

# Mergers

## EU Company Law

### Exam question

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Explain and discuss rules and principles concerning national and cross-border mergers (including the motives for mergers).

### Introduction

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#### Motives for a merger

- Restructuring
- Economic reasons
  - Joint workforce
  - Survival
  - etc
- Movement of primary establishment
  - Create subsidiary, wait, merge parent into subsidiary.

### National mergers

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#### Source of EU law

Directive 1978/855/EEC (The National Merger Directive)

The National Merger Directive **applies to public limited companies.**

#### 2 forms of mergers

The mergers may be conducted in 2 different ways:

- Merger **by acquisition** (absorption) (Art. 3)
  - Company A acquires the assets (and liabilities) of company B.
    - B is subsequently eliminated.
      - B is compensated by cash and/or shares in A.
- Merger **by formation** of new company (combination) (Art. 4)

#### Merger by acquisition

One or more companies are wound up without going into liquidation

- They transfer to another company (the "acquiring company") all their assets and all their liabilities
  - In exchange of shares in the acquiring company
    - and a cash payment (if any) not exceeding 10% of the nominal value of the shares to issued.
      - According to Art. 30 MS may however exceed the 10% limit.
    - To the shareholders of the company/companies being acquired.

In practice, a capital increase will very often be made in the acquiring company

- parallel to the merger taking a place,
- – this in order to provide the shareholders of the company/companies being acquired with shares in the acquiring company.

- A capital increase is not necessary
  - if the acquiring company has a **holding of own shares** which it uses as consideration to the shareholders of the company/companies being acquired

## Merger by formation of a new company

Several companies are wound up without going into liquidation

- All their assets and all their liabilities transfer to a new company that they set up
  - In exchange of shares in the new company
    - and a cash payment (if any) not exceeding 10% of the nominal value of the shares to issued.
      - According to Art. 30 MS may however exceed the 10% limit.

In practice, the new company will hereby be established through **formation based on non-cash contributions** to the new company.

- (i.e. the whole business (all assets and liabilities) of the participating companies)

## Power to decide merger

Art. 7

Power:

- General meeting decision in each participating companies.

Majority requirement:

- Starting point: Not less than **2/3** of the votes.
  - MS laws may provide that a **simple majority** is sufficient *when at least 1/2 the subscribed capital is represented* on the general meeting
- If **more than one class** of shares
  - Decision shall be subject to a separate vote by each class affected by the merger.

Exemption of approval from the general meeting of the acquiring company – art. 8

- Under certain conditions MS may provide that merger does not need the approval of the general meeting.
  - Properly publishing of the terms. - with inspection possibility of the shareholders.
  - Minority protecting – 5% of the shareholders may call for a general meeting decision on the issue.

## Merger plan

Art. 5

- Preparation of a merger plan (**draft terms** of merger) by the administrative or management bodies.
  - (In a way "the acquisition contract" between the parties)
  - In writing.

The merger plan must as a minimum contain:

- Type, name, registered office of companies participating in merger
- **share exchange ratio** (+ amount of cash payment (if any))
- terms relating to **allotment** (tildeling) of shares in the acquiring company
- **date** from which entitled to participate in dividends

Art. 6.

- The merger plan must be **made public** in accordance with Art. 3 of the Disclosure Directive (1<sup>st</sup>).
- The general meeting may not approve the merger before at least 1 month from publication.

## Detailed report by administrative/management bodies

Art. 9

- Preparation of a report by the administrative or management bodies.
- “The administration or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio.”

The report must in detail explain

- the merger plan
- the legal and economic grounds for the merger plan

In particular, the share exchange ratio is to be explained and justified.

The report shall also describe any special valuation difficulties which have arisen.

Made for each company individually.

## Independent expert report

Art. 10

- Preparation of report by independent expert (auditor).

The independent expert report must as a minimum contain:

- examination of the merger plan
- statement as to whether the share exchange ratio is fair and reasonable
- indication of methods used to arrive at the proposed share exchange ratio
- assessment of whether methods are adequate
- description of valuation difficulties

Opt-out possible if all shareholders of all companies involved agree, cf. Art 10(4)

## Creditor protection

Art. 13

- MS are obliged to lay down an adequate system for protecting the interests of creditors of the merger companies
  - whose claims pre-date the publication of the merger plan
  - and which have not fallen due at the time of such publication.
- Such creditors are entitled to adequate safeguards
  - where the financial situation of the merging companies makes such protection necessary
  - and where those creditors do not already have such safeguards.
- In practice some MS solve this issue in the way that non-secured claims may be notified and required secured if the independent expert's report concludes that the creditors' access to satisfaction will be deteriorated by the merger.

Art. 15

- Holders of securities, other than shares, to which special rights are attached
  - must be given rights at least equivalent in the acquiring company.

## Effective date

Art. 17

- The laws of the Member States shall determine the date on which the merger takes effect.

Thus, the Member States may lay down different criteria as to when a merger is deemed effective.

- Germany: The date of the registration of the merger with the commercial registry.
- France: Considerable freedom to determine the date which may be retroactive for financial or tax reasons.

## Legal implication

Art. 19

- Consequences apply ipso jure and simultaneously
- Universal succession.
  - 3<sup>rd</sup> parties
    - As a starting point: → bound
    - Change of controls clause
    - Can be inserted to give third-parties a way to dismiss the contract.
- Shareholders in the company being acquired become shareholders in the acquiring company / new company.

## Cross-border mergers

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### Source of EU law:

SEVIC case (C.411/03)

Directive 2005/56/EC (The Cross-Border Merger Directive)

- The Cross-Border Merger Directive **applies to public and private limited companies**
  - on the condition that they may merge under national law.
- Most Member States allow for their private limited companies to merge and have introduced rules similar to those of the National Merger Directive which is only mandatory for public limited companies.

### Cross-border dimension

Art. 1

- The Cross-Border Merger Directive applies to mergers of limited companies
  - formed in accordance with the law of a MS
  - and having their registered office, central administration or principal place of business within the Community
  - provided at least 2 of them are governed by the laws of different MS.

### Referrals to national law

The Cross-Border Merger Directive frequently refers to provisions in national law for compliance with the formalities of cross-border merger.

According to Art. 4(1a),

- a company participating in a cross-border merger
  - must comply with the provisions and formalities of the national law to which it is subject.
    - The merger rules for public limited companies are similar but not identical in the various Member States as a consequence of the implementation of the various options offered by the National Merger Directive to the Member States regarding important issues such as:
      - decision making by the general meeting
      - creditor protection (see Art. 13 in the National Merger Directive “adequate safeguards”)
        - cross-border merger assumes same protecting.

- Priori
    - Creditor may require security from the moment the draft terms are published.
  - Posteriori
    - Security after the merger has been registered and published → thus only security from the acquiring company.
- date on which merger takes effect

## Power to decide merger

Art. 9

Power:

- General meeting decision in each participating companies.
  - After taking note of the reports.

Majority requirement:

- In **casu public** limited companies, the National Merger Directive requires that a decision to merge requires not less than 2/3 of the votes.
- Member State laws may provide that a simple majority is sufficient when at least ½ the subscribed capital is represented on the general meeting

## Merger plan

Art. 5

- Preparation of a joint merger plan (joint **draft terms** of merger) by the administrative or management bodies. (In a way "the acquisition contract" between the parties)

The merger plan must as a minimum contain:

- Type, name, registered office of companies participating in merger and those proposed for the company resulting from the cross-border merger
- share exchange ratio (+ amount of cash payment (if any))
- terms relating to allotment of shares in the acquiring company
- date from which entitled to participate in dividends
- likely repercussions of the cross-border merger on **employment**
- statutes of the company resulting from the merger

Art. 6

- The merger plan to be **made public** in accordance with Art. 3 of the Disclosure Directive.
- The general meeting may not approve the merger before at least 1 month from publication.

## Detailed report by administrative/management bodies

Art. 7

- Preparation of a report by the administrative or management bodies.

The report must in detail explain:

- the legal and economic grounds for the merger plan
- implications of the cross-border merger for shareholders, creditors and employees

In particular, the share exchange ratio is to be explained and justified.

## Independent expert report

Art. 8.

- Preparation of report by independent expert (auditor).

The independent expert report must as a minimum contain:

- examination of the merger plan
- statement as to whether the share exchange ratio is fair and reasonable
- indication of methods used to arrive at the proposed share exchange ratio
- assessment of whether methods are adequate
- description of valuation difficulties

Opt-out possible if all shareholders agree, cf. Art. 8(4)

## **Scrutiny and pre-merger certificate**

Art. 10 and 11:

- Each Member State shall designate the court or other authority competent to scrutinize the legality of the cross-border merger as regards the part of the merger procedure which concerns each merging company subject to its national law and
  - – where appropriate – the formation of a new company from the cross-border merger where the company created by the cross-border merger is subject to its national law.
- A certificate attesting proper completion of the pre-merger acts and formalities shall be issued by the authority of each Member State concerned.

Art 12:

- A merger may not enter into effect until after the scrutiny has been carried out.

## **Legal implication**

Art. 14.

- Universal succession.
- Shareholders in the company being acquired become shareholders in the acquiring company / new company.