

## Response to European Commission consultation on cross-border mergers and divisions

22/02/2015

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The Company Law Committee of the CCBE, which has prepared this response on behalf of the CCBE, supports the Commission's desire to facilitate cross-border activities between companies in the EU, whilst also believing it is important to protect existing rights of creditors and shareholders of existing companies. The CCBE has various comments and suggestions on the consultation as follows:

1. The CCBE believes it is important to protect the existing rights of creditors and minority shareholders of companies who choose to enter into a cross border merger and that this protection of existing rights is more important than making it easier for companies to complete cross border mergers. Those creditors and minority shareholders have created relationships with the company that wishes to merge based on an expectation as to the protections they will have if there is a merger. We do not think those protections should be different depending on whether the company choose to merge with a company from the same member state or with a company from a different member state. Accordingly we have answered "no" to questions 3-8. However, we can see that there would be a benefit if member states were to align the protections they afford creditors and minority shareholders more closely. We therefore suggest that there would be a benefit if there were to be a Recommendation that member states should publish information on the protections given to creditors and minority shareholders in the case of a cross border merger and the date determining the beginning of the period in which creditors and minority shareholders are protected, and that such publication might lead, over time, to member states choosing to bring the protections closer together. We would suggest that if, contrary to what we propose, any change to the rights of creditors or shareholders is to be made in connection with a cross border merger, it should only apply to those who become shareholders or creditors of a company after the date the relevant change is made.
2. Although we can see that there may be difficulties for merging companies where different types of valuation methods of assets and liabilities are used in connection with the issue of shares, the valuation methods used in member states may be related to other requirements, particularly those relating to tax. Also, it does not seem sensible that one valuation method is used when a company issues shares in connection with a cross border merger but a different valuation approach is used when the same company issues shares at another time. We therefore do not think it makes sense to set common rules across all member states for valuations in the case of a cross border merger.
3. Similarly, we recognise that companies may face difficulties where, for accounting purposes, different dates apply to determine the date from which the transactions of the merging companies are treated as being those of the company resulting from the cross border merger. Again, the accounting requirements may be closely related to other requirements, particularly tax, and we therefore do not think it is sensible to impose a harmonised date. However, we think it should be possible for the parties to agree on a relevant date, where

this is permitted and also, where there are two or more different requirements, to choose one of the dates that apply and use this for all the relevant transactions. We assume that under the relevant accounting requirements the merged company will be required to make clear in the accounts of the merged company what approach it has taken.

4. The CCBE recognises that the rules currently in force under the CBMD on employee participation may sometimes result in a cross border merger not completing and so be thought to be an impediment in such cases. However, the CCBE believes that it will be very difficult to reach agreement on any changes to this aspect of the Directive – as some will want more employee protection and others less employee protection.
5. The CCBE believes that not all member states currently provide for divisions of private companies at national level (for example the United Kingdom, Spain, Slovakia and the Czech Republic). Also, the CCBE notes that the Sixth Company Law Directive only requires the provisions of the Directive to apply to public limited companies where the national law permits those companies to carry out divisions by acquisition or divisions by the formation of a new company (or a combination of the two). It is not clear to us whether the Commission is proposing that cross border divisions should apply only where the member state of the company to be divided already permits divisions under national law or whether it is proposed that the Directive would require member states to permit a division by a company even in circumstances where a division would not be allowed by national law. We are also not clear whether it is proposed that a cross border division directive would apply to private companies as well as to public companies. At present there is no harmonisation of provisions relating to divisions of private companies. Some members are in favour of a cross border division Directive applying to both private and public companies, regardless of whether there are national laws on divisions of such companies, whilst others think that any compulsory requirement should be limited to those member states that currently allow national divisions. We suggest that there should be further debate on this topic before a final decision is made.
6. The CCBE believes that the costs mentioned in question 2 of Part III as being ones that would be reduced by the introduction of a Cross Border Divisions Directive are not the only costs that are important in a Cross Border Division and that it is important that the tax treatment of a cross border division is also considered.
7. The CCBE does not think a Cross Border Divisions Directive should harmonise the rights of creditors or minority shareholders or the dates from which protection applies for the same reasons as they do not think this should be regulated in the case of Cross Border Mergers ie so as to preserve existing rights under national law. We suspect that, in the case of divisions, there will be fewer problems with differences of requirements between member states as the creditors and minority shareholders will all be creditors and minority shareholders of the company that wishes to divide itself into one or more different companies. The concerns will relate more to providing them with information about what their rights will be if they become creditors or minority shareholders of a company in a different member state and how that differs from their current rights and protections. As for Cross Border Mergers, we think a Recommendation that requires Member States to publish information about the rights and protections of creditors and minority shareholders would be helpful and could encourage member states to harmonise their approach over time. Similarly, we do not think accounting issues should be harmonised for the reasons given above in relation to Cross Border Mergers.
8. Most members of the CCBE think it would be a good idea to include provisions in relation to Cross Border Divisions in the same Directive as the Cross Border Mergers Directive as we think this is mostly likely to result in the requirements being the same, as far as possible – which we think would be very helpful. We recognise that there will need to be additional protections for creditors in the case of cross border divisions which are not needed for mergers. If there are separate Directives there is a greater risk that a change will be made to one Directive without being made to the other. However there is some concern that, because a Directive on cross border divisions will be new and because some member states do not have national provisions on divisions, there could be delays in agreeing the provisions on cross border divisions which would therefore also affect the proposed changes to the Cross Border Mergers Directive.

Below are our answers to the [online questionnaire](#) (our responses are highlighted in yellow).

## I. Information

### 1. Country of respondent

- a) EU country
- b) Non EU country

### 2. Please provide your name and address:

CCBE, Rue Joseph II, 40/8, 1000 Brussels

### 3. Please indicate if you are responding on behalf of:

- a) Public authority (including government)
- b) University/Research Institute/Think Tank or similar
- c) Lawyer/notary
- d) Business Federation/ Business Organisation/Chamber of Commerce, Consumer association, other federation, association or organisation
- e) Trade Union/Employee Body or similar
- f) Company
- g) Individual
- h) Other

## II. Cross-border mergers

The Cross-Border Merger Directive (CBMD) contains a harmonised framework of rules for mergers between companies from different Member States. In the 2012 consultation the majority of stakeholders expressed the view that the existing EU rules for cross-border mergers should be adjusted to meet the changing needs of the single market. Furthermore, the study on the application of the CBMD from 2013 put forward a number of concrete suggestions to improve the existing legal framework. The questions below build on the above-mentioned research and concern concrete actions that could be taken at EU level.

### 1. Should the CBMD apply to cross-border mergers of companies that have not been formed in the EU/EEA but have converted into an EU/EEA form?

- a) Yes
- b) No
- c) I do not know

**2. Should cross-border mergers be possible between different company types in general, e.g. a merger between a private limited liability company and a public limited liability company?**

- a) Yes
- b) No
- c) I do not know

**3. Should the rights of creditors in case of a cross-border merger be harmonised?**

- a) Yes
- b) No
- c) I do not know

3.1. What approach should this harmonisation take?

- a) Full harmonisation of rights of creditors in all Member States
- b) Two option approach - Member States could implement one of the two sets of rights for creditors provided for by EU law
- c) Open-menu approach - Member States could, but would not be obliged to, avail themselves of one of the two proposed sets of rights for creditors provided for by EU law
- d) I do not know

3.2. The creditors should have the right to: [multiple choice question]

- a) Block the merger
- b) Request a company to provide a guarantee or security to the creditor
- c) Ask the court to require that a company provides a guarantee or security
- d) Other rights (please specify)
- e) I do not know

**4. Should the requirements companies are subject to, when the creditors' protection period is running, be harmonised?**

- a) Yes
- b) No
- c) I do not know

4.1. Which requirements for companies should be harmonised? Those regarding: [multiple choice question]

- a) Creditors' meetings
- b) Guarantees/securities
- c) Separate management of assets and liabilities
- d) Other (please specify)
- e) I do not know

**5. Should the date determining the beginning of the period throughout which the creditors of the merging companies are protected be harmonised?**

- a) Yes
- b) No**
- c) I do not know

5.1. The starting date should be:

- a) Before a cross-border merger takes effect ("ex ante")
- b) After a cross-border merger takes effect ("ex post")
- c) Other (please specify)
- d) I do not know

**6. Should the rights of minority shareholders in case of a cross-border merger be harmonised?**

- a) Yes
- b) No**
- c) I do not know

6.1. What approach should this harmonisation take?

- a) Full harmonisation of rights of minority shareholders in all Member States
- b) Two option approach - Member States could only implement one of the two sets of rights for minority shareholders provided for by EU law
- c) Open-menu approach - Member States could, but would not be obliged to, avail themselves of one of the two proposed sets of rights for minority shareholders provided for by EU law
- d) I do not know

6.2. The minority shareholders should have the right to: [multiple choice question]

- a) Block the merger
- b) Right of investigation
- c) Request compensation
- d) Other rights (please specify)
- e) I do not know

**7. Should the date determining the beginning of the period throughout which the minority shareholders of the merging companies could exercise their rights be harmonised?**

- a) Yes
- b) No**
- c) I do not know

7.1. What should be the "event" triggering the starting date? [multiple choice question]

- a) General meeting

- b) If there is no general meeting, the publication of the common draft terms of cross-border merger in the register or on a company's web-site
- c) If there is no general meeting, the application to the relevant authorities for the pre-merger certificate
- d) If there is no general meeting, the registration of the merger in the business register
- e) Other (please specify)
- f) I do not know

**8. Should the length of the period throughout which the minority shareholders of the merging companies can exercise their rights be harmonised?**

- a) Yes
- b) No**
- c) I do not know

8.1. How long should this period of protection be?

- a) One month
- b) Two months
- c) Longer than two months (please specify)
- d) I do not know

**9. When a cross-border merger involves the issuance of new shares, the valuation of assets and liabilities may be necessary. Among Member States two different types of valuation methods are used: the fair value method and the book value method. Since the two methods may result in different valuations, should common rules be set across all Member States?**

- a) Yes
- b) No**
- c) I do not know

9.1. Which method should be chosen?

- a) Company should be able to choose between fair or book value
- b) Common standard of book value should be imposed
- c) Common standard of fair value should be imposed
- d) Other
- e) I do not know

**10. Should the date from which the transactions of cross-border merging companies are treated, for accounting purposes, as being those of the company resulting from the cross-border merger, be harmonised?**

- a) Yes
- b) No**

c) I do not know

10.1. What kind of date should be considered?

- a) The effective legal date ("registration date") of the merger, i.e. the date when the merger is entered into the business register
- b) The accounting date ("decisive date") of the merger which is to be specified by the common draft terms of cross-border merger, i.e. the date from which the acquired company's transactions are treated as being those of the acquiring company for accounting purposes
- c) Another date (please specify)
- d) I do not know

**11. If, under certain circumstances, no general meeting is necessary should the date for the publication of the common draft terms of cross-border merger be harmonised?**

a) Yes

b) No

c) I do not know

11.1. What should be the "event" by reference to which the publication date of the draft terms of the cross-border merger is determined?

- a) Submission of the documents to the national authority responsible for scrutinising the legality of the cross-border merger
- b) Submission of the documents to the business register
- c) Disclosure of the merger in the business register
- d) Other (please specify)
- e) I do not know

**12. Should, in certain cases, a harmonised "fast track" cross-border merger procedure be introduced?**

a) Yes

b) No

c) I do not know

12.1. In what circumstances should such a procedure be available? [multiple choice question]

- a) When a company has no employees
- b) When all shareholders agree
- c) When 90% of shareholders agree
- d) When there would be no impact on creditors
- e) Other (please specify)
- f) I do not know

**13. Should each of the respective national authorities involved in the cross-border merger only check compliance with the requirements imposed by its own Member State?**

- a) Yes
- b) No
- c) I do not know

13.1. Should in that case both authorities check the documents from both Member States?

- a) Yes, all
- b) Yes, some (please specify which documents in particular)
- c) No
- d) I do not know

**14. Should the rules currently in force under the CBMD on the employee participation be modified?**

- a) Yes
- b) No
- c) I do not know

(No response)

**III. Cross-border divisions**

Divisions at national level are currently harmonised by Directive 82/891/EEC, but EU company law has no rules on cross-border divisions. The 2012 consultation on the future of EU company law showed that there is a need for a clear European legal framework specifying the conditions under which cross-border divisions could be made.

**1. Why would a company want to carry out a cross-border division? [multiple choice question]**

- a) Realise new Internal Market opportunities
- b) Change/simplify its organisational structure
- c) Adapt to changing market conditions
- d) Other (please specify)
- e) I do not know

**2. How could harmonisation at the EU level of legal requirements concerning cross-border divisions help enterprises and facilitate the increase of cross-border activities of companies within the EU? [multiple choice question]**

- a) Reduction of regulatory costs (fees)
- b) Reduction of the costs directly related with the cross-border division (e.g. cost of translation, advice, etc)
- c) Reduction of the operating costs of the company or group of companies

- d) Other (please specify)
- e) I do not know

**3. What, if any, are the obstacles to the execution of cross-border divisions when compared to national divisions? [multiple choice question]**

- a) Costs of a cross-border division effected via a national division and then a cross-border merger
- b) Difficulty of financing cross-border divisions
- c) Legal uncertainty because of a lack of European rules
- d) Duration and complexity of the current procedures necessary to execute a cross-border division
- e) Tax issues
- f) Any other obstacles than mentioned above? (please specify)
- g) I do not know

3.1. Please identify which costs you consider as major. [multiple choice question]

- a) Translations
- b) Registration requirements/fees
- c) Costs of different rules on the valuation of assets when doing a cross-border division
- d) Costs of advice related to a cross-border division
- e) Costs related to the preparation of reports to shareholders and other stakeholders (creditors, employees)
- f) Operational costs for preparing and conducting general meetings.
- g) Any other costs
- h) I do not know

3.1.1. Please give an estimate of these costs. [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.2. Please give an estimate of these costs. [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.3. Please give an estimate of these costs. [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.4. Please give an estimate of costs for legal advisors. [multiple choice question]

- a) Amount in Euro (please specify)

- b) % of the total cost of a division (please specify)
- c) I do not know

3.1.5. Please give an estimate of costs for notaries. [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.6. Please give an estimate of costs for accountants. [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.7. Please give an estimate of these costs. [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.8. Please give an estimate of these costs. [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.9. What would be these other costs? Please specify:

3.1.10. Please give an estimate of these costs [multiple choice question]

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.2. How much could be saved by a company if, instead of a national division and a cross-border merger, a direct cross-border division would be available?

- a) Please insert amount in Euro
- b) Please insert % of the total cost of division
- c) I do not know

**4. What are the main issues related to cross-border divisions that should be regulated at EU level? [multiple choice question]**

- a) Creditors' issues
- b) Minority shareholders' issues
- c) Stakeholders' issues
- d) Procedural issues
- e) Accounting issues
- f) Employee participation

g) Other (please specify)

h) I do not know

**5. Should harmonised rules on cross-border divisions be integrated in the framework established in the Directive on cross-border mergers?**

a) I agree (please specify the reasons)

b) I disagree (please specify the reasons)

c) I do not know