PART I

EC rules on cross-border mergers

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Community rules applicable to cross-border mergers

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I Introduction

1 Purpose

1. Mergers between companies situated in different Member States are difficult. In certain jurisdictions, it is unclear whether a cross-border merger is even possible, especially if the company created through the merger will have its registered or head office in another state.

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (the 'Cross-border Merger Directive' or the 'Dir.')[1] is intended to facilitate this type of merger by providing procedural rules. A copy of the Directive can be found in Annex I of this book.

The Cross-border Merger Directive does not affect the applicable provisions of national law. Thus, each company taking part in a cross-border merger remains subject to the provisions and formalities of national law which would apply in the case of a purely domestic merger.[2] However, these national rules should be largely harmonised thanks to transposition of the Third Council Directive (78/855/EEC) of 9 October 1978 concerning mergers of public limited liability companies (the 'Domestic Merger Directive').[3]

2 History

2. The Cross-border Merger Directive is based on a proposal by the European Commission of 18 November 2003 for a directive on cross-border mergers of companies with share capital.[4] In its Explanatory Memorandum, the Commission explains that European companies have been requesting for some time a legal instrument which will enable them to carry out cross-border mergers.

A first proposal for a directive facilitating cross-border mergers was adopted by the Commission on 14 December 1984.[5] This proposal was subsequently discussed in the European Parliament but the issue of employee participation in the decision-making process of the companies participating in the merger proved to be problematic. A report was prepared and presented to the European Parliament on 21 October 1987, but the Parliament was never able to reach an agreement on it. The adoption of a statutory framework for employee information and participation in the establishment of a European company ('SE') finally allowed the deadlock with respect to employee participation in

1 *Official Journal* L 310 of 26 October 2005.
2 Third recital to the Cross-border Merger Directive.
3 *Official Journal* L 295 of 20 October 1978.
4 COM (2003) 703 final.
5 *Official Journal* C 23 of 25 January 1985.

cross-border mergers to be broken by referring to the rules applicable to the formation of an SE by merger.[6]

The Economic and Social Committee formulated its opinion on the proposed directive on cross-border mergers on 28 April 2004.[7] Based on a report of its Committee on Legal Affairs of 25 April 2005,[8] the European Parliament approved certain amendments to the proposal on 10 May 2005 and sent the amended proposal back to the European Commission for finalisation.[9] The Commission accepted several of these amendments and incorporated them into the final draft of the Directive.

II Application

3. The deadline for transposition of the Cross-border Merger Directive into national law by the Member States was 15 December 2007 (Art. 19 Dir.).

Most Member States were late in enacting implementing legislation, and some have yet to do so. Currently, all Member States have transposed the Cross-border Merger Directive.

The Cross-border Merger Directive applies to the member countries of the European Economic Area (EEA), i.e. the EU Member States plus Norway, Iceland and Liechtenstein.[10] Therefore, all references in this report to the European Union or its Member States should be construed to include these three EEA countries as well, unless specified otherwise.

III Scope

1 General

4. The Cross-border Merger Directive applies to cross-border mergers of limited liability companies formed in accordance with the law of an EU or EEA Member State and which have their registered office, central administration or principal place of business in the European Economic Area. A merger is considered cross-border if at least two of the participating companies are governed by the laws of different Member States (Art. 1 Dir.). Consequently, the Directive does not apply to mergers between companies from the same

6 Art. 16 Dir.; see the Opinion of 28 April 2004 of the Economic and Social Committee, no 3.3.2; for a discussion of the rules applicable to the SE, see P. François and J. Hick, 'Employee Involvement: Rights and Obligations' in *The European Company*, D. Van Gerven and P. Storm (eds.), Cambridge University Press, vol. I, 2006, 77 *et seq.*

7 *Official Journal* C 117 of 30 April 2004.

8 A6–0089/2005 final.

9 *Official Journal* C 92 of 20 April 2006.

10 Further to the EEA Joint Committee's Decision of 22 September 2006, amending Annex XXII (Company Law) to the EEA Agreement (*Official Journal* L 333 of 30 November 2006).

Member State. Nor does it apply to a cross-border merger between a company established in the EEA and one governed by the laws of a non-EEA country.

In general, a company's central administration is considered to be its head office for purposes of applying the so-called real seat (*siège réel*) theory, which holds that a legal entity is governed by the law of the country where its head office is located. The terms 'head office' and 'central administration' are used interchangeably in the Community regulations and directives on company law,[11] in accordance with the European Court of Justice's case law. [12] The reference to the principal place of business being in the European Economic Area therefore seems redundant.

5. The Cross-border Merger Directive is intended to regulate mergers between all limited liability companies, regardless of their corporate form. The scope of the Cross-border Merger Directive is broader than that of the Domestic Merger Directive, which sets forth uniform rules for purely domestic mergers of public limited liability companies. When implementing the Domestic Merger Directive, several Member States extended the scope of the rules set forth therein to other corporate forms.

Limited liability companies include the companies listed in Article 1 of the First Company Law Directive (68/151/EEC) of 9 March 1968 (Art. 2(1)(a) Dir.).[13] A list of qualifying companies in each Member State can be found in Annex II of this book.

Limited liability companies also include companies with share capital and legal personality which possess separate assets that serve to cover their liabilities and which are furthermore subject to guarantees provided for by national law, such as those described in the First Company Law Directive to protect the interests of shareholders and others (Art. 2(1)(b) Dir.).[14] This extension covers all companies with share capital whose partners or shareholders may be held liable only up to the value of their subscriptions or contributions, as represented by their shareholdings, provided these companies are subject to the provisions of national law implementing the First Company Law Directive. In other words, the term 'limited liability company' includes not only companies that take the corporate forms mentioned in Article 1 of the First Company Law Directive but also other companies, to the extent the rules set forth in the

11 In Regulation No 2137/85 of 25 July 1985 on the European economic interest grouping, the term 'head office' is defined as the place of central administration (Art. 4). The English-language version of Regulation No 2157/2001 of 8 October 2001 on the European company uses the term 'head office' (Art. 2), while the term '*administration centrale*' is used in the French version. The term head office is also used in Regulation No 1435/2003 of 22 July 2003 on the European Cooperative Society (Art. 2).

12 ECJ, *Daily Mail*, 27 September 1988, *ECR*, 1988, 5483.

13 *Official Journal* L 65 of 14 March 1968.

14 The English version refers to the protection of 'members'. The French version refers to '*associés*' and the German version to '*Gesellschafter*', i.e. shareholders or partners, which is a better term to designate the holders of shares in such a company.

First Company Law Directive apply to these companies. These rules pertain to publication requirements, the validity of undertakings by a company in formation, the (un)enforceability of restrictions in the articles of association and the declaration of nullity of a company by the courts. It seems that the Cross-border Merger Directive is intended to apply to all companies with limited liability which are subject to a similar legal framework throughout the European Economic Area that provides sufficient protection for third parties when dealing with such companies.

The ultimate goal is indeed to extend the Cross-border Merger Directive to all small and medium-sized enterprises ('SMEs') that are not interested in forming an SE.[15] In the Community legislature's view, the SE is a form reserved for larger companies, which should be encouraged to create an SE when consolidating. The reality is, of course, more complex in that some SMEs may wish to set up an SE while larger companies may prefer merging rather than forming an SE.

The Member States may extend their rules of national law implementing the Cross-border Merger Directive to other corporate forms, such as companies with unlimited liability. However, in this case, these companies will only be entitled to benefit from the merger *ipso jure* if the national law of the Member States where the other companies participating in the merger are established so allows.

6. The Cross-border Merger Directive is intended to authorise cross-border mergers without liquidation and the automatic transfer of assets and liabilities to the surviving or newly formed company.

Only companies that qualify as limited liability companies, as defined above, and that merge in accordance with the conditions and requirements of the Cross-border Merger Directive can benefit from the above rule. Furthermore, as explained below, such companies will only be entitled to apply the Cross-border Merger Directive if they are permitted to merge by national law (see no 13 of this chapter).

2 Excluded companies and mergers

7. A Member State may decide not to apply the Cross-border Merger Directive to cross-border mergers involving a cooperative, even if that cooperative qualifies as a limited liability company as described above (Art. 3(2) Dir.). In this case, the cooperative shall still be entitled to participate in a merger to form a European cooperative society in accordance with the rules laid down in Council Regulation No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society ('SCE').[16]

15 Explanatory Memorandum to the proposal for a directive, p. 3; Opinion of 28 April 2004 of the Economic and Social Committee, no 3.2.

16 *Official Journal* L 207 of 18 August 2003. A corrigendum has been published in the *Official Journal* (L 049 of 17 February 2007). For a discussion of the rules applicable to the SCE, see D. Van Gerven, 'Provisions of Community Law Applicable to the European Cooperative

The Cross-border Merger Directive does not define cooperatives. In its communication of 23 February 2004 on cooperative societies in Europe, the European Commission defined cooperatives as entities which

> [o]perate in the interests of their members, who are at the same time users, and (…) not managed in the interests of outside investors. Profits are received by members in proportion to their businesses with the co-operative, and reserves and assets are commonly held, non-distributable and dedicated to the common interests of members. Because personal links among members are in principle strong and important, new membership is subject to approval while voting rights are not necessarily proportional to shareholdings (one man one vote). Resignation entitles the member to repayment of his part and implies reduction of the capital.[17]

The significance of characterisation as a cooperative varies greatly from one Member State to another. In some countries, cooperatives operate as professional associations, providing services solely to their members, while in others they have evolved into commercial companies that present an alternative to other corporate forms.

8. The Cross-border Merger Directive does not apply to cross-border mergers which involve a company whose corporate purpose is the collective investment of capital invested by the public and which operates on the principle of risk-spreading and whose units may be, at the holder's request, purchased or redeemed, directly or indirectly, out of that company's assets (Art. 3(3) Dir.). In this respect, actions taken by the company to ensure that the market value of its units does not vary significantly from its net asset value shall be regarded as a repurchase or redemption.

Such companies are governed by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended.

9. Finally, the Cross-border Merger Directive does not apply to mergers to create a European company (SE) or a European cooperative society (SCE).[18] In this case, the merger will be governed by the rules laid down either in Council Regulation No 2157/2001 of 8 October 2001 (the 'SE Regulation')[19] or in Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (the 'SCE Regulation').[20]

Society' in *The European Cooperative Society*, D. Van Gerven and P. Storm (eds.), Cambridge University Press, 2010, to be published.

17 See also the recitals to of Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (*Official Journal* L 207 of 18 August 2003).

18 Art. 18 of the SE Regulation and Art. 20 of the SCE Regulation.

19 *Official Journal* L 294 of 10 November 2001.

20 For a discussion of the formation of an SE by merger, see D. Van Gerven and P. Storm (eds.), *The European Company*, Cambridge University Press, vol. I, 2006, and vol. II, 2008. For a

IV Definition of a merger and conditions

1 Definition

10. The Cross-border Merger Directive distinguishes three types of mergers: (i) a merger whereby one participating company absorbs the other participating companies; (ii) a merger whereby all participating companies cease to exist and a new company is formed; and (iii) a merger of a subsidiary into its parent company (Art. 2(2) Dir.). The latter type of merger can be realised by means of a simplified procedure in which no new shares must be issued by the parent company (see nos 39 and 40 of this chapter).

11. With respect to the first two types of mergers, the Cross-border Merger Directive regulates mergers whereby all the assets and liabilities of the participating companies are transferred to the surviving company in return for the issuance to shareholders of securities or shares representing the capital of the surviving company and a cash payment which may not exceed 10 per cent of the nominal value of the shares or, in the absence thereof, the accounting par value of the securities or shares (Art. 2(2)(a) and (b) Dir.). The term 'accounting par value' is not defined and must be determined in accordance with national law but, in general, should equal the amount obtained by dividing the share capital by the number of shares.

The reference to securities and shares representing capital is liable to cause confusion. It appears from the French version of the Cross-border Merger Directive[21] that the Community legislature considers both to represent capital. The term 'securities' (*titres*) seems to refer to freely transferable financial instruments, while 'shares' (*parts sociales*) are identified by the shareholder's name in a register or otherwise.

If the cash payment exceeds 10 per cent of the nominal value or, in the absence thereof, the accounting par value of the securities or shares representing capital, the merger can only benefit from the rules set forth in the Cross-border Merger Directive if at least one of the Member States concerned allows such a cash payment (Art. 3(1) Dir.). In this case, the merger will not benefit from the tax neutrality provided for by Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers (as amended by Directive 2005/19/EC of 17 February 2005).[22]

12. In all types of mergers covered by the Cross-border Merger Directive, the assets and liabilities will be considered transferred on the date of dissolution without liquidation of the company. This seems to imply that a company which

discussion of the formation of an SCE by merger, see Van Gerven and Storm, *The European Cooperative Society.*

21 The French version refers to '*titres ou de parts représentatifs du capital social*', which confirms that both securities and shares represent capital.

22 See Chapter 3 of this book.

has already been dissolved and is in liquidation cannot participate in a cross-border merger. This is an important difference compared to domestic mergers. Indeed, the Third Council Directive of 9 October 1978 concerning mergers of public limited liability companies explicitly authorises the Member States to permit companies in liquidation to participate in a domestic merger, provided the company has not yet begun to distribute its assets to shareholders.[23]

2 Conditions

13. Cross-border mergers governed by the Cross-border Merger Directive are subject to the applicable provisions of national law on mergers, unless the Directive provides otherwise. This fact is very significant.

Firstly, a cross-border merger in accordance with the Cross-border Merger Directive is only possible between companies that are entitled to merge under applicable national law (Art. 4(1)(a) Dir.).

Secondly, the companies participating in the merger must comply with the provisions and formalities of national law to which they are subject (Art. 4(1)(b) Dir.), including those relating to the decision-making process for a merger and, taking into account the cross-border nature of the merger, the protection of creditors, debenture holders, the holders of securities or shares and employees (Art. 4(2) Dir.). In this respect, national law may not introduce restrictions on freedom of establishment or on the free movement of capital unless these are justified in light of the European Court of Justice's case law, in particular by requirements in the general interest, and are necessary for, and proportionate to, achieving these requirements.[24]

The foregoing also implies that special legislation applicable to specific types of activities must be observed, such as Community and national legislation regulating credit intermediaries and other financial undertakings.[25]

In order to determine which national rules apply to each merging company, the Cross-border Merger Directive refers to the law to which the company is subject. In this way, the Directive avoids taking a position on the question of whether a company is governed by the law of the country where its registered office is located or of the country where its head office or principal place of business is situated. The head office is the place where the company is effectively managed and controlled, the place where its central management and administration are located.[26] Consequently, the law to which a company is subject will depend on national conflict-of-law rules. It is thus possible for a company to be subject to and governed by two sets of laws, i.e. if it has its registered office in a Member State which refers to the incorporation theory to

23 Arts. 3(2) and 4(2) Domestic Merger Directive.
24 Third recital to the Cross-border Merger Directive.
25 *Ibid*., tenth recital.
26 ECJ, 27 September 1988, *ECR*, 1988, 5483.

determine the applicable law and its principal place of business in a Member State which applies the head office theory.

14. The Member States can adopt legislation designed to ensure appropriate protection for minority shareholders who oppose a cross-border merger (Art. 4(2) Dir.; see no 28 of this chapter).

3 Opposition by national authorities

15. The national rules of a Member State that allows its national authorities to oppose a domestic merger on grounds of public interest will also apply to cross-border mergers if at least one of the merging companies is subject to the law of that Member State (Art. 4(1)(b) Dir.). The concept of 'public interest' should be interpreted in accordance with applicable national law.

The national authorities can also oppose the formation of an SE or SCE by merger on grounds of public interest.[27] However, the national authorities cannot oppose a cross-border merger on grounds of public interest to the extent the merger is subject to scrutiny as a concentration under the EC Merger Regulation.[28] In this case, the European competition authorities will be competent, and the rules contained in the EC Merger Regulation will apply. Indeed, characterisation as a cross-border merger governed by the Cross-border Merger Directive is without prejudice to application of the rules on the control of concentrations set forth in the EC Merger Regulation and in national competition law.[29]

V Consequences of a merger

16. As a result of a cross-border merger governed by the Cross-border Merger Directive, the disappearing companies will be dissolved but not liquidated (Art. 2(2)(a) and (b) Dir.). Indeed, the assets and liabilities of these companies will be transferred without liquidation to the surviving company in the state in which they are located. This will occur by operation of law on this date. National law cannot provide otherwise.

In the event of a parent–subsidiary merger, all assets and liabilities of the subsidiary will be transferred without liquidation to the parent company holding all of its securities or shares representing capital. The subsidiary will then be dissolved but not liquidated (Art. 2(2)(c) Dir.).

The above-mentioned provisions regarding the consequences of a cross-border merger refer only to mergers between limited liability companies with

27 Art. 19 SE Regulation and Art. 21 SCE Regulation.

28 Art. 4(1)(b) of the Directive in conjunction with Art. 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (*Official Journal* L 24 of 29 January 2004).

29 Ninth recital to the Cross-border Merger Directive.