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Cross-Border Mergers Directive: EU Perspectives and National Experiences

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The Implementation of the CBMD in Luxembourg – A Critical Assessment

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Context

No objection to corporate moves inside or outside Luxembourg

Luxembourg is a jurisdiction that is very opened to the idea of corporate restructurings across the borders

Even before the transposition of the the CBDM (that took place in 2009) and in the absence of any specific legal provisions on this topic, cross-border mergers were already practiced in Luxembourg:

- First big wave following the transposition of the directive 90/434/CEE (1990) (on the common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of shares concerning companies of different member states) at a time when only internal mergers of public limited liability companies were regulated
- Second big wave followed the adoption of the SE regulation in 2001 that was interpreted as giving a signal at EU level in favour of cross-border mergers
- Third wave followed the CJEU Sevic case, (2005), that involved the acquisition of a Luxembourg company.

This situation is not surprising considering Luxembourg's status as an international financial centre

Context

In such setting Luxembourg did **not** exercise the **option allowing national authorities to oppose a merger (internal or cross-border) on grounds of public interest** (see art. 4, 1, b) CBDM and art. 121, 1, b) dir. 2017/1132 of June 14th, 2017 relating to certain aspects of company law, codifying EU company law directives including the ones relating to – eventually cross-border – mergers and divisions)

Context

Since 2007, **internal and cross-border mergers and divisions are allowed when one of the companies involved undergoes bankruptcy proceedings, proceedings relating to composition with creditors or a similar procedure**, such as suspension of payments, controlled management or proceedings instituting special management or supervision (see art. 257 and 285 Law on Commercial Companies, *infra* : “LCC”)

Context

Cross-border mergers are regulated **for all companies enjoying legal personality** (civil or commercial, so including : public and private limited liability companies, partnerships and limited partnerships, partnerships limited by shares, simplified joint stock companies – SAS – and cooperative societies, Economic Interest Groupings being also covered) according to the principles of the EU Cross-Border Directive, the same legal principles being also declared applicable to cross-border mergers involving companies originating in a state that is NOT a member of the EU (provided that the other state's national law does not preclude it) (see art. 257 LCC). Cross-border mergers (European and international) are regulated within the same legal provisions as the national mergers

Context

Cross-border divisions (within the EU and also with a company/EIG originating in a state that is not a member of the EU) are **allowed** from the point of view of Luxembourg **but**, as no EU directive applies to the topic, **do not receive any specific regulation** (see art. 285 LCC)

Partial divisions (possibly cross-border ones) are also allowed from the point of view of Luxembourg but are not specifically regulated either (see art. 287 (1) LSC)

Context

Furthermore the law of Luxembourg also recognizes that the following transactions may be carried out with a foreign actor (European or non-European, provided that the latter's national law does not preclude it) : **transfers of professional assets** (originally inspired from Swiss law, art. 308bis-6, sub-§ 3 LCC), **partial transfers of assets** (by reference from art. 308bis-2 LCC), **transfers of a branch of activity** (by reference from art. 308bis-3 LCC) and **transfers of all assets and liabilities** (by reference from art. 308bis-4 LCC)

Specifically relating to the implementation of the CBMD

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Many cross-border mergers do take place in Luxembourg. Most practical difficulties in implementing the new regime were solved in the first months/years following the transposition of the Cross-Border Mergers directive

As a matter of fact **most of the cross-border mergers taking place in Luxembourg are** of a rather uncomplicated kind as they are often intra-group mergers:

- between companies with no or very few employees and,
- furthermore, in a vast majority of cases, between a parent company and its 100% subsidiary.

Consequently the protection of employees or minority shareholders is not at stake and one can, in most cases, have recourse to the **simplified merger procedure**

For this reason, this topic **did not**, to our knowledge, **give rise to disputes brought to Court**

Specifically relating to the implementation of the CBMD

Moreover:

- most cross-border mergers involving a Luxembourg company are intra-European but there are some cases of mergers involving non-European companies

- almost all Luxembourg companies involved are either public or private limited liability companies (SA or SARL), the latter type of company being very appreciated by US multinational companies and private equity funds establishing subsidiaries in Luxembourg

- the so-called "merger" between different group of companies rarely takes place by using the merger procedure in the proper legal sense but is mostly first operated through acquisition of shares or assets, the proper "merger" in the legal sense being effected in the post-acquisition stage

In practice however, the following questions/issues were raised:

Specifically relating to the implementation of the CBMD

- **lack of complete harmonization of delays** can frustrate the parties' expectations in terms of timing (f. e. art 6 (1) of the CBMD, Luxembourg : one month, Belgium : six weeks)

- mergers between companies that are not limited liability companies in the sense of the CBMD: such mergers are allowed following the Sevic case but since none of the EU directives addressing the topic cover such mergers, the legal regime remains uncertain, which can be problematic for Luxembourg that allows all companies with legal personality to merge and that experiences an undeniable revival of some entities, such as limited partnerships (limited by shares or not), that are very much in use in the funds industry

Specifically relating to the implementation of the CBMD

- mergers with bi-national companies :

Illustration : a Luxembourg company (real seat theory applies in Luxembourg) is to merge with a company having its statutory seat in the Netherlands (statutory seat theory applies in the Netherlands) and its real seat in Luxembourg (so the company is Dutch from Dutch point of view and Luxembourgish from Luxembourg point of view). Even though this merger could be viewed as an internal merger from Luxembourg point of view, it will usually be treated like a cross-border merger for the sake of legal certainty. A clarification on this topic would, however, be welcome

Specifically relating to the implementation of the CBMD

- the **simplified merger** brings more than welcome simplification in intra-group mergers but this procedure applies only when the parent company acquires its subsidiary and not to the case – frequent in practice – of the "reverse merger" where a subsidiary acquires its parent company. Some simplification would be welcome in that case as well

- **still relating to simplified mergers** the CBDM requires an approval by the shareholders of the acquiring company whereas such requirement is not applicable to an internal merger (provided that some conditions are satisfied) (see art. 15, 1 of the CBDM). Is it actually useful to maintain such difference of treatment?

Specifically relating to the implementation of the CBMD

- a new company law reform was recently adopted in Luxembourg (2016), introducing, a.o., a new **article 1865bis in the Civil Code that allows "dissolution-confusion"** in one-shareholder companies: inspired from French law (art. 1844-5 of the French Civil Code), it provides for the possibility (not an obligation), when the shares of any type of company find themselves concentrated within the hands of a single shareholder, for the single shareholder to proceed to the winding-up of the company followed by transfer of all of the company's assets and liabilities to said shareholder without going into a liquidation procedure. In this case the company's creditors may, within a 30 days delay, go to court to request additional securities (the protection is substantially the same as for a merger but the delay awarded to creditors is shorter than the one awarded by art. 268 for the case of a merger: two months). In French law it has been argued that this provision could not applied to the companies considered under the 3rd (internal) mergers directive. Another question could be asked as to whether this provision could be applied across the borders. F.e. could a French company being the sole shareholder of a Luxembourg company decide to dissolve it without having to consider the provisions of the CBDM?

Beyond the CBMD: more issues relating to companies'mobility have to be addressed

- the directive only addresses mergers. **Other reorganization techniques** such as divisions, transfers of assets, transfers of a branch of activity or of all the assets and liabilities of the company are not covered by the directive and this even though they can likewise take place across the borders and can be difficult to carry out in the absence of some harmonized regime;

Beyond the CBMD: more issues relating to companies'mobility have to be addressed

- since 2016 the cross-border merger is no longer the sole way for a company to change its nationality/applicable law without having to comply with some unanimity requirement. Indeed both the public and private limited liability companies can now decide to transfer their seat at the same qualified majority demanded for a (cross-border) merger. That of course adds to the arguments formulated on Luxembourg's side so that the EU would finally harmonize the conditions at which the **transfer of a company's seat** could be transferred