"THE LEGAL ANALYSIS OF MERGERS & ACQUISITIONS IN THE EU."

Does it get us where we want to be?"
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ABSTRACT

The Mergers & Acquisitions in the European framework will be the core research objective of this thesis. Being both, the most widely used and important mechanism in practice while also one of the most extensively researched topics in academic sphere the M&A remains the center of the company and corporate law focus around the world.

Due to the enormous amount of research and literature existing on the topic this thesis will focus only on the certain aspects of the European M&A practice, discussing some of the most relevant legislative texts of the EU Company law – Cross-Border Merger Directive and the Takeover Directive with the certain extensions to a relevant mechanisms related to those two.

The purpose of this thesis is twofold: on the one hand, descriptive and legal analysis will be provided with the explanation of the various mechanisms open for the European M&A practice, while outlining the usage of these options in practice and the consequences on the EU Company law framework. Subsequently, an effort will also be made to determine to which extend the Mergers and Takeovers Legislation in the EU is substantiated in practice and commercial realities of the European corporate world. (Part I and II). On the other hand the emphasis will be further given to most relevant discussions (the relevance, need for reform, efficiency of the EU Directives, possible alternatives) and opinions on these discussions concerning the role and future development of the M&A in Europe. (Part III) In order to bring this work closer to a corporate reality the discussion will also touch upon the possibilities of M&A focused corporate restructuring in the light of Brexit, which would help to amplify the problems arising in the usage of the available M&A options on the continent. (Part III)
“It is clear that you cannot stay in the top league if you only grow internally. You cannot catch up just by internal growth. If you want to stay in the top league, you must combine.”

— Daniel Vasella, Chief Executive Officer, Novartis, July 2002
INTRODUCTION

(Cross-Border) mergers and takeovers form the core instruments of external European growth. Every legal practitioner, in almost any field, sooner or later comes in contact with M&A one way or another. Being extremely popular and high demanded field, M&A made its appearance in the pan-European market in the nineties and have kept lawyers and legislators all over Europe occupied with regularization and harmonization of the field.

Due to its importance in a wide variety of sectors, the M&A topic has been of great interest for the scholars and lawyers all over the world over the past four decades. As result, the literature on the M&A, that addresses different facets of the topic, is quite extensive, making it impossible to outline it as broadly as possible due to the limited space available. Therefore, it is not the aim of this thesis to provide an extensive, deeply theoretical outline of the M&A concepts. The purpose, appears to be a discussion of the major M&A instruments in EU and its development on the European markets. The objective, is to outline and discuss key mechanisms and rules regarding cross-border mergers and takeovers in the EU in the prospective of the future development of the M&A standards and its influence on the growth and globalization between European Members States.

This thesis cannot, in fact, be shaped by one exact research question. Rather, a compilation of the couple inquiries will lead the research. Main inquiry could be posed as an attempt to give a clear and broad review of the existing M&A mechanisms in Europe while trying to critically assess whether the existing framework functions properly in practice. The general inquiry can, therefore, be divided into the several broadly formulated questions. First question should be: “What is the main legislative mechanism for M&A in Europe”, the second query as a consequent result of the first query should be: “Does the existing mechanisms, discussed as a part of the first query, work in practice and deliver satisfactory results?” alongside with the supporting question on “Whether the structure we currently have in place is helpful in the new realities of the 21st century businesses?”. This queries cover a broad line of questions concerning the usage of the M&A instruments in Europe, need for reform, impact it has on shareholders and possibilities to value creation and innovation. The reason behind this questions is the issue on the functionality and value of current structure and mechanisms in the light of the new political and economic realities of the twenty first century and the changing framework of the European Union landscape.

In order to give an answer to intended queries this thesis can, in effect, be divided in three main parts, which are interconnected. It is structured as follows; Part I, which primarily serves as a general base for the further discussion. General outline is necessary for a better understanding of the M&A practice and its effect on the international business world. This part provides the broad discussion on the M&A
concept, terminology and principles. Further, it outlines the historical background of the M&A development worldwide, namely the so-called M&A waves, with a main focus on the 5th wave, which appeared to have had the most impact in Europe. Additionally, last chapter of the first part focuses on the impact that cross-border M&A activity has on the globalizing world of today and *vice versa*, while also outlining the main issues the cross-border M&A have in general - without a region specific focus. This serves a purpose of creating an overall understanding of the effect and issues on an international level, which is important to know before focusing on a specific issues existing in the EU.

The emphasis in the Part II is directed at the European M&A mechanisms and practices and a specific EU related issues. Firstly, the most relevant EU legislation, in the framework of M&A is discussed and critically assessed with regard to a further development of the EU Company law. The above mentioned legislation includes Cross-Border Merger Directive and the Directive on Takeover Bids. Each Directive will be thoroughly reviewed in an apart chapter including outlines of: short historical overview; scope and working; most important provisions, the impact and results achieved; concluding with the critical points and the possible solutions. Furthermore, alternative mechanisms, including SE and a division options, will be explained as an important and correlated tools in addition to the mergers and takeovers. The research of alternatives provides a comprehensive outline on the cross-border restructuring options in Europe and adds a certain perspective to the mainly general discussion on the M&A mechanics in the EU.

In it totality, this part will answer the first query of this thesis while also touching upon the second query with regard to factual findings and statement of existing issues in the mechanisms presented. However, the main objective of this discussion is to lay ground for the further discussion in the Part III.

Consequently, Part III serves as an answer to the second query of this thesis. It concludes the factual findings of the first two parts with a relevant discussion and evaluation of the role, impact and future of the M&A in Europe in a context of current political and business trends. This part presents findings and forms logical conclusions apropos a possible future that the M&A market might face in Europe, in a framework of technological development and innovative initiatives. More specifically: first chapter focuses on the nationalism and protectionist trends the Member State engage in and the impact it produced on the cross-border M&A activity. Second chapter consists of several discussion points which all can be classified as innovation, efficiency and technology related trends with connection to the M&A; the chapter will discuss, and bring to light possible correlations between the technological developments and the M&A influence while also touching upon disruptive innovation and the future of the M&A in Europe. This chapter will also comment on the debated topic of stakeholders wealth and value creation resulting out of cross-border M&A. Next chapter serves as a support of relevant findings by demonstrating a practical example of relevant M&A possibilities in restructuring
framework prior Brexit. This latter research is intended to add certain up-to-date relevance to this thesis while demonstrating knowledge and understanding of tools outlined in Part II. Lastly the final chapter attempts to understand the reasons why the existing regulatory framework in the EU seems to perform less successfully than in the US additionally presenting the prognosis on the future between the two regimes.

This research will be based on study of a primary EU legislation in the company law domain, alongside with the works of prominent scholars in the field of EU company law and the legal articles of the field’s experts. Also the usage will be made of working papers of the EU bodies, reports of international law firms and relevant newspapers articles with a view to bring it closer to practical realities.
I. THE M&A CONCEPT

To begin with, it might be useful to outline some general concepts and rules concerning mergers and acquisitions, for it is impossible to discuss the topic at a certain depth without the understanding of general rules and principles. The main goal of this chapter is, as stated above to give a general outline of the M&A concepts in order to lay base for the further reflective discussion.

In this chapter the concept of the M&A will be discussed on the more global level and not only involving the European practice, since the rules and concepts are to some extent similar for the US and Europe and it might be handy to have a more general understanding of the mechanism. The necessary differences will be emphasized but the overall idea of the mechanisms and the globalization of the corporate world has led to the at least some amount of worldwide generally accepted principles of the M&A.

1. KNOW THE CONCEPT, KNOW THE NAME

The concept “mergers and acquisitions” (M&A) is primarily used as business term, not as legal term of art. While being not sharply defined in a legal point of view it refers to a broad set of similar transactions. Basically, it represents a generic term that refers to combining of two or more companies into one business.\(^1\) Lots of various transactions are being conducted nowadays under the M&A slogan, in all cases the bottom line of the M&A activity is: one company makes an offer to buy the other company, it can be in its entirety or only the specific assets.\(^2\)

1) Types of M&A transactions or lost in translation

Due to the broad meaning of the term M&A some specification of what exactly we will look at are in order. That is not the intention of this work to provide a full and extensive review of all the possible types, characteristics and specifics of various transactions, which generally fall under the M&A definition. Therefore this paragraph can in no way be considered a full outline of all the possible M&A options. The purpose is to give the general base of understanding of what will be covered in the critical discussion further on.


\(^2\) http://www.investopedia.com/terms/m/mergersandacquisitions.asp
a) The “merger” without the “acquisition”. Meaning behind the name

Distinctions between the concept of “merger” and the “acquisition” getting increasingly blurred, which leads to the situation that sometimes the words are used as synonyms. That is, however, wrong approach in most of the cases because despite the numerous similarities the two concepts mean somewhat different things:

**Acquisition**: acquisition is also often called a takeover of one company by another. It means the buyer takes over the target company and establishes itself as owner. Leading to the situation where the buyer controls the target company. The term acquisition is generally considered to have more aggressive connotation then “merger”, as it is mostly associated with controlling and dominating another firm. ³

The difference made sometimes between takeover and the acquisition is that some consider takeover as a situation where the control of the company taken without the target’s agreement, while the acquisitions are considered to be deals where the control was taken with the permission of the target’s company’s board of directors.⁴

It is probably clear what is meant when calling a takeover “friendly” or “hostile”. In a friendly acquisition, the managers, more precisely board of directors of the target firm, welcome the acquisition and, in some cases, seek it out. In a hostile acquisition, the target firm’s management does not want to be acquired.⁵

**Merger**: generally means that minimum 2 companies get combined to form a new company. After the merger, only one company remains. The merging companies become one, jointly owned company with a single identity.⁶

Important to mention is that in the EU context “Merger” has a very specific legal definition to be found in the Directives⁷. However, the details on each type depend on the mechanism and the Directive in force generally mergers are defined as being of three types, namely: merger by acquisition; merger by formation of a new company and merger by merger of a subsidiary into its parent.

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⁴ http://smallbusiness.chron.com/takeover-vs-acquisition-32510.html
⁶ http://finance.mapofworld.com/merger-acquisition/difference-between.html
Merger by absorption occurs where a company transfers all of its assets and liabilities to another already existing company in exchange for the issue to the disposing company's members of securities or shares in the capital of the acquiring company, sometimes accompanied by a cash payment. This complications in the name of the transactions clearly demonstrate the divergences in the use of terminology by US and EU. Where in the US such a transaction would clearly be defined as an acquisition the EU legislation deems it to be a merger.

From the basics, stated above, it is safe to conclude that normally M&A transactions involve a buyer and a seller. The business to be transferred is generally called the "target," which may be separately incorporated, or may consist of an operating unit or division owned along with other businesses by a single entity. Merger as well as acquisition can be either cross-border or domestic. Domestic M&A constitutes an activity between companies at the same state while cross-border M&A are those involving companies from at least two different states, or more precisely between companies whose headquarters are located in a different states.

Further, the mergers can be divided into the horizontal and the vertical ones. Horizontal are considered the deals between the companies operating in the same industry on the same level, therefore with approximately the same customers. While the vertical mergers are those happening between companies which operate in different stages of production process, supplier-customer relationship.

In the US, the M&A concept is considered to be more evolved and therefore involving more forms, options and mechanisms then the one known to us in Europe. Typical US concepts involve: tender offer, proxy fights, consolidation, down raid, Saturday night special etc. Despite being extremely interesting, mechanisms and the technicalities of the US M&A domain will not be further discussed in this thesis.

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10 Clear example is the Daimler-Chrysler merger, considered the largest industrial horizontal merger of the 20th century,
b) *M&A waves*

The M&A wide usage is not a discovery of recent times. The first appearance of M&A in a high frequency evolved at the end of the 19th century, when a USA markets were in need for bigger investments.\(^\text{13}\) Concerning the historical development, what we need to know is that the Mergers and Acquisitions emerged through so-called M&A waves, it had to do with the fact that the activity of the M&A fluctuated depending on an economic and financial environment of the markets.\(^\text{14}\) These ways were global, taking place and shaping up the corporate world in the US and Europe. There have been 6 key M&A waves through the history, namely: of the early 1900s, the 1920s, the 1960s, the 1980s, and the 1990s, and the last one of the beginning of 2000’s, more precisely 2003-08, which has marked globalization era, by the large amount of the cross-border mergers coming into being.\(^\text{15}\) This cross-border M&A trends came as a logical result of the shifting of global capital as well as business internationalization which on its turn led to a creation of multinational corporations shaping the world we know today.\(^\text{16}\)

However for the Europe the most important and the most noticable one is considered to be the 5\(^{th}\) wave. The first three waves have gone almost unnoticed but the 5\(^{th}\) wave has opened an unprecedented demand for M&A transactions in Europe.\(^\text{17}\) The numbers serve a clear demonstration - total monetary value of the 5\(^{th}\) wave is estimated to be US 5.6 trillion, which is more than eight times the value of the 4\(^{th}\) wave. The introduction of the common currency and an internal market among the EU Member States, technological innovation, and globalization process are believed to be one of the many reasons for active participation in the 5\(^{th}\) M&A wave in Europe.\(^\text{18}\)

The cultural and geographical proximity of EU member states and the raising level of economic and legal harmonization, alongside with the political stability in Europe which created a favorable economic conditions for corporate growth served as a push for European M&A. Due to the rise in competition, firms participated in M&A transactions in order to gain dominant market positions in the European Single


\(^{17}\) B. CASSIMAN and C. MASSIMO (Eds.) "Mergers and acquisitions: The innovation impact", Cheltenham, UK: Edward Elgar, 2006, p.11

Market. Furthermore, European firms preferred European counterparts to partners located outside of the EU to reduce risks.\textsuperscript{19}

![Figure 1: (Completed) M&A activity in Europe 1990-2014\textsuperscript{20}]

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure1.png}
\caption{(Completed) M&A activity in Europe 1990-2014\textsuperscript{20}}
\end{figure}

2. \textbf{THE IMPACT OF THE M&A AND THE WAY TO APPROACH IT}

Literature points out that the weightiest motive for a merger is considered to be synergy. Another strong motives are to dominate the market by investing in a profitable business or capturing a competitor who pose a threat.\textsuperscript{21} No matter what the main motive for M&A is, be it growth, development, competitive rivalry or globalization of business mergers and acquisitions (M&A) constitute an important part of the market economy. They take the rightful place among the most important corporate procedures in the finance and business world in terms of both size and impact. In particular, the stream of cross-border M&As is believed to be an important area for prospect development due to international setup across borders in the world economy. The M&A markets, especially when it comes to a cross-border M&A are considered one of the building bricks behind the accelerated globalization of the 21\textsuperscript{st} century, the cross-border M&A wave of 2003-08 is a clear demonstration of that.\textsuperscript{22}

\textsuperscript{19}E. CFIS and A‘TRIGUERO, “Make, Buy, or Both: The Innovation Sourcing Strategy Dilemma After M&A,” \textit{Growth and Change} vol. 47.2, 2016, p. 176-177


\textsuperscript{22}J. SEDLACEK and P. VALOUCH, “Motifs of M&A in the US, European and Asian Markets”, \textit{ERMM} 2015, p. 363.
The global M&A has demonstrated a results of 3.9$ trillion in 2016, according to J.P.Morgan report, with cross-border M&A representing 36% of this total volume.\textsuperscript{23} In the prominent literature, cross-border M&A is referred as a most aggressive and “one of the fastest ways to enter a foreign market”.\textsuperscript{24} It plays an important role in the growth of companies and the development of market structures. When executed correctly the M&A can produce various positive effects among which are, for example, operational efficiency and technological growth.\textsuperscript{25}

The considerable size of the industry and its strong international aspect produces certain complexities with regard to enforcement and understanding of the transactions in the same way over different jurisdictions. It is a given fact that different countries regulate M&A differently and therefore exhibit different patterns in M&A forms. Consequently, despite the wide usage of M&A mechanism, it is a reasonably complex phenomenon which involves financial, strategic, behavioral, operational challenges, most of which appear on a cross-border level. This complexity can be supported by the failure rates of nearly fifty percent by the cross-border M&A.\textsuperscript{26} Due to the fact that M&A legal principles don’t apply similarly to all methods of pursuing a given transaction, it gives possibilities for M&A to be structured in that way in order reduce the effect of or avoid or circumvent some laws.\textsuperscript{27} Therefore considering all reaching impact of an M&A it is important to approach the existing problems in a globalized and open-minded way.

This mainly has to do with a theoretical problem of nationalism - related issues become very real in a situation of cross-border transactions, where there is no room for the interpretation and the rules of the game should be clearly defined for all the parties in order to conduct a clean deal without any unexpected complications. This is an widespread issue, especially in Europe where the recent political and economic struggles has made Member States less prone to a far reaching harmonization. (see: \textit{infra} Part II)

\textsuperscript{23} J.P.Morgan, “2017 M&A Global Outlook; Finding opportunities in a dynamic market”, p.2
II. M&A AND THE EUROPEAN UNION. MECHANICS, CURRENT PRACTICES AND THE RATIONALE BEHIND

As appears from numerous research articles and the actual trends there is a strong growth pattern present for the M&A in Europe. From being quite insignificant in the beginning of the 1980s, the takeover market reached a level of 4,000 annual transactions by the end of the 80ties. Furthermore, it started with 7,000 M&As at the beginning of the fifth wave in 1993, and more than doubled by 2000. By the first quarter of the 2017 the global M&A resulted into $726.5 billion, while M&A in Europe reached $215.3 billion, thus, representing roughly ¼ of the world M&A activities. This simple data demonstrates how sizable the European M&A market has become over the last decade.

Figure 2: the rising of the European M&A

The reasons for this M&A phenomenon in Europe were already shortly outlined in the 1st chapter. The obvious reasons for the increasing amount of the M&A activities in Europe can be explained by the important factors of the development of the European Union at that time. The development of the single European market, alongside with the introduction of the single currency and the willingness to be involved in the transatlantic dealings had fueled the rapid development of the M&A in Europe at that time.

1. Regulation of the M&A in the EU.

The general description of the M&A notion and the difficulties when defining transactions as such were provided in the first chapter of this thesis. It appeared to be rather worthwhile to first provide the general outline of ambiguity of the M&A terms, for the better understanding of the mechanism and its role worldwide, nonetheless as of now the general focus will be on the European definitions and concepts of the M&A.

In functional terms the instruments of M&A in Europe can be quite substitutable (for example merger and friendly takeover generally produce the same result), nevertheless, these practices have different weight in the legal practice in different countries. These differences can lead to distortions in cross-border cases when the practice which is well known in one country can’t be similarly applied in another country.32

After the Sevic33 judgment cross-border merger has also been long recognized as one of the methods of establishment in another Member State.34 This development has come as a result of a major push for a further developments of the EU corporate mobility, so-called “Incorporation Mobility” initiatives of the ECJ. The relevant case law of the ECJ 35 on the issue36 has triggered the legislative movement in order to remove the obstacles of the cross-border mobility and to open a way for a more harmonized Company law.37 Nonetheless, the possibility of relocating the actual registered seat is still a matter of considerable legal uncertainty for some Member States.38

In order to tackle these issues the EU legislators have been trying to regulate the M&A for the last 30 years.39 Regulatory policy on M&A transactions in the EU is primarily structured by national legislations which, in its turn, have to be in conformity with the wide EU rules. Common EU policy was implemented through EU Directives and Regulations in order to control the corporate behaviors of

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35 Centros case; Überseering case; Inspire Art case; Sevic case; Daily Mail case; Cartesio case;
36 The ECJ decisions in Centros, Überseering and Inspire Art have made it possible for new firms to migrate to more favorable jurisdictions and are considered the core base cases for a EU Company among couple of others (see footnote 23)
39 First Directive that deals with M&A was adopted in 1978, however first only to deal with the national understandings of Mergers.
European companies and to secure a healthy degree of competition and corporate development, while trying to harmonize and bring the EU Corporations to a “single market” level. 40

The main interest of this thesis will lie on the cross-border European mergers and takeovers, with as well general discussion on (cross-border) divisions.

2. EU DIRECTIVE ON CROSS BORDER Mergers

1) Historical perspective and primary goals

On 26 October 2005, the European Directive 2005/56/EC1 (the ‘Cross-Border Merger Directive’) was adopted. It has introduced a harmonizing legal basis within the European Union for cross-border mergers. The mechanism was necessary to tackle the problems that are deemed to arise in a cross-border framework, which on its part was necessary for the further development of external European growth, so that Europe could stay competitive against US and Japan.41

a) Third Council Directive and the rise of EU company law

The Cross-border Merger Directive 42 (further referred to as “CBMD”) is mainly inspired by its ancestor, the Third Council Directive43 concerning national mergers of public limited liability companies. It is generally recognized among the scholars and prominent commentators that Third Directive was one of the biggest achievements in European harmonization of company law – it developed a comprehensive and functional concept of mergers and by doing so it actually managed to harmonize the mergers field in the EU.44

The Third Directive is considered to be the setting stone for the mergers rules within the EU, which made the CBMD possible. Third Directive recognized two types of mergers - by acquisition or by formation and allowed the transfer of assets with implied continuity of ownership.45 Despite the applicability only to a domestic mergers this Directive remained important for the future cross-border mechanisms due to the fact that this was the Third Directive that has set the definition and the main

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rules and effects of the merger. The CBMD and the SE-Regulation have for a fair amount just gave a cross-border application to a main aspects of the Third Directive.46

2) Mechanism and usage
   a) Application

The CBMD applies to mergers when at least two of the merging companies are from different EU Member States (which was later extended to companies of the European Economic Area (EEA)).47 Further the CBMD applies only to limited liability Companies (regardless their corporate form) formed in accordance with the law of EU or EEA Member State.48 By introducing this Directive, the European legislator intended to increase the mobility of companies within the European Union by providing the tools to companies to restructure and cooperate at the European level.49 Nevertheless, a number of discrepancies remain across the EU member states concerning the translation of the Directive into national legislation. The majority of Member States choose to transpose the Directive in their own jurisdiction to as minimal level as possible.50 In this scenario the general meeting has no authority, except the limited power to decide on a reaction to a hostile bid.51

   b) Basic technicalities

The Directive has aimed at authorizing and regulating cross-border mergers without liquidation and the automatic transfer of assets and liabilities to the entity which results from the merger. The Directive defines 3 types of merger: (i) merger by absorption, (ii) merger by creation of a new company, (ii) merger of a subsidiary into its parent. The scope is therefore almost completely taken over from the Third

47 The Cross-Border Merger Directive may therefore be applied to different companies governed by the laws of the same Member State, as long as at least one company involved in the merger is governed by the laws of a different Member State.
48 Article 2.1 Directive 2005/56/EC defines a limited liability company as: (a) a company as referred to in Art. 1 of Directive 68/151/EEC, or (b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others.
Directive except the small expansion - CBMD explicitly involved the subsidiary merger, which was not included in the Third Directive.

By the type (i) and (ii) the CBMD regulates deals whereby all assets and liabilities are transferred to a surviving company in return for the shares/securities representing the capital of surviving company. Cash payment is allowed only in case it doesn’t exceed 10% of the nominal value of the shares. If the cash payment exceeds this threshold the merger can’t benefit from the CBMD.  

The CBMD also provides simplified procedure for the merger of subsidiaries into their parent company which is also known as an “upstream merger” and from this type there appeared another type, namely reversed merger of parent into the subsidiary (see: infra next subchapter).

The working of the CBMD means that in general each participating legal entity is subject to the applicable national provisions on the process of merging, while the CBMD only contains final, special regulations for specific points.

Another core element of the CBMD is the so-called Merger Plan, which must be jointly prepared by the management or administrative bodies of the all participating companies. The required content of this Merger Plan is set forth in Art. 5-6 of the CBRR. However, the Directive while outlining the necessary information to be included in the plan, does not stipulate any form of the Merger Plan, with the result that national provisions apply. The procedures of a shareholders’ meetings, based on the Article 9, such as the general requirement of the meeting, requirements as to form, notice periods and majorities, are based on national law.

c) Reverse Cross-Border Merger

Another interesting instrument provided by the CBMD is so-called reverse cross-border merger. This practice has come to the continent from the US, where there is no direct possibility to transfer a seat from one state to another, hence the method of reverse merger. Despite being quite uncommon in Europe this mechanism is worth mentioning due to the possible impact it might have on the restructurings and

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company migrations out of UK due to the Brexit 56 (for current development see: infra part III).

This mechanism is primarily designed in order to avoid the need for company liquidations and also to circumvent the restrictive effects of Daily Mail judgment. It can simply be explained as a reversed option of the 3d type of merger outlined in the CBMD, namely merger by absorption of a wholly-owned subsidiary. 57 Consequently it constitutes the parent company being absorbed by its subsidiary after which the parent company ceases to exist. Nevertheless, the absorbed parent can be “preserved” in a form of a branch. Subsidiary which absorbed the parent can exercise its right of secondary establishment and thus preserve a branch in a previous parent company state. Accordingly, the company transfers its seat indirectly to the intended new Member State without having to go through liquidation and formation in the new State. 58

Under the UK law such merger was not allowed until the recent decision of 23 January 2017 where the High Court approved a reverse cross-border merger. As a result of the ruling a UK parent company was absorbed by its Italian wholly owned subsidiary and the shareholders of the UK parent became the shareholders of the Italian subsidiary. By this the High Court has set a precedent which would allow in a future to conduct a reverse merger between English and European companies. This decision has already had a huge reaction in a press by speculating on how this decision might affect the cross-border restructurings for the UK parent companies seeking to relocate to other EU Member State prior Brexit (the further discussion see: infra part III).

3) Impact
   a) What is positive or general achievements

Based on the combined research, it can be concluded that the CBMD is regarded very positively. It has provided market participants with a clear and predictable framework for carrying out cross-border mergers within the EU and EEA, which makes cross-border mergers a fast, predictable, structured and less costly. Stakeholders are also believed to be supportive towards new rules set out by the CBMD. 59

The CBMD provides EU companies with a variety of restructuring possibilities, which in its part, facilitates reorganization at European level without the obligation to register as an “SE” (or “European Company”). The CBMD further considered to remove substantial barriers to reorganizations, allowing for legal certainty and the removal of the significant cost of liquidation of any transferor company. This results are believed to have led to a new age for cross-border mergers.

The main positive effects of the CBMD can be summarized as follows. Firstly it made the cross-border mergers possible in all the Member States of the EU while also improving the effectiveness by introducing simplified procedures in certain cases. Secondly, the CBMD has resolved some issues concerning the conflicts between domestic laws of different Member States by introducing the conflict of law rules. Thirdly, the CBMD mechanism has opened a possible alternative for a transfer of seat and facilitated group re-organizations among groups of companies. Lastly it has introduced the rules with regard to protection of the stakeholders and employees.

The results reached in the fields of stakeholders/employee protection can however be debated on its results, nevertheless the compromises reached and the possibilities opened to Member States can be seen as a positive thing.

The increasing number of cross-border mergers (the increase of almost 3 times - from 132 in 2008 to 361 in 2012) confirms the general positive reaction of the market participants to the CBMD and the overall improvement of the cross-border mobility. There are however still a number of difficulties and gaps in the CBMD framework. The main concerns are directed at the issues with regard to scope, practical obstacles and protection of stakeholders (see: subchapter infra).

b) What is negative or problems and difficulties

As mentioned above, despite the overall positive results achieved by the CBMD there remain particular issues that were considered serious downsides by the practitioners.

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60 Prior to the implementation of CBMD establishment of the SE was one of the three options for undertaking a cross-border merger. Other two options were: seat transfer and non-harmonized merger. See: Study on the application of the Cross-Border Mergers Directive, 2013/S 015-020058, September 2013, p. 35
62 For example Article 15 (1) CBMD
63 See: as in its Article 4 (1) (b) first sentence
65 J. SCHMIDT, Research paper: “Cross-border mergers and division, transfers of seat: Is there a need to legislate”, June 2016, p. 16
as well as legal scholars. The main concerns are focused mainly in 3 aspects: the scope of the CBMD framework; the divergence of national regimes on protection of stakeholders; procedural obstacles.

Concerning the scope, the main issue remains the narrow coverage of only one legal company form, namely limited liability Company, which also reduces the possibilities to use the freedom to merge introduced explicitly in the Sević judgment. The issue of stakeholder protection appears to be the optionality of the relevant provisions – most of the countries have adopted provisions on the creditor protections, however the provisions differ strongly, while only six Member States have adopted the provisions minority shareholders protection which leads to even bigger discrepancy. Consequently, significant differences between the rules among the Member States which, in its turn, creates legal uncertainty and complexity for the parties. The practical issues include among others, the divergent accounting rules, deadline’s differences, communication between authorities and the documentation requirements.

We can summarize the generally proposed solutions to the issues sketched above as follows. Concerning the scope of the application it is advised to extend the scope of the CBMD to all legal entities within the meaning of Article 54 TFEU. The minority shareholder protection rule should be wholly harmonized for all the Member states. It is crucial for the minority shareholders to receive an exit right for a reasonable compensation and the possible additional compensation in case of the unfavorable share exchange ratio. The area of creditor protection should also be harmonized but no to the extent of possibility to block the merger. The ex-post protection is considered enough and therefore advisable.

There are also possibilities for resolving some procedural issues. The burdensome and costly requirements of merger report should have the possibility to be waived in specific cases (for example subsidiary mergers) in order to not impose overly formalistic approach to a companies that can’t pose any threat of abuse of the EU rules. Another practical issue that has to be taken care of is the valuation rules. The

harmonization of valuation rules regarding the determination of the merger ration is needed in order to remove uncertainty.\textsuperscript{70}

Figure 3\textsuperscript{71}

Another important issue connected to the efficient use of the CBMD constitutes taxation. Although, the issue is not discussed in this thesis, we should be aware that in the business world, the taxation issue remains one of the most important arguments for all the corporate transactions. In fact the crucial obstacle to intra-European mergers has always been taxation, more precisely taxation of the unrealized capital gains and the possibility to carry forward losses. While being solved on the national level, this was not covered for a cross-border mergers, until 2009. With introduction of the Tax Merger Directive\textsuperscript{72} the problem appeared to be solved – Directive provided a common tax system applicable throughout all member states which allows to defer taxation of profits and gains relating to assets and liabilities transferred until the desposal of such

\begin{flushright}
\textsuperscript{70} J. SCHMIDT, Research paper: “Cross-border mergers and division, transfers of seat: Is there a need to legislate”, June 2016, p. 20-25 \\
\textsuperscript{71} Source: Study on the application of the Cross-Border Mergers Directive, 2013/S 015-020058, September 2013. \\
\textsuperscript{72} Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.
\end{flushright}
assets by the receiving entities or shareholders.\textsuperscript{73} There remain however certain uncertainties connected to complexity of the deals.

3. TAKEOVERS IN THE EU

What meant here is the specific takeover bid mechanism used in Europe. The rules and practices for takeover bids are different from the one for mergers. Although the merger and the takeover are in general functionally equivalent, Member States differ in their preference of one or the other and despite the similar outcome in both the rules and legal consequences it produces differ.\textsuperscript{74} Takeover bid is addressed to each shareholder directly, while the merger proposal is addressed to the company as a whole and decided by consensus. In case of takeover bid it is up to each such shareholder of the target company to decide whether he will accept the bid. It is only possible to intervene for the general meeting if the decision needs to be taken concerning the reaction in case of a hostile bid.\textsuperscript{75}

1) 2004 Takeover Directive

The practical importance on the Takeover regulation in Europe can be outlined by a simple statistics. In approximately half of takeovers worldwide there is European Company involved, either as a bidder or the target, consequently the European legal rules will apply to those.\textsuperscript{76}

The Takeover Directive has been a subject to controversies and political discussion from the very beginning of its existence. The main objectives of the Directive were to provide common legal rules for takeovers and by that also facilitate takeover rules in order to integrate capital markets of the EU. What it does in its function, is setting the common legal framework but leaving the freedom to MS on how to implement it. The positive outcomes of the Directive is the common language on takeovers which brings clarity on a subject among Member States. It has also identified the crucial aspects of takeover mechanisms and helped classify alternative takeover regimes and rules.\textsuperscript{77}

\textsuperscript{73} D. VAN GERVEN, Cross-Border Mergers in Europe. Vol. 1, Cambridge etc.: Cambridge University Press, 2010, p. 45
\textsuperscript{74} For example the merger is possible only with qualified majority in both of the merging companies while takeover is possible with a simple majority only in a target company,\textsuperscript{75} M. WYCKAERT, K. GEENS, “Cross-Border Mergers and Minority Protection - An Open-Ended Harmonization”, Utrecht L. Rev. 40(52), 2008 p. 42
a) The historical outline

The adoption of the Takeover Directive had a complicated path. Deliberations on creating a set of rules governing public takeovers across Europe had already begun in the mid-1970s. The main objective was to create a level playing field which would provide legal certainty in the takeover market on the Continent. The first proposal was presented in 1989, it called for extensive harmonization in the field, which was inspired by the favorable economic climate of that time. Already at that time, the main focus was at two provisions, namely mandatory bid and passivity rule, which also appeared to be main issues of disagreement. The second proposal was rejected by a European Parliament in 2001, it contained less details, although in essence the rules were kept unchanged. The final version was finally adopted on 2 April 2004 and appeared to be a result of lengthy consultations and a compromise. The compromising approach resulted in the possibility for both, companies and member States to opt in or out of the breakthrough and passivity rules. This leniency made the adoption possible, while at the same time making the Directive way less efficient. 78

b) Major provisions

Most of the provisions, among which important core provisions like a breakthrough rule (Art. 11) and board neutrality rule (Art 9), are optional due to disagreements among Member States, seeking to protect their national interests. This freedom given to Member States highlights the minimum degree of harmonization achieved. In other words, Directive provides the minimum harmonization, which is considered to have such a little impact that some might argue that it can’t be considered the harmonization at all. 79

i. Mandatory bid rule

This rule of Article 5 is considered to be the main obligatory rule of the Directive. The Takeover Directive dedicates a lot of focus to the protection of the minority shareholders of the target, therefore article 5 sets a “mandatory bid rule”. It requires a bidder, who exceeds a certain shares ownership threshold in a target company, to buy the rest of target’s company shares. Simply speaking, the mandatory bid must be launched when somebody has taken the control of a company.

The rationale is to provide an exit possibility for target shareholders who did not sell their shares prior to buyer obtaining the sufficient amount of shares from the ones

who were willing to sell. Thus this rule is needed in order to avoid that the remaining shareholders would be left, holding shares without real control and without the possibility to influence the company’s decisions.

The main issue consists of the fact that Directive doesn’t provide the definition of “control”. Consequently, the generally accepted threshold appears to be somewhat above 30% but Member States are free to set a threshold as high or low as they please. As a result of that, as we can see from a comparative analysis between different member states, they indeed made use of this freedom by adopting very different requirements with thresholds varying between 25 and 66%.80

ii. Squeeze-out and sell-out

Article 15 of the Takeover Directive establishes squeeze-out rights that aim to promote the takeover activity. It sets forth that in a situation when offeror acquires a certain percentage of shares he/she is able to make all the holders of remaining shares to sell them to offeror at a fair price. By this provision the Directive stated that at a certain point in time, the interest of the shareholders doesn’t outweigh the disadvantages for the bidders. Article 16 sets a mirror provision, namely sell-out right, which intends to protect minority shareholders by granting them the possibility to sell their shares in case the bidder acquires certain amount of the shares in the target company. The general threshold is set on 90% of the voting stock but the exact percentages vary between 90-95% and depend on the national law.81

iii. Board neutrality and Breakthrough

Article 11 is a breakthrough rule, it constitutes the idea of restricted voting rights. This rule introduces the one share-one vote principle rule in order to move the control away from the dominating control group.82 This rule is designed in a way that eliminates a variety of takeover defenses, which are considered to be a significant barrier to the development of an efficient cross-border takeovers market. The Breakthrough rule should be regarded together with the Board neutrality rule (see: below) considering that both rules complement each other and have the same objective of supporting the shareholder supremacy, promoting takeovers and limiting the board power for post-bid defensive measures.83

Board neutrality rule also known as non-frustration rule (Art 9) requires the management board to stay neutral during the takeover attempt as well as not to take any actions which may result in the failure of the bid. Among other things, it was intended to facilitate the bids, integrate the EU capital markets and promote the corporate control.\textsuperscript{84}

This rule requires the board of the target to obtain an authorization from the shareholders’ prior to taking any action which might result in the frustration of the bid. By this, the effect of the rule is that the decision making is shifted from the board to the shareholders. It is, nevertheless, allowed for the board to seek alternative higher bids.\textsuperscript{85}

This provision gives a clear example of the differences between the takeover philosophy between the US and the EU. While in the EU we try to keep the takeover market open and friendly, US which has also much higher numbers of hostile takeovers has slightly more far-reaching approach with a possibilities of strong defenses, power of the board and the lack of general laws on the defenses.\textsuperscript{86}

Despite the importance of those provisions the reciprocity rule of Art. 12 makes the Breakthrough and board neutrality rules optional for member states – Member states are granted an “opt-out”, however the companies in those Member states are given a personal “opt-in” right that allows them to fall “back” under the Directive regime. Member States may also opt for a selective board neutrality rule, based on so-called reciprocity. It is not hard to guess that most Member States have opted out for a mere reason of giving their boards more freedom, by this making the rule quite ineffective.\textsuperscript{87}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{85} J. T. WHITLOCK, “The Board Neutrality and the Breakthrough Rules in Europe – A Case for Reform”, Durham theses, Durham University, \url{http://etheses.dur.ac.uk/10933/1/Toby_Mjur_thesis_final_draft.pdf}.
\item \textsuperscript{87} L. ENRIQUEZ, R. GILSON, A. PACCES, “The case for an unbiased takeover law”, Harvard Business Law Review 41 (1), 2014, pp. 117
\end{itemize}
\end{footnotesize}
Figure 4: Reciprocity rule of the Article 12 Takeover Directive.\(^{88}\)

iv. Reform or go home?

It is to conclude from the European Commission’s report of June 2012\(^ {89}\) that despite significant flexibility left to the MS’ and the lack of radical changes, the legal and regulatory framework created by the Takeover Directive is working satisfactory, even though further changes and improvements are strongly recommended.

The unenthusiastic satisfaction the EU legislators seem to take in the Directive doesn’t mean it is not in heavy need for reform, in order to improve legal certainty and clear out the existing issues. According to the EU Commission and the prominent commentators reforming EU takeover law in order to achieve a level playing field across the EU is strongly desirable.\(^ {90}\)

The question raised in this framework is: weather the mandatory provisions, which would remove the big part of contractual freedom of the Member States, would be more efficient and therefore more desirable? It is believed by some that the market in itself is capable to function best on the optional rules\(^ {91}\) while other commentators in


the field seem to be more skeptical on the subjects of broad freedom for Member States.\(^\text{92}\)

Nevertheless, we should not forget that the world is changing very rapidly and the Western European realities have also changed quite a lot in the last 15 years. EU position is now weaker than ever, considering the current happenings around us: Brexit, the Greece crisis, terrorist attacks in the heart of Europe, refugee crisis. It is only natural that all those EU actualities are shifting European Company Law development on the very back of the priorities list. Another important fact is that now we have found ourselves with a considerable amount of Member States\(^\text{93}\), each with its own agenda. It is only logical that by that great amount of states which strongly differ culturally and economically most of them just trying to protect their national interests instead of harmonizing further. Additionally, Member States’ consequent unwillingness to adopt EU level corporate law confirmed and reinforced the desire for national legislative autonomy. In this light it seems almost impossible that the Commission would go back to the optional provisions, win back those Member States, that in the thirty years could not be persuaded, and achieve some kind of consensus on stricter rules between all the 28 (for now) Member States. Call me pessimist, but this is not likely to happen. Not now, not ever.

4. **Societas Europaea (“SEs”)**

Another interesting mechanism, worth mentioning is SE. It is relevant in the framework of this thesis due to the fact that SE constitutes one of the alternatives to CBMD in case of the cross-border restructuring.\(^\text{94}\) Further SE used to be in a spotlight of the EU agenda for some time, promoting the idealistic future of harmonized and similarly governed EU corporations.

An SE is a European public limited company, which capital is represented by shares and that can be created and registered in any EEA member state.\(^\text{95}\) The rules and conditions for the establishment and the legal power of SE were established by the SE-regulation\(^\text{96}\) which entered into force in 2004. SE is the only legal entity for which the EU law has explicitly provided the legal framework for transfer of seat.\(^\text{97}\) The idea

\(^{92}\) M. Ventorizzo et al., Comparative Corporate Law, St. Paul, MN: West Academic Publishing, 2015, p. 569

\(^{93}\) The European Union comprises 28 member states: https://en.wikipedia.org/wiki/Member_state_of_the_European_Union

\(^{94}\) Study on the application of the Cross-Border Mergers Directive, 2013/S 015-020058, September 2013, p. 35


\(^{97}\) Art. 8 SE-regulation; J. Schmidt, Research paper: “Cross-border mergers and division, transfers of seat: Is there a need to legislate”, June 2016, p. 12
behind the creation of SE was promotion of cooperation between firms located in different EU Member States and allowing firms to have an international “flexibility” by using this harmonized European model.98

According to the rule stated in the SE Regulation, SE can be formed in different ways. Formation is possible: via (I) merger of minimum two existing companies which are ruled by the laws of at least two different member states (cross-border merger), (II) formation of a holding company supported by public or private limited companies, (III) formation of a jointly held subsidiary, or (IV) conversion of an existing public limited company.99 SE represented a new legal form which came to coexist with already established corporate forms governed by national laws. It is, however important to understand that despite the existence of SE- Regulation the SE remains still to a biggest extend governed by national laws, factually speaking only 10% of the company law applicable to SE is derived from the SE-Regulation.100 It is therefore to question whether this European Company form is really that efficient in achieving the one common EU company framework.

There are numerous advantages of the SE regime like the possibility for a consolidated entity to follow a single set of corporate law rules; its flexible governance structure; protection of shareholder participation rights; employee participation rights; possibility to choose between one-tier and two-tier systems. The major advantage, however of an SE, is that its registered office can be relocated to another EU jurisdiction without liquidating the SE or creating a completely new legal person. Consequently making it somewhat easier to relocate to another Member Sate. With the further execution of Brexit, for companies that see benefits arising from being registered within the European Union formation of an SE either by transformation or by merger may turn out to be an attractive option to execute the relocation before the likely completion of Brexit in 2019.101 (see: discussion infra part III)

Despite the attractive form and the numerous advantages for companies with a strong international focus the SE has not been a great success. Being introduced more than a

decade ago the amount of registered SE’s doesn’t exceed 3000 companies. The reasons for failure of a great idea can be numerous: some prominent commentators consider the lack of statutory guidance, strict requirements and the absence of a specific related tax regime; others blame unresolved structural difficulties and the nationalistic approach of the Member States in promoting their national forms, another possibilities appear to be the conflict on exportation of employee participation rights and the length and cost of the SE formation process. However some, on contrary, consider the SE a success and a form which despite the slow take off is raising popularity in the recent years (see: infra Figure 5). Most of the so-called success of the SEs comes due to popularity in Member States that impose mandatory employee representation on corporate boards (like Germany, Austria, and Netherlands).

Total number of registered European Companies (SEs) by year of establishment (2004–2014) *

* Transformed/liquidated companies are excluded.

Figure 5: The data on established SE’s up to March 2014.

102 2525 companies are registered as SE as of march 2016; https://en.wikipedia.org/wiki/Societas_Europaea
107 Source: European Trade Union Institute. 21 March 2014.
5. **CROSS-BORDER DIVISION RULES**

For the completeness of discussion it is important to shortly discuss the division or de-merger rules, being the mirror-opposite of merger but serving the same purpose. Division is long considered (just like merger) to be a mechanism for restructuring, aimed at making the internal market function efficiently. Although there exists a Directive that covers national divisions of public limited liability companies, EU law still does not provide for a specific legal framework for cross-border divisions. The “national divisions” Directive (Sixth Directive) doesn’t oblige Member States to permit divisions but simply provides for regulation where Member States can voluntary decide to do so.

In a division, a company is dissolved without liquidation through division of its capital and assets, and their allocation in their entirety to one or more companies. Division can also be partial - commonly called a spin-off: that where the only parts of capital and assets are transferred other company(ies) without however the dissolution of the transferor. In a cross-border division company will be split with the resulting entities being incorporated in two or more different Member States.

Despite the availability of the Sixth Directive for the national division regulation the EU legislators failed to provide a legislative base for the cross-border divisions. Hence, the right for a cross-border division is commonly believed by the academics to be protected as an inherent aspect of the freedom of establishment principle. This position is based on the Sevic ruling of the ECJ which stipulated that the freedom of establishment principle.

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114 Interesting to notice is the fact that despite the lack of regulation, the Tax Merger Directive 90/434 has, from the very beginning provided a legal basis for tax relief in cross-border divisions. This option still remains unregulated on a EU Company law level, which creates misbalance. See also: L. L. HANSEN, "Merger, Moving and Division Across National Borders: When Case Law Breaks through Barriers and Overtakes Directives." 2007, European Business Law Review, vol. 18 (1), p. 192
establishment cannot be limited to only cross-border mergers, The Court further explicitly extended this freedom to other operations.\textsuperscript{116}

In general, there are now two possibilities to conduct a cross-border division. It can be done via a traditional national division (regulated by the Sixth Directive) followed by a cross-border merger (regulated by a CBMD). Consequently we circumvent the lack of rules by doing it in two steps. The second option is to base a cross-border division directly on the Treaty’s establishment rules as per the \textit{Sevic} judgment. This option, however, remains uncertain.\textsuperscript{117} The decisive point here is whether a cross-border division results in an establishment in a way analogous to that, which according to the ECJ was permitted in a cross-border merger.\textsuperscript{118} Nevertheless, without a clear and secure EU legal framework, this mechanism based on one of the core principles is quite illusive.

Despite the lack of legal clarity on the topic the division trends in Europe seem to be on a rise the last couple of years.\textsuperscript{119} As before the general trend was to believe that M&A can be overall profitable if done right nowadays the opinion has reversed to state that breaking up companies that don’t belong together can be profitable. This can be explained by the fact that smaller companies have more focus on succeeding in narrower field, which makes the management easier and incentivizes employees and managers to make it a success. Further it can be pleaded for the transparency benefits for the shareholders that such demergers can bring.\textsuperscript{120} (see: discussion: \textit{infra} part III)

1) Cross-Border Division EU rules. How and why?

According to some legal scholars there is a clear need for the adoption of the clear EU legal framework for cross-border divisions. This is needed in order to bring clarity and offer a secure and set alternative mechanism for cross-border reorganizations.\textsuperscript{121} Some Member States, among which Spain, France, Finland, Belgium, Luxembourg, have created their own mechanisms in order to permit cross-border divisions without the harmonized EU legal rules. Some of the countries (like Finland Spain,

\begin{footnotesize}
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\item \textsuperscript{119} According to Christer Gardell, co-founder of Cevian “...demergers and the destruction of conglomerates is the next major trend in the M&A market”
\item \textsuperscript{120} T. STERLING, ”Demergers and destruction: activists press Europe conglomerates”, Now 29, 2016, \textit{http://www.reuters.com/article/us-europe-companies-spinoffs-idUSKBN13O1WY}
\item \textsuperscript{121} J. SCHMIDT, Research paper: “Cross-border mergers and division, transfers of seat: Is there a need to legislate”, June 2016, p. 29
\end{itemize}
\end{footnotesize}
Luxembourg) have gone so far as to provide specific legislation on this issue, either by going further with the scope of the CBMD (gold-plating) or creating legislation independently from the CBMD, while others (like Italy, Poland France) are considered to permit such divisions without actually regulation them.  

Given the fact that cross-border divisions can be fairly considered to be the mirror reflection of cross-border mergers, it is logical to assume that these divisions should be governed by the similar rules obviously with a specific exceptions when needed. This assumption can also be supported by the fact that EU legislators have in fact followed a principles in Merger Directive in order to set a Division Directive. Therefore, it appears to be logical and efficient to do the same for the cross-border type.

Concerning the core provisions in the hypothetical cross-border division rules, there should first of all be a clear definition on a scope. It is generally accepted in the relevant literature that the scope, unlike the national divisions Directive, should include all possible divisions, more precisely not only complete split-up’s but also spin-off’s (partial division) and hive-downs.

Consequently it is considered that the approach taken in the CBMD (which as we know includes generally 3 types of mergers) should be followed in cross-border division regulations. Further, the rules stipulated in CBMD concerning subsidiaries, the general division procedures (timing, costs, notification procedures etc.) and shareholder protection could be transposed to the cross-border division Directive with the minimal “mirror” changes in order to suit the division mechanism.

In my opinion, despite it all being quite handy and relatively necessary mechanism the cross-border division directive is not meant to see the light of day. The recent initiatives in the sector, like for example the EU Commission Proposal of 2015 serve as a clear demonstration of a reluctance to strive for a further major changes in

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124 For explanation of each type see: J. SCHMIDT, Research paper: “Cross-border mergers and division, transfers of seat: Is there a need to legislate”, June 2016, p. 28


the field of EU Company Law.\footnote{The Proposal while introducing some helpful improvements generally is focused on codification of existing texts in the CBMD and the national Division Directive.} It might be a very reasonable approach; the thirty-year-old dream of full harmonization and creation of truly European Company law framework are over. Realities of current economic, social and political situation on the continent appear to close the age full harmonization and open the doors for a slightly more protectionist approach by Member States.
III. THE CURRENT M&A ROLE IN THE WESTERN EUROPE. DOES IT GET US WHERE WE NEED TO BE?

Financial globalization and increasing competition have contributed to the rise of M&A of large companies which is also influenced by technological changes. M&A activity have become an important middle to enter new markets, expand product portfolios, acquire new technology, gain access to research and development (R&D), and access resources that would allow companies to compete on a global scale.\footnote{P. K. GUPTA, “Mergers and Acquisitions (M&A): the strategic concepts for the nuptials of corporate sector”, \textit{Innovative Journal of Business and Management}, vol.1(4), 2012, p. 61.}

As it can be concluded from the overall idea of the previous chapter many efforts to regulate M&A fail, as a matter of fact not only in Europe but in US as well. The reasons for failure are numerous: the lack of the harmonized system, variety of M&A instruments, lack of one compulsory system for all, the possibility to structure deals in order to evade given rules and regulations, we can go on and on about why the breadth of the M&A and the complexity of the modern business realities preclude the further M&A development.

The one of the current roles for M&A regulations is to facilitate the M&A. In the US, the M&A field is considered to be far more developed and advanced in comparison to the old world. Being further on the M&A food chain they managed to create a complex world of M&A which leads the global business development of the US corporations.

1. NATIONALISM IN THE CROSS-BORDER M&A

International M&A represents approximately one third of the world merger activities, what implies the fact that different countries’ economies and businesses become more and more integrated. The views on the business and corporate world also have changed significantly in the last two decades. It is no longer enough to be nationally successful, the companies strive to dominate on a global scale. With that in mind it is only logical to presume that cross border mergers are to become more and more popular. The resent data also supports this trend - according to the S&P Global ratings report the European M&A activity lately has been driven by the overseas buyers, especially from Asia and the U.S.\footnote{“What's The Driving Force Behind M&A Activity in Europe?” may 06,2016, \url{http://marketintelligence.spglobal.com/blog/what-s-the-driving-force-behind-m-a-activity-in-europe}}

Nonetheless, despite the positive effects on the intra-European economy and the potentials for value creation the data gathered by the research of DINK and EREL seems so suggest a high level of nationalism when it comes to letting foreign
companies “in the house”. By nationalism the scholars generally mean the preference for natives against foreigners. According to the extensive research, the governments appear to interfere in order to support domestic mergers in order to create a domestic strong businesses. Moreover, the interference of the state authorities is proven to have direct impact on the outcome of the deals. This leads to conclusion that, such nationalism is not simply political posturing of the Member States, eager to seem very keen of their own, but rather a fact that has direct impact on the functioning of the market economy.\textsuperscript{130}

The reasons for this preferential treatment can be found in both: sociological (as for example attitude of citizens towards foreigners, trust of the population in foreign investments, having common boarders, language, religion) and political factors (for example dominance of certain political parties, the type of government system, EU presidency turns, nationality of the EU Commission president).\textsuperscript{131}

The clear message at this research study consists of idea that negative reactions of European governments affect the cross-border mergers on both direct (by blocking and opposing the particular planned mergers) and indirect (by decreasing the incentives of the foreign companies to attempt a potential merger in a future) level, therefore these effects combined can have a significant negative impact on the European economy.

The issue in question appears to be, whether the resent difficulties on the economic, political and social scale wouldn’t cause even further nationalization of the EU member States. It has already started with UK leaving the EU despite all the potential negative effects it will bring to the country. Many are concerned that this might serve as a push for other strong member States, not content with EU policies. All this, despite being more about politics and safety than about business and company law, will affect the latter one way or another. It is only to hope that the protectionism, separation and ignorance raising among the member States nowadays will not go as far as effecting the positive results that were reached so far in the intra-European Company practices.

\textbf{2. INNOVATION, TECHNOLOGY AND VALUE CREATION}

It is a given fact nowadays that innovation has become extremely important for the development and success in a modern business world. Innovation is one of the major engines that pushes companies to achieve and maintain a competitive advantage these days in order to generate a revenue growth and to stay on the market. The world has changed, in this new world life goes faster and demands of the population grow daily.


Remaining static company with a stable, old-fashioned products will not guarantee a success like it would have thirty years ago, on the contrary - without constant innovation, customers will lose interest in a firm’s products and services, consequently, sales will drop leading to a decay of a business. However sometimes it can be quite challenging to continually produce in-house innovation, especially in high-technology markets, thus M&A comes handy as way to gain new ideas and products.\textsuperscript{132}

M&A is often regarded as an alternative to “organic” innovation-driven firm growth. More precisely, M&A is being used by more and more companies as a strategic growth device in order to extend their dominance globally and participate in the new sector developments in order to stay competitive. The M&A had become at some point the general concept used for fast company growth.\textsuperscript{133}

Despite the fact that Mergers and Acquisitions are known to be instruments for firm growth and the development of the innovation process, the amount of research sources, conducted in the field of interrelation between M&A and innovation is surprisingly narrow, which leads to a situation where notwithstanding the convincing arguments offered in the literature on the impact of merger decisions on innovation, there is a limited empirical evidence on this effect.\textsuperscript{134}

An old study on US mergers\textsuperscript{135} concluded in 1988 that a successful merger offer increases a combined value of the merged entity by an average of 7.4%. The recent empirical study based on the US data has delivered results which imply that the internalization of knowledge and the need for the innovation funding at the highly innovative companies create further incentives for firms to merge. By that, providing the confirmation for the existing reversed causality between mergers and innovation. The innovation needs M&A just as much as mergers activity promotes innovation, therefore the innovative firms have inclination to influence merger likelihood decisions.\textsuperscript{136}

While M&A activity in Europe, Asia, and Latin America recently started growing at a faster pace than that in the U.S., the M&A literature refers mainly to the U.S. and the


The limited literature available on the correlation between innovation and the M&A mostly evaluates the US M&A dealings. It is, therefore, only for us to assume that the European research would provide similar results. Cross-Border Merger Directive (CBMD) has contributed to development of the Intra-European Company network by making a step towards common market where it wouldn’t be possible for the national jurisdictions to preclude companies to move between Member States as they develop and widen their business. Further is has enabled firms to overcome, to certain extent, obstacles concerning free corporate mobility which arise from differences in national corporate laws, by this encouraging competitive lawmakering.

1) You merge with “unicorns” to avoid being a “dinosaur “

Aside from the basic harmonization (discussed in previous chapter) set up in Europe in order to open up the borders and allow more international approach to companies formation we, lawyers on the Continent, remain ignorant of the technological developments and trends that affect the business realities of the modern world. Some of us would wrongly think that tech and artificial intelligence development is really not the topics modern M&A lawyers should concern themselves with. They cannot be wore wrong, since by affecting the businesses these modern technology developments consequently affect legal realities. Business cannot be structured and governed properly without proper legal rules and regulations while proper rules should reflect the realities of modern world. What is law if not the reflection on the consensus of society concerning the relevant issues that affect the world on one or the other period of time.

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Figure 6: M&A activities involving AI companies are increasing. The figure presents main locations of the acquirers in the M&A deals with “Artificial Intelligence” Companies as targets.138

The question that arises then is how far can the M&A activity, being the major mechanism for development and growth in a corporate world, help the evolvement and entrance of the “old school” corporate giants into the new realities of the modern 21st century millennial business world. Despite being an important trend, the list of the relevant literature on the topic of interaction between M&A and R&D developments and its influence on innovation and growth are quite limited.139

As it can be observed from the graph, presented above, the technological acquisitions of the innovative tech firms mostly happen involving the US companies. By that, the potential innovative trends are being shifted further and further from Europe while ensuring that US remains the tech capital of the world. I couldn’t help but wonder, whether the improvement of the EU company regimes, in order to promote establishment of start-up’s and simplify M&A procedures could enhance Europe’s chances to at least participate at the technological race, which, according to a graph and to common sense or reality, at the moment we are clearly loosing.

It is important for the European tech companies merge with an innovative start-ups in order to reinvent their innovation strategies and adopt their ways of doing business.

2) Legal tech development and the future for the corporate M&A

What we can observe nowadays is a legal landscape in which M&A lawyers are increasingly turning to technology to simplify their work. The use of digital tools ensures that law firms can create efficiencies in their own work, speed up previously laborious and repetitive tasks and also pinpoint errors. Given these global tech developments and considering the speed of modern life I can predict that it is not long to the moment when complex programs and artificial intelligence will be used in the legal profession in general and in M&A sector in particular.140 This developments will certainly influence the M&A practice and the future of the corporate law as we know it.

There is a spreading belief among scientists and the IT specialists that legal world doing it all completely wrong. Instead of embracing the new world we still remain dependent on the ways which come from the times of the Roman Empire. How much

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138 Source: Prof E. P. M VERMEULEN, International Business Law II class 2017, Tilburg University
139 B. CASSIMAN and C. MASSIMO (Eds.) “Mergers and acquisitions: The innovation impact”, Cheltenham, UK: Edward Elgar, 2006, p.1
paper is wasted every year on contracts, incorporation statues, letters of intent, gentlemen agreements and the list can go on and on. We have now a possibility to replace it all by e-signing and e-docs, nevertheless we cling to old ways out of fear for something new. But the world is not standing still and our realities are changing whether we like it or not. We can either embrace it or be left behind and loose to someone who is less afraid to change.

Right now, we talk about this tech developments as handy tools for lawyers to simplify their day-to-day transactions, simplify research and the due diligence, speed up the contract drafting, enhance proof-reading of clauses and many more. But what if that wouldn’t have to stop there. There exist ideas already that we(lawyers) are looking at the usage of tech all wrong. Instead of embracing it to the fullest and developing a new way of thinking and new way of looking at the legal profession we try to clinch to the old ways and letting the innovative trends influence our profession only to a minimum capacity.

The ultimate dream of the legal tech creators these days is the idea of the cyber space technological utopia without the legal profession as we know it. Instead of letting the computer do the simple task for us, enabling us to save some time on the routine checks and drafting, we could create the companies and let it be governed by the principle of the blockchain technology.\(^\text{141}\)

The legal tech development and the improvement of the blockchain technology and AI will certainly have a huge impact on the company and corporate world, which in its turn, will influence M&A activity. The idea is that in the near future we will be able to create and operate the companies using the blockchain technology, which would make the corporate law as we know it unnecessary. It has already begun with the creation of Ethereum.\(^\text{142}\) The most probable scenario of further tech development is that creation of the corporation and its management will fully depend on the codes and algorithms which would create secure company world without borders. Shareholders will just all get special access and establishing a company with cross-border elements would be as simple as ordering goods online. How the M&A activity would look like in this situation and most importantly, would it be needed at all? Since the companies would exist in a cyber space all over the world would we really need costly, complicated, disharmonized nationalistic rules to manage the transactions?

\(^{141}\) For explanation of the technology see: https://en.wikipedia.org/wiki/Blockchain; see also the relevant article of E.P.M. VERMEULEN, ”There is No Escape from Blockchains and Artificial Intelligence... Lawyers Better Be Prepared!”, Medium 23 January 2017, https://medium.com/@erikpmvermeulen/there-is-no-escape-from-blockchains-and-artificial-intelligence-lawyers-better-be-prepared-2d7a8221c627

\(^{142}\) An interview with Han, Founder and CEO of ”Otonomos”, to discuss what Ethereum is. https://www.youtube.com/watch?v=7mG8edtw35w
In my opinion, we are still far away from this perfect world due to numerous complications in our way but to one or another extent the change of the corporate world due to the tech boom is inevitable. Therefore it might be very important for the European legislators and legal practitioners to keep the hand on the pulse of global innovation and try to redefine the corporate legal practice, which would include all technological perks that would facilitate global corporate world. Maybe instead of writing countless papers and discussing the need to further harmonization of the EU company law we should start creating IT start-ups funded by the European Union and engaging into the creation of a strong tech ecosystem in order to harvest all the possibilities in this fast changing world.

Figure 7\textsuperscript{143}: Over 70+ corporations are invested in blockchain and bitcoin startups

\textsuperscript{143} Source: "Which Financial Services Firms and Corporations Are Investing in Blockchain And Bitcoin?", 2march 2016, \url{https://www.cbinsights.com/blog/financial-services-bitcoin-investors/}
3) Impact on the shareholders wealth and efficiency

a) National M&A

However, as mentioned in the introduction to this chapter, different companies have various reasons for participation in M&A activities the main purpose remains creation of shareholder’s value above the one of the sum of two companies. There exist a lot of studies conducted over the questions of value creation and the results of M&A to a shareholder wealth. However, measuring the M&A value is inexact science and financial research is not decisive on this issue. Some claim that M&A increases value and effectiveness and relocates resources toward optimal uses. Opposing view states that M&As do not lead to subsequent performance gains and instead destroy value. Yet some others believe that any gains to shareholders simply represent the redistribution of wealth from other stakeholders.

The evidence from research studying mergers in the US and Europe shows that more than 50 percent of mergers and acquisitions fail to create shareholder value. I, however, support the idea that correctly planned, valued and executed mergers provide positive returns to investors and the successful mergers indeed increase the shareholders wealth.

The new study published recently, questions the efficiency of the EU Takeover rules. What made this publication so particular is that this is, in fact, the first study to create a far-reaching and comprehensive takeover law guide, which allows a straight comparison and analysis between countries in terms of their market regulations for takeovers. The authors constructed a research, using hand-collected data on takeover activity of the 16 EU Member States assessing and comparing he results based on the information whether the State has implemented major Takeover Directive mechanisms, among which mandatory bids rule, ownership disclosure rules, management neutrality, a fair price rule, squeeze-out- and sell-out rights.

The study comes to conclusion that, however the takeover rules were substantially improved in the last decade we are still in need of substantial improvements that would provide better shareholder protection. According to the research, stricter takeover regulation facilitates value-enhancing takeovers and improves the efficiency of the takeover market. The study also discovers that stricter takeover regulation does not hurt bidders but benefits targets. Positive gains for target shareholders doesn’t

146 H. BIESHAAR, J. KNIGHT AND A. VAN WASSENAER, "Deals that create value", 2001, McKinsey Quaterly, No 1, pp. 64-73
come at the expense of bidders consequently having overall more positive than negative effects.\textsuperscript{148}

It is further concluded that of all the major Takeover Directive provisions the ownership disclosure rule and the mandatory bid rule appear to matter the most for the wealth effect, since they are of crucial importance for achieving higher combined announcement returns. The interesting finding appears to be that, according to this research, benefiting dominating blockholders and being too prescriptive at a country level does not reduce the overall efficiency of the takeover market.\textsuperscript{149}

\textit{b) Cross border M&A}

While national mergers and takeovers, discussed above, can create shareholder’s value if executed correctly it is highly debatable if the same can be said about the cross-border M&A. There exist numerous empirical studies, researching this issue, pleading for both, positive and negative results. According to an old survey by KPMG in 1999 only 17\% of cross-border acquisitions created shareholder value, while 53\% destroyed it.

The reasoning behind this lies in the facts that due to international setting and border laws relating to taxation, legal fee and investor protection the negotiation and transaction cost for cross-border deals is significantly higher than the cost for domestic deals.\textsuperscript{150} This data however, represents the situation of almost two decades ago. This cannot be representative of the current situation due to substantial changes in the corporate and legal world. Nevertheless I mention this data however in order to demonstrate how uncertain and results of cross-border M&A have been and still partially remain due to the lack of clear, international procedures. It is therefore difficult to make a substantial conclusion on this topic due to the fact that (mostly economic) literature on the issue remains diversified in its opinions and results.\textsuperscript{151}

\section{3. Spin-off trends, Brexit implications and the great EU De-merger}

As a logical extending of the previous subchapter sometimes it can be profitable for the shareholders to go the other way and demerge the conglomerates with too much

\begin{itemize}
\item \textsuperscript{148} Y.\textsc{wang}, H.\textsc{lahr}, Takeover law to protect shareholders: Increasing efficiency or merely redistributing gains?, Journal of Corporate Finance, Volume 43, April 2017, pp. 288-315.
\item \textsuperscript{149} “New research into European takeovers questions their efficiency “, \url{http://www.open.ac.uk/research/main/news/new-research-european-takeovers-questions-their-efficiency}
\item \textsuperscript{150} K.\textsc{reddy}, “Corporate Restructuring in the Asian electronics market: Insights from Philips and Panasonic,” MPRA Paper 73663, 2016, University Library of Munich, p. 4
\item \textsuperscript{151} M.\textsc{matev}, “Is the M&A Announcement Effect Different Across Europe? More Evidences from Continental Europe and the UK”, ResearchGate, January 2017, \url{https://www.researchgate.net/publication/304979649_Is_the_MA_Announcement_Effect_Differ ent_Across_Europe_More_Evidences_from_Continental_Europe_and_the_UK}
\end{itemize}
business lines. As mergers itself the demerger argument is subject of great controversy, where the outcome for the shareholders can perfectly go very bad as well as very good. The recent study of JPMorgan, however suggests that spin-offs in US (where the demerger trend has naturally started earlier the in EU) has brought the rise of the combined value both companies up to 15-20 percent. The research further states that it is highly probable for the trend to be taken over on the continent due to the high concentration of conglomerates in Europe.

And this prediction can already be confirmed by the recent corporate activity in Europe. The activities of the corporate giants in energy and industrial sector like Philips of the Netherlands, Fiat Chrysler of Italy and Germany's two biggest energy groups E.ON and RWE have all floated major divisions this year by means of spin-offs through initial public offerings.

While companies in most Member States considering and executing divisions and spin-offs due to the pressing economic needs or a part of their business strategy in one particular place in the EU the restructuring appears to be a necessity due to the political change - it is time to talk about the Brexit.

1) Possible options to flee the ship

a) “Reverse cross-border merger”

The interesting point to stress is the effect Brexit will have on the demerger practices all around the EU. It has been already mentioned above that relocation initiatives for numerous of major corporate players is on its way. However, according to recent publications in the legal and financial press the relocation is not the only consequence Brexit might have.

The recent important initiative was the clearance by the High Court of “reverse cross-border merger” mechanism, which would permit companies to be absorbed by European subsidiaries as they restructure in response to the UK decision to leave the EU. (for explanation of mechanism see: supra) While being a well-known practice in the US this mechanism has not been allowed under the UK law before. According to the one of the partners working on that case: "In the light of Brexit, EU cross-border

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mergers have significantly gained in importance when it comes to considering the future of pan-European corporate structures. 155

This decision was made in the light of the recent political events and the pressing need for structural solutions with regard to Brexit consequences. Following the Brexit, this type of merger has an increased importance when it comes to considering the future of pan-European corporate structures. Still, some commentators have already outed their doubts concerning the usage of such technique in the future; according to UK laws this process involves a fairly complex and time consuming procedure involving export reposts, compulsory court hearing, publication in the London Gazette etc. 156 Nonetheless regarding the fact that this case is a very recent it remains to be seen whether it becomes established law and would be relied upon in a similar transactions that can follow soon. 157

b) Societas Europaea (“SEs”)

Another available option for the relocation appears to be the usage of the SE. (for the outline see: supra part II). As discussed above this company form is specifically created in order to offer a flexibility of a cross-border reincorporation.

This mechanism is open for UK groups with group in other member states of the EEA.

The possible action could be as follows - SE could be created in the UK, afterwards its registered office can be moved to another European Union jurisdiction before Brexit. Under the EU rules, namely SE-Regulation, after having been registered as a SE for two years, a company can transform into a public limited company under the law of the jurisdiction of its registered office. This means that an English public limited company could relocate, for example, to Ireland and ultimately become an Irish company by operation of law without a liquidation or creation of a new legal person. 158 This option remains, however, questionable due to the little popularity the SE had in the UK system so far. This can be a result of a complex requirements caused by the collusion between EU and UK regimes and the potential employee involvement rights. 159

158 T. J. Reid and Davis Polk, "The Law and Brexit XI" https://corpgov.law.harvard.edu/2017/04/14/the-law-and-brexit-xi/
159 T. J. Reid and Davis Polk, "The Law and Brexit XI" https://corpgov.law.harvard.edu/2017/04/14/the-law-and-brexit-xi/
Despite the limited use the of the SE form in the past it might come in handy to company groups which are looking to re-domicile entities to other parts of Europe in the context of Brexit. Still, it can solve the problem only partially due to the unsuitability of SE for small and medium businesses – the incorporation requirements of 120,000 EUR capital gives a clear indication that this form will not be used by small private companies.\textsuperscript{160}

As is the case with the CBMD, if the UK eventually joins the EEA the SE Regulation will continue to apply. If the situation turns out otherwise the already registered SE’s will continue to be valid legal persons, at the moment the SE-Regulation will cease to be applicable, although while being recognized by UK law, those companies will probably not be recognized as SEs by EU law.\textsuperscript{161}

c) Cross-border de-merger

Another possibility that might be considered by some includes cross-order division of the business and establishing one of the split companies in the different EU member State (for general discussion on divisions: see supra part II).

UK law doesn’t provide an express legal basis for the cross-border divisions, however such mechanism is considered to be generally accepted in the UK.\textsuperscript{162}

There are various possibilities to execute such division using the existing practices, although due to the lack of the explicit cross-border division rules this action would require more complex structures. According to leading international law firm, active in the UK, possibilities open to a UK firms under the local laws include: three cornered de-merger, three cornered capital reduction, schemes of arrangement, section 110 liquidation scheme and spin-off by universal succession.\textsuperscript{163} The hereby presented options are however suitable only if the company would leave one legal entity of the business in the UK, therefore these options require a case be case consideration.

2) EU rules in the UK after the Brexit

It is of course impossible to tell for sure what consequences the Brexit will bring. Nevertheless it is possible to make some logical predictions. The fair part of UK


\textsuperscript{163} For the short explanation of each scheme see: Simmons&Simmons report “Group structures rationalizing legal entities and moving operations- addressing issues for asset managers and financial institutions in the context of Brexit”, http://www.simmons-simmons.com/en/services-and-sectors/~/media/68AF119F26BC4C8C964FD274690880C2ashx
company law is not derived from the EU, which means that a full split from the EU with no participation in the single market would have less of a notable if compared to other Member States. Nevertheless, such effect will be present in specific sectors.

It might be expected, unless otherwise agreed, that upon the leaving of the EU the above discussed EU legislation will cease to apply to the UK, bringing further complications, especially for the Cross-border transactions implications. It is, however, predicted by the prominent commentators in the field that the decisions of the Court of Justice, which pre-dated Brexit, will continue to bind British courts. Therefore is it logical to conclude that the landmark cases on the corporate mobility will remain binding and even further might be rediscovered for the purposes of facilitating transfers of companies that would like to relocate out of UK.

Like for example a landmark Sevic case, which allowed to implement an indirect move of a company to the other Member State. This case law allows to perform a move by establishing a subsidiary in the Member State to which the company needs to move, and then to carry out a reverse vertical merger where the parent company is merged into the subsidiary (see: subchapter supra). Nevertheless the case law is quite divided and while Sevic might offer an escape route, rulings like Centros, Überseeing, and Inspire Art do not explicitly offer big corporations the possibility of free choice to reincorporate and migrate across borders. It should be noted that in case the UK chooses for complete break with the EU, it will likely to lose all the perks as well. Consequently, the freedom of establishment right would also stop applying, therefore returning the “real seat” doctrine.

The general effects of the EU Company Law might turn out to be less of a problem. The existing differences between the M&A internal regimes of UK and the rest of Europe has led to a situation where while officially being recognized and giving effect to the EU rules those very rules have a limited impact on how M&A is regulated in the UK. Therefore British M&A rules will not be materially affected by Brexit and there is no reason to suspect that the existing UK framework is likely to change. The situation is however different for the Cross-Border Directive which might have a noticeable impact of limiting the international M&A transactions between the UK and

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165 According to recent surveys numerous offices consider relocating:
167 C.F. Wetzel, “How the impending Brexit impacts the legal framework of doing business with the UK - the German perspective: Corporate law”, 29 July, 2016,
http://www.lexology.com/library/detail.aspx?g=e9be3db8-92df-42bc-82d4-3a027423d936
the rest of Europe. This however is not set in stone, the joining of the EEA by the UK will solve this problem by leaving the CBMD applicable.

This all, however, is merely a speculation of what might or might not happen in the near future, when the withdrawal modalities will be set and the Brexit will be complete. The big question which addresses most of our concerns is actually: will the UK decide to stay in the EEA or will it break the ties completely? A complete break from EU would terminate the right of establishment for UK and EEA companies. Consequently, this would lead to a loss of the single market benefits by which weakening the UK position as a center of the European corporate world. The participation in the EEA will leave most of the EU legal mechanisms applicable to the UK, therefore having the minimal impact on a cross-border corporate activity of the UK companies. Under the EEA regime the CBMR will remain applicable alongside with the European freedom of establishment.169

3) The game of prediction

In the wake of the ECJ’s decisions in Centros170, Überseering171, and Inspire Art172, the UK became the popular destination for incorporations of significant number of private companies with a minimal link to the UK, which still allows them to operate in various EU Member States. With the current satiation of UK leaving the EU these companies might find themselves in unexpected and most importantly undesirable position.173 What we do know for sure, all facts considered, the UK is not to be a leading state for European business formations.

In my opinion, while giving the UK a certain options the Cross-border M&A mechanism might not be the prior choice of mechanism in order to relocate the companies. Firstly, the application of EU legislation after Brexit remains under a big question mark, therefore companies which are considering using EU Company Law and more precisely CBMD should execute their plans before the exit procedure is over. Secondly, due to the procedural-complexities for merging UK entities the cross-border merger is an unlikely mechanism to be used for a relocation. The choice of the entities therefore would likely be a transfer of seat doctrine under the freedom of establishment principle or the division practices. There is however no certainty concerning future application of the EU principles to the UK after Brexit. It depends on the exit agreements made by the parties. The only certainty of now is that it is

171 Überseering, C-208/00 http://curia.europa.eu/juris/liste.jsf?language=en&num=C-208/00
impossible to predict the exact outcome of the negotiation process. We can anticipate a certain outcome but if we learned something from the political events over the last year is that it can all turn out to be very different from all the logical expectations. Therefore the bottom line advice to the companies is: expect the unexpected and be on time.

4. EU AND US PARALLELS. WHY ARE WE STILL SO FAR BEHIND?

Over the last 3 decades the economic integration between Europe and the US has significantly increased. Nevertheless, despite the increasing convergence the regulatory takeover regimes and used M&A practices remain bluntly different. To pursue the same goal, namely maximizing shareholder value two legal systems chose radically different frameworks.\[174\] It is useful to outline and understand the major differences between two frameworks and the reasoning behind it in order to assess the possible future convergence between the two.

The M&A practice and development came much quicker and developed more intensely in the US. US M&A market has more than a century on its European successor therefore it is only logical that US remains ahead, however, during the turbulent times the activity of both were almost equal (see figure). The failures of the EU legislators to create a European version of the Delaware model can have various explanations. The lack of a common history, culture, language and national protectionism among the Member States, alongside with the still present taxation barriers reduces the possibility of US-style corporate lawmaking in Europe. On a more practical side charter fees and franchise taxes are not available to tempt European Member States to modernize and optimize their corporate law regimes.\[175\]

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\[174\] D.Li, “Takeover Regulation in Europe and the United States: Will There Be Convergence within Europe and between Europe and the U.S.”, 28 Feb 2017, Columbia Journal of European Law

1) Two worlds on one planet. Interesting examples of major differences.

In comparison to the approach taken by the EU legislation, the US grants significantly more freedom to both parties of the transaction – to the acquiring party and to the target corporations. This can be explained, firstly, by the differences in the ownership structures between US and Europe. While the US companies, mostly, are widely dispersed, giving management considerable influence at board level, European companies are owned by controlling shareholders. European regime is more favorable to shareholders because the companies are in practice owned by controlling shareholders. The US regulatory framework gives directors greater freedom because when corporations are diffusely owned, they need a centralized governance in order to keep it functional. 177

Another reason might lie in the difference in political involvement and the legislative process. In the US, by contrast, the major motto is flexibility and litigation. Courts are central, even without a formal role in approving any given deal. American lawsuits are so commonplace that they managed to transform courts into a quasi-regulatory agency creating “regulation” as much as resolving disputes and also driving deal-related disclosure decisions as much as the actual regulatory body (the

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177 D. Li, “Takeover Regulation in Europe and the United States: Will There Be Convergence within Europe and between Europe and the U.S.?”, 28 Feb 2017, Columbia Journal of European Law
SEC) with formal authority over disclosure. Delaware courts, for example, when rendering their decisions, also take into account the modern developments of corporate landscape that the state of current legal needs.

In Europe on the other hand the courts play a background role while laws are based on the bank-centered governance politics which has dominated the philosophy of the early European Community. US antitakeover law is concerned mainly with hostile takeovers (e.g., takeover defenses), while European takeover regulation emphasizes the protection of minority shareholders.

Further difference that demonstrate how far, actually, the corporate freedom has reached in the US in comparison to the Europe can be shown with an example of corporate mobility. In the US, corporate mobility is considered to be an exceptional phenomenon. It works as follows: any corporation can select its jurisdiction of incorporation at any point in its life cycle so long as its managers and shareholders reach a decision on the choice. In Europe, on the contrary, corporate mobility is a more complex concept that makes a fundamental distinction between reincorporation of existing firms and incorporation of start-up firms. It is also generally believed that despite all the initiatives on the intra-European level, the EU legislation had opened only a narrow door for reincorporation of existing firms.

To conclude, the present situation under the European rules and the general practices don’t entail incentives similar to those that drive US charter competition. First of all, in order to reach to a convergence between the European and US regulatory structures for takeovers, European Union would first have to reach a higher level of harmonization among its Member States. As emphasized multiple times throughout this thesis such further harmonization seems highly unlikely even in a distant future. Therefore, despite the globalization and the increased cross-border dealings between the old world and the new, the base core differences between the two regulatory regimes propose that not much convergence will appear in a near future.

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CONCLUSION

Corporate M&A has received a lot of attention from the corporate world, public and academic world as response to the rise in M&A activities as well as the increasing complexity of dealings. Having a great impact on the economic and business developments, it has been the most popular and debated topic all around the world for decades. It has rightfully been put among the most important corporate procedures in finance and business worlds in terms of both size and impact. Among other objectives, the M&A has evolved to be a primary tool for restructurings, growth and strategic development of companies. Considering the impact and potential power of the M&A mechanism this thesis has provided a structural and clear legal outline on the possible M&A activity in Europe (therefore focusing more on a cross-border aspect of the M&A) and presented possible solutions to drawbacks that the M&A market faces on the Continent.

In part II deep, substantial research has been conducted with regard to the Cross-Border and Takeover Directives, outlining the objectives, working and the possible shortcomings. Based on this research, it can be concluded that latter EU Directives have made it possible for (cross-border) mergers and takeovers to receive the necessary push in order to become widely used and efficient restructuring tools among the European companies. Additionally, some related instruments, namely the “European Company” form (SE) and the company division were analyzed and regarded in comparison to the M&A. This analysis has indicated limited usage of the latter instruments. The reasons for it vary depending on opinions, nonetheless, it can generally be based on either the lack of regulatory legislation (with regard to divisions); or on the procedural complexities and nationalistic implications of the Member States (SE). By that, this part additionally confirms mergers and takeovers as a leading restructuring mechanism in the cross-border context.

The drastically increased amount of deals in Europe clearly indicates the positive trend in development on the cross-border M&A market in Europe as a result of the enacted EU legislation. Additionally, legal scholars and prominent commentators in the field have stated the positive results that the EU Company harmonization has brought along. Noticeable, however, is the overall higher approval of the CBMD in comparison to the Takeover Directive, which is believed to have reached less positive results.

Nonetheless, despite the general positive effects, the EU regulatory texts are in a strong need of revision and improvement. They should be updated in order to correspond to the business and technological realities of the fast developing globalized world we live in today. In addition to that, the unforthcoming approach of the EU legislators towards a full harmonization and the protectionist attitude of most member States has resulted in an unbalanced and still very diverse set of legal rules...
on cross-border mergers and takeovers. When it comes to CBMD the most concern is
driven with regard to the scope of the CBMD framework; the divergence of national
regimes on protection of stakeholders; procedural obstacles. Whereas the major issue
in Takeover Directive appears to be the strong dominance of non-mandatory
provisions.

Part III of this thesis has raised important issues concerning the efficiency of the
presented M&A options and its possible future. The analysis of future developments
in a LegalTech and Artificial Intelligence indicates the rapidly changing scope of the
legal profession, which might affect the procedural aspects of the M&A deals. In
addition to that, the raise of blockchain technology provides a perspective of a
completely new “virtual” company without nationality or country limitations. With
the evolvement of this technology, experts in the field predict the complete
turnaround of the way companies are set up, managed and restructured, thus affecting
the M&A practice as we know today. The possible advice for the EU regulators is to
promote and take notice of technological development. This could be done firstly by
creating working groups consisting of IT and legal professionals. This groups should
work on setting up new regulating techniques which would be suitable for a
technological era and globalized businesses.

By applying the theoretical background, discussed in Part II, an evaluation was done
to an existing practical issue of restructuring possibilities in a Brexit framework. The
evaluation of possible options where M&A could serve in order to simplify the
existing complications has added a practical value to conducted research and
demonstrated the importance of the M&A practice in real life. The conclusion drawn
from the research indicates strong dependence on the exit arrangements between UK
and EU. The arrangements appear to be crucial, for it would define the future
applications of the CBMD and the freedom of establishment for the UK. Aside from
that, general preferences indicate the possible usage of the demerger mechanism,
reverse merger and the transfer of seat.

Further, the issue of nationalism and protectionism is proven to have both direct and
indirect negative effects on the cross-border M&A activity. Regarding highly
controversial topic of whether the cross-border M&A produces value and wealth
creation to a shareholders it could be concluded, basing on the recent relevant
research, that even stricter takeover rules would benefit the stakeholders. On the other
hand, this positive response on value-creation is only applicable in the domestic
M&A, while the cross-border dealings remain unstudied. The lack of research on the
wealth and value-creation resulting out of the cross-border M&A produces
uncertainty and gives rise to speculations without basing the opinions on factual
findings.

As a summary of conclusions to a second query of this thesis it can be stated that the
impact M&A has on the innovative and development initiatives remains considerably
limited in comparison to the US market. It can be advised to the EU regulators to design simpler, faster rules in order to promote M&A activities between smaller companies, and more particularly startups, in order to create a favorable ecosystem for tech startups in Europe. Additionally the issue of nationalism and protectionism is proven to have direct and indirect negative effect on the cross-border M&A activity.

As to the potential synthesis between the US’ and EU’s M&A systems it can be stated that due to the base core differences between the two it seems almost unlikely to bring the EU closer to the US framework. Recent events on economic and socio-political scale have incentivized the more protectionist and nationalistic approach among Member States, leading to a situation where a further harmonization and development of the common European Company Laws seems unlikely. The regulatory framework that European Union finds itself in clearly indicates how far we stand from the M&A framework in the US.
LITERATURE

LEGISLATION


• Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies

• Directive 82/891/EEC concerning division of public limited liability companies


• Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States


CASES

Sevic, C-411/03, [link](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/03)


Überseering, C-208/00 [link](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-208/00)

Inspire Art, C-167/01, [link](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-167/01)
REPORTS AND STUDIES


BOOKS AND JOURNALS


• CATHERINE CASEY, ANTJE FIEDLER, and BENJAMIN FATH. “The European Company (Se): Power and Participation in the Multinational Corporation.”, 2016, *European Journal of Industrial Relations*, vol. 22(1), pp. 73–90


• HANSBIESHAAR, , JEREMYKNIGHT ANDALEANDER VAN Wassenhaer, “Deals that create value”, 2001, McKinsey Quaterly, No 1, pp. 64-73


**ONLINE SOURCES**

• “Mergers and Acquisitions - M&A “
  http://www.investopedia.com/terms/m/mergersandacquisitions.asp

• ROSE JOHNSON, “Takeover Vs. Acquisition”,
  http://smallbusiness.chron.com/takeover-vs-acquisition-32510.html

• “Difference Between Merger and Acquisition”,
  http://finance.mapsofworld.com/merger-acquisition/difference-between.html


• X, “Acquisitions and Takeovers”,


• An interview with Han, Founder and CEO of “Otonomos”, to discuss what Ethereum is. https://www.youtube.com/watch?v=7mG8edtw35w

• Which Financial Services Firms and Corporations Are Investing in Blockchain And Bitcoin?”, 2 March 2016, https://www.cbinsights.com/blog/financial-services-bitcoin-investors/


• THOMAS J. REID and DAVIS POLK, “The Law and Brexit XI” https://corpgov.law.harvard.edu/2017/04/14/the-law-and-brexit-xi/


