

THE EUROPEAN DIRECTIVE ON CROSS-BORDER MERGERS:
AN INTERNATIONAL MODEL?

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Abstract: In 2005 the European Union adopted a Directive on Cross-Border Mergers, which Member States have to implement until 15 December 2007. This Directive is not only interesting for European lawyers because it addresses general problems of cross-border mergers and could therefore also become an international model for its regulation. The first part of my article outlines possible solutions for the conflict of different laws that can arise with cross-border mergers. The second part deals with the existing law on cross-border mergers in the Member States of the European Union, which, in many situations, can make cross-border mergers difficult or even impossible. As the new European Directive was therefore necessary, its history, its applicability, its basic regulatory approach, and its compromise on employees' co-determination are discussed in the third part. The fourth part addresses the likely impact of the Directive, in particular, its effect on regulatory competition. Moreover, possible alternatives and obstacles to the new Directive are examined. Finally, I return to the question of how far and in what ways the new European law on cross-border mergers could be seen as an international model.

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MATHIAS M. SIEMS

Cross-border mergers are becoming more frequent again.¹ Yet, in many legal systems they are not explicitly regulated. For the European Union this is about to change. The European Commission proposed a draft Directive on cross-border mergers in November 2003,² and after its controversial aspects had been resolved,³ it was approved by the European Parliament and the Council in 2005 and has to be implemented by the EU Member States until 15 December 2007.⁴ Although the freedom of establishment (Art. 43, 48 of the EC Treaty) is the basis of the directive,⁵ this directive is not only interesting for European lawyers. The directive addresses general problems of cross-border mergers and could therefore even become an international model for the regulation of mergers.

The first part of this article outlines possible solutions for the conflict of laws that can arise in the context of mergers. The second part deals with the existing law on cross-border mergers in the Member States of the European Union, which, in many situations, can make cross-border mergers difficult or even impossible. As the new European directive is therefore necessary, its history, its applicability, its basic regulatory approach and its compromise on employee co-determination are discussed in the third part. The fourth part addresses the likely impact of the directive, in particular its effect on regulatory competition. Moreover, possible alternatives and obstacles to the new directive are examined. Finally, I will return to the question of how far and in what ways the new European law could be viewed as an international model.

¹ For empirical data see, e.g., Mergers and Competition Policy in Europe, in EEAG Report (2006), available at http://www.ifo.de/DocCIDL/eeag_report_chap5_2006.pdf

² Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital, COM (03) 703 final (November 2003) [hereinafter Proposal].

³ See discussion *infra* Part III.A.

⁴ Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies 2005 O.J. (L 310) 1 [hereinafter Directive 2005/56/EC].

⁵ See discussion *infra* Part III.A.

I. CONFLICT OF LAWS AND CROSS-BORDER MERGERS

When a conflict of corporate laws arises, the method for determining the nationality of the corporation at issue, be it by reference to the statutory seat (state of incorporation) or real seat (state where the corporation is headquartered), can be a vital determinant in the outcome of a dispute.⁶ The *168 question is equally significant in the context of cross-border mergers. The classification of a corporation as foreign, and thus the term cross-border merger, depends on the method by which the nationality of a corporation is ascertained. Furthermore, cross-border mergers might enable a corporation to evade its domestic “real seat doctrine.” By incorporating a new corporation in a statutory seat jurisdiction, a subsequent merger between the existing corporation and this new corporation would make it possible for the corporation to choose a new legal system.⁷

However, the relationship between conflict of laws and cross-border mergers is not limited to the debate about the differences between the statutory seat and the real seat doctrine. Another critical question pertains to the determination of the law that governs the cross-border merger.

There are several possible ways in which laws can address the merger of a domestic with a foreign corporation: it could be that the easiest solution is that either the domestic or the foreign corporate law is applicable to a certain merger. On the one hand, this could lead to the application of the law of the acquiring or new corporation,⁸ because after a merger it will be this corporation that will do business in the future. On the other hand, it could also be said that the corporate law of the corporation that is going to disappear is most affected, and that therefore the law of the acquired corporation has to be applicable. When one examines these alternative arguments, however, it becomes clear that these “single theories” have serious shortcomings. The former disregards the law of the corporation that disappears, whereas the latter disregards the fact that the cross-border merger cannot be justified without taking into account the law of the acquiring corporation. Furthermore, the latter does not work if there are three or more corporations, because, for instance, they might wish to merge by forming a new corporation.

It is therefore commonly assumed that a mixed approach is most appropriate.⁹ The

⁶ See, e.g., Matthew G. Clarke, *The Conflicts of Law Dimension*, in *Corporate Law: The European Dimension* 161 (Celia A. Trenton ed., 1991); Robert R. Drury, *The Recognition and Regulation of Foreign Corporations*, 57 *Cambridge L.J.* 165 (1998); Richard M. Buxbaum & Klaus J. Hopt, *Legal Harmonization and the Business Enterprise: Corporate and Capital Market Law Harmonization Policy in Europe and USA* 226-229 (1988).

⁷ See also discussion *infra* Part IV.A.

⁸ Mergers can be mergers by way of absorption or mergers by way of incorporation of a new corporation; see *infra* Part III. A.

⁹ See Peter Kindler, *Internationales Handels- und Gesellschaftsrecht in Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 11, paras. 655-675 (3rd ed., 1999); Silja Maul et. al., *Der Richtlinien-vorschlag zur grenzüberschreitenden Verschmelzung von Kapitalgesellschaften*, 58 *Betriebsberater* 2633,

details of this solution, however, are problematic. Since the laws of two countries are affected, a comprehensive combination of both laws might be preferable. However, this can lead to inconsistencies. For that reason, it could be said that the more demanding of the two laws should be applicable. Yet, determining which law is more demanding can be a difficult task. It may be the case that the laws use different regulatory techniques, for instance, in protecting shareholders, and that therefore an objective assessment of the quality of the law is not possible. Consequently, it could be argued that the problem is not to be solved by the rules on conflict of laws, but rather that the substantive provisions of the corporate law on cross-border mergers have to be harmonized.¹⁰ In that case, there would be no need to determine which law is applicable, because the results would be identical. However, once again, this solution could lead to more problems than it might solve. The law on cross-border mergers is closely linked to other fields of corporate law. For instance, ***169** mergers typically require approval at general meetings¹¹ and address questions of creditor protection,¹² so all requirements that belong to these sub-areas of law would also have to be embraced. Furthermore, it is too far-reaching to unify everything that relates to cross-border mergers. To some extent, there is no need to harmonize the substantive law, because it does not create any problems if, for instance, the rules governing the convening of the shareholders' meetings (at which the shareholders vote on the cross-border merger) remain different.

As a result, a mixed theory that distinguishes between different types of rules is the best solution.¹³ This would mean that, firstly, the requirements of a cross-border merger are dealt with by the law of each corporation, because it is for each legal system to decide if, and to what extent, cross-border mergers are allowed. Secondly, the rules of the procedure of a cross-border merger, such as the approval of the shareholders and the information provided for the employees, are also based on the law of each corporation. This can sometimes lead to the application of both of the laws, because, for instance, the contract for the cross-border merger has to fulfill the rules of both countries. Thirdly, the consequences of the merger require a differentiated approach. The dissolution of one corporation and the transfer of all of its assets and liabilities are to be decided by the law

2635-2636 (2003); Peter Behrens, Die Umstrukturierung von Unternehmen durch Sitzverlegung im Licht der Niederlassungsfreiheit im Europäischen Binnenmarkt (Art. 52 und 58 EWGV), 23 Zeitschrift für Unternehmens- und Gesellschaftsrecht [ZGR] 1, 13 (1994).

¹⁰ Cf. Behrens, *supra* note 9, at 23.

¹¹ See, e.g., Delaware General Corporation Law, §§ 251, 275; Third Council Directive 78/855/EEC of October 9, 1978 concerning mergers of public limited liability companies, 1978 O.J. (L 295) 36, art. 7; Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, The Evolution of Corporate Law, U. Pa. J. Int'l Econ. L. 751, 812 sqq (2002).

¹² This is particularly important, if a legal system requires minimum capital, see, Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, 1977 O.J. (L 26) 1.

¹³ See Kindler, *supra* note 9, at 661-675.

of the expiring corporation. However, further consequences might also have to be dealt with by the law of the new or surviving corporation, because only this corporation will do business in the future.

In general, the new European directive follows this mixed approach.¹⁴ However, it is also clear that the rules for cross-border mergers do not only concern these technical problems. As will be shown in the third part of this article, highly political questions, in particular the protection of labor by corporate governance, are also decisive. Furthermore, the European directive responds to existing problems of cross-border mergers in the EU Member States.

II. CROSS-BORDER MERGER LAW IN THE EU MEMBER STATES

There are different methods by which two corporations can engage in a cross-border merger. The following survey of the law of the EU Member States will focus on legal (or direct) mergers,¹⁵ because the directive on cross-border mergers only deals with these kind of mergers. The term legal merger means that there are (1) at least two corporations, (2) a legal transfer of all assets and liabilities of at least one of the corporations, (3) the winding up of at least one of them without liquidation, and (4) one remaining corporation (either a newly established corporation or one of the previous corporations).¹⁶

Regarding legal (or direct) mergers, there are three different types of Member States: Member States where cross-border mergers are ***170** legally permissible, Member States with cross-border merger difficulties and Member States where cross-border mergers are not directly permissible.¹⁷

Examples of the first group are France, Spain and Italy. In the case of a merger by way of absorption, these countries accept that a domestic corporation may be either the acquiring or the acquired corporation. In case of a merger by way of the incorporation of a new corporation, the new corporation can also be, for instance, French, Spanish or Italian. This, however, does not overcome problems that stem from the law of the foreign corporation. For instance, the Spanish registry requests a certificate issued by the registry of the acquired corporation stating that the target could be dissolved without

¹⁴ See discussion *infra* Part III.

¹⁵ However, with respect to the impact of this directive, the fourth part of this article considers whether alternative measures could provide functional substitutes. See discussion *infra* Part IV.B.

¹⁶ See, e.g., Fédération des Experts Comptables Européens, Fee Survey on Business Combinations 6 (March 2002), available at <http://www.iasplus.com/resource/feebcrpt.pdf>.

¹⁷ See generally Anne-Sophie Cornette de Saint-Cyr, Cross-Border Mergers, 13 Int'l Company and Commercial L. Rev. 343 (2002).

registration.¹⁸

This legal uncertainty increases if there are cross-border difficulties in the law of the other country involved. In a number of Member States, such as Belgium and the Netherlands, there are no specific provisions on cross-border mergers.¹⁹ As academics often disagree about its lawfulness, a direct cross-border merger would be risky, and due to the lack of cases, there is also no clear judicial authority to allow or forbid cross-border mergers. Furthermore, some countries, such as the U.K., distinguish between different kinds of mergers, while other countries, such as Luxembourg, only permit cross-border mergers if the domestic corporation will survive and will not be absorbed.²⁰

Finally, in some Member States, such as the Nordic Countries, Austria and Germany, cross-border mergers are not possible at all.²¹ This is particularly clear in German law, because the German Transformation Act (UmwG, Umwandlungsgesetz, § 1) states explicitly that it is only applicable if both (or all) corporations are domiciled in Germany. However, German academics have suggested that, due to the freedom of establishment (art. 43 and 48 of the EC Treaty), cross-border mergers have to be permitted in the European Union.²² In September 2003 a German district court submitted this question for a preliminary ruling to the European Court of Justice.²³ The case concerned the absorption of a foreign corporation by a German corporation. Since the German corporation would not lose or change its legal capacity, there is indeed no good justification for such a prohibition, and, consequently, in December 2006 the European of Justice ruled that this merger had to be allowed.²⁴ However, this decision does not render the European cross-border merger directive redundant. Since a court cannot establish detailed rules on cross-border mergers, the new directive is still necessary.

¹⁸ Id. at 344.

¹⁹ Id. at 346-47.

²⁰ Id. at 347-48.

²¹ Cf. Kindler, *supra* note 9, paras. 676-684; Commission proposal for a Directive on cross-border mergers - frequently asked questions, MEMO/03/233 (November 18, 2003).

²² Herbert Kronke, *Deutsches Gesellschaftsrecht und grenzüberschreitende Strukturänderungen*, 23 ZGR 26 (1994).

²³ LG Koblenz, September 16, 2003, 4 HK.T 1/03. See also the comment by Peter Jung, 2 *Gemeineuropäisches Privatrecht [GPR]* 87 (2003/2004).

²⁴ SEVIC Systems AG, Case C-411/03, 2005 E.C.R. I-10805; for comments see Clemens Peter Schindler, *Cross-Border Mergers in Europe – Company Law is catching up*, *European Company and Financial Law Review* 102 (2006); Mathias Siems, *SEVIC: Beyond Cross-Border Mergers*, forthcoming in *European Business Organization Law Review* (2007).

III. THE EUROPEAN DIRECTIVE ON CROSS-BORDER MERGERS

*171 The directive on cross-border mergers cannot be understood without considering its long and controversial history. I am therefore first going to provide a historical sketch. In the following three sections, I will describe and assess the provisions that pertain to the applicability of the directive, to its main regulatory model and to its compromise on employee co-determination.

A. A Historical Search

The new directive on cross-border mergers is the result of an extensive discussion. The first draft of common rules for cross-border mergers in the EU emerged in 1972 in a convention based on art. 220 (now art. 293) of the EC Treaty.²⁵ The main discussion concerned employee participation in the boards of corporations. Some Member States, in particular Germany, feared that cross-border mergers could be used to circumvent their rules on employee co-determination – a problem that did not go away in the following years. However, ten years later the European Commission proposed a directive instead of a convention. This was possible because Article 220 of the EC Treaty does not exclude harmonization by directives.²⁶ The legal form of a directive was now also regarded as more appropriate. Even if agreement were to be reached on the convention, there would be lengthy delays pending its ratification.²⁷ Furthermore, by this point in time the 1978 directive had harmonized the law on national mergers of public limited liability corporations.²⁸ This directive served as a model for the Commission's proposal for a directive on cross-border mergers in December 1984.²⁹ Several details, such as the definition of mergers, the terms of mergers and their publication, resembled the 1978 directive.³⁰ Yet, there was still the problem of differences in employee co-determination, which does not arise in the case of national mergers. In this respect, the Commission's proposal provided that Member States could refuse to apply the directive

²⁵ Bull. E.C. Supp. 13-1973.

²⁶ Cf. Sorika Pluskat, Der neue Entwurf für eine europäische Verschmelzungsrichtlinie: Transnationale Fusionen in Europa damit in greifbare Nähe gerückt?, 1 Europäisches Wirtschafts- & Steuerrecht (EWS) 1, 2 (2004).

²⁷ Cf. Jane Welsh, Tenth Draft Directive on Cross-Border Mergers, 7 Company Lawyer 69 (1986).

²⁸ Council Directive 78/855/EEC, 1978 O.J. (L 295) 36 (concerning mergers of public limited liability companies).

²⁹ Commission of the European Communities, Proposal for a Tenth Council Directive based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies, COM (84) 727 final (January 1985).

³⁰ See also discussion *infra* Part III.C. (with respect to the new directive).

if the domestic corporation were becoming part of a foreign corporation in which there was no employee participation (art. 1(3) of the 1984 draft directive). This veto option, however, was only put forward as a temporary solution, because it was linked to the plans of a directive concerning the structure and management of public limited corporations.³¹ If the substantive structure (including the question of employee co-determination) of public corporations had been similar, no exception from the applicability of the cross-border mergers directive would have been necessary. In the end, both of the directives were not approved by the European Parliament because no agreement could be reached on employee participation in corporate decision-making bodies. For some countries it was not acceptable that employee participation would become compulsory, whereas others feared that this participation would be circumvented by means of cross-border mergers.

In the following years academics and expert groups continued to demand a directive on cross-border mergers.³² The breakthrough, however, was the new law on a European Company – “Societas Europaea” or “SE.” Building on the Davignon report of May 1997, an agreement on the establishment of a European Company was reached at the summit in Nice in December 2000. The SE is the functional equivalent to a merger between two public corporations.³³ Therefore, there was originally also an intensive debate on how the problem of employee co-determination was to be solved for the law of the SE. The compromise is now as follows: if two corporations merge to form an SE, and the law of only one of them embraces the concept of employee co-determination, managers and employee representatives are supposed to negotiate mutually agreed arrangements. If this is not successful, the standard principles for employee participation apply.³⁴ A similar approach was also suggested for the new cross-border merger directive, which the Commission proposed in November 2003, and which was eventually successful in 2005.³⁵

³¹ For drafts of this Fifth Directive see, Commission of the European Communities, Proposal for a Fifth Directive on the coordination of safeguards which for the protection of the interests of members and outsiders, are required by Member States of companies within the meaning of Article 59 paragraph 2 with respect to company structure and to the power and responsibilities of company boards, COM (72) 887 final (October 1972); Commission of the European Communities, Amended proposal for a Fifth Directive founded on Article 54(3)(g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs, COM (83) 185 final (August 1983); Commission of the European Communities, Second amendment to the proposal for a Fifth Council Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of the organs; COM (90) 629 final (November 1991).

³² Cf. Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe 101 (Nov. 4, 2002), available at http://ec.europa.eu/internal_market/company/modern/index_en.htm.

³³ See discussion *infra* Part IV.B.

³⁴ See discussion *infra* Part III.D.

³⁵ See *supra* notes 2 and 4.

B. The Applicability of the Directive

The first requirement for the applicability of the directive is that there must be a “merger.” A “merger” can be a merger by acquisition, a merger by creation of a new corporation or a merger by transfer of share capital to a holding corporation (arts. 1, 2(2)(a)-(c)). These provisions are almost identical to the 1978 directive on national mergers³⁶ and therefore pose no problems.

Secondly, the merger has to be a “cross-border merger.” This requires that at least two of the corporations are governed by the laws of different Member States (art. 1). Since mergers by European and non-European corporations are not included, Member States may create different merger provisions for national, European and international mergers. This is, however, not recommendable. With respect to national and European mergers, the 1978 and 2005 directives lead to similar requirements for both types of mergers. As far as there is room for discretion, it is also not appropriate that Member States distinguish between these types of mergers. In the European Union, corporations should not be discriminated against because they merge with another European (but not domestic) corporation. With respect to international mergers, there can be reasons for why countries might be more cautious. If a corporation wants to use a merger as a means of circumventing its domestic law, the danger of regulatory arbitrage may justify restrictions. This should, however, not lead to a total ban on international mergers, because in the cases in which ***173** only the foreign corporation ceases to exist, there is no reason why the domestic regulator should not permit these mergers. Furthermore, the argument of “regulatory arbitrage” is not entirely conclusive. It could also be said that the possibility of international mergers would lead to a beneficial “regulatory competition,” which brings us back to the controversy between incorporation and real seat theory doctrine.³⁷ It is therefore likely that countries that follow the more liberal incorporation doctrine will not distinguish between national and international mergers.

Thirdly, the directive on cross-border mergers applies to all “companies with share capital,” “having legal personality” and “possessing separate assets” (arts. 1, 2(1)(b)). Furthermore, the new directive refers to the catalogue of another European Directive (arts. 1, 2(1)(a)).³⁸ In Article 1 of this directive the types of corporations are explicitly specified. However, it might be seen as a problem that the new directive is not limited to joint stock corporations, whereas the 1978 directive on national mergers excludes private limited corporations. The law on private limited corporations has been harmonized

³⁶ Cf. Directive 78/855/EEC, *supra* note 28, arts. 3 and 4.

³⁷ See *supra* note 6.

³⁸ Council Directive 681/51/EEC, 1968 O.J. (L 65) 8 (on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community).

to a significantly lesser extent than the law on joint stock corporations. The result, therefore, that in the law on private limited corporations the only harmonized “island” will be the rules on cross-border mergers, appears to be inconsistent. Nevertheless, I agree with the extensive scope of the new directive. Since the European Company (SE) already makes cross-border European corporations possible for joint stock corporations, the new directive is above all relevant for private limited corporations.³⁹ It is also important to note that neither in law nor in practice is the distinction between larger and smaller corporations identical in Europe.⁴⁰ Therefore, the incidental preference for joint stock corporations or private limited corporations must not be decisive for the applicability of the directive on cross-border takeovers. This corresponds, furthermore, to the freedom of establishment, which also embraces all kinds of corporations.⁴¹

C. The Regulatory Model of the Directive

***174** 1. The “basic principle”⁴² of the directive is that, in general, a cross-border merger shall be governed by the rules already applicable to domestic mergers (art. 4(1)).

This principle has several important consequences. The first implication is that cross-border mergers must now be permissible in the European Union. A Member State can no longer regulate only domestic mergers and thus make cross-border mergers impossible.⁴³ Secondly, this basic principle makes it clear that the directive does not follow the logic that from now on one unified law should govern cross-border mergers in the EU. Although this would eliminate all conflicts of different corporate laws for cross-border mergers,⁴⁴ unified law in the field of cross-border mergers is not necessary and would also contradict the principle of subsidiarity (art. 5 of the EC Treaty). Thirdly, the basic principle does not mean that coordination of domestic laws is not necessary at all. Since the applicability of two different laws may lead to an accumulation or lack of norms (“positive or negative conflict”), this principle is only applicable “save as otherwise provided in this Directive” (art. 4(1)). Thus, systematically, Article 4 is subordinate because the following provisions of the directive limit its scope. Fourthly, the basic principle is applicable to the question which types of companies can merge, to the merger formalities and to the provisions concerning the decision-making process relating to the

³⁹ See also discussion *infra* Part IV.B.

⁴⁰ See generally Marcus Lutter, *Limited Liability Companies and Private Companies*, in: *International Encyclopedia of Comparative Law*, Ch. 2 (Alfred Conard ed., 1998); *The European Private Company?* (Harm-Jan De Kluiver & Walter van Gerven eds., 1995); Mathias Siems, *Convergence in Shareholder Law*, Ch. 2 (2007, forthcoming).

⁴¹ Cf. Maul et. al., *supra* note 9, at 2635.

⁴² Proposal, *supra* note 2, at 3.

⁴³ See examples *supra* Part II.

⁴⁴ See discussion *supra* Part I.

merger and the protection of creditors, debenture holders and the holders of securities other than shares to which special rights are attached, as well as of employees as regards rights other than those governed by Article 16 (art. 4(1)(a),(b),(2)). This catalogue has to be understood in a wide sense. If there are no special provisions in the directive, the existing domestic rules have to step in. In general, it is therefore for the Member States to decide whether, for instance, shareholders should be granted an appraisal right because the merger will transform them into shareholders of a different and foreign corporation.⁴⁵ Furthermore, the domestic rules may also be harmonized by other directives, as in the case of the special safeguarding of employee rights in the event of transfers of undertakings.⁴⁶

2. The “other provisions” of the directive have the common rationale that they can be explained by the cross-border nature of the merger.⁴⁷

Most provisions of the directive tackle this aim by harmonizing the law on cross-border mergers in the EU. This harmonization often resembles existing rules in other directives and regulations of European law. Many provisions follow the 1978 directive on national mergers, which seeks to insure the protection of shareholders, creditors and employees by providing reliable *175 information.⁴⁸ Hence, Article 5 on the common draft terms of cross-border mergers, Article 6 on its publication, Article 8 on its examination by experts, Article 9 on its approval at general meetings, Article 13 on the publication of the completion of the merger, and Article 14 on the consequences of a merger, resemble largely the 1978 directive on national mergers.⁴⁹ Furthermore, some rules are modeled on the more recent law of the European Company (SE). The rules on the supervision procedure of cross-border mergers in Articles 10 and 11 and the irreversibility of a merger in Article 17 are based on the regulations of the SE.⁵⁰ In general, all these rules apply to the law of both of the Member States. The only exception is the rule on the consequences of a merger, because the transfer of all assets and liabilities and the

⁴⁵ Cf. Maul et. al., *supra* note 9, at 2639.

⁴⁶ Cf. Council Directive 2001/23/EC, 2001 O.J. (L 82) 16 (on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses); Council Directive 2002/14/EC, 2002 O.J. (L 80) 29 (establishing a general framework for informing and consulting employees in the European Community); Council Directive 94/45/EEC, 1994 O.J. (L 254) 64 and Council Directive 97/74/EC, 1998 O.J. (L 10) 22 (on the establishment of a European Works Council).

⁴⁷ See Proposal, *supra* note 2, at 3.

⁴⁸ Cf. Karl Riesenhuber, *Die Verschmelzungsrichtlinie: Basisrechtsakt für ein Europäisches Recht der Strukturmaßnahmen - Zum Schutz durch Information im Europäischen Gesellschaftsrecht*, *Neue Zeitschrift für Gesellschaftsrecht* [NZG] 15 (2004).

⁴⁹ Cf. Council Directive 78/855/EEC, *supra* note 9, arts. 5-7, 18-19. For similar provisions applying to the European Company see Council Regulation 2157/2001, 2001 O.J. (L 294) 1, arts. 18-34 (on the Statute for a European company). Art. 18 refers to Council Directive 78/855/EEC.

⁵⁰ Council Regulation 2157/2001, *supra* note 49, arts. 25-26, 30.

cessation of the corporate acquisition (art. 14(1)(a) and (c)) refer only to the law of this first corporation, whereas the issue of the creation of new shareholders of the acquiring corporation (art. 14(1)(b)) only concerns this second corporation.⁵¹

It is debatable how much discretion the Member States have in implementing these provisions. On the one hand it could be suggested that they have to be interpreted in a narrow sense: common rules for cross-border mergers are based on the reasoning that different rules could make these mergers impossible.⁵² This can also be supported by Recital 4 of the Directive which only indicates that the companies (but probably not the Member States) are free to agree on other items. This restriction also makes sense, because too much information could be counterproductive.⁵³ On the other hand, there is no need to deny any scope for discretion at all. Cross-border mergers, for instance, are not vitiated if the Member States have different provisions on the form of the common draft terms, which is not mentioned in Article 5 of the directive.⁵⁴ The particulars that have to be published according to Article 6(2) should be regarded as minimum standards. If the law of one of the corporations requires more extensive publication, neither the law of the other country nor the possibility of a cross-border merger as such are harmed.

3. Against the harmonization of the law on cross-border mergers two lines of criticism are conceivable but are ultimately not convincing.

Firstly, it has, once again, to be born in mind that the new cross-border merger directive is applicable not only to joint stock corporations but also to private limited corporations.⁵⁵ For this reason, it might appear to be surprising that the directive on domestic mergers and the regulation on the European Company (SE), which *176 pertain only to joint stock corporations, have partially been copied by this new directive. Furthermore, there are, for instance, in German merger law some provisions that distinguish between different kinds of corporations.⁵⁶ However, against a line of reasoning that would suggest that the cross-border merger directive is too demanding for private limited corporations, counterarguments can also be raised. It can be said that private limited corporations that merge with foreign corporations will be typically larger in size and more professional in kind than ordinary private limited corporations. Given this atypical character, it could be appropriate to apply the same rules as those for joint stock corporations. Furthermore, Member States have some discretion in deciding how the directive is go-

⁵¹ Corresponding provisions apply to a merger by formation of a new company. Directive 2005/56/EC, art. 11(2).

⁵² See discussion *supra* Part 1.

⁵³ Cf. Riesenhuber, *supra* note 48 at 20.

⁵⁴ Cf. Maul et al., *supra* note 9, at 2637.

⁵⁵ See discussion *supra* Part III.B.

⁵⁶ Umwandlungsgesetz (German Transformation Code) [UmwG] §§ 60-98.

ing to be implemented. This discretion should be therefore used in order to adapt the directive to the particularities of private limited corporations.

Secondly, instead of harmonizing the law on cross-border mergers, clear rules on conflict of laws might have been preferable. The problem of contradictory laws can often be solved by determining the legal system of one country.⁵⁷ In part, this has also been done by the directive on cross-border mergers. According to Article 8(2), a single expert report is sufficient for both corporations. Although this is similar to the directive on domestic mergers,⁵⁸ it is an innovation that an expert report from one Member State is also valid in another Member State. A second example is Article 12, which states that the law of the Member State to whose jurisdiction the corporation created by the merger is subject, shall determine the date on which the merger takes effect. Thirdly, in the case of the simplified procedure of a merger by transfer of share capital to a holding corporation, the reports are only necessary if one of the Member States requires them (art. 15(2)). Therefore, the chosen solution is that the stricter of the two laws is applicable.⁵⁹ Finally, Article 16 on employee co-determination can lead to the “de facto” applicability of a foreign law. Although the question of co-determination is ascertained by the rules of the new or surviving corporation, this law has to provide that the co-determination of the acquired corporation is maintained.⁶⁰ This last case is a consequence of the fact that harmonized rules on co-determination could not be agreed upon. For the other provisions, the different regulatory techniques can be understood in light of the fact that harmonization is mainly in line with the existing European laws and was therefore not controversial. Furthermore, harmonization can be justified by the need for legal certainty and the aim of creating a level playing field in the EU. By contrast to a situation in which a particular national merger law is applicable to cross-border mergers, unified rules offer a release from complex conflict-of-law questions, so that the issue of economic reasonableness is decisive in determining whether cross-border mergers should take place.

D. The Compromise on Employees Co-Determination

The long-enduring discussion on the participation of employees has eventually been resolved by reference to the statute and to the directive of the European Company (SE).⁶¹ The crucial provision of the directive on cross-border mergers is Article *177

⁵⁷ See discussion supra Part I.

⁵⁸ Council Directive 78/855/EEC, supra note 28, art. 10(1).

⁵⁹ See discussion supra Part I.

⁶⁰ See discussion infra Part III.D.

⁶¹ Council Regulation 2157/2001, supra note 49; Council Directive 2001/86/EC, 2001 O.J. (L 294) 22 (supplementing the Statute for a European company with regard to the involvement of employees); for

16: in the event that at least one of the merging corporations is operating under an employee participation system, and where the national law applicable to the corporation created by the merger does not impose the same level of employee participation, most of the provisions of the SE concerning co-determination are applicable. This means that a special negotiating body has to be established in order to find agreement on the arrangements for employee involvement between the parties.⁶² If these negotiations are not successful, a set of subsidiary standard rules is to be enforced to secure the participation of employees.⁶³ These standard rules apply if at least 1/3 of the total number of employees had been subject to co-determination before the merger.⁶⁴ The employees must have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body equal to the highest proportion of one of the merging corporations.⁶⁵ How this is implemented depends on the Member State in which the future corporation has its statutory seat. Furthermore, Member States also have the possibility of opting out of these standard rules. If, in this case, an agreement on arrangements for employee involvement cannot be achieved, a cross-border merger is not possible.⁶⁶

Although it is promising that a compromise has been found, I am not convinced that the new rules on employee co-determination for cross-border mergers present a good solution. *178 Firstly, the legislators of the Member States in which employee co-determination does not exist may have considerable problems implementing a special co-determination for corporations that are the product of a cross-border merger. For instance, it is questionable whether for one tier systems, participation in the one tier board or an internal distinction between management and control is necessary.⁶⁷ This is not the same problem that Member States without co-determination have to solve with respect to the SE. The SE, by virtue of its Community nature, is not subject to any existing national rules on compulsory participation in the Member State in which its registered office is situated, whereas the corporations created by a cross-border merger are corporations governed by the law of a Member State.⁶⁸ It is therefore probable that some Mem-

comments, see Mathias M. Siems, *The Impact of the European Company (SE) on Legal Culture*, 30 *Eur. L. Rev.* 431-442 (2005).

⁶² Council Regulation 2157/01, *supra* note 49, art. 12(2)-(4); Council Directive 2001/86/EC, *supra* note 61, arts. 3-6.

⁶³ Council Directive 2001/86/EC, *supra* note 61, art. 7.

⁶⁴ Directive 2005/56/EC, art. 16(3)(e). This is different in the Council Directive 2001/86/EC, *supra* note 61, art. 7(2)(b) (25 %).

⁶⁵ Council Directive 2001/86/EC, *supra* note 61, annex 3(b).

⁶⁶ Council Regulation 2157/2001, *supra* note 49, art. 12(3); Council Directive 2001/86/EC, *supra* note 61, art. 7(3).

⁶⁷ Martin Henssler, *Unternehmerische Mitbestimmung in der Societas Europaea - Neue Denkanstöße für die "Corporate Governance"-Diskussion*, in *Festschrift für Peter Ulmer*, 193, 200-207 (2003).

⁶⁸ Proposal, *supra* note 2, at 4; Pluskat, *supra* note 26, at 4.

ber States will opt out of the subsidiary standard rules.⁶⁹ Since voluntary arrangements are unlikely if there is no other pressure to apply the standard rules, cross-border mergers will therefore be hindered and thus, the purpose of the new directive is impaired.

Secondly, the rules on co-determination can reduce the effectiveness of the new directive. This problem is also addressed by the proposal of the Commission. One frequently asked question is whether “the proposed directive [would] not lead to a situation where companies would be reluctant to merge with those from other Member States where high levels of worker participation are required, as the merged company would probably have to apply those rules.”⁷⁰ The Commission has responded in the negative, offering three reasons: that employee participation could also contribute to the success of a corporation; that the new possibility of cross-border mergers would in any case be “a big step forward”; and that negotiated arrangements would be paramount. However, this outlook is perhaps too optimistic. With respect to negotiations, parties are usually reluctant to agree on more or less than the law provides for if negotiations are fruitless. Furthermore, management and shareholders⁷¹ are, in practice, not enthusiastic supporters of the idea that employee participation makes their corporation more successful. Rather it is the case that they are reluctant to share their powers with employees. Finally, it has to be seen that the direct cross-border merger, as regulated by the new directive, is not the only way of merging two corporations. If one corporation is dissolved and all of its assets are transferred to the other corporation, there is no protection of employee co-determination at all. In order to assess the impact of the directive, it is therefore necessary to extend the analysis to other methods of cooperation.⁷²

IV. THE IMPACT OF THE EUROPEAN DIRECTIVE ON CROSS-BORDER MERGERS

In the Commission’s comments on the directive, its economic effects are only mentioned briefly. It is said that “the key provisions of the proposal should *179 allow companies which wish to carry out a cross-border merger to benefit from substantially reduced legal and economic requirements, which are currently highly complex and expensive. This benefit will accrue to all companies with share capital in the EU and

⁶⁹ See Council Regulation 2157/2001, *supra* note 49, art. 12(3); Council Directive 2001/86/EC, *supra* note 61, art. 7(3).

⁷⁰ Directive on cross-border mergers - frequently asked questions, *supra* note 21.

⁷¹ Directive 2005/56/EC, art. 9(2) states that the general meeting may reserve the right to make implementation of the merger conditional on the express ratification by it of these arrangements.

⁷² Note: The version of this article published in Columbia Journal of European Law 2004/2005 referred to three reasons why the compromise on employee participation of the draft cross-border merger directive could not to be approved. However, the first reason mentioned there has now been addressed by the Directive 2005/56/EC.

should therefore have a favorable impact on employment and competitiveness.”⁷³ However, this is not all that can be said about the impact of the new directive.

A. Regulatory Competition in European Corporate Law

It can be expected that the new Directive will have a considerable effect on regulatory competition in corporate law in the EU. Whereas in the United States regulatory competition in corporate law has been possible since the end of the 19th century,⁷⁴ many European countries have used the real doctrine⁷⁵ in order to prevent corporations from circumventing their domestic law. In the last years, however, the European Court of Justice has decided that, in general, a Member State must not discriminate against an EU company because its real seat is not the same as its statutory seat.⁷⁶ Yet, there is still one important difference between the situation in the United States and in the EU. The decisions of the European Court of Justice were about cases in which either a new corporation had been founded or in which an old corporation had changed its real seat. This scheme differs from that which prevails in the U.S., because the regulatory competition in European corporate law is mainly centered around re-incorporating existing corporations. Although a direct change of the corporate domicile is also not feasible in the U.S., re-incorporation is possible, because it is a well-established procedure for a new corporation to be founded, for instance, in Delaware, and to then merge with the expiring corporation of the other state.⁷⁷

A similar method of re-incorporation could now evolve in the EU. The directive on cross-border mergers makes it, in general, possible for corporations to change their corporate law by founding a new corporation and merging it with the existing corporation. The important exception to this concerns the rules on employee co-determination. If 1/3

⁷³ Proposal, *supra* note 2, at 17.

⁷⁴ *Paul v. Virginia* 75 U.S. 168 (1868). See also Christian Kersting, *Corporate Choice of Law - A Comparison of the United States and European Systems and a Proposal For a European Directive*, 28 *Brook. J. Int'l L.* 1 (2002); Brian R. Cheffins, *Company Law: Theory, Structure, and Operation* 422- 451 (1997); Roberta Romano, *The Genius of American Corporate Law* (1993); Buxbaum, *supra* note 6, at 62-70.

⁷⁵ See discussion *supra* Part I.

⁷⁶ *Centros Ltd. v. Erhervsog Selskabsstyrelsen*, Case C-212/97, 1999 E.C.R. 1459; *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, Case C-208/00, 2002 E.C.R. 9919; *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, Case C-167/01 2003 E.C.R. 10155. A compilation of the innumerable case notes will not be attempted, but see, e.g., Mathias M. Siems, *Convergence, Competition, Centros and Conflicts of Law: European Company Law in the 21st Century*, 27 *E.L. Rev.* 47 (2002); Catherine Holst, *European Company Law After Centros: Is the EU on the Road to Delaware?*, 8 *Colum. J. Eur. L.* 323 (2002); Luca Cerioni, *The “Überseering” Ruling: The Eve of a “Revolution” for the Possibilities of Companies’ Migration Throughout the European Community*, 10 *Colum. J. Eur. L.* 117 (2004).

⁷⁷ Cross-border mergers are possible in the U.S., see, e.g., *Del. Gen. Corp. Law* § 252(a).

of the total number of employees had been subject to co-determination before the merger, some kind of co-determination is compulsory.⁷⁸ The market for re-incorporation will therefore remain less open than the market for first incorporations. This can be justified by the reasoning *180 that it is only in the case of re-incorporations that the existing employee rights to participate in company decisions have to be preserved.⁷⁹

Nevertheless, this protection does not completely prevent circumvention of co-determination. One possible scenario is that a corporation founds a new corporation abroad, transfers all of its assets to it and subsequently dissolves itself. However, tax law makes this solution difficult. Whereas for a re-incorporation by a cross-border merger the hidden assets of the existing corporation are not taxable,⁸⁰ the assets may be taxable if a corporation transfers all its assets abroad. It is not yet clear whether the law, which in many Member States requires taxation of the hidden assets in the latter case, violates the freedom of establishment (art. 43 and 48 of the EC Treaty). The European Court of Justice has recently decided that with respect to European citizens the transfer of their residence must not lead to the taxation of unrealized capital gain.⁸¹ Therefore, it is possible that discrimination imposed by tax law would also be unlawful for corporations that indirectly transfer their statutory seat by transferring their assets.⁸²

The less complicated alternative of direct re-incorporation by change of statutory seat has not yet been possible in most Member States.⁸³ However, this will probably also change. The Commission has started a new public consultation on a directive concerning the cross-border transfer of the registered office of corporations.⁸⁴ In this document it is said that legislation needs to be adopted to coordinate national law, so that: (1) a corporation may decide “to transfer its registered office to another Member State in order to acquire legal personality there in place of the legal personality of its home Member State and to modify its memorandum and articles of association as required (...) without losing its original legal personality before acquiring legal personality in the Member State to which it wishes to move” and (2) the corporation “may be registered in the new Member State as a legal person under national law without further incorpora-

⁷⁸ See discussion *supra* Part III.D.

⁷⁹ See Council Directive 2001/86/EC, *supra* note 61, rec. 7, 18.

⁸⁰ See Council Directive 90/434/EEC, 1990 O.J. (L 225) 1 (on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States) as amended by Directive 2005/19/EC.

⁸¹ *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, Case C-9/02 2004 E.C.R. I-2409.

⁸² See, Thomas Wachter, *Ende der Wegzugsbeschränkungen in Europa*, 8 GmbH-Rundschau R 161 (2004).

⁸³ See, e.g., Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, 40 *Common Market Law Review* 661 (2003).

⁸⁴ Public Consultation document, available at http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm.

tion formalities being necessary provided it meets the substantive and formal requirements for companies to be recognised under national law.”⁸⁵ It can also be expected that this directive will have many similarities to the directive on cross-border mergers. As in the directive on cross-border mergers, it is said in the document on cross-border seat-transfers that, where “employee participation rights are more firmly enshrined in the home Member State, they should be maintained or negotiated.”⁸⁶ The reason for this is that the two directives can be seen as functional equivalents: on the one hand, the possibility of a cross-border transfer of the registered seat enables a corporation that wants to merge with a foreign corporation to transfer its seat and then engage in a domestic merger with the other corporation; on the other hand, *181 as has just been outlined, the possibility of a cross-border merger can also foster regulatory competition by enabling an indirect transfer of the statutory seat of a corporation.

B. Alternative Options

There are several options that could, in practice, be more important than cross-border mergers under the terms of the new directive.

1. The direct alternative is the possibility of incorporating a European Company (SE). Although the SE has advantages, such as its European character, it cannot be expected that due to the existence of the SE, the cross-border merger directive is unnecessary. The main reason for this is that the SE is not the best solution for small and medium-sized enterprises (SMEs).⁸⁷ The SE statute and the supplementary laws of the Member States are aimed at joint stock corporations.⁸⁸ It is also not a valid counter-argument to suggest that cross-border mergers are typically more important for larger corporations. As has correctly been advocated by the Commission in its Multiannual Programmes for Small and Medium-sized Enterprises in the European Union, the increasingly competitive European market requires that these corporations also internationalize their activities.⁸⁹ Furthermore, the directive on cross-border mergers can also be important for joint stock corporations. On the one hand, this concerns corporate groups which can be simplified by cross-border mergers.⁹⁰ On the other hand, there may be good reasons why

⁸⁵ Id. Current framework, para. 5.

⁸⁶ Id. Coordination Directive, para. 10.

⁸⁷ Proposal, *supra* note 2, at 16-17.

⁸⁸ On the plans for a European Private Company see High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, *supra* note 32, at 113-118.

⁸⁹ Proposal, *supra* note 2, at 16-17.

⁹⁰ Cf. Maul et. al., *supra* note 9, at 2641.

independent corporations would prefer an ordinary cross-border merger to the legal form of the SE. If there are different possibilities, corporations will choose the law that is closest to their preferences. In this respect, it is particularly important that the SE is slightly more strict in safeguarding employee co-determination than the cross-border merger directive.⁹¹

2. The first indirect alternative to a cross-border merger could be for a corporation to place its trust in internal growth in order to stay competitive. However, due to the increasingly international economy, this strategy can be problematic. If most of its competitors merge, a corporation that relies on its own growth may not succeed.

Secondly, corporations may therefore engage in joint ventures. This solution can be advantageous to a unified corporation. It is more flexible and it may be preferable for political and practical reasons that the corporations retain their independence.⁹² Again, there are, however, limits, because in industries with a high level of concentration, mere joint ventures may be less competitive.

***182** Thirdly, a corporation might attempt to grow by (hostile) takeovers. Yet, despite the new European takeover directive,⁹³ cross-border takeovers will not always be possible. Although it is said that the takeover directive is supposed “to make safeguards for the protection of members and other constituencies equivalent throughout the Community,”⁹⁴ this aim can be circumvented. The rules governing the duty of the board of the target (company) to remain neutral and those on the breakthrough of certain pre-takeover defenses,⁹⁵ which appear to be the core of this new law,⁹⁶ are not so in reality, as Member States reserve the right not to require their companies to comply with these provisions (“opt-out model”).⁹⁷ Furthermore, for small and medium-size enterprises, which are the main addressees of the cross-border merger directive, public takeovers are unlikely, because they are usually not engaged on the capital market.

Fourthly, an indirect merger that takes place by the transfer of all of the assets of one corporation to another corporation is conceivable in corporate and property law. Consequently, however, tax law would assume that the old corporation has been wound up,

⁹¹ See *supra* note 64.

⁹² Cf. Hortense Trendelenburg, *Cross-Border Mergers: Problems and Solutions*, 30 *International Business Lawyer* 69, 71 (2002).

⁹³ European Parliament and Council Directive 2004/25/EC 2004 O.J. (L 142) 12 (on takeover bids). See also Jesper Lau Hansen, *When less would be More: The EU Takeover Directive in Its Latest Apparition*, 9 *Colum. J. Eur. L.* 275 (2003).

⁹⁴ European Parliament and Council Directive 2004/25/EC, *supra* note 93, rec. 1.

⁹⁵ European Parliament and Council Directive 2004/25/EC, *supra* note 93, arts. 9, 11.

⁹⁶ Cf. Jason Chuah, *A New Framework For Takeover Bids In The EU*, 4.9(1) *Finance and Credit Law* (2002). In which he states: “Article 11 is indeed the core of the new proposals.”

⁹⁷ European Parliament and Council Directive 2004/25/EC, *supra* note 93, art. 12.

and thus the corporation would have to pay taxes for its hidden assets.⁹⁸ As a result, in practice this solution is typically excluded.

Finally, special forms of “merely economic” or “synthetic” mergers may thus be the best alternative. For an economic merger, the essential element is that “two circles of shareholders from different legal entities want to pool their interests by having at least a common board which coordinates all business activities on a long-term basis guaranteed by legally binding agreements. The new common board will normally be an element of an existing or a new legal entity, but this entity must not have a traditional legal form like a public limited company.”⁹⁹ It is, therefore, possible that there is no transfer of assets and that the corporations will continue their separate existences and different national identities. There are various possible ways in which these mergers may be shaped. For instance, the merger of Daimler-Benz and Chrysler presents an innovative model of an indirect cross-border merger.¹⁰⁰ A new corporation – “Daimler/Chrysler AG” – was incorporated in Germany. This corporation then acquired all the shares of Daimler-Benz AG and Chrysler Corp. in exchange for its own shares. Finally, Daimler-Benz AG and Daimler/Chrysler AG merged. Chrysler Corp. still exists in the form of a 100 % subsidiary of Daimler/Chrysler *183 AG, because U.S. law allows for the exclusion of a minority of shareholders after a successful exchange offer. The same result – where the two corporations continue to exist – is also evidenced in the Aventis merger between the German Höchst AG and the French Rhône-Poulenc SA.¹⁰¹ In this case, no new corporation was founded; Rhône-Poulenc S.A. simply was renamed Aventis SA after the majority of shareholders accepted the exchange offer for all the outstanding Höchst shares by Rhône-Poulenc.

The directive on cross-border mergers states that, in practice, these types of mergers are problematic, because corporations that intend to merge “have to resort to complex and costly legal arrangements.”¹⁰² Furthermore, running the “quasi-merged” corporation after this arrangement may also pose problems. By contrast to the Daimler/Chrysler

⁹⁸ Erik Werlauff, *The Law of the European Company* 6 (2003); Stefan Grundmann, *Wettbewerb der Regelgeber im Europäischen Gesellschaftsrecht - jedes Marktsegment hat seine Struktur*, 30 ZGR 783, 820-1 (2001).

⁹⁹ Reinhart Schmidt, *Cross-Border Mergers and Corporate Governance. An Empirical Analysis from 1988 to 1999*, in: *Globalisierung als Herausforderung der Betriebswirtschaftslehre*, 137 (Dodo zu Knyphausen-Aufseß ed., 2000).

¹⁰⁰ For more details, see Benjamin W. Johnson, *German Corporate Culture in the Twenty-First Century: The Interrelation between the End of Germany, Inc. and Germany's Corporate Capital Gains Tax Reform*, 11 Minn. J. Global Trade 69, 81-87. (2002); Michael Gruson, *Global Shares of German Corporations and Their Dual Listings on the Frankfurt and New York Stock Exchanges*, 22 U. Pa. J. Int'l Econ. L. 185 (2001); Theodor Baums, *Corporate Contracting around Defective Regulations: The Daimler-Chrysler Case*, 155 J. Inst. & Theo. Econ. 119 (1999); Schmidt, *supra* note 99.

¹⁰¹ Jochen Hoffmann, *Die Bildung der Aventis S. A. – ein Lehrstück des europäischen Gesellschaftsrechts*, 22 NZG 1077 (1999); Schmidt, *supra* note 99.

¹⁰² Proposal, *supra* note 2, at 2.

merger, the Aventis merger has not enabled the parent corporation to acquire all shares of its subsidiary. Hence, the running of the subsidiary may be problematic, because minority shareholder have special rights, such as the rights to information or to shareholder suits.¹⁰³ Nevertheless, parties may prefer these complicated mergers if, for instance, the applicability of employee co-determination can be evaded. In the Höchst/Rhône-Poulenc merger, only the now less important supervisory board of Höchst has to apply the demanding German rules on co-determination. For the superior corporation, Aventis, only the less severe French rules are applicable. This would be different if Höchst and Rhône-Poulenc had used the new cross-border merger directive.¹⁰⁴ Indirect mergers may therefore be preferred in order to evade the directive's compromise on employee co-determination.

As a result, it should not be argued that one type of merger will become the only method by which cross-border mergers will be designed in the future. The advantages and disadvantages of different kinds of mergers will have to be analyzed in each case. The directive on cross-border mergers, therefore, will "just" add one important additional method to the existing methods of business arrangements.

C. Problems of Cross-Border Mergers

Cross-border mergers are an important topic not only for corporate law. In the past, tax and accounting laws have often created difficulties for cross-border mergers. Now, these problems have been reduced in the European Union: if there is a legal (direct) merger, corporations do not have to pay taxes for its hidden assets.¹⁰⁵ Furthermore, the differences in accounting systems, which can make cross-border mergers at least more complicated, are in decline.¹⁰⁶ However, cross-border mergers do not consist merely of technicalities. Since *184 the new directive can hardly influence these additional "macro" and "micro-problems," its impact may still be reduced in practice.

On the macro-level, there may be political pressure not to engage in a cross-border merger. Sometimes competition law or laws that apply to special industries (e.g., the media) can be used as a political means to protect domestic industries. But even if this is not the case, political influence must not be disregarded.¹⁰⁷ For instance, the French

¹⁰³ Cf. Hoffmann, *supra* note 101, at 1082.

¹⁰⁴ See *supra* Part III.D.

¹⁰⁵ See discussion *supra* Part IV.A.

¹⁰⁶ Most recent overview available at http://ec.europa.eu/internal_market/accounting/index_en.htm.

¹⁰⁷ "Another way to put the question: will the minister insist that the new plant be located in Lyon rather than in Düsseldorf?" Jeffrey N. Gordon, *The International Relations Wedge in the Corporate Convergence Debate*, in: *Convergence and Persistence in Corporate Governance* 161, 163, (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

government has recently put pressure on Aventis not to merge with the Swiss corporation Novartis, but rather to accept a takeover by its French competitor, Sanofi. Although the French government and the French securities authority AMF did not have strong legal means with which to prevent a French-Swiss merger, they eventually succeeded in their preference for an enlarged French corporation.

On the micro-level, cross-border mergers may be inefficient, or they may not even occur in the first place, because business cultures and corporate governance systems are too diverse. For instance, the involvement of employees in corporate decision-making has already led to the not very convincing compromise reached in the cross-border merger directive.¹⁰⁸ As a general statement, it is often said that truly global corporations are just a myth: multinational corporations converge only on the surface, but below this their national roots remain a vital determinant.¹⁰⁹ Although this skepticism is perhaps somewhat exaggerated, because in a global economy even deeply-rooted characteristics might change, the diversity of business cultures will still continue to account for differences between domestic and cross-border mergers.

V. CONCLUSION

To some extent, the new directive on cross-border mergers is a distinctive European product. It is influenced by the freedom of establishment according to the EC Treaty, it is partially copied from the directive on domestic mergers and the law of the European Company (SE), and its rules on employee co-determination are the result of a typical European compromise. However, it makes sense to ask whether similar laws could also be useful elsewhere. For the EU, it has been said that the European market needs European enterprises¹¹⁰ and that cooperation between corporations from different Member States is an essential part of making Europe more competitive.¹¹¹ The same statement can be made with respect to the international level. Since markets are becoming increasingly international, it is likely that international enterprises will follow and that competition will promote more transnational mergers. Furthermore, the problems that European mergers have faced are amplified in the case international mergers, because internationally, there is likely even more diversity in the laws on cross-border mergers, which may lead to disputes resulting from clear but conflicting laws, a lack of clear laws, or even

¹⁰⁸ See discussion *supra* Part III.D.

¹⁰⁹ Douglas M. Branson, The Very Uncertain Prospect of "Global" Convergence in Corporate Governance, 34 Cornell Int'l L.J. 321, 328-332 (2001); Paul N. Doremus et al., The Myth of the Global Corporation (1999).

¹¹⁰ Hoffmann, *supra* note 101, at 1077.

¹¹¹ Directive on cross-border mergers - frequently asked questions, *supra* note 21.

the exclusion of cross-border mergers as such.¹¹² The *185 details of the directive, in particular the applicability and the basic regulatory approach of the directive (apart from the compromise on co-determination) are useful solutions,¹¹³ which could also be transplanted elsewhere. There is, however, no fixed method by which this could be done: on the international level, the OECD could consider extending its guidelines¹¹⁴ to cross-border mergers. For regions or groups of countries where the freedom of establishment is becoming analogous to that of the EU, it may also be possible to enact unified rules. Furthermore, national legislators have to be aware that in drafting their merger laws, coordination with the laws of other countries is needed. On the one hand, they have to be aware that cross-border mergers can also foster regulatory competition in corporate law.¹¹⁵ On the other hand, it may also be the case that alternative options and problems will reduce in practice the effect of a law on cross-border mergers.¹¹⁶

¹¹² See discussion *supra* Parts I-II.

¹¹³ See discussion *supra* Part III.

¹¹⁴ OECD Principles of Corporate Governance (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf>.

¹¹⁵ See discussion *supra* Part IV.A.

¹¹⁶ See *supra* IV.B. and C.