

Wegen, 'Deutsche Gesellschaften in grenzüberschreitenden Umwandlungen nach "SEVIC" und der Verschmelzungsrichtlinie in der Praxis', NZG 2006, 721; Storm, 'Cross-Border Mergers, the Rule of Reason and Employee Participation', (2006) 3 ECL 130; Ugliano, 'The New Cross-Border Mergers Directive: Harmonisation of European Company Law and Free Movement', (2007) 18 EBLR 585; van Gerven (ed.), *Cross-Border Mergers in Europe*, (Cambridge [et al.], University Press, 2010); van Solinge, 'Corporate Law Aspects of Cross-Border Mergers', in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union* (Antwerp [et al.], Maklu [et al.], 1995), 143; Weitnauer, 'Die europäische grenzüberschreitende Gesellschaft', EWS 1992, 165; Weng, *Zulässigkeit und Durchführung grenzüberschreitender Verschmelzungen*, (Berlin, Duncker & Humblot, 2008); Winter, 'Grenzüberschreitende Verschmelzungen – ein Update', *GmbHR* 2008, 532; Wyckaert/Geens, 'Cross-Border Mergers and Minority Protection: An Open-ended Harmonization', (2008) 5 ECL 288; see also ECFR-Symposium Cross-Border Company Transactions (namely Mergers), (2007) 4 ECFR 5 et seq.; and bibliographies above in §§25 and 28; and on the draft Convention on international mergers below N. 2.

I. IMPORTANCE, SCOPE AND SUBJECT MATTER

1. Importance – Need for Cross-Border Mergers and Existing Possibilities

a) Need for Cross-Border Mergers

1. The cross-border merger was the first type of structural change that the European legislature envisaged regulating. Since harmonisation did not seem suited because of the complexity of the problems involved, already in 1958 competence for an international Convention was inserted into the Treaty (Art. 220 EEC, now repealed by the Treaty of Lisbon). For no other structural change was legislative intervention by the EU legislature considered so important – because without a measure at the EU level, cross-border mergers seemed largely impossible or prohibitively expensive, while they also appeared to be the core instrument for external growth (in more detail, also on other instruments, above §25 para. 3–6, 14, §28 para. 2–4), especially because important problems were deemed to exist in the law of cross-border groups of companies, both at the national and EU levels.¹ External growth, however, was absolutely necessary to face the challenges of a globalised world with mainly US and Japanese competitors.

¹ Ommeslaghe, ZHR 132 (1969) 201 (213–230); positive evaluation of the 10th Directive, particularly, because of this background, in: Ugliano, (2007) 18 EBLR 585 (611–614).

b) Serving These Needs by Harmonisation

2. To begin with, the adoption of a Convention on international mergers² had been envisaged. This Convention (still with 69 articles!) was meant to unify both substantive law (procedure, safeguards, validity and effects) and conflict of law rules. However, difficulties arising in the negotiations gave rise to the idea of regulating national mergers first and doing so with a harmonising act dealing solely with substantive law. In the course of adoption, this act was further split in two parts, the Merger Directive (by far the more important) and the Division Directive (§28). This reduced the extent of regulation needed for cross-border mergers.³ It seems highly inconsistent with this legislative history that the rest – for international mergers – had to wait for almost thirty years.

3. During the 1980s, the European legislature decided that it no longer wished to treat international mergers in a Convention. Rather, in 1985, the EU Commission submitted the Proposal for a Tenth Directive on Cross-border (or International) Mergers, replaced at the end of 2003 by a modernised, yet very similar Proposal (so that literature on the 1985 Proposal is still of value). In May 2005, the 10th Directive on Cross-Border Mergers was adopted in a single reading by both the Council and the European Parliament.⁴ Its content is based on the work on the Convention and on the substantive law adopted in the Merger

² Draft for a Convention on the International Merger of 27 September 1972, Bull. EC Suppl. 13/73; reprint for instance in *RabelsZ* 39 (1975) 539; on this Convention Goldman, 'La fusion des sociétés et le projet de convention sur la fusion internationale des sociétés anonymes', *CDE* 1981, 4 (Chairman of the Working Group); Koppensteiner, 'Grundlagenkritische Bemerkungen zum EWG-Entwurf eines Übereinkommens über die internationale Verschmelzung von Kapitalgesellschaften', *RabelsZ* 39 (1975) 405; Sonnenberger, 'Der Vorentwurf eines Abkommens über die internationale Fusion', AG 1969, 381; Loussouarn, *Revue Critique de Droit International Privé* (1974), 236/455. Apart from the considerations by Goldman – those by Beitzke, *Festschrift für Hallstein* 1966, 14; id., *Revue Critique de Droit International Privé* (1967), 1, and in the following decades those by Großfeld and Behrens (see bibliography) were groundbreaking.

³ On the Merger Directive as a preparation for a legal measure on international mergers see references above in §28 N. 7.

⁴ (Initial) Proposal for a Tenth Directive of the Council based on Article 54 (3) (g) of the Treaty concerning cross-border mergers of public limited companies, OJ 1985 C 23/11, COM(84) 727 final. (Fresh) Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital of 18 November 2003, COM(2003) 703 final. Then adopted as Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ 2005 L 310/1. For projects to revive the parallel initiative of a Transfer of Seat Directive see above §27 N. 8. The legal basis for the adoption of a 10th Directive was beyond doubt, Art. 293 EC (old version) did not bar such a legal measure: Farmery, (1987) *Bus. L. Rev.* 35 (35); Ganske, *DB* 1985, 581 (581) (both implicitly); Schweitzer, in: Grabitz/Hilf, Art. 293 para. 2; in this sense then explicitly (for fundamental freedoms which harmonisation should also foster) ECJ case 208/00 *Überseering* [2002] ECR I-9919 (9964 para. 54 et seq.); consenting with the outcome Forsthoft, *DB* 2002, 2471 (2472) (case note).

Directive. In Art. 3, reference is made generally to internal law which, however, for the PLC, transposes the Merger Directive, Art. 3(1). The Proposal of 1985 had still referred directly to the rules of the Directive; the core idea is therefore only to extend these now to cross-border situations as well (in more detail above §28 para. 4–6). The model there – informing shareholders (above §28 para. 21–31) and avoiding negative external effects for creditors (above §28 para. 35–37) – is extended into the international context. With the adoption of the Directive, legal certainty was reached for an arrangement whose possibility seemed beyond doubt at the time of adoption; soon afterwards, the ECJ in fact confirmed in the *SEVIC* case that cross-border mergers already had to be accepted before the Directive's adoption because of the guarantees enshrined in the fundamental freedoms: (see above §25 para. 33 et seq. (*SEVIC*)).

c) Existing Possibilities – With Renvoi

4. **Within the Directive's substantive scope of application** – i.e. for mergers within the meaning of the Merger Directive and mergers with a 100% parent company – the relevance of the initiative mainly stemmed from the remaining legal uncertainty (before 2005): the availability of the cross-border merger, despite the transposition of the Third Directive and independently of conflicts and tax law questions, did not seem to be guaranteed in all Member States, especially not under German substantive law (above §25 para. 53). This, however, changed with the ECJ's decision in *SEVIC*. Obstacles such as those resulting from (old) German substantive law are not justified by imperative reasons in the public interest (above §25 para. 33 et seq., 49–55). The legal uncertainty therefore rather stemmed from the fact that the answer to the question of which law to apply can differ in detail and also from the question of which adaptations are needed in substantive law in the event of frictions between them. This is exactly what the Directive had to clarify. An important modification can, of course, also be seen in the largely extended scope of application (see below §29 para. 6).

5. The importance of the Directive should moreover not be exaggerated because, unlike in the case of transfer of seat, **alternative arrangements** exist which can also be used in cross-border situations.⁵ These are the forms described of a merger (and division) in the broad, non-technical, economic sense which, already before the Cross-Border Directive (and its transposition), could be

carried through on a general private law basis and to which the Merger Tax Directive applies, thereby guaranteeing a largely neutral tax regime. The key difference is that it is not a unitary structure that comes into being, but rather a group or holding structure.⁶ With a Directive on cross-border mergers, the need to choose these other arrangements has been eliminated in cases where a group structure is not desired (for instance because of questions of liability).⁷

2. Scope of Application and Subject Matter (Art. 1 et seq.)

a) Personal Scope of Application

6. The Directive obliges the Member States to permit the cross-border merger. Art. 1(1) of the Proposal of 1985 still sought to introduce this duty only for PLCs, while the Proposal of 2003 sought to extend it to all limited liability companies – the national laws of conversion and merger of companies seemed homogeneous enough for all limited liability companies (on the basis of the measures transposing the Third Directive). However, Art. 4(1)(a) now restricts the scope of application to types of companies which may merge under the national law of the relevant Member States. The companies participating (because nothing else is prescribed) must have been **validly formed under the law of a Member State** (Art. 1). This provision also emphasises (as did the 6th recital of the proposal of 1985 and Art. 2 of the 2003 proposal) that **not all companies participating may be subject to the law of the same Member State**. It was only with respect to this one element that the scope of application of the Proposal of 1985 deviated from that of the (National) Merger Directive.⁸

*7. The Proposal of 2003 and the Directive now adopted have, however, a broader scope of application with respect to the types of company covered. It is a bit complicated. The adopted version, according to its Art. 4 (1) lit. a, applies to **all types of companies that**

⁶ See in more detail above §25 para. 3–6, § 28 para. 2. The literature on the details and the great range of variations in cross-border mergers in the broad sense is abundant. See for instance the contributions in Horn (ed.), *Cross-border Mergers and Acquisitions and the Law* (Kluwer: The Hague et al., 2001), in particular: Horn, 'Cross-border Mergers & Acquisitions and the Law: A general introduction', 3 (8–16) and Wymeersch, 'Some Aspects of Cross-Border Co-operation between Business Enterprises', 63; Herzog/Förster, *DB* 1994, 1 (2–8); Kallmeyer, *ZIP* 1994, 1746 (1747 et seq., 1749); Menjucq, *Droit européen des sociétés*, 319–321; Rixen/Böttcher, 'Erfahrungen über eine transnationale Verschmelzung', *GmbHR* 1993, 572; Samson/Flindt, *NZG* 2006, 290; Schaumburg, *GmbHR* 1996, 501 and 585; van Solinge, in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union*, 143 (148); and moreover monographs by Böhler, *Grenzüberschreitende Fusionen*; Lennertz, *Die internationale Verschmelzung*; and from the perspective of French law the summary by Cozian/Viandier/Deboissy, *Sociétés*, para. 1300–1304 (with further references); see also references above in §28 N. 31.

⁷ On the reasons which speak in favour of a unitary form or in favour of a group of companies see above §25 para. 3–6, §26 para. 4, §28 para. 2.

⁸ 6th recital; Ganske, *DB* 1985, 581 (581).

⁵ Behrens, in: Ferrarini/Hopt/Wymeersch (eds.), *Capital Markets in the Age of the Euro – Cross-border Transactions, Listed Companies and Regulation*, (2002), 503 (518 et seq., 518–526); Herzog/Förster, *DB* 1994, 1 (2 et seq., 8); Kallmeyer, *ZIP* 1994, 1746 (1752 et seq.); Lutter, *Europäisches Unternehmensrecht*, 42 et seq.; van Solinge, in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union*, 143 (148); on the additional possibility of a cross-border merger (in the narrow sense) between PLCs which thereby create a European Company, see below §33 para. 16–24.

may merge under the national law of the relevant Member States (Art. 4(1)(a)), but the Directive only applies to limited liability companies ((Art. 1 in conjunction with Art. 2 no. 1)). However, this category is not restricted to the companies enumerated in Art. 1 of the First Directive (Art. 2 no. 1 lit. a), but includes every other company with share capital which has legal personality, possesses separate assets that alone serve to cover its debts and is, under national law, subject to the safeguards of the transposed provisions of the First Directive (Art. 2 no. 1 lit. b).⁹ Therefore, the transposition in Sweden also includes business associations. If the regime now applies to a wider range of types of companies, this would indeed seem to speak in favour of solution where all rules based on the Third Directive, albeit only indirectly, should apply under the Cross-Border Merger Directive.¹⁰ This applies, in particular, to merger regimes that legislatures enacted in parallel for companies other than PLCs. On the other hand, specific types of company are excluded from the scope of application (investment funds, Art. 3(3)), and others at least may be excluded by the Member States (cooperative societies, Art. 3(2)) – even if they qualify as limited liability companies.

b) Substantive Scope of Application: Types of Merger Covered

8. The definition of a merger is largely identical to that in the Merger Directive, with respect to both merger by acquisition and merger by formation of a new company (Art. 2(2), above §28 para. 12–16). However, the Cross-Border Mergers Directive also applies to mergers with additional cash payments exceeding 10%, where the respective national legislator allows such cash payment in accordance with Art. 30 of the Merger Directive (Art. 3(1)). These other arrangements, however, are also covered by the Third Directive with the sole differentiating feature that the Third Directive in these cases does not compel the national legislature to introduce this arrangement (see above §28 para. 11–19). The two Directives are distinguished by the personal scope of application (see above). The same is true for measures which are equivalent within the meaning of Art. 24 of the Merger Directive (see in this sense Art. 2(2)(c)). Accordingly, any Member State must introduce the possibility of the merger with a 100% subsidiary both at the national level (Art. 24 of the Merger Directive) and for cross-border situations – and here too with less stringent requirements (Art. 15) (a merger with a 90% subsidiary [Art. 27 of the Merger Directive] is a merger within the meaning of the Directives anyway). The safeguards for employee participation rights had been drafted as an exception from the (substantive) scope of application in Art.

⁹ For a survey on the company forms which the individual transposing laws of the Member States cover, see the list drawn up by the EU Commission at: http://ec.europa.eu/internal_market/company/docs/mergers/scope_en.pdf. On the scope of application in Germany, namely for the Ltd. see Frischhut, EWS 2006, 55 (56 et seq.); Koppensteiner, Der Konzern 2006, 40; on the coverage also of company forms from third states: Drinhausen/Keinath, RIW 2006, 81 (86 et seq.); on cross-border mergers of partnerships: Audretsch, Verschmelzung von Personengesellschaften; Thümmel/Hack, Der Konzern 2009, 1.

¹⁰ In this sense: van Eck/Roelofs, (2011) 8 ECL 17.

1(3) and (4) of the 1985 Proposal, but already then, these were really safeguards for the protection of a particular group of persons (in this sense today Art. 16 of the adopted Directive, therefore on this question below §29 para. 15).

c) Regulating the Freedom of Establishment by Conflict of Law Rules and Some Specific Substantive Law Rules

9. If the legal relevance of the Directive today is mainly that of rendering the regime of the Merger Directive also applicable to international mergers, the EU legislature uses two techniques for this purpose. On the one hand it establishes conflict of law (and international procedural) rules,¹¹ which, however, could already be found in similar form in the conflict of law regimes of the Member States.¹² In so doing, the EU legislature allocates competences to regulate and to supervise: it states which law applies to which aspect of the merger and which authority may and must supervise which part. On the other hand, the Directive also supplements the regime of the Merger Directive in certain aspects with substantive law rules particularly designed for international cases. This is also a traditional part of private international law,¹³ more so probably mainly because now all (limited liability) companies have been included which may merge under the respective national laws and because the national law rules applying to them, while in fact being often identical to those applicable to the PLC, need not reach the same level of protection *de iure*. Specific substantive law rules in the Cross-Border Mergers Directive therefore have a priority over those contained in the Merger Directive and in the national (transposing) law which was still (partially) made explicit in Art. 2(2) of the 1985 Proposal. Therefore, the Merger Directive completely (Art. 4(1)(b) and Art. 4(2)), unless there are diverging rules in the Cross-Border Mergers Directive itself as, for instance, in the case of Art. 17 and 22(1) of the Merger Directive in particular (instead of these rules now Art. 14 and 17). The most important of these specific substantive law rules is stated rather implicitly, and at any rate not as clearly as in the draft Proposal for a Transfer of Seat Directive (see on this initiative above §27 para. 1): the cross-border merger has to be permitted and be treated according to general merger

¹¹ Groundbreaking for this approach: Behrens, in: Dausen (ed.), *Handbuch*, para 148 et seq.; similar Menjuq, *Droit européen des sociétés*, 326 (mix with substantive law, designed specifically for cross-border cases); rather in favour of formulating the whole substantive law anew, an approach increasingly important in the more recent versions: Farmery, (1987) *Bus. L. Rev.* 35 (35); Ganske, *DB* 1985, 581 (582).

¹² Therefore Behrens, *JBL* 2000, 341 (351 et seq.) does not see in (national) conflict of laws rules the true problems of the validity of cross-border mergers; similar van Solinge, in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union*, 143 (149 et seq.).

¹³ See for example Edwards, *EC Company Law*, 393; Kropholler, *Internationales Privatrecht*, (6th edition 2006), 95–102; Menjuq, *Droit européen des sociétés*, 326.

law – clearly quite a revolutionary rule and the most important one in the Cross-Border Mergers Directive.¹⁴ Art. 4 (1) lit. a also contains a prohibition on discrimination¹⁵ against the international merger, which implies that no additional burden may be placed on cross-border mergers as compared to national mergers.¹⁶ Moreover, Art. 4 (1) lit. b with (2)(1) contains the **basic conflict of law rule**: the complete national law of mergers applies to each company, i.e. two laws apply cumulatively, unless the Cross-Border Mergers Directive provides otherwise. (see also the 3rd recital). Art. 4 (2)(2) explicitly allows Member States to create adequate rules on the protection of minority shareholders, i.e. rules that conform with primary EU law.¹⁷

II. MERGER PROCEDURE

1. *Draft Terms of Cross-Border Merger and Explanatory Report (Art. 5 et seqq.)*

a) Conflict of Laws

10. The draft terms of cross-border mergers and their publication are regulated primarily in Art. 5 et seq. The regime is based on the assumption that the content and drawing up of the draft terms lie within the joint competence of the boards of both companies and that therefore the **laws of all participating companies** apply, because the directive establishes only a minimum standard in this respect,¹⁸ but that as regards publication, each company is responsible for it and that therefore **for each one only its own law** applies (see Art. 6 (2), but also Art. 4 para. 1 lit. b which applies in this context).¹⁹ As opposed to the Proposals, the explanatory report is now addressed separately in Art. 7, which largely replicates

¹⁴ Edwards, *EC Company Law*, 392 et seq.; Menjuq, *Droit européen des sociétés*, 220 et seq.

¹⁵ In this sense also Oechsler, *NZG* 2006, 161.

¹⁶ Formerly, this had been justified by analogy to Art. 7 sentence 2, 9(2), and 15(2) of the Proposal; see Menjuq, *Droit européen des sociétés*, 326; Heenen, *CDE* 1981, 15 (15) sees more generally a prohibition on introducing more stringent rules and this leads to the situation that cross-border mergers have to be as easy to carry through as national mergers.

¹⁷ On this issue, see for Germany Bayer/Schmidt, *NJW* 2006, 401 (405), and for Austria: Doralt, (2007) 4 *ECFR* 17 (31 et seqq.); in more detail Adolff, *ZHR* 173 (2009), 67 (79 et seqq.). There is at least the potential that this may turn out to be a flood-gate for national law obstacles: see Wyckaert/Geens, (2008) 5 *ECL* 288 (the directive has a 'rather nationalistic reflex' in this respect, p. 295).

¹⁸ This differs from the approach taken in Art. 20 of the European Company Regulation, see Bayer/Schmidt, *NJW* 2006, 401 (402).

¹⁹ This is similar in classic national conflict of laws rules, for instance German, see references above in §25 N. 147 et seq.; in this sense also Bayer/Schmidt, *NJW* 2006, 401 (402 et seq.); similar for the dressing and for the content of the draft merger plan: Frenzel, *RfW* 2008, 12 (16); opposite Kallmeyer, *AG* 2007, 472 (474 et seq.).

Art. 9 of the Merger Directive, but additionally emphasises that all implications of the cross-border merger for members, creditors and employees have to be explained (not only the exchange ratio). Additionally, the opinion of the employee representatives, where applicable, needs to be appended to the report. As each board has to draw up its own report for its shareholders, it should also be clear that each report is solely subject to the law of the company for which it is drawn up.²⁰

b) Specific Substantive Law for International Cases ('Adaptation')

*11. For the preparation and content of the draft terms, two applicable laws which potentially diverged had to be coordinated. Art. 5 of the 1985 Proposal stated in this respect that Art. 5(2) of the Merger Directive (concerning the content) had to be seen as a minimum and maximum rule in the case of cross-border mergers, i.e. that differences were excluded. The standard stipulated in Art. 5(2) of the Merger Directive had to be imposed, but at the same time no additional requirements were allowed. This rule would have been too strict; it would certainly have been sufficient (and less intrusive) to apply the transposition which was the less demanding of the two. Today, one common minimum standard is prescribed (Art. 5), and additional requirements can be introduced only via agreement between the companies. Moreover, the rule explicitly contained in Art. 5 of the 1985 Proposal probably still applies: the (more demanding) law which stipulates authentication by a notary public takes priority, and if both laws contain this requirement the companies may choose under which they want to proceed,²¹

*12. For publication (Art. 6 of the Merger Directive) which, however, can be substituted by publication on the internet (in national and in cross-border mergers), the EU legislature saw a need for adaptation in that it prescribed the disclosure of **additional items**. In this respect, exceptionally, the principle that no additional burdens may be introduced for the cross-border merger is not respected. The reason is that information gathering is more difficult in cross-border cases. Therefore, the following have to be disclosed via publication and thus be easy to find: the law applicable to all companies (seat) and the type of company and business name; for all companies, the place where more information and documents can be inspected; and, more generally, the mechanisms of creditor and (minority) shareholder protection (Art. 6(2)).

²⁰ Quite explicit already Art. 4 of the Proposal of 2003; in this sense, again already, also classic national conflict of laws rules, for instance German, see references above in §25 N. 147. As far as a common report is accepted, both laws would have to be cumulated: Frenzel, *RfW* 2008, 12 (16 *ret seq.*) (with further references).

²¹ Opposite in this respect: Frenzel, *RfW* 2008, 12 (16). The competent organs of the companies involved only have to comply with the formalities of that law to which each individual company is subject.

2. *Independent Expert Report (Art. 8)*

*13. Independent examination is prescribed for each company separately (Art. 10 of the Merger Directive, here Art. 8); therefore, for each company, its own law has to apply (conflict of law, see Art. 8(1)(2)). However, substantive law was adapted for the case where the companies wish to have it in common (Art. 8(2)). Art. 8 of the 1985 Proposal still prescribed that all applicable laws had to provide for such a possibility, otherwise this possibility would have been excluded. Where all applicable laws did provide for such a possibility, the companies would have had the right to choose the competent authority and with it also the applicable law, which would then have governed the appointment of experts, the entire examination and also liability (Art. 8(2) and Art. 14 of the Proposal). Under Art. 8 of the adopted Directive, consensus between the companies is sufficient, again showing the tendency to accept more liberal solutions (see above §29 para. 11). The wording suggests that a public authority in one of the seat States has to appoint the common expert(s) whenever both companies so request. It is not completely clear which law then applies (choice of the companies or application of the law of the authority which appoints the expert(s)).

3. *Inspection of Documents and Approval by the General Meeting (Art. 6 and 9)*

*14. Both problems concern each company separately and therefore have to be resolved for each company according to its law separately (conflict of law) – although neither Art. 7 of the 1985 Proposal nor Art. 4²² of the adopted Directive states this very explicitly. As regards inspection, the Third Directive – more precisely, its national transposition – applies without modification, and the same is true for the general meeting, the only difference being that in this context, Art. 7 of the 1985 Proposal explicitly stresses the prohibition of discrimination in this context (which also applies more generally): the majority required in the general meeting may not be set at a more demanding level than for national mergers. The reason for restating the principle explicitly in this context was that here in particular, national practice diverged considerably: if transnational structural changes were permitted at all (cross-border transfer of seat or merger), this possibility was often granted only in the case of a unanimous vote in the general meeting.²³ This particular prohibition of discrimination likewise applies under the adopted Directive, although it no longer contains such a specific (repetitive) rule. Conversely, Art. 9(2) of the Directive stresses an aspect which today seems still more problematic: the general meeting must have the right to make its consent conditional on the chosen arrangements regarding employee participation being again submitted to it for ratification.

²² This had not been the case in Art. 7 of the 1985 Proposal or Art. 2 of the 2003 Proposal either.

²³ References above in §25 N. 89; the view that this transaction is impossible in all Member States is obsolete since the beginning of the century. In this sense still for instance: Ganske, DB 1985, 581 (581).

III. IN PARTICULAR: PROTECTION OF EMPLOYEES, SHAREHOLDERS, CREDITORS AND THE PUBLIC

1. *Employee Protection (Art. 16)*

15. The Transfer of Undertakings Directive applies also to cross-border mergers (in this sense explicitly Art. 14(4)). The employee participation regime has changed fundamentally. Previously, it had been conceived as an exception from the substantive scope of application (Art. 1(3) of the 1985 Proposal),²⁴ however, the Member States could probably not have invoked this rule in cases where an agreement had been reached on the basis of the Employee Involvement Directive supplementing the European Company Statute. It should be remembered that certain other Member States allow an employee participation regime on a voluntary basis (see above §12 para. 21 et seq.). This is exactly the concept of the new Art. 16. The Cross-Border Mergers Directive is the first Directive where the compromise on the employee participation question reached for the European Company is extended to structural changes concerning companies under national law, i.e. to cases where the cross-border transaction had not hitherto been regulated at the EU level precisely because of the employee participation problem (see above §27 para. 5). This also implies that, unlike under Art. 1(3) of the 1985 Proposal, it is no longer only the complete loss of employee participation that is relevant, but any reduction (smaller ratio of participation, probably not yet: participation in an organ that does not have all the same competences). The core components are as follows.²⁵ While the employee participation regime coincides in principle with that for the European Company, three differences are meaningful and lead to even higher flexibility in the more recent regime: the board can opt for the standard solution from the outset and forego a negotiated solution (which typically would be less favourable for labour) (see Art. 16 para. 4 lit. a); Member States can limit labour participation after the structural change to one third (thus limiting the 'before and after' principle, see Art. 16 para. 4 lit. c); and the regime thus reached applies only for three years if the destination country does not have any employee participation regime or only a weaker one (Art. 16 para. 7).

²⁴ This rule, more generally, has been construed restrictively and only Member States which have employee participation regimes have been seen as being entitled to invoke it: Farner, (1987) *Bus. L. Rev.* 35 (35); Ganske, DB 1985, 581 (583) (both implicitly and fearing adverse effects for German and potentially Dutch companies). This can also be a company which is not part of the merger (in this sense explicitly Art. 3 of the 1985 Proposal), for instance when an affiliated company is merged with a foreign company and this has the consequence that its workers are no longer counted when calculating the thresholds.

²⁵ For more details see §33 para. 52–57; for the employee representation regime of the new directive see Pannier, 16 (2005) *European Business Law Review*, 1424; Siems, 11 (2005) *Columbia Journal of European Law*, 167 (176–179); Storm, (2006) 3 *ECL* 130; more references below §33 N. 135.

2. Other Interests Protected

a) Conflict of Laws

16. Other interests affected are no more specifically regulated (still different for creditor protection Art. 9 of the 1985 Proposal). Therefore, the principles applying to national mergers also apply in the same way to international mergers (above §28 para. 21–37). In conflict of law, it is important which national company law applies to which interest and its protection, and again a distinction has to be made: shareholder and creditor protection in the transferring company follow its law (if there are several, several laws apply separately), and shareholder and creditor protection in the acquiring company follow the latter's law.²⁶ This had been stated for one particular case already in Art. 9(3) of the 1985 Proposal, which prescribed for securities representing specific rights, such as convertible bonds, that a potential waiver by collective decision (resolution) followed the law of the transferring company, but a sell-out right with respect to the acquiring company the law of the latter.

b) Specific Substantive Law for International Cases ('Adaptation')

17. There is no specific substantive law for specific safeguards. Art. 9(2) of the 1985 Proposal still stated explicitly for creditor protection that it had to be the same in cross-border and in national mergers, i.e. that one regime may not be more lenient than the other, but neither can it be more demanding. In the new regime, the same follows from the general principle of non-discrimination (above §29 para. 9). Likewise, differences in shareholder protection would be problematic, for instance, additional shareholder protection in the form of a sell-out right only in the case of cross-border mergers. The argument that there is also a change in the applicable law (and that therefore protection is needed more urgently) is weak, because the same could be said for creditor protection and a *maior* because here even the competent forum can be lost. In any case, shareholders are enabled to make an informed decision, as the Directive now requires the report of management or the administrative organ to explain the implications of the cross-border merger for members, creditors and employees (Art. 7(1)) – including any implications arising from the change in applicable law. Moreover, already the national merger represents a fundamental change for shareholders, and the risk of any rule discriminating between national and international mergers is that the cross-border transaction is frustrated after all.

²⁶ For shareholder protection: Wyckaert/Geens, (2008) 5 *ECL* 288 (critical [why this 'one possible and very vague exception' to the general recognition regime], but as well with a short comparative law survey at p. 290 et seq. showing that the Member States were rather cautious in introducing additional safeguards); Großfeld, *AG* 1996, 302 (303); for creditor protection: Behrens, *JBl* 2000, 341 (352 et seq.).

IV. IN PARTICULAR: VALIDITY AND IRREGULAR MERGERS

1. Control and Validity (Art. 10–14)

a) Conflict of Laws

18. The cross-border merger changes the applicable law of the transferring company: more accurately, it disappears.²⁷ As a consequence, it seems reasonable to apply the law of the acquiring company for the effects of the merger (for instance Art. 12, sentence 1 for the date on which the change produces its effects). Nevertheless, in this phase as well, the principle is applied to the extent possible that each company is judged according to its national applicable law. An exception is necessary where a question can be answered only in a uniform way.

19. Therefore, each law decides the question of which type of *ex ante control* applies to this company (Art. 10 et seq.) – scrutiny by a court or certification by a notary public – as well as which substantive requirements have to be complied with. In all this, Art. 10 seems to refer to the transferring companies and Art. 11 to the acquiring company. And in all this, it is only implicitly indicated that not only the competences of supervisory authorities are distributed between the different States, but also the power to regulate (applicable law), and that each company is subject to its own applicable law. According to Art. 11, the competent authority²⁸ for the acquiring company has to require production of the certifications issued to the transferring companies by their authorities and also has to check whether all companies have ratified the same draft terms of cross-border merger (contract). Again in accordance with its own law, each company also has to publicise the completion of the transaction (Art. 13). There can only be a uniform answer to the question of which effects the transfer produces and starting from which date. For this, the sole surviving national company law has to be applied, i.e. the law of the acquiring company (Art. 12, sentence 1).²⁹ An exception can be found in Art. 14(3) for the question of whether some specific rights can be transferred only when certain formalities have been complied with

²⁷ See references above §25 N. 153.

²⁸ On the authorities competent in the different Member States see EU Commission survey at: http://ec.europa.eu/internal_market/company/docs/mergers/scope_en.pdf.

²⁹ The Proposal does not state this explicitly for the effects of the merger, but only for the relevant date; as regards the effects, however, the same follows *e contrario* from Art. 11 No. 3 of the 2003 Proposal *e contrario*. Many national, for instance German, conflict of laws systems would rather opt for cumulation, see references above in §25 N. 18. In practice, however, conflict of laws questions will be irrelevant in most cases because of substantive law harmonisation: see below §29 para. 20.

– because these rules are designed to protect the public specifically in the law of the transferring company.

b) Specific Substantive Law for International Cases ('Adaptation')

20. The Directive contains three additional rules on the substantive law level. First, the competent authority for the acquiring company is invested with the power and the responsibility to ensure that all supervisory steps in the other Member States have been taken. For this purpose, it has to make registration dependent upon the production of all certifications mentioned and, moreover, to check whether the same draft terms of cross-border merger have been ratified and whether a solution for the employee participation question has been found (Art. 11(1) sentence 2 and (2)). Second, the Directive (unlike the 1985 Proposal) also itself states the most important legal consequences (see Art. 14(1) and (2)) – and this is important because the rules listed there, while identical to those in the Merger Directive, have not necessarily been transposed for all types of company that may merge under the national law of all Member States. Lastly, own shares of the subsidiary and participations of the parent company in the subsidiary should disappear. Art. 14(5) restricts the exchange of shares in the company being acquired that are held either by the acquiring company or by the company being acquired (or any person acting on their behalf). The reason is that the law of the acquiring company could not handle such 'cross-over' participation on its own.

2. Liability

21. Liability again follows the conflict of law principle that, to the extent possible, each company is judged according to its national applicable law.³⁰ This is the case also for liability of board members and the expert examination (explicitly in this sense still Art. 14 of the 1985 Proposal). In cases where a common expert has been appointed, the law applicable to (chosen for) that appointment applies.

3. Nullity (Art. 17)

22. Likewise for nullity, the 1985 Proposal, in a conflict of law rule (Art. 15), opted for the cumulative application of all company laws. This, however, would actually have increased the incidence of nullity, a consequence which the Proposal did not accept completely even at the conflict of law level. More importantly: in substantive EC/EU law, the grounds for nullity which could have

been introduced at all by the Member States would have been dramatically reduced. The only ground admitted would have been that the merger had not involved the prescribed state control (this element is easy to check even in cross-border situations), but no longer that there had not also been a (valid) resolution by the general meeting (which is one additional ground for nullity under Art. 22(1)(b) of the Merger Directive for the national merger).

23. The regulation in Art. 17 of the adopted Directive continues in this direction. It excludes any ground for nullity: an international merger once registered can no longer be avoided. This seems logical if compliance with all requirements really has to be certified by the competent authority in the country whose law applies, if it is only on the basis of this certification that registration in the State of the acquiring company is allowed (Art. 11(1) sentence 2 and (2), Art. 12 sentence 2) and if the whole regime is based on the principle that these certifications (i.e. decisions taken by public authorities) have to be mutually recognised, i.e. that the result of scrutiny by a public authority can then circulate throughout the Union. Lastly, the Directive deals with national procedures to scrutinise and amend the exchange ratio or to compensate minority members. Even if those procedures do not prevent the registration of the cross-border merger, they only apply if either all merging companies are subject to such procedures under their own national law or if they explicitly accept the possibility for their members to have recourse to such a procedure (Art. 10(3)). However, such a procedure does not hinder the validity of the cross-border merger, but must be indicated in the registration certificate.

V. TAX TREATMENT – RENVOI

*24. The cross-border merger is so far the only structural change which has its own harmonised tax regime. Therefore, in this respect, and unlike in the case of a cross-border transfer of seat, there is legal certainty already. The regime is part of the EU tax law regime for structural changes and groups of companies, which is treated in one block and separately (see therefore below §32).

VI. TRANSPOSITION – COMPARATIVE LAW

*25. Most transposing laws follow the wording of the directive very narrowly, i.e. simply transpose its minimum level.³¹ In France, where company law had already in principle

³⁰ On the problem that liability may continue in the state of emigration on the ground of public faith instruments, see Oechsler, NZG 2006, 161 (164).

³¹ Comparative Law surveys in: Winter, *GmbHHR* 2008, 532; and contributions in: van Gerven (ed.), *Cross-Border Mergers in Europe*, 2010.