditors to be protected the month before the general meeting on the approval of cross border merger, but also two month after the general meeting, as it could be held one month after the disclosure[80].

The Directive also saved the present in the Proposal about the declaration of the management of the company but, the same as the Proposal provision, this is just and option for the legislation of Member States.[81]

[75] Ibid. Article 126b (3) (a) Proposal
[76] Ibid Article 126b (3) (b)
[77] Ibid Article 126b (2)
[78] Directive 2017 (n. 42) Article 126b (1)
[79] Ibid. Article 126b (1)
[80] Ibid. Article 133 (1)
[81] Ibid Article 126b (2)

Part III. Chapter II. Protection of stakeholders in cross border merger

Sub-Chapter I to Chapter II. The general approach to stakeholders' protection under CBMD

Another sensible group of cross-border merger involved participants are minority shareholders. Been a group of special attention in the company law generally ("dissenting stakeholders"), cross-border merger related legislation is not an exception.

Article 4 (2) of CBMD inter alia states:

"A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger[82]*."*

Three things that should be noted from this provision are:

- CBMD provides minority shareholders protection as optional right of Member States.
- The Directive protects the rights of minority shareholders who are opposed the cross-border merger.
- Protection applies only to the minority shareholders of the company in the country, where special protection mechanisms were implemented.

To understand the approach established by EU legislation the deeper analysis should be made to the exact risks of minority shareholders and their nature. Among the main risks the minority shareholders can face the three fundamentals can be identified:

- differences in the valuation of asserts and liabilities and the merger ratio;
- problems related to amendments to the company's statute and articles of association;
- less favorable national regime under new jurisdiction. [83]

[82] CBMD (no. 39) Article 4 (2)
[83] TRULI E. (no. 53) p. 42

The differences in risks are that the first two appears both in domestic and cross border merger. But, as it can be seen from the literature, the jurisdictional merger problems of protection of minority shareholders is the excessive feature of cross-border merger.[84]

The more interesting this problem appears if to take into account previously mentioned thesis that one of the most popular objectives of cross-border merger is actually to change the company's "corporate passport". In this case what is the main objective of the company as an entity considers a problem for minority shareholders of this company.

Here we come again to the complicated issue of EU Company law to support the balance between the rights provided by EU single market or general economic interest in mergers and the private interest of persons who are reasonably against the cross-border operation.

On the one side, minority shareholders, like any stakeholder of the company, enjoy the privileges of investors. Investing in a capital of the company in one country, investor reasonably predict that this company will be governed by the law of the state of its incorporation.

The reasons why investors choose the definite jurisdiction are diverse, such as expropriation of benefits by stakeholders or management (level of protection of stakeholders in case of major stakeholder or management would unreasonably alienate the asserts of the company[85]), the court system[86], squeeze-out procedures etc.

On this matter an interesting comparison of national regime was made to the class shares. From the point of investor, national jurisdiction among others forming the system of conditions, that influence the decision to participate in capital of one or another company. Another important part of this system is the types of shares the investor is buying. Different types of shares give different abilities to impact on the decision-making process.[87]

Therefore, buying privileged shares or shares with multiple voting right in any state, for example, Netherlands, investor has a reasonable expectation of enjoying the rights provided by this state. And unlawful change of shares, the same as the change of jurisdiction could be an inappropriate intervention in the investor's rights.

[84] KURTULAN G. Minority Shareholder Protection in Cross-Border Mergers: A Must for or an Impediment to the European Single Market?. *Eur Bus Org Law Rev* 18*, 2017.* [interactive] [reviewed in 21 March 2020]. Available at: <https://link.springer.com/article/10.1007%2Fs40804-017-0061-7> P. 105 P.101–121 (2017).
[85] Ibis. p. 110 - 113
[86] Ibis. p. 116
[87] Ibis p. 108-110

Sub-Chapter 1I of Chapter II. The Fiat-Chrysler merger case

The best illustration of the duality of the problem can be viewed from Fiat-Chrysler merger in 2014. This was an interesting case of a company, governed under the Italian law for more than 100 years decided to move its registered office to Netherlands. The reason for that decision was in biggest part influenced by the Dutch company law, that allowed to create more favorable conditions for majority shareholders (dealing with mentioned multiple-voting rights).

The actual move to Netherlands, as it said by the respect articles, is fully a step in favor of the Agneli family[88], controlling the company through the investment company Exor. The Dutch legislation allows the establishments of different kinds of shares, so the Fiat (or to be more precise the beneficial decision-makers) enjoyed these rights and created a special kind of "Loyalty shares".

The main point of this loyalty program was that every stakeholder that was holding its shares for more than three years was granted additional voting right for each share.[89] At the same time, the former stakeholders (as the Exor) were given extra voting right from the start of functioning of merger company.[90] This in fact gives the control over majority of decisions that refers to the stakeholders competence in managing of the company to the former holders of the shares.

This case should be analyzed from different perspectives of different participants for deeper understanding of the reasons and outcomes of such corporate structure. From the view of the controlling stakeholder, multiple voting rights provide more stable position of the company and preserve gives opportunity to prevent unfavorable change of the management of the company (this was the actual position of FCA[91]), or takeovers.

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[88] The multiple voting structure of the new Fiat-Chrysler is a clear breach of the basic principle of equal treatment of shareholders, published on 22 July 2014. [interactive] [reviewed in 21 March 2020]. Available at: <https://frontisgovernanceblog.wordpress.com/2014/07/22/the-multiple-voting-structure-of-the-new-fiat-chrysler-is-a-clear-breach-of-the-basic-principle-of-equal-treatment-of-shareholders/>

[89] FIAT CHRYSLER AUTOMOBILES N.V. SPECIAL VOTING SHARES – TERMS AND CONDITIONS, [interactive] [reviewed in 21 March 2020]. Available at <https://www.fcagroup.com/en-US/investors/stock_info_and_shareholder_corner/Documents/Special_Voting_Shares_Terms_and_Conditions_ENG.pdf> p.4

[90] Ibid. p.3

[91] Fiat-Chrysler Financial Report at December 2014[interactive] [reviewed in 21 March 2020]. Available at: <https://www.fcagroup.com/en-US/investors/financial_regulatory/financial_reports/files/FCA_2014_Annual_Report.pdf> p. 35

From the perspective of former minority shareholders, formally they are treated equally with others stakeholders, as the extra votes also applies to them. At the same time the factual possibility of participating in the ruling of the company is doubtable due to the decreased level of the flexibility in stakeholders structure. In other words, any attempt to extends the influence of minority shareholder would be complicated by the established loyalty program and the doubled power of majority shareholders.

As for the newcomers of the list of shareholders of FCA, such approach should decrease the interest of potential investors. The real participation in management of the company is very doubtable before the extend of the three years period.

Also, the question could arise why the former shareholders grant the extra voting rights even if they invest in the capital of the company right before the merge without the application of three years term loyalty. The pinion presents that the given measures perceive the breach of the basic treatment of the equality of shareholders in such acts.[92]

So, what the minority shareholder can do in order to protect their right in cross-border merger, that is opposed its interests.

Sub-Chapter III of Chapter II. The mechanisms to protect minority shareholders

As it can be seen from the provision of CBMC, similarly to creditor's protection clause, Member States enjoys the full discretion in establishing the definite mechanisms to protect the stakeholders of local company, leaving also such issues as when should the protection appears (in the new formed or the old companies), who is considered to be a minority shareholder, not harmonized. This creates a range of issues, as the variety of such mechanisms in different states leads to negative outcomes both for the minority shareholders and for the market of cross-border merger generally.

The protection of minority shareholders in different forms appears during the process of merger. They are usually divided to the right to be informed and consulted, the right to vote against the merger, the right to get a fair compensation for their shares, withdrawal and appraisal rights.[93]

[92] The multiple voting structure of the new Fiat-Chrysler is a clear breach of the basic principle of equal treatment of shareholders (n.88)

[93] WYCKAERT M, GEENS K. 2008. Cross-border mergers and minority protection, An open-ended harmonization. *Utrecht Law Review*, 4(1),2008 [interactive] [reviewed in 21 March 2020]. Available at:

Rights to be informed and consulted are the part of a general mechanism of cross-border merger in CBMD, as all stakeholders notwithstanding their share participation in the company have a right to get the complete information about the operation.

Therefore, as a part of considering the interest of minority shareholders, the merger draft terms are published one month before the general meeting[94], the management should draw up a special report and, as an optional provision, the report of independent expert should be made[95].

After been informed the next level of protection is actually the right to vote against the merger on the general meeting. Here the Member states are in their discretion to apply domestic corporate provisions on the quorum to take necessary decision. At the same time, Marieke Wyckaert and Koen Geens in their article add here that the decision should be made by the general meetings of all merged companies, that could also be considered as an extra protection.[96]

The last mechanism of compensation applies only in the case when all other mechanisms did not provide a satisfactory protection to the stakeholders and applies specifically to the minority shareholders.[97]

Compensational traditional mechanism, that was formed a long time ago and still is assumed to be the most effective and balanced in protecting the rights of minority shareholders in different unfavorable for them situations is appraisal or withdrawal rights.

Moreover, if to interpret the provision of CBMR on the protection of minority shareholders (Article 4 (2)), as the legislator provides the protection of minority shareholders, who were opposed the merger and also taking into account Article 10 (3), the conclusion could be made that by such formulation the CBMD makes references to monetary compensation as more preferable mechanism.[98]

The procedures could be different in different Member States, but the basis is pretty similar. The description is based on the former Italian legislation[99].

<https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/eurcompl0005&div=56&id=&page=>
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[94] CBMD (no.39) Article 6

[95] CBMD (no.39) Article 7,8

[96] WYCKAERT M, GEENS K (no. 93) p. 46

[97] WYCKAERT M, GEENS K (no. 93) p.45

[98] WYCKAERT M, GEENS K (no. 93) p. 42

[99] VENNTORUZZO M. Cross-Border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights Under Italian Law. *European Company and Financial Law*

In fact, the protection of the minority shareholders' interests starts as it was mentioned from the right to be informed and consulted and their right to vote on the general meeting, including the respect question of merger[100]. But obviously it could not be considered as enough level of protection for dissenting shareholders. Therefore, the stakeholders, who were opposed the merger, are given rights to get the proper compensation for their shares.

The preemptive right to buy shares in this case is provided to the company. If nobody buys the shares and the company can not do that (that could be the case if minority shareholders holds more than 50% of shares[101]), the company reduces legal capital or goes through the wound-up procedure.[102]

On this matter the note should be made about the Article 10 of the CBMD and the possible jurisdictional abuse that it prevents.

The Article 10 (3) of CMBD regarding the pre-merger certificate states that in case when the legislation of one Member State of merging company provided the mechanisms of minority protection (obviously mechanisms with material compensation) without preventing the registration of cross-border merger, and other Member States of other merging companies do not have such mechanisms, such companies should approve that stakeholders can get their relief in such states by filing a motion in the court of the jurisdiction where the merging was formed. [103]

By establishing such a rule, the EU tries to prevent jurisdictional problems, that could appear when in the former state of the company the minority shareholders lost their right to sue as the company becomes an object of jurisdiction of another state. It should be noted that this rule applies when minority shareholders can not prevent the merger (more precise the registration of it so they can not prevent the legal fact of merger).

The special attention should be paid in respect to the problems, appears during the process of getting monetary compensation for shareholders. First of all, it refers to the evaluation

Review (ECFR), 2007. [interactive] [reviewed in 21 March 2020]. P. 24 Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=960579>

[100] Ibid. p.11

[101] BECH BRUNN, LEXIDATE. The study on application of cross border merger directive. FOR THE DIRECTORATE GENERAL FOR THE INTERNAL MARKET AND SERVICES, THE EUROPEAN UNION, 2016. . [interactive] [reviewed in 21 March 2020] Available at: < https://op.europa.eu/en/publication-detail/-/publication/0291c60a-df7a-11e5-8fea-01aa75ed71a1> p. 69

[102] VENNTORUZZO M (n. 99) p. 16

[103] CBMD (no. 39) Article 10 (3)

of shares, or, more precise, what minority shareholder can do if the evaluation of shares were unfair.

In such case, with analogy of creditors protections, the mechanism could be ex ante and ex post. Under ex ante approach the minority shareholders, who were opposed the merger, sells their shares to the company, as it was mentioned with the reference to the Italian legislation or get the compensation before the merger. This approach also includes the variant of challenging the operation before it actually happen on the basis of draft common terms and other available information.

At the same, the possibility of getting the compensation after the merger is also presents, mainly in the form of getting remedies through the court. The challenging of the merger could face the Article 17 of CBMD, under which the merger that come into legal force can not be stated null and void.[104] Therefore, getting remedies through court proceedings in this case is the only way get any compensations. Of course, if this was chosen, the burden of prove of the fact of damages, the same as the amount of damages, is lay down on the minority shareholder.

Sub-Chapter IV of Chapter II. The Company law package and the protection of stakeholders

The problems of the protection of stakeholders, that are present in the CBMD, exactly the lack of harmonization and absence of establishment of any mechanisms of such protection, giving the full discretion to the Member States is fully understandable by the respective authoritative in EU. Therefore, the Company law package was aimed to increase the level of harmonization in this sphere.

The Proposal for the amendments to the Directive 2017/1132 in the context of the proposal states:

"the Directive lays down some rules concerning shareholders in general (e.g. information via the draft merger terms, expert reports, voting during the general meetings) but leaves

[104] CBMD (no. 39) Article 17

it to Member States to decide whether to introduce further protection for minority shareholders."[105]

Therefore, the Proposal offers establish a separate provision, an Article 126a, concerning the protection of minority shareholders. According to the proposal, the cash compensation was chosen as the main mechanism of protection of minority shareholders.

Also the Proposal extends the group of the stakeholders, who are granted the protection. In the CBMD, as it was mentioned, under the protection of domestic legislation were the stakeholders, who were opposed the merger. The protection under the Proposal is also granted to the stakeholders without voting rights[106], and the stakeholders, who were not opposed the merger, but who consider the exchange ratio as inadequate[107].

The Proposal establish a mandatory rule that Member states should ensure that, firstly, an offer to relative stakeholders was made in the common draft terms, second, the offered cash compensation should be adequate, and establishes the period of acceptance of no more that one month after the approval of draft common terms on the general meeting.[108]

Other supposed by the Proposal amendments are establishing the period, within which the compensation should be paid[109], review by independent expert report the adequacy of the cash compensation[110] and the possibility of reviewing the cash compensation in the court within one month after the acceptance[111], the same right with ratio exchange in case when the stakeholder was not opposed the merger during the month after the merger takes effect.[112]

However, the final Directive 2019/2121, that amended the Directive 2017/1132, being close to the Proposal by establishing the separate Article, has some differences that should be noted. First of all, the Directive leave the stakeholders without voting rights with no protection, formulating, that *"at least the members of the merging companies who voted against the approval of the common draft-terms of the cross-border merger have the right to dispose of their shares for adequate cash compensation…"*[113]

[105] Proposal (n. 71) Context
[106] Ibid Article 126a (1) (b)
[107] Ibid Article 126a (8)
[108] Ibid. Article 126a (3) Proposal
[109] Ibid. Article 126a (4)
[110] Ibid. Article 126a (5)
[111] Ibid. Article 126a (6)
[112] Ibid. Article 126a (8)
[113] Directive 2019/2121 (no. 14) Article 126a (1)

The Directive 2019/2121 also do not contain the provisions on evaluating the adequacy of cash compensation by the independent expert, established the obligation for the Member States to proper fixation of votes in case the voter is against the merger[114] and extends the period, within which the compensation should be paid to 2 months.

Generally, the finally implemented provisions in Directive 2019/2121 provide the less level of harmonization, than it was in the Proposal. I am not sure, but the reason why the EU legislator did not agreed to such level of harmonization can be the intend not to overcomplicate and burden the flexibility of cross border merger. At the same both from the Proposal and from the final Directive it can be seen the direction to the further harmonization.

Sub-Chapter V of Chapter II. Conclusions on the stakeholder's protection in European Union

The given Fiat merger case inter alia shows that the problems of protection of minority shareholders actually exceeds the scope of the regulation, provided by the CBMD by protecting the minority stakeholders who are opposed the merger before the merger.

Appraisal or withdrawal rights can be an effective way to keep balance between the market and company interest to economic development and the interest of a minority shareholder as an investor with its legal expectations inter alia to get the profit or at least to get money back.

At the same time the EU faced the problem with such mechanism, as CBMD does not contain the enough level of harmonization for protection of stakeholders. The CBMD does not provide the MS with the exact mechanism and the procedure of its implementation.

The Company law package and Directive 2019/2121 made a considerable amendment to the regulation of protection of stakeholders first of all by establishing the compensational mechanism of protection on the level of the Union.

[114] Ibid

At the same time, the problem arises that compensating mechanisms can not be considered as an appropriate mechanism to prevent the abuse by majority shareholder when the whole merger has its aim to strengthen their positions.

It would be fair to add that the business literature, noting that that in legal sense the FCA experience is doubtable, put out attention that economically such step was a success.

"By 2018, there were 1,549,647,057 shares of FCA outstanding, traded on both the New York and Milan stock exchange, and the company reported earnings for shares of $2.27, twice what is was in 2017"[115]

Another fact that should be noted, that the Italian legislators fully understood that such merger was not in the favor of Italian state. It was a considerable "punch" in the traditions of Italian corporate law.

Therefore, in 2015 *"the Italian government, as part of a package of reforms designed to make listing more attractive for closely-held corporations … allowed corporations to issue multiple voting shares and loyalty shares that attribute to their long-term holders increased voting rights"*[116]

This decision is a bright illustration of the fundamental idea of freedom of establishment, when the Member States are involved in the competition with each other to create more attractive conditions (also in sphere of corporate law) for the companies. At the same time during this more economical competition the Member States should not forget about the rights of stakeholders, principle of equal treatment. This fundamentals could not be sacrificed to for the material purpose.

The proper analysis of the outcomes of such practice and building a necessary model of behavior in similar cases will be an object of future research. We should not forget the initial aim of CBMD that is improving the Single Market and developing economy of the Union. In present the described situation is seems to be a challenge for corporate lawyers and governments.

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[115] GORDON S., CUNTHIA A. Business Organizations: Cases, Problems, and Case Studies *Williams Wolters Kluwer Law & Business* p.589

[116] VENTORUZZO M. The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat. *ECGI - Law Working Paper No. 288/201.* [interactive] [reviewed in 25 March 2020] Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574236> p.1

PART IV. PARTICIPATION OF EMPLOYEES IN CROSS BORDER MERGER

Part VI. Chapter I. The general approach in participation of employees in cross border merger.

The issue regarding the participation of employees for the long time was considerable factor preventing the harmonization in the sphere of cross border merger. In the Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital', the Committee pays much attention to the including the provisions of employee participation.

And, notwithstanding that the final CBMD differs from the Proposal, analyzed by the Committee, the fact is that the problem of participation of employees takes a special place in harmonizing the cross-border merger.

The point is that different Member States have different employee participation rules. Therefore, some jurisdictions are more preferable for employees due to the high level of participation of in the company life (for example Germany), some jurisdictions are less strict on this matter.

As it can be seen from the previous issues described in this work, the goals of cross-border mergers could be different, companies are looking for better conditions to hold their business activity. At the same time EU approach shows us that cross-border merger could not be aimed to put employees in less favorable positions, than it was previously. In case when it happens, special mechanisms are applied.

The basis for the protection of rights of employees was established by Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (so called "Employee involvement Directive), the same as actually the establishment of SE company became the basis for cross-border merger.

It should be noted, that CBMD does not word to word copy the provisions of the Directive 2001/86/EC, but definitely can be seen the similarity in approaches and the impact of the SE regulations of CBM regulations generally. For example CBMD, in contrast to Employee

Involvement Directive, does not provide the procedure of information and consultation (as it is established for the other dissenting groups)[117].

Employees enjoy the protection, provided by the general mechanism of cross-border merger, as every dissenting group, including publishing of draft common terms, management reports and independent expert reports, accepting on the general meeting and scrutinizing of the cross border merger by authorities. At the same time the employees have a special regulation on participation in cross border merger.

The general rule, established in Article 16 (1) of CBMD (originally in Employee Participation Directive) states that the formed from the merger company regarding the rules of employees should use the legislation of a Member State, where it has its registered office. At the same time the Directive in Article 16 (2) implies exceptions from this rule in case:

-*"at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger as referred to in Article 6, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of Article 2(k) of Directive 2001/86/EC";*

- if the legislation of Member State where the registered office is situated does not provide *"for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation";*

- if the legislation of Member State where the registered office is situated does not "*provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.*

In other words, the first exception refers to the definite number of employees and the previously established system of participation. The second exception is regarding the participation of employee in the company after the merger in new jurisdiction. The third is

[117]ANDENAS M., WOOLDRIDGE F. Cross-border mergers and acquisitions. In *European Comparative Company Law*. *Cambridge: Cambridge University Press, 2009.* [interactive] [reviewed in 25 March 2020]. Available at: <https://www.cambridge.org/core/books/european-comparative-company-law/crossborder-mergers-and-acquisitions/B181FC36B6C672392E1C6D69485B5046> p .499

directed to protect the employees from the countries, different to the registered office of a new company. These illustrates the three basic situations where the EU law intervene the merger and apply special mechanisms of negotiations, that will be described further.

The given provisions show the previously mentioned approach of protecting the right to participate for the employee in case the conditions of the merger do not grant them the previously available level of protection. Directive implements the so called "before after" concept, according to which the basis for the participation of the employees in the merger process is established according to their previously stated legal status.[118]

Every exclusion, provided by Directive has its own issues, but, before analyzing them, the basic question should be paid attention regarding what is the participation of employees and who should be treated as employee.

According to the mentioned Directive 2001/86/EC, as it is stated in the Article 2 (k):

""participation" means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:

- the right to elect or appoint some of the members of the company's supervisory or administrative organ, or

- the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ."

Actually, the given term is quite narrow, recognizing under participation the voting rights and rights to be opposed or recommend. The first definition of participation is directed to protect first of all, the right of employees to have their representatives in the management of the company. And these rights could be considered with some clarifications as been at least precise. The second definition is been limited to recommendations and oppositions. The point is that could this rights provide the influence on the company? As the provision does not contain any binding consequences for such recommendations or obligations to take into account the opposition of employees, such approach could lead to the abuse by the company, then giving right to recommend or been opposed would be considered as a participation.

As for the employee meaning, both Directives do not implement the exact term, so it is a question of domestic legislation. Generally, it is a person, who singed a labor agreement

[118] KOVACS E. Employee Participation in Cross-Border Mergers – European Rules, Risks and Loopholes. In In book: *Stakeholder Protection in Restructuring* p. 162

with company. An interesting question is also arising who of the employees can enjoy the guarantees provided by CBMD in the case if the company for example has its subsidiaries.

The basic rule, that was found in respected literature, that the CBMD implies on the merging companies and is not regulating issue of counting the employees of subsidiaries, as nothing in the text of the Directive indicates other approach.[119] At the same, than the question is should the employees of subsidiaries granted the protection. The answer on this question is disputable, as it should be analyzed the impact of the merger to such employees and the possible negative outcomes for them, that is hard with regard to the usual level of participation of subsidiary in the management of the major company.

This also raises a question of possible evasion of employees' participation in companies. The scholars put or attention that as most Member States uses territoriality principles and do not count the workers abroad for the purpose of EPS, companies in order to avoid the possible inconveniences with employee participation, transfer the human resources to other countries.[120]

Another issue on this matter regarding the temporary workers. Dr. Erica Kovács states that temporary workers are great opportunity for the companies to evade the participation of employees. As the Directive does not regulates the definition of employee and gives a discretion to the Member States, it gives basis not to count the temporary worker as an employee for the purpose of Employee Participation System.[121]

Part IV. Chapter II. Exceptions from the standard rule

Now the attention is paid to the first exceptional rule, when one of the merging company has more than 500 employees and the special employee participation system in accordance with previously mentioned Article 2(k) of the Directive 2001/86/EC. Analyzing this provision, Dr. Erika Kovács underline the main problems of it, that:

- in defininate cases the rule does not guarantee the implementation of the best employee participation procedure in case of initiating the negotiation procedures;

[119] Ibid P. 164
[120] Ibid P. 175-176
[121] Ibid. P. 175

- the rule is not applicable in cases, where according to the sense and aim of the provision, it should be.

The scholar illustrates an example, where instead of automatic implementation of the most favorable employee participation system according to the general rule (under the jurisdiction of finally formed company), sides need to start the negation procedures. When the company with a large number of employees and participation system acquires company with low number of employees in the jurisdiction, where such participation systems are not required. [122]

The second example when the rule is logically should be applied, is also illustrated by the author. The acquiring company has few employees, not enough to establish the employee participation system according to the local legislation. At the same time the acquired company has more then 500 employees and no employee participation system. Therefore, in case when the corporate law of the acquired company does not contain the provisions of counting of the foreign employees to EPS, there is no any norm in CBMD to represent the interests of the employees of acquired company.[123]

At the same time, could it be suggested, that the case when the Member State does not count the employees for the purpose of establishing of the EPS is the basis for the application of the third exception? The Article 16 (2) (b) of CBMD uses the wording that the exception can be used when the legislation of the Member State does not provide "*the same entitlement to exercise participation rights",* as the employees of MS of registered office enjoys.

Form the formalistic point of view, if to consider the definition, provided in the Article 2 (k) of the Directive 2001/86/EC, the exception can be applied only in cases when the law of a Member State directly forbid the right to vote and be presented among the company's organs, or to recommend or be opposed some appointments to supervisory or administrative organ.

It seems that the ban to count the foreign employees for the minimum to organize EPS is a trick from the state to circumvent the EU law, but from the view of the word-by-word interpretation of its provisions, the exception could not be applied. But it should be considered that such an approach of the Member State could lead to the discrimination of

[122] Ibid. P. 163
[123] Ibid P. 163-164

the foreign employees in participation of the company, as not counting them can have a result of not establishing the EPS and, therefore, decrease of the role of foreign employees.

So, taking into account the abovementioned, the third exception looks like the most problematic. The point is that this wording of the provision gives opportunity to interpret it from different points of view, that is not the best variant for the mechanisms, that are to be applies in different states.

Additionally, in the respect literature the third exception is also leads to the problems of territoriality. Dr. Erika Kovács emphasizes that most countries of EU protect the workers on their territory and it is their legitimate right to establish such rules.[124]

At the same time the third exception can be considered as a logical implementation of free movement of workers and Single Market and such provisions could be considered as a breach of that principle[125], as it grants the protection of employees on the whole territory of European Union. Previously, its was mentioned the problem of treating as employees the subsidiary workers and, notwithstanding the existence of territoriality principle, this should become a sufficient problem.

The policy of European Union is to establish a comfortable conditions for the companies transfers through the Union, but it is obvious that the employees and industrial powers are not so flexible. The situation when the company has a considerable number of employees abroad does not seem as an isolated case, so the attempt to protect their rights is justified withing the concept of territoriality.

What should be known about the second exception, that is placed in this work after the third because of the logical continuation of discussion about the first exception, is that it is the most direct rule aimed in implementing the "before-after" concept. But again, the wording of the Directive does not provide us with the necessary legal certainty, as the scholars put our attention that from the text of the provision it not fully understandable, the CBMD protects the rights, established in the national law, or the rights from the employee participation system in certain company.[126]

In the case of the situation where any of the mentioned exceptions could be applied, the CBMD states to start a special negotiating procedures. The regulation of negotiation process in fact is a complicated system of interactions between the CBMD and the

[124] Ibid P. 165-166
[125] ANDENAS M (n. 117) p.500
[126] KOVACS E. (n. 118) P. 164-165

Employee Participation Directive. The CBMD contains a blanket provisions, that make reference to the Articles 4-7 of the Directive 2001/86/EC, but with some clarifications.

Part IV. Chapter III. Special Negotiating Body

Article 3 of Employee Participation Directive prescribes that start of the negotiating procedures is connected with the obligation of the administrative organs or management of the companies to inform the representatives of employees to start negotiations.[127]

An interesting question arises if the companies-participants do not have the representatives of the employees. The scholars, analyzing the approach of EU in this sphere, put out attention on the different mechanisms, in case when employees did not used their rights to provide representatives and when this rights were not available to them.[128]

Dr. Erica Kovács underlines three different situations:

- employees has a chance to establish the work council but they have not do that;
- employees do not have rights to establish representation system according to local legislation;
- employees did not achieve a necessary threshold for participating in company[129].

EU in prior protects rights of employees with no company participation rights are given rights for direct electing the representatives of SNB. The Article 3 (2) (b) states:

"Without prejudice to national legislation and/or practice laying down thresholds for the establishing of a representative body, Member States shall provide that employees in undertakings or establishments in which there are no employees' representatives through no fault of their own have the right to elect or appoint members of the special negotiating body."[130]

So, given EU approach means that if employees did not used their rights to establish representative bodies, they do not have a right to direct appointment of representatives in SNB. At the same time if employees do not have a legal opportunity to enjoy their

[127] CBMD (n. 42) Article 3 (1)
[128] KOVACS E. (n. 118) p. 169
[129] Ibid. P. 169 - 170
[130] CBMD (n. 42) Article 3 (2) (b)

representation rights, even in case of established thresholds (that is a competence of a Member State[131]), the Member States should provide such employees with the direct appointment of representative to SNB.

Jan M B Cremers in his article puts our attention that the regulation of the composition of SNB is rather strict.[132] The Article 3 (2) (i) of the SE Directive states that the SNB is

"elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10 %, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together"[133]

The two approaches could be seen from this provision. The first is the members of SNB represents the direct group of workers (10%) in the country, where the merging company (or subsidiary, or establishment) is situated. The second approach is based on the representation of the group of workers in all states, where participating companies are situated.

The Directive also protects the rights to represent the companies, who will lose their entity. EPD obliges to include at least one member to SNB of such company, notwithstanding the number of employees in such companies (but generally should be). The overall members representing such companies should not exceed 20% of all members of SNB and MS should prevent the double representation of employees.[134]

The Directive is also applies special voting procedures to decrease the ability to reduce the rights of employees and participation of them in the company. The SMB makes decision by the absolute majority, but when the decision leads to the reduce rights of the employees, the qualified majority of 2/3 is needed. In this case the votes of representatives of the employees from at least two Member States are needed.[135]

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[131] KOVACS E. (n. 118) P. 170
[132] CREMERS J (no. 32) p.. 37
[133] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees *OJ L 294, 10.11.2001, p. 22–32.* . [interactive] [reviewed in 25 March 2020] Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0086>
[134] Ibid Art. 3 (2) (ii)
[135] Ibid Article 3 (4)

The same number of votes are necessary for making decision not to open the negotiations or to terminate opened decision. This request is an additional regulation, set up in the CBMD, that should be taken into account when analyzing the regulation of cross-border merger in the scope of two Directives.

The deadlines for the negotiations are established in the Article 5 of SE Directive by the terms of 6 month form the formation of special negotiating body with the right to extend them up to the year in case of joint agreement by all the parties.

The EPD states that "*special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees within the SE"*[136]. Therefore, the negotiation should result in the agreement between parties, that should be in the written form and contain all the necessary provisions, regarding the status of employee in the new company. If to analyze the mandatory provisions that should be presented in the agreement, the signed document is in all its bigger part should regulate the two main issues – the forming and functioning the representation organ (b, d, e) and the issue of consultation and information (c, f).

Standard Rules

As it was mentioned, the Employee Participation Directive is also based on the standard rule of application of the legislation in the Member State of the registered office of the formed company (SE company).

In case of negotiation procedures the standard rule also can be applied in direct situations, established is Article 7 of EPD:

1. When parties agreed about it[137]

2. When the deadlines for negotiations are over and:

    - the competent organs of merging companies decide to implement standard rules;

    - the Special Negotiating Bodies decide not to open the negotiations or to terminate opened negotiations[138,139]

The standard rules are *"only"* applied (according to the Employee Participation Directive):

[136] Ibid. Article 4 (1)
[137] Ibid Article 7 (1) (a)
[138] Ibid Article 7 (1) (b)
[139] Ibid Article 3 (6)

"- if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering at least 25 % of the total number of employees in all the participating companies, or

- if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering less than 25 % of the total number of employees in all the participating companies and if the special negotiating body so decides,"[140]

The division in Directive 2001/86/EC is made according to the percentage of the employee participating in the in the whole company, including foreign subsidiaries and establishments. The difference in CBMD is that the percentage of necessary participation is higher. While in EPD it is 25% of all employees, the Cross-border merger Directive establishes higher threshold of 1/3 of all employees[141].

Also it should be mentioned that the employee participation is also generally protected by the Part 3 (b) of Annex of EPD, that states:

"In other cases of the establishing of an SE, the employees of the SE, its subsidiaries and establishments and/or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE equal ***to the highest proportion*** *in force in the participating companies concerned before registration of the SE."*

This is another provision that protects the abovementioned concept of "before-after" status of employee participation and also makes attempts to protect the rights of foreign. At the same time the Part 3 Annex provision should not applied in case when the participation is above 1/3 of employees or the SNB decides to apply standard rules.[142]

[140] Article 7 (2) (b)
[141] Article 16 (3) (e)
[142] Article 7 (3) SE Directive

Part IV. Chapter IV. The information and consultation rights of employee and the Company Law Package

Under the CBM Directive the employees were the subject of information under the general mechanism of cross-border merger with some extra clarifications regarding the special status of employees in the operation.

According to the Article 5 of CBMD, the draft common terms should contain, *inter alia*

"the likely repercussions of the cross-border merger on employment;

where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16",[143]

Article 7 CBMD regarding the management report is also intended to protect the right of employee participation to be informed about respective legal and economic aspects of merger:

"The management or administrative organ of each of the merging companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees."[144]

The report should be available to representatives of employees, or, in case of absence of such representatives, directly to the employees, no less than one month before the general meeting, where the merger is to be voted.[145] Also if in a "good time" the administrative organ of management of the company receives the opinion, as provided by the national law, this opinion is also should be attached to the report.[146]

The right to be informed is also given to the Special Negotiating Body. Article 3 (3) of EPD provided such obligation on the management and administrative organs of merging companies up to the registration of newly formed company.[147]

As for the consultation rights, the Special Negotiation Body has a right to request experts, who could be present on negotiations meetings and" *promote coherence and consistency*

[143] CBMD Article 5 (d), (j)
[144] Article 7 CBMD
[145] Ibis
[146] Ibis
[147] Article 3 (3) SE Directive

at Community level"[148]. All costs regarding such experts, at the same time as other costs, arises from the functioning of SNB are on the merging companies.[149,150]

Despite all mentioned employee rights, the further practice showed that the CBM provisions on this regard is not enough to provide a necessary level of employee protection. The improve in sphere of information and consultation rights of employees became the main purpose of the Company law package.

The Proposal for a Directive on amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions in the context of the proposal on this regard states, that

"As to the employee participation on board level, the existing rules set out a comprehensive framework. However, the rules do not require merging companies to provide any specific and comprehensive information about a cross-border merger to the employees. Currently, the situation of employees is only considered in a general manner in the management report addressed predominantly to shareholders."[151]

To start the topic of management report it is necessary to note that the report could be waived with the agreement of members of merging companies. But in this case the employees have a right t be properly informed about it.[152]

The Proposal suggested the new Article 124a. In the final Directive 2019/2121 the new article was not implemented, instead the approach from the proposal was included into the Article 124. This approach lies in the obligation to make a separate section in the report, explaining the impact of the merger on the employees.

The Directive also has a provision regarding the context of the section of the report. This section should necessarily contains *"the implications of the cross-border merger for employment relationships, as well as, where applicable, any measures for safeguarding those relationships", "any material changes to the applicable conditions of employment or*

[148]Employee Participation Directive (no. 133) Article 3 (5)
[149] Cremers, J. M. B. (2019). Exercising voice across borders: workers' rights under the EU Cross-border Mergers Directive ETUI series -Workers' rights in company law. ETUI Series – Workers' Rights in Company Law. P. 38
[150] EPD (no. 133) Article 3 (7) SE Directive
[151] Proposal (n.71) Context
[152] Proposal (n. 71) Article 124 and Directive 2019/2121 (n. 14) Article 124

to the location of the company's places of business", and how mentioned factors affect any subsidiaries of the company".[153]

Here we can see the differences between the Proposal not only in fact, that the employee report there was a separate document, regulated with the separate provision, but also in the context of this document. In the final Directive there is no a request for the report to contain *"the implications of the cross-border merger on the future business of the company and on the management's strategic plan"*[154]. It should be mentioned that this provision of proposal was criticized, as such formulation as a "future of business" is far from been certain and clear.[155] The proposed originally term of one month before the general meeting for the availability of the report to the employee was extended to 6 weeks before the meeting.[156]

Another novel, provided by the Company law package is the employee protection in case of any regarding any subsequent domestic operation (merger, division, conversion). The company should *"take measures to ensure that employees' participation rights are protected"* in above mentioned cases.[157] This is made in order to prevent the possible evasion of employee participation by the way of restructuration[158] and forum shopping, that could be a result of opportunity to manipulate between different jurisdiction. The only difference between the Proposal and the Directive 2010/2121 is in the terms of such protection. The Directive established the 4 years protection period against the 3 years in the Proposal.

The last employee concerning issue, provided by the Company law package is also connected to information issues. The Proposal adds the para. 8 to Article 133, obliging the company to inform employees in case when the decision was made to implement the standard rules and in case when the negotiations with SNB starts. Also the company is obliged to report about the outcomes of such negotiations. The provision of the Proposal here was directly implemented in the Directive without any changes.

[153] Directive 2019/2121 (n. 14) Article 124 (5)
[154] Proposal (n. 71) Article 124a
[155] KOVASC E. (n. 118) P. 171
[156] Proposal (n. 71) Article 124 and Directive 2019/2121 (n. 14) Article 124
[157] Directive 2019/2121 (n. 14) Article 133 (8)
[158] KOVASC E. (n. 118) P. 133

Part IV. Chapter V. Conclusions on the participation of employees in cross border mergers in European Union

The provisions of the employee participation in cross-border merger is considered to be the most complex and thoroughly regulation, if to compare with other dissenting groups. The EU legislation implements the "before-after" principle, trying as much as possible to safe the rights of employees to participate in the company and in the cross-border merger. At the same time the key principle is to protect the rights, that were present to employees before the cross-border merger.

In fact EU does not provide the employees with a large scope of rights to participate in company, that is provided by the Member State. The basis for the protection of employees in cross-border merger refers to the SE Employee Participation Directive. The legislation on this matter looks like and complicated system of connection between two Directives. The procedure comes form SE Directive, but CBMD establish a special regulation to certain mechanisms considering the features of cross-border merger.

The employee participation in EU suffers from a number of issues, such as the abuse by the Member States of the principle of territoriality, attempts to evade the participation of employees, not enough level of information and consultation. The present regulation still leaves loopholes, that could be use in order to reduce the employee's participation.

The problems of access to information become the main issue when the Company law package was decided. The implemented in the Directive 2019/2121 novels increase the protection of employees in the informational sphere. At the same even in the target issues the success is doubtable. The respected literature shows that the presented previously right to provide the opinion of the representatives of the employees was not added with the any mechanism of consideration and the provision with the obligation to inform employees about the negotiations does not indicates which company should do that.[159]

Also the problems of information, as it was mentioned, are not the onlyone the employees could face in cross border merger. The serious problems of invasion, forum shopping, considerable differences of employee participation systems all over the European Union are still remaining unsolved.

[159] KOVASC E. (n. 118) P. 172-173

CONCLUSIONS

1. The cross-border merger of companies in European Union is as essential part of opportunities, provided by the freedom establishment. The idea of this operation exists from the start of existence of the freedom of establishment principle. For a quite considerable time cross border mere was almost impossible procedure in the territory on the Union, and transnational mergers went through the long way development of freedom establishment, European Company and the corporate mobility.

One of the objectives of corporate mobility and freedom of establishment was to establish the possibility for the companies to change their "corporate passport" and "travel" through the Union. But the problem was that this idea needed the high level of harmonization and strict connections between Company law systems in different Member States, that was problematic in scope of the presented at that time practice of ECJ ("Daily mail case"). The cross border merger became an important "trigger" facilitating the development in mentioned sphere.

The sufficient role in facilitating played the ECJ with the "Sevic case". In this decision the Curt approved that right to merge without going through the liquidation procedures considered the freedom and establishment and the MS cannot refuse the registration of such companies. At the same time no exact procedures were established. The outcome of development of the idea of cross border merger and the ECJ decisions became the Directive 2005/56/EC, that established the necessary procedure.

The conclusions can be made that in the scope of freedom of establishment the cross border merger performed two main functions: to provide the companies with increased level of corporate mobility and stipulates the further harmonization of domestic and European legislation in sphere of Company law.

2. The whole mechanism and all the features that are implemented to protect one group or another is consider saving the balance. This comes from two the fact, that the regulation on cross border merger is aimed to fulfill two controversial objectives – to facilitate the cross border merger operations through the European Union and to protect the rights of the group, who could suffer from the outcomes of the merger – creditors, stakeholder (in particular minority) and employees. A considerable amount of work is dedicated to the protection of this groups, as the biggest discussions, researches were made around the protection of their rights and interests. The interest of a creditor is to be sure that the company will fulfil the obligations and the creditor will be paid the debts, and the procedure of claiming of that

debts would not be burden by the change of jurisdictions. The minority shareholder is interested in adequate compensation in case of been opposed the merger and the employees are interested in saving their participation in the company oat least on the previous level.

The CBMD, been the first legal act that regulated the cross border merger on the level of European Union, can not be considered as a detailed harmonize document. The Member States under the CBMD had a high level of discretion if to establish or not specific mechanisms. For example, the CBMD establishes that the Member States "may" establish the protection mechanisms for minority shareholders. The CBMD also did not solve the problem of different timetables in different countries for enjoying the same mechanisms, that could be applies before the merger in one county, and after the merger in another.

The Proposal on amendments the Directive 2017/1132 (so called "Company Law package"), based on the cross-border merger practice of more than ten years tried to solve the problems of lack of harmonization. The document, instead of given the full discretion to MS, established the exact mechanisms of protection (for example the compensational mechanism for minority shareholders), the terms of implementation of mechanisms, improving the rights of receiving the information or consultation(for the employees firths of all) etc.

However, it should be stressed out that the Directive 2019/2121, that was finally approved in November 2019, contains cut version of the improvements, that were proposed earlier (for example no extends of the protection on other then CBMD deceptive groups, no additional consultation by the independent expert and others) . This situation shows, that the European Union does not fasten the situation in order to provide maximum harmonization, but more choose the politics of minimum improvements in order not to put pressure on the Company law legislation of Member States and not to burden the cross border merger procedure, that should still be flexible and convenient to the companies, that enjoys the freedom of establishments.

From the research, that was held, the conclusions can be made that the present conditions, laid down in the acts, regulating the cross-border merger, are not enough to protect the dissenting groups and in present the EU by the lack of harmonization prioritize the flexibility of the companies. At the same time, notwithstanding the fact that Directive 2019/2121 does not implement all the proposals, offered in order for better protection of dissenting groups, the tendencies shows, that the cross border merger regulation is slowly coming to better level of harmonization

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Summary

In master thesis “Cross border merger in European union”, the author analyzes the procedure of the cross border merger in European Union in the scope of the freedom od establishment.

In the first part the implication of freedom of establishment on the cross border merger is analyzed.

In the second part the author analysis what can be considered as the merger, the evolution of regulation of mergers and the general mechanisms of the cross border merger.

The third part is dedicated to the protection of dissenting groups, creditors and minority shareholders.

The separate part is dedicated to the protection of employees.

All regulation regarding the protection of separate group are compared to the provision of new Directive and the previously applied Directive.