

Cross-Border Mobility Within the EU and Specifically in Luxembourg and Belgium: Same Destination, Different Roads

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1. INTRODUCTION

Conscious of the need to fundamentally refresh its company law statute that, to the exception of the mostly strict¹ transposition or implementation of European directives or regulations, had barely changed since its adoption in 1915,² the Luxembourg legislator engaged in a thorough modernizing exercise lasting for over twenty years³ and culminating with the adoption of the law of 10 August 2016.⁴ Its new company law statute,⁵ notably under the influence of legal practitioners active in the private equity industry,⁶ can be characterized as both liberal and contractual in nature, entailing a pro-majority shareholder inclination⁷ and a benevolent attitude towards all types of cross-border operations.

Less than two years later, the European Commission, in accordance with the objective announced in its communication to the

European Parliament on the upgrading of the Single Market⁸ and following:

- (1) the study on the application of the cross-border mergers directive published by Bech-Bruun and Lexidale in September 2013⁹;
- (2) two public consultations on cross-border mergers and divisions;¹⁰ and
- (3) two studies on the need to legislate with respect to cross-border mergers, divisions and conversions,¹¹

finally adopted on 25 April 2018 a proposal for a Directive¹² amending the cross-border merger regime currently enshrined in Directive (EU) 2017/1132¹³ and introducing a new regime applicable to cross-border conversions and divisions.

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1 Originally the Luxembourg company law statute was almost the mirror image of the Belgian company law statute but the necessity of transposing/implementing European company law led the Luxembourg legislature to engage on a different path than Belgium: rather than opting for a gold-plated transposition/implementation as was often the case in Belgium, Luxembourg adopted an approach, generally summarized as 'all of the directive but only the directive', that went hand in hand with its traditionally liberal regulatory tradition: I. Corbisier, *La réforme du droit luxembourgeois des sociétés*, RPS, no 6985, 336, no 19 (2008) (in open access: <http://orbilu.uni.lu/handle/10993/29888>).

2 I. Corbisier, *La réforme du droit luxembourgeois des sociétés*, RPS-TRV 418 (2017) (in open access: <http://orbilu.uni.lu/handle/10993/30949>).

3 *Ibid.*, at 417.

4 Law of 10 Aug. 2016 modernizing the legislation on commercial companies and amending the Civil Code and the amended law of 19 Dec. 2002 on the Register of Commerce and Companies, as well as the accounting and annual accounts of firms, www.legilux.public.lu (accessed 01 Dec. 2018).

5 Law of 10 Aug. 1915 on commercial companies, as amended, www.legilux.public.lu (accessed 01 Dec. 2018) (hereinafter referred to as 'Luxembourg Law').

6 Corbisier, *supra* n. 2, at 418 and 419.

7 *Ibid.*

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 28 Oct. 2015, *Upgrading the Single Market: more opportunities for people and business*, COM(2015) 550 final, 5, <http://eur-lex.europa.eu> (accessed 30 Nov. 2018).

9 Bech-Bruun & Lexidale, *Study on the Application of the Cross-border Mergers Directive* (Sept. 2013), http://ec.europa.eu/internal_market/company/mergers/index_fr.htm (accessed 30 Nov. 2018) (hereinafter referred to as the 'Bech-Bruun Study').

10 Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions of 25 Apr. 2018, SWD(2018) 141 final, <http://www.europarl.europa.eu> (30 Nov. 2018), 106–118 and *Feedback statement – Summary of Responses to the Public Consultation on Cross-border Mergers and Divisions* (Oct. 2015), <http://ec.europa.eu> (30 Nov. 2018).

11 St. Reynolds, A. Scherrer & E. Trulli, *Ex-post Assessment of the EU Framework in the Area of Cross-border Mergers and Divisions*, PE 593.796, <http://www.europarl.europa.eu> (accessed 30 Nov. 2018) and J. Schmidt, *Cross-border Mergers and Divisions, Transfers of Seat: Is There a Need to Legislate?* PE 556.960 (June 2016), <http://www.europarl.europa.eu> (accessed 30 Nov. 2018).

12 Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions of 25 Apr. 2018 (Text with EEA relevance), COM(2018) 241 final, <http://eur-lex.europa.eu> (30 Nov. 2018) (hereinafter referred to as the 'Directive Proposal').

13 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (Text with EEA relevance), <http://eur-lex.europa.eu> (30 Nov. 2018) (hereinafter referred to as the 'Company Law Directive').

A little bit more than a month later, the Belgian government filed a bill¹⁴ in Parliament introducing a radically modernized Code relating to companies and associations.¹⁵ Being influenced by the far-reaching consequences of the *Polbud*¹⁶ case and the urgent need to protect stakeholders, this new Code contains specific parts devoted to the regulation of corporate restructurings and conversions, including cross-border divisions and conversions.¹⁷

The purpose of this contribution is to focus primarily on the new regimes established or proposed in those three legal instruments for cross-border conversions and divisions of limited liability companies, while only limitedly referring to the cross-border mergers regime when pertinent. The purpose is not to draw up a comprehensive catalogue of all legislative differences or similarities existing between them in terms of cross-border mobility, but to focus instead on the most concerning differences and possible discrepancies or inefficiencies. This will illustrate the fact that despite a common objective of modernization and simplification of cross-border operations, there is by far no consensus within the European Union on the ideal features and procedures governing these '*particular methods of exercise of the freedom of establishment*'.¹⁸

2. GENERAL LEGISLATIVE APPROACH

The general legislative approach of the European Commission towards cross-border transactions is to extensively regulate all three different types of operations up to the very last detail, despite their similarities and the opposite recommendations made in this respect in preliminary studies.¹⁹ Such technique bearing the intrinsic risk of generating

inconsistencies and frictions²⁰ does not correspond to the approach that can be found in the future Belgian Code or Luxembourg Law, even if these two instruments significantly differ from one another.

The future Belgian Code includes provisions governing cross-border mergers and divisions within the relevant book governing the same operations in a purely national context, providing for specific rules where the international nature of the operations so requires.²¹ Cross-border conversions are specifically regulated,²² despite the existence of a national conversion procedure.²³

Luxembourg Law, loyal to its liberal and fundamentally contractual nature, only explicitly regulates cross-border mergers and dissipates any potential doubts concerning the feasibility of cross-border divisions²⁴ or conversions²⁵ via two distinct and rather minimalistic legal provisions, leaving it up to practitioners and notaries to determine the adequate procedure while applying the relevant private international law principles.

3. PRIVATE INTERNATIONAL LAW PRINCIPLES

3.1. Connecting Factor

Embracing the position of a programmed obsolescence of the real seat theory²⁶ accelerated by the Court of justice with its decision in the *Polbud* case and in order to foster Belgian law's attractiveness for economic actors²⁷ in the Brexit context,²⁸ the future Belgian Code wisely opted for the deletion of the nineteenth century old real seat as the companies' connecting factor to the benefit of the registered office.²⁹ The adoption of this variation of the well-known incorporation theory,³⁰

14 Projet de loi du 4 juin 2018 introduisant le Code des sociétés et des associations, et portant des dispositions diverses, *Doc.*, Ch., 2017–2018, no 54–3119/001 (for the explanatory memorandum) and no 54–3119/012 (for the legal provisions) (hereinafter together referred to as the 'Belgian Code').

15 The term '*association*' covering non-profit organizations with legal personality.

16 C.J., *gd. ch.*, case *Polbud – Wykonawstwo sp. z o.o.*, 25 octobre 2017, C-106/16, EU:C:2017:804, <http://curia.europa.eu> (24 May 2018) (hereinafter the '*Polbud Case*'), § 44 where the Court of justice ruled that '*freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company*', thereby confirming the protection of the isolated transfer of the registered office by the freedom of establishment. See i.a.: W. Bayer & J. Schmidt, *Grenzüberschreitende Mobilität von Gesellschaften: Formwechsel durch isolierte Sitzungssitzverlegung*, ZIP 2225–2234 (2017); I. Corbisier, *L'arrêt Polbud de la C.J.U.E. ou le Luxembourg à la croisée des chemins – Maintien d'un critère de rattachement appliqué de manière ambiguë ou choix franc d'un libéralisme rendu possible par la Cour de justice?*, *J.T.L.*, 2018, 33–39 (on demand: <http://orbilu.uni.lu/handle/10993/35579>); P. Kindler, *Unternehmensmobilität nach 'Polbud': Der grenzüberschreitende Formwechsel in Gestaltungspraxis und Rechtspolitik*, NZG 1–7 (2018) and Chr. Teichmann, *Der Fall 'Polbud': Formwechsel in die Briefkastengesellschaft*, GmbHR R356–R357 (2017).

17 Belgian Code, explanatory memorandum, 232 and 324.

18 C.J.E.C., *gd. ch.*, case *SEVIC Systems AG c. Amtsgericht Neuwied*, 13 Dec. 2005, C-411/03, EU:C:2005:762, §19, <http://curia.europa.eu> (accessed 11 Mar. 2016).

19 Schmidt, *supra* n. 11, at 37.

20 J. Schmidt, *EU Company Law Package 2018 – Mehr Digitalisierung und Mobilität von Gesellschaften (Teil 2)*, *Der Konzern*, no 07–08, 273 (2018).

21 Part 4, Book 12, Title 6 (for cross-border mergers) and Art. 12:73 and 12:90 (for cross-border divisions) of the Belgian Code.

22 Part 4, Book 14, Title 1, Ch. 3 of the Belgian Code.

23 Part 4, Book 14, Title 1, Ch. 2 of the Belgian Code.

24 Art. 1030–1 (3) of the Luxembourg Law.

25 Art. 450–3 (1) (for public companies (SA)) and 710–26 (1) (for private limited liability companies (Sà r.l.) of the Luxembourg Law.

26 Belgian Code, explanatory memorandum, 340 and M. Fallon & E.-J. Navez, *La transformation transfrontalière d'une société par transfert du siège statutaire après l'arrêt Polbud*, RPS-TRV 379 (2018).

27 Belgian Code, explanatory memorandum, 339.

28 As a matter of fact even before Brexit became a known fact the adoption of the 'statutory seat' or 'registered office' theory had already been strongly advocated: see for instance, Kr. MARESCEAU, 'Belgium, get ready to compete for corporate charters: une plaidoirie pour l'introduction de la théorie du siège statutaire' in *La modernisation du droit des sociétés*, Bruxelles, Larcier, 111–143 (2014).

29 Art. 110 of the Belgian private international law Code, as it will be amended by the Belgian Code.

30 The very liberal incorporation theory originally introduced in the United Kingdom to allow companies incorporated in Great-Britain to be governed by British law while being economically operating in the colonies is, amongst others, applied in the United Kingdom, Ireland, the United States, Sweden, the Netherlands, Norway, Finland and Italy.

in addition to featuring the generally recognized triple advantage of simplicity, predictability and legal certainty,³¹ also significantly simplified the adoption of a specific cross-border conversion regime³² explicitly preserving the relevant company's legal personality in the process.³³

Luxembourg Law, to the contrary and despite repeated pleas from several authors and practitioners,³⁴ preserves so far its variant of the real seat theory³⁵ originally imported from Belgian law at the occasion of the adoption of the law on commercial companies in 1915.³⁶ Accordingly, the so-called *lex societatis* will be determined by reference to the place of the 'central administration', i.e. the place where the most important decisions pertaining to the company are adopted.³⁷ It is however worth mentioning that the effects of a strict real seat theory are tempered by (1) a rebuttable presumption that the registered office corresponds to the place of the central administration,³⁸ (2) certain non-rebuttable presumptions that circular resolutions adopted by the board or shareholders' meetings held without physical presence are located at the place of the registered office³⁹ and (3) the fact that a transfer of seat requires a positive action from the general meeting of the shareholders⁴⁰ and is thus not a purely factual matter.⁴¹

The disparity existing between Member States in this respect will not be removed by the Directive Proposal despite the recommendation expressed in the two preliminary studies.⁴² This is obviously regrettable in terms of legal certainty and cohesion within the internal market, but can be easily explained in terms of political feasibility.

3.2. Conflict-of-law Rules

In terms of cross-border mergers, the general conflict-of-law rule originally adopted in the Company Law Directive is the one of subsidiary applicability of national law,⁴³ meaning that except where

the directive has provided for specific material rules (e.g. in connection with the determination of the effective date of the transaction⁴⁴) or specific conflict-of-law rules (e.g. cumulative application of the national laws with pre-eminence of the most severe rule in connection with the form of the draft terms⁴⁵), each entity involved will be governed by its own national law. Due to its European origin, such rule is properly reflected in both Belgian Code and Luxembourg Law.

In connection with cross-border divisions and due to its restricted material scope of application,⁴⁶ the Directive Proposal introduces a very simple and straightforward conflict-of-law rule, providing that the procedures and formalities to be followed in order to obtain the pre-division certificate will be governed by the national law of the Member State of the company being divided, while the national laws of the Member States of the recipient companies shall govern the part of the procedure and the formalities to be complied with following receipt of such certificate.⁴⁷ Such rule definitely has the twofold advantage of being both simple and logical, but is definitely inappropriate in the case of a cross-border division with at least one pre-existing recipient company. Undoubtedly inspired by the current cross-border merger regime, the future Belgian Code promotes a distributive application of national laws, except where a cumulative application is required due to the specific nature or objectives of the relevant rule,⁴⁸ e.g. in connection with the protection of creditors in the case of a cross-border division of a Belgian company.⁴⁹ Despite the inexistence of a formal textual basis in this respect, this is typically the approach also followed in Luxembourg.⁵⁰

31 T. Biermeyer, *Stakeholder Protection in Cross-Border Seat Transfers in the EU: Between Freedom and Boundaries* 33 (Oisterwijk: Wolf Legal Publishers 2015) and St. Leible, in S. Heidinger, L. Michalski, St. Leible & J. Schmidt (under the direction of), *GmbHG*, 50, no 7 (3d ed., Munich: Verlag C. H. BECK 2017).

32 Kr. Maresceau, *De invoering van de statutaire zetelleer en de procedure tot grensoverschrijdende omzetting*, in *Le projet de Code des sociétés et associations – Het ontwerp Wetboek van vennootschappen en verenigingen* 55 (Brussels: Larcier 2018).

33 Art. 14:16 of the Belgian Code.

34 Corbisier, *supra* n. 16, at 39 and A. Steichen & A. Prüm, *Siège réel ou incorporation – Dialogue entre Alain Steichen et André Prüm*, in *Cent ans de droit luxembourgeois des sociétés* 462 and 463 (coll. de la Faculté de droit, d'économie et de finance de l'Université du Luxembourg, Brussels: Larcier 2016).

35 Art. 100–2 and 1300–2 of the Luxembourg Law.

36 Corbisier, *supra* n. 16, at 37.

37 Corbisier, *supra* n. 16, at 37 and A. Steichen, *Précis de droit des sociétés*, 140–143, nos. 185 and 186 (Saint-Paul ed., Luxembourg, 2017).

38 Art. 100–2 (3) of the Luxembourg Law and Steichen, *ibid.*, at 149, no 191.

39 Art. 444–3, §1, (3); 444–4, §3, (2); 710–15, §2 (2) and §3 (2) and 710–21, §2 (2) of the Luxembourg Law.

40 Art. 450–3 (1) (for public companies (SA)) and 710–26 (1) (for private limited liability companies (S.à r.l.) of the Luxembourg Law.

41 The discrepancies generated by the interplay of the various presumptions and a formal real seat theory has lead an author to consider that the incorporation theory was de facto applicable in Luxembourg. See A. Prüm, T. Baums, A. Couret, B. Hannigan, H.-J. De Kluiwer, B. Kurcz, J. Loesch, V. Simonart, L. Strine & M. Szpunar, *VIII. – Concurrence réglementaire/Regulatory Competition*, in *Cent ans de droit luxembourgeois des sociétés* 559 (Brussels: Larcier 2016).

42 Fallon & Navez, *supra* n. 26, at 380 and 381.

43 Art. 121, §1, (b) and §2 of the Company Law Directive.

44 Art. 129 of the Company Law Directive.

45 D. Beutel, *Der neue rechtliche Rahmen grenzüberschreitender Verschmelzungen in der EU – Einflüsse des Gemeinschaftsrechts auf die Schaffung nationaler Rechtsgrundlagen grenzüberschreitender Verschmelzungen unter Beteiligung deutscher Kapitalgesellschaften* 128 (Munich: Herbert Utz Verlag 2008) and M. Evrard & E. van der Vaeren, *Les fusions transfrontalières: un pas de plus vers une Europe harmonisée*, D.A. O.R. 114 (2007).

46 See *infra* 4.1.

47 Art. 160d, §4 of the Directive Proposal.

48 Belgian Code, explanatory memorandum, 310.

49 Belgian Code, explanatory memorandum, 310 and Art. 12:15 of the Belgian Code.

50 J.-P. Spang, *La fusion transfrontalière en droit luxembourgeois: regard du praticien*, in *Fusions transfrontalières de sociétés – Droit luxembourgeois et droit comparé* 94 (Brussels: Larcier 2011).

Finally, the rule laid down in the Directive Proposal in connection with cross-border conversions is almost identical to the one applicable to cross-border divisions as the national law of the departure Member State shall govern the part of the procedures and formalities to be complied with in order to obtain the pre-conversion certificate, and the national law of the destination Member State shall govern the remaining part.⁵¹ The future Belgian Code adopted a very similar rule in determining (1) a detailed procedure applicable to emigration cases (i.e. situations where the Belgian company wishes to transfer its registered office) up to the, in this case optional, deliverance of the pre-conversion certificate and (2) a fairly limited procedure starting with the notarial deed recording the conversion in immigration cases (i.e. situations where a foreign entity wishes to transfer its registered office to Belgium). The rules for cross-border conversions in Luxembourg apply in a similar fashion, albeit without any clear legal basis pertaining thereto in Luxembourg Law.⁵²

4. SCOPE OF APPLICATION

4.1. Material Scope of Application

4.1.1. *Types of Cross-border Operations*

Against the recommendations of the two studies commissioned in this respect,⁵³ the Commission deliberately restricted the scope of its intervention to cross-border conversions, mergers and divisions by incorporation, thus excluding, amongst others, cross-border divisions by acquisition, mixed cross-border divisions and hive-downs. The exclusion of cross-border divisions involving at least one existing company was justified by the highly complex nature of such operations requiring the involvement of competent authorities from several Member States and entailing additional risks in terms of fraud and circumvention of mechanisms meant to protect the interests of stakeholders.⁵⁴

Such self-restricting approach was not followed in the future Belgian Code that explicitly chose to cover the three main types of cross-border operations, being cross-border mergers,⁵⁵ divisions⁵⁶ and conversions.⁵⁷ Cross-border hive-downs, despite not being explicitly regulated, are also covered and possible on the basis of applicable private international law rules and principles.⁵⁸ All types of cross-border divisions, either full or partial,⁵⁹ by incorporation, acquisition or mixed are covered.⁶⁰ Even so-called '*silent divisions*' whereby the divided entity transfers without dissolution or issuance of new shares a portion of its assets and liabilities to another entity already holding all its shares and other titles are now also explicitly covered⁶¹ and may be carried out across the border.⁶² A similar attitude towards cross-border operations was also adopted in Luxembourg Law where all types of cross-border mergers,⁶³ divisions⁶⁴ and hive-downs⁶⁵ are allowed.

4.1.2. *The Possibility of an Unrestricted Cash Payment*

While the Commission explicitly decided to leave the question of the recognition of cross-border mergers or divisions where the cash payment allocated to the shareholders in addition to the exchanged shares exceeds 10% of the nominal or par value of the securities or shares to be issued to the discretion of the Member States,⁶⁶ both Luxembourg Law⁶⁷ and the future Belgian Code⁶⁸ explicitly allow this type of operation, the latter however with the specificity of prohibiting it within a purely internal context.⁶⁹

4.2. Personal Scope of Application

Despite significant criticism in connection with the fairly narrow personal scope of application of the current Company Law Directive,⁷⁰ the Commission strictly limited the benefit of its Directive Proposal to limited liability companies,⁷¹ with a possibility to exclude cooperative companies should they fall within the

51 Art. 86c, §4 of the Directive Proposal.

52 For a description of the Luxembourg procedure applicable to cross-border conversions see D. Boone & Chr. Piette, *Au salon du bricolage: transfert de siège transfrontalier inbound et rapport révisoral en droit comparé belge et luxembourgeois*, JN Sociétés, 272 and 273 (2014/5–6); Corbisier, *supra* n. 16, at 37 and 38 and Steichen, *supra* n. 37, at 148 and 149, no 190.

53 Reynolds, Scherrer & Truli, *supra* n. 11, at 53 and Schmidt, *supra* n. 11, at 29.

54 Directive Proposal, explanatory memorandum, 16 and recital 38 of the Directive Proposal.

55 Part 4, Book 12, Title 6 of the Belgian Code.

56 Art. 12:73, §1 (divisions by acquisition) and 12:90, §1 (divisions by incorporation of new companies) of the Belgian Code.

57 Part 4, Book 14, Title 1, Ch. 3 of the Belgian Code.

58 Belgian Code, explanatory memorandum, 315 and 317.

59 Belgian Code, explanatory memorandum, 300.

60 Art. 12:73, §1 (divisions by acquisition), 12:90, §1 (divisions by incorporation of new companies) of the Belgian Code and Belgian Code, explanatory memorandum, 314 (mixed divisions).

61 Art. 12:8, 2° of the Belgian Code.

62 Belgian Code, explanatory memorandum, 300.

63 Art. 1020–1 (3) of the Luxembourg Law.

64 Art. 1030–1 (3) of the Luxembourg Law.

65 Art. 1040–2, 1040–3 (2) and 1040–4 (2) of the Luxembourg Law.

66 Art. 120, §1 of the Company Law Directive and Art. 160c, §1 of the Directive Proposal.

67 Art. 1024–1 (1) and 1033–1 (1) of the Luxembourg Law.

68 Art. 12:107 (cross-border mergers) of the Belgian Code.

69 Art. 12:2; 12:3; 12:4; 12:5; 12:6 and 12:19 of the Belgian Code.

70 Reynolds, Scherrer & Truli, *supra* n. 11, at 36 and Schmidt, *supra* n. 11, at 17.

71 Art. 160a, §1 of the Directive Proposal.

definition of *limited liability companies*⁷² and to the exclusion of companies the object of which is the collective investment of capital provided by the public.⁷³ Such restrictive conception of cross-border operations was justified by the fact that (1) other company forms have not yet benefitted from thorough harmonization throughout the European Union and (2) the impact assessment established that the retained entities are the most frequently impacted by cross-border operations.⁷⁴

This vision was however not shared by national legislators as under both the future Belgian Code⁷⁵ and Luxembourg Law,⁷⁶ to the exception of collective investment companies with respect to the cross-border merger procedure under the Belgian Code, all company types having a separate legal personality may carry out cross-border operations.

The situation is slightly more ambiguous in connection with companies in liquidation or subject to insolvency proceedings. While the Directive Proposal resolutely excludes this specific category of entities, even if there is only a threat of insolvency,⁷⁷ Luxembourg Law considers that both companies subject to insolvency proceedings⁷⁸ and in liquidation,⁷⁹ provided that the allocation of their assets amongst their shareholders has not yet been initiated, may carry out a cross-border division or merger. The future Belgian Code prohibits cross-border mergers involving a company in liquidation,⁸⁰ as well as cross-border conversions of companies under insolvency proceedings⁸¹ in order to avoid last minute attempts to alter the applicable law in favour of shareholders or a specific class of creditors.⁸² It is however surprising that cross-border divisions of companies in liquidation or under insolvency proceedings, despite being potentially more detrimental to creditors than cross-border mergers, have not been explicitly excluded.

4.3. Geographic Scope of Application

Due to the European Legislator's restricted competence in connection with cross-border operations involving third States, only limited liability companies (1) formed in accordance with the law of a Member State and (2) having their registered office, central

administration or principal place of business within the European Union may carry out a cross-border operation.

Not being subject to similar limitations, the future Belgian Code,⁸³ similarly to Luxembourg Law,⁸⁴ does not introduce a distinction between EU and non-EU entities. Such a resolutely liberal position however presupposes the existence of adequate safeguards for the various stakeholders involved rendering any geographical limitations superfluous and is only of interest if the other State accepts and recognizes similar cross-border procedures.

5. PROCEDURE

5.1. A Diversity of Approaches

While both Belgian and Luxembourg cross-border merger procedures include specific provisions originating in the Company Law Directive, their cross-border division regime is built following the internal regime applicable to the transaction.⁸⁵ The Luxembourg cross-border conversion regime has the specificity of being only marginally regulated by Luxembourg Law entailing that its features have been largely determined by practice.⁸⁶ To the contrary, the future Belgian cross-border conversion regime includes features inspired by (1) the internal conversion and merger regimes and (2) the provisions on share capital reductions.⁸⁷ If this approach may be questionable in light of the non-discrimination principle of cross-border operations *vis-à-vis* internal operations as enshrined in the case-law of the EU Court of justice,⁸⁸ it has the clear advantage of offering an appreciable level of legal certainty while building upon well known operations as organized by national company law.

5.2. Selected Procedural Steps

5.2.1. *The Common Draft Terms*

5.2.1.1. *The Objectives of the Draft Terms*

Building upon the well-known European model for cross-border operations, the Directive Proposal and, to the extent referred to, the

72 Art. 86a, §3 and 160c, §2 of the Directive Proposal and of the Company Law Directive.

73 Art. 86a, §4 and 160c, §3 of the Directive Proposal.

74 Directive Proposal, explanatory memorandum, 18.

75 Art. 12:1, §1 and 14:15 (albeit excluding European Companies and European Cooperative Companies governed by specific European Regulations) of the Belgian Code.

76 Art. 1020-1 (1) and 1030-1 (1) of the Luxembourg Law.

77 Art. 86c, §2, 120, §4 and 160d, §2 of the Directive Proposal.

78 Art. 1020-1 (2) and 1030-1 (2) of the Luxembourg Law.

79 Art. 1020-3, §2 and 1030-3, §2 of the Luxembourg Law.

80 Art. 12:106 (2), 2° of the Belgian Code.

81 Art. 14:17 of the Belgian Code.

82 Maresceau, *supra* n. 32, at 57.

83 Art. 12:106; 12:73, §1; 12:90, §1 and 14:15 of the Belgian Code.

84 Art. 1020-1 (3) and 1030-1 (3) of the Luxembourg Law.

85 D. Willermain, *Restructuration de sociétés: première analyse du Livre 12 du CSA*, in *Le projet de Code des sociétés et associations - Het ontwerp Wetboek van vennootschappen en verenigingen* 336 (Bruxelles: Larcier 2018) in connection with cross-border divisions.

86 Corbisier, *supra* n. 16, at 37.

87 Belgian Code, explanatory memorandum, at 324 and 327 and Fallon & NAVEZ, *supra* n. 26, at 381.

88 Fallon & Navez, *supra* n. 26, at 381.

Company Law Directive, provide that a cross-border merger, division or conversion is to be initiated by the management body of each relevant company, by drawing up common draft terms in furtherance of (1) ending the preliminary negotiations period, (2) informing the various stakeholders likely to be impacted by the process and (3) serving as corner stone for the remainder of the procedure.⁸⁹ Given their fundamental nature, it is therefore not surprising that such draft terms will also be required for all three operations under the future Belgian Code⁹⁰ and for cross-border mergers and divisions under Luxembourg Law.⁹¹

5.2.1.2. *The Form of the Draft Terms*

As the Company Law Directive in connection with cross-border mergers, the Directive Proposal contains no indication as to the form of the draft terms, leaving this question to the Member States. In this respect, both Luxembourg Law⁹² and the future Belgian Code leave the choice between a private or notarial deed to the parties for cross-border mergers and divisions, to the proviso however that (1) under the former, if no resolutions of the general meeting are to be passed and recorded in a notarial deed, the draft terms must have the form of a notarial deed⁹³ and (2) under the latter, the relevant resolutions of the general meeting or, in certain specific cases, of the board to proceed with the transaction must be recorded in a notarial deed.⁹⁴ The future Belgian Code similarly contains no specific requirement with respect to the form of the draft conversion terms.⁹⁵ This can be easily explained by the fact that a cross-border conversion must always be recorded in a notarial deed.⁹⁶

5.2.1.3. *The Contents of the Draft Terms*

The main difference between the various regimes at hand lies in the minimum contents of the draft terms. Drawing an extensive catalogue of all the differences existing in this respect between the three regimes would go far beyond the scope of the present article, but

two selected aspects are worth mentioning. First, under Luxembourg Law, due to the absence of a clear procedure, no draft terms will be required at all in connection with a cross-border conversion. Under the future Belgian Code, even if draft terms are required, their contents is fairly minimalistic and limited to (1) the name, legal form and registered office of the company after its conversion and (2) the details of the competent notary in order to strengthen the efficiency of its creditor protection mechanism.⁹⁷ To the contrary, the Directive Proposal imposes a comprehensive catalogue of up to eleven items to be reflected in the draft terms⁹⁸ including, a.o., a proposed timetable⁹⁹ and the safeguards offered to creditors.¹⁰⁰ Second, given that both Belgian Code and Luxembourg Law referred to the contents required in the case of a national division instead of the one required in the case of a cross-border merger as the basis to determine their cross-border division regime, the relevant lists lack certain items that were introduced by the Company Law Directive for cross-border mergers to reflect the international nature of the operation, such as (1) the likely repercussion of the operation on employment¹⁰¹ or (2) information on the procedures whereby arrangements for the involvement of employees in the definition of their rights of participation in the converted company are determined and on the possible options for such arrangement.¹⁰² Such mentions were however included in the description of the contents of the cross-border division draft terms under the Directive Proposal.¹⁰³

5.2.1. *The Board Report(s)*

Contrary to what is currently provided in the Company Law Directive for national mergers¹⁰⁴ and divisions¹⁰⁵ or for cross-border mergers,¹⁰⁶ the Directive Proposal imposes upon the board of managers of the relevant entities an obligation to draw up two several reports in the case of a cross-border merger,¹⁰⁷ division¹⁰⁸ or conversion.¹⁰⁹ The first one specifically targets members while the second is only intended to provide some limited information to the

89 See in connection with cross-border mergers: Th. Tilquin, *Traité des fusions et scissions*, 174, no 227 (Brussels : Kluwer 1993) and D. Willermain, *Les fusions transfrontalières de sociétés*, J.T., no 6365, 586 (10 Oct. 2009).

90 Art. 12:59 (1); 12:111 (1) and 14:18 (1) of the Belgian Code.

91 Art. 1021-1, §§1, 2 and 4; 1031-1, §§1 and 2 and 1032-1, §§1-3 of the Luxembourg Law.

92 Art. 1021-1, §1; 1021-12, §1; 1031-1, §1 and 1031-13, §1 of the Luxembourg Law.

93 Art. 1021-12, §1 and 1031-13, §1 of the Luxembourg Law.

94 Art. 12:84 (1) and 12:116, §9 of the Belgian Code.

95 Art. 12:75 (1) and 12:111 (1) of the Belgian Code.

96 Art. 14:25 (1) of the Belgian Code.

97 See *infra* 5.2. and Maresceau, *supra* n. 32, at 58 and 59.

98 Art. 86d, §1 of the Directive Proposal.

99 Art. 86d, §1, (d) of the Directive Proposal.

100 Art. 86d, §1, (f) of the Directive Proposal.

101 Art. 122 (d) of the Company Law Directive.

102 Art. 122 (j) of the Company Law Directive.

103 Art. 160e, §1, (e) and (l) of the Directive Proposal.

104 Art. 95 of the Company Law Directive.

105 Art. 141 of the Company Law Directive.

106 Art. 124 of the Company Law Directive.

107 Art. 124 and 124a of the Directive Proposal.

108 Art. 160g and 160h of the Directive Proposal.

109 Art. 86e and 86f of the Directive Proposal.

employees. The Commission's decision to proceed with such a split is to be explained by the legal uncertainty affecting the report requirement in the context of a cross-border merger under the Company Law Directive. In this respect, given that the report has to include an explanation of the implications of the operation for members, employees and creditors,¹¹⁰ there are some uncertainties as to whether the two latter categories are also to be considered as addressees of the report or not. Would that be the case, this would mean that the report would also have to include information specifically aimed at these two categories of stakeholders. In connection with the employees, it flows from (1) the preparatory works¹¹¹ and (2) the subsequent communication requirement that they are to be considered as direct addressees of the report.¹¹² The situation is however less clear with respect to creditors as the report does not need to be communicated to them. It is therefore generally considered that those are not direct addressees of the report¹¹³ and this corresponds to the position adopted under the Directive Proposal.

Given the innovative nature of this split, it is not surprising that neither the future Belgian Code nor Luxembourg Law have yet embraced it,¹¹⁴ being thus still subject to the above-described legal uncertainty in the case of a cross-border merger. Beyond this, two selected significant differences between the relevant procedures are worth mentioning. First, given that both Luxembourg and Belgian cross-border division regimes are aligned on the national one, there's no requirement that the board report would include information on the implications of the contemplated operation for creditors and employees and it is not required that it be made available to latter category.¹¹⁵ Second, in the case of emigration of a national company, Luxembourg Law does not provide for any report requirement, while the future Belgian Code imposes on the board of the relevant entity, the obligation to draw up a report including information on the consequences of the operation for

members, creditors and employees,¹¹⁶ albeit without the obligation to make such report available to employees as would be the case in a cross-border merger scenario.¹¹⁷

5.2.3. *The Independent Expert's Report*

In order to, a.o., complete the shareholders' information, the cross-border merger, division and conversion regimes under both the future Belgian Code¹¹⁸ and the Directive Proposal,¹¹⁹ as well as the Luxembourg cross-border merger¹²⁰ and division regimes¹²¹ request the intervention of an independent expert to assess the contemplated operation. It is worth mentioning that, while no specific independent expert's report is required under Luxembourg Law in the case of a cross-border conversion, prior to the 2016 reform, Luxembourg notaries tended to request an independent expert's report certifying that the relevant company's net assets were at least equal to the subscribed share capital if such company was to adopt the form of a public company (*société anonyme*) on the basis that such a report was requested in the case of a national conversion to a public company.¹²² With the suppression of the relevant provision in 2016, it is expected that no external expert's report will be required anymore.¹²³

A further significant difference deserving attention pertains to the general scope of the expert's mission. While his role is clearly focused on the verification of (1) the draft terms and, specifically, the share exchange ratio computation in connection with cross-border mergers or divisions under the future Belgian Code¹²⁴ and Luxembourg Law¹²⁵ and (2) the accuracy of the financial statements drawn up by the board in the case of a cross-border conversion under the Belgian Code,¹²⁶ his missions have been extended in the case of a cross-border conversion¹²⁷ or division¹²⁸ under the Directive Proposal. More specifically, under the latter, his missions will include, in addition, (1) the assessment of the accuracy of the

110 Art. 124 (1) of the Company Law Directive.

111 Report of the Committee on legal affairs on the proposal for a directive of the European Parliament and of the Council on cross-border mergers of companies with share capital (COM(2003)0703 – C5-0561/2003–2003/0277(COD)) (Rapporteur: Klaus-Heiner Lehne), *P.E. Doc.*, A6-0089/2005 of 25 Apr. 2005, <http://www.europarl.europa.eu> (24 Nov. 2018), 19.

112 D. Beutel, *supra* n. 45, at 179; W. Bayer & J. Schmidt, *Die neue Richtlinie über die grenzüberschreitende Verschmelzung von Kapitalgesellschaften*, NJW, 403 (7/2006) and Willermain, *supra* n. 89, at 587, no 24.

113 Fr. Behrens, *Die grenzüberschreitende Verschmelzung nach der Richtlinie 2005/56/EG (Verschmelzungsrichtlinie)*, 101 (Göttingen: Cuvillier Verlag 2007); D. Beutel, *supra* n. 45, at 179 and 180; S. Kulenkamp, *Die grenzüberschreitende Verschmelzung von Kapitalgesellschaften in der EU*, 220 (Mannheim: Nomos, 2008) and J. Vetter, *Die Regelung der grenzüberschreitenden Verschmelzung im UmwG*, AG, 620 (2006).

114 Art. 12:61; 12:77; 12:113 and 14:20 of the Belgian Code and Art. 1021–5; 1031–5 and 1031–1, §1 of the Luxembourg Law.

115 Art. 1031–5 of the Luxembourg Law and Art. 12:61 and 12:77 of the Belgian Code.

116 Art. 14:20 of the Belgian Code.

117 Art. 12:113 (6) of the Belgian Code.

118 Art. 12:62, §1; 12:78, §1; 12:114, §1 and 14:21 (2) of the Belgian Code.

119 Art. 86g and 160i of the Directive Proposal and Art. 125 of the Company Law Directive.

120 Art. 1021–6, §1 and 1022–1, §1 of the Luxembourg Law.

121 Art. 1031–6, §1 and 1032–§, §1 of the Luxembourg Law.

122 Former Art. 31–1 of the Luxembourg law of 10 Aug. 1915 on commercial companies and S. Bellamine & C. Pauwels, *Le transfert du siège social d'une société anonyme étrangère vers le Luxembourg: de la théorie à la pratique*, 3(7) *JurisNews – Sociétés*, 115 (2010); I. Corbisier, *supra* n. 16, at 38 and Steichen, *supra* n. 37, at 148 and 149, no 190.

123 D. Boone, *Les transformations de sociétés à la lumière de la réforme du droit des sociétés (loi du 10 août 2016)*, 9(2/3) *JurisNews – Sociétés* 326 (2016).

124 Art. 12:62, §1, (2) – (4); 12:78, (2) – (4) and 12:114, §1 (2) – (4) of the Belgian Code.

125 Art. 1021–6, §2; 1031–6, §2 and 1032–1, §1 of the Luxembourg Law.

126 Art. 14:21 (2) of the Belgian Code.

127 Art. 86g, §3 of the Directive Proposal.

128 Art. 160i, §3 of the Directive Proposal.

reports drawn up by the board of managers¹²⁹ and (2) the identification and description of all factual elements for the relevant competent authority to conduct an in-depth-assessment aimed at preventing artificial arrangements.¹³⁰ In other words, under the Directive Proposal, the independent expert becomes an auxiliary of the relevant national authority in addition to being an independent third party offering an objective view on the conditions of the operation to shareholders and employees alike. This difference has an impact on the potential waiver of such report. While the independent expert's report may be waived by unanimous consent of the shareholders in the case of a cross-border merger or division under the future Belgian Code¹³¹ and Luxembourg Law,¹³² such exception is not foreseen in the Directive Proposal for cross-border divisions or conversions, with however the precision that small and medium enterprises¹³³ are automatically exempted¹³⁴ in order to spare them the relevant costs.¹³⁵

5.2.4. Legal Scrutiny

5.2.4.1. An Efficient Two-step Approach

One of the main characteristics of the multi-layered cross-border operation procedure laid down by the Directive Proposal is the two-step legal scrutiny process¹³⁶ inspired from the cross-border merger regime under the Company Law Directive¹³⁷ and Regulation for the European company.¹³⁸ Such controls are a direct consequence of the promoted approach of a distributive application of national laws as a local authority is best suited to assess the due completion of the relevant part of the procedure governed by its own law. Should this be the case, then the relevant authority will issue a certificate to a centralizing authority located either in the destination Member State in case of a cross-border conversion¹³⁹ or in the Member State of

the recipient entities in case of a cross-border merger¹⁴⁰ or division.¹⁴¹ Despite its cumbersome appearance and obvious issues in terms of communication and scope of work¹⁴² between the relevant authorities, studies conducted on the cross-border merger regime have generally shown the effectiveness of such system.¹⁴³ It is therefore not surprising that a similar approach is to be found in the future Belgian Code and under Luxembourg Law. While the cross-border division and conversion regimes under the Belgian Code present nothing more than an analogous application of the cross-border merger regime,¹⁴⁴ albeit with a different scope,¹⁴⁵ cross-border conversions under Luxembourg Law deserve more attention. In the specific case of a cross-border conversion of a foreign entity to a Luxembourg one that may only be incorporated via a notarial deed,¹⁴⁶ it is frequent for the Luxembourg notary recording both the transfer and the adoption of articles of association to request a specific legal opinion issued by a legal counsel in the country of origin of the relevant entity certifying that (1) such transfer is legally possible without interruption of the legal personality and (2) all applicable formalities have been duly complied with.¹⁴⁷ Such a highly flexible solution ensures that even if no authority in the country of origin was legally appointed to carry out the local scrutiny process, the Luxembourg notary will nevertheless benefit from a certain level of legal certainty in recording the conversion deed.

5.2.4.1. The In-depth Assessment

A significant, and already criticized¹⁴⁸ feature of the new cross-border conversion and division regimes under the Directive Proposal is that the relevant local authority has the obligation (1) to refuse the issuance of a pre-completion certificate if the procedure constitutes a so-called '*artificial arrangement aimed at obtaining*

129 Art. 86g, §3, (a) and 160i, §3, (e) of the Directive Proposal.

130 In furtherance thereof, according to Art. 86g, §3, (b) and 160i, §3, (f) of the Directive Proposal, the report must at least include: the characteristics of the establishment(s) in the destination Member State or in the Member States concerned of the recipient companies, including the intent, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by (a) the converted company in the destination Member State and the departure Member State or (b) the company being divided in the Member States of the recipient companies. See *infra* f, bb.

131 Art. 12:62, §1 (6); 12:78 (6) and 12:114, §3 of the Belgian Code.

132 Art. 1021-6, §5; 1031-8, §1 and 1032-1, §1 of the Luxembourg Law.

133 Small and medium enterprises are defined in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC).

134 Art. 86g, §6 and 160i, §6 of the Directive Proposal.

135 Recitals 14 and 48 of the Directive Proposal.

136 Art. 86m; 86n; 86o and 86p of the Directive Proposal for cross-border conversions and Art. 160o; 160p; 160q and 160r of the Directive Proposal for cross-border divisions.

137 Art. 127 and 128 of the Company Law Directive.

138 Art. 25 and 26 of Council Regulation (EC) 2157/2001 of 8 Oct. 2001 on the Statute for a European company (SE), <http://eur-lex.europa.eu> (accessed 29 Nov. 2018).

139 Art. 86p, §1 of the Directive Proposal.

140 Art. 128, §1 of the Company Law Directive.

141 Art. 160r, §1 of the Directive Proposal.

142 Bech-Bruun Study, *supra* n. 9, at 62; Reynolds, Scherrer & Trulli, *supra* n. 11, at 46 and 47 and Schmidt, *supra* n. 11, at 24 and 25.

143 Directive Proposal, explanatory memorandum, 5.

144 Art. 12:73, §3 and 12:90, §3 of the Belgian Code.

145 For an illustration thereof, see *infra* 5.2. in connection with the Belgian notary's unique role in the creditor protection regime within the framework of a cross-border merger or division.

146 Art. 100-4 of the Luxembourg Law.

147 Bellamine & Pauwels, *supra* n. 122, at 114 and Corbisier, *supra* n. 16, at 37.

148 W. Bayer & J. Schmidt, *BB-Gesetzgebungs- und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2017/18*, BB 1570 and 1571 (44/2018); F. Bernard, *L'avènement des scissions transfrontalières*, D.A.O.R., no 127, 34-36 (2018/3); DAV, *Stellungnahme zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates zur Änderung*

undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members¹⁴⁹ or, (2) if it has serious concerns about the true motivations behind the cross-border operation, to conduct an in-depth assessment.¹⁵⁰ Such anti-abuse safeguard, which has surprisingly not been extended to the cross-border merger regime, is obviously unknown from both the future Belgian Code and Luxembourg Law. Beyond its innovative character, practice will most likely show its incompatibility with the flexible legal scrutiny approach promoted both in Belgium and in Luxembourg. Indeed, neither the Directive Proposal¹⁵¹ nor the Company Law Directive¹⁵² include indications as to the identity of the local authority to be entrusted with the scrutiny task, leaving it up to the Member States. Such self-restricting approach generated a huge disparity between Member States in connection with the current cross-border merger regime. Empirical data gathered on this subject has evidenced that a majority of Member States opted for commercial registries or courts¹⁵³ while notaries are generally favoured by practitioners and economic actors due to their availability, reduced cost and flexibility.¹⁵⁴ Given the more liberal stance adopted by both Luxembourg Law and the future Belgian Code, the national authority primarily responsible for carrying out the legal scrutiny will be a public notary.¹⁵⁵ While such public authority's limited financial and human resources do not prevent them from accomplishing their legal scrutiny mission under national law, it is hard to see how it could conduct multiple in depth-assessments without either jeopardizing the timing of the operation or simply adopting the independent expert's view. Furthermore, the anti-abuse procedure introduced by the Commission and considered by it as a 'crucial element' of the Directive Proposal¹⁵⁶ has been the

source of a general outcry by notaries as the relevant assessment goes way beyond their traditional role,¹⁵⁷ not even yet speaking in terms of professional liability as any refusal of delivery of a certificate will (1) restrict the relevant entity's freedom of establishment and (2) have serious economic consequences for the relevant company.

6. PROTECTION OF MINORITY SHAREHOLDERS AND CREDITORS

6.1. Protection of Minority Shareholders

Neither the future Belgian Code nor Luxembourg Law provide for a protection in favour of (dissenting) minority shareholders other than – possibly reinforced for cross-border conversions – majority requirements applicable to the decision-making process.¹⁵⁸

That means that in the present situation dissenting shareholders in Belgian and in Luxembourg companies do not benefit from an exit right. Furthermore when some cross-border merger happens to be carried out involving a company whose national law opens the possibility of an exit right for its dissenting shareholders, such exit procedure will be available only when the Belgian or Luxembourg companies also involved accept it and this because of a questionable compromise achieved in Article 127 (3) of the Company Law Directive.

Precisely in order to respond to criticism raised by Article 127 (3) of the Company Law Directive, the Directive Proposal now introduces an exit right for those who voted against the transaction or did not agree with it while being deprived of voting rights. In

der RL 2017/1132/(EU) in Bezug auf grenzüberschreitende Umwandlungen, Verschmelzungen und Spaltungen COM (2018) 241, NZG, 858 (2018) and Schmidt, *supra* n. 20, at 276.

149 Art. 86c, §3; 86m, §7, (b); 160d, §3 and 160p, §7, (b) of the Directive Proposal.

150 Art. 86m, §7, (c) and 160o, §7, (c) of the Directive Proposal.

151 Art. 86m, §1; 86p, §1; 160o, §1 and 160r, §1 of the Directive Proposal.

152 Art. 127 of the Company Law Directive.

153 According to the study conducted by Bech-Bruun and Lexidale, 11 Member States (Bulgaria, Estonia, Finland, Iceland, Latvia, Malta, Norway, Portugal, Romania, Spain and Sweden) opted for a commercial register, 9 (Austria, Germany, Cyprus, France, Hungary, Ireland, Poland, the United Kingdom and Slovenia) for a court, 7 (Belgium, Luxembourg, Italy, Lithuania, the Netherlands, the Czech Republic and Slovakia) for a notary and 3 (Denmark, Greece and Liechtenstein) for another type of authority. See Bech-Bruun Study, *supra* n. 9, at 62.

154 Bech-Bruun Study, *supra* n. 9, at 61.

155 Art. 12:73, §3; 12:90, §3; 12:117 and 14:26 of the Belgian Code and Art. 1021–12, §2 and 1031–13, §2 of the Luxembourg Law.

156 Directive Proposal, explanatory memorandum, 4 and 8.

157 According to Art. 1 of the Belgian law of 25 Ventôse An XI regarding the organization of the profession of notary public, <https://www.notaire.be> (accessed 29 Nov. 2018) and Art. 1 of the Luxembourg law of 9 Dec. 1976 regarding the organization of the profession of notary public, www.legilux.public.lu (accessed 29 Nov. 2018), it is the notaries' primary mission to record all the deeds and contracts to which the parties must or wish to be given the character of authenticity attached to the deeds of the public authority, and to certify the date, keep the deposit and issue certified copies thereof.

158 For cross-border mergers and divisions:

See Belgian Code, Art. 12:116 (cross-border mergers) and 12:67, 12:73, 12:83 and 12:90 (cross-border divisions) that rest mainly on an usual $\frac{3}{4}$ majority vote with however a series of special cases such as when companies involved are unlimited liability ones or comprise shareholders incurring an unlimited liability regime (unanimity will apply in such cases).

In Luxembourg rules that are comparable to the Belgian ones (implementation of the rules generally applied to the modification of statutes with some special cases) do apply (see Luxembourg Law, Art. 1021–3 and 1021–4 for cross-border mergers and the general provision of 1030–1 for cross-border divisions).

For cross-border conversions:

See Belgian Code, Art. 14:24 that requires a $\frac{4}{5}$ majority vote – the statutes could possibly provide for an even higher majority requirement – whereas the applicable majority usually required to change companies' statutes is a $\frac{3}{4}$ majority; in some cases unanimity will apply, namely for cross-border conversions: where some shareholders incur an unlimited liability regime; when the company existed for less than two years and when the statutes provide that the company may not adopt another form.

In Luxembourg the rules generally applicable ($\frac{2}{3}$ majority for the SA and $\frac{3}{4}$ majority for the S.à r.l.) for statutory modifications do apply: see Art. 450–3 (1) (SA) and 710–26, 1st § (S.à r.l.) Luxembourg Law.

such case either the company, remaining members or third parties in agreement with the company will have to acquire their shares for adequate cash compensation reviewed by the independent expert and subject to judicial review. Members willing to remain in the company will also have the right to challenge the share exchange ratio in the case of a merger or a division.¹⁵⁹

Two observations:

- (1) Both Belgian and Luxembourg Law confer the possibility to create beneficiary shares,¹⁶⁰ aside from non-voting shares. These beneficiary shares could be deprived of voting rights and the definition of their rights is largely left to the company's statutes. The question is whether the Directive Proposal also means to encompass such shares when referring to 'members holding shares without voting rights'.¹⁶¹
- (2) It is to be noted that Belgian Law generally provides for an exit right for shareholders of a non-listed SA or for a SRL (ex SPRL) who can demonstrate in court that they have a 'just motive' for leaving the company.¹⁶² Such 'just motive' is generally recognized when the exiting shareholder's personal interest is not seen as entering in conflict with the company's best interest.¹⁶³ It is therefore a bit surprising that a shareholder's personal interest could be protected in that way in the course of the company's ordinary business but not when some cross-border transaction takes place. The question whether some shareholder(s) could start an ordinary exit procedure when becoming aware of a contemplated cross-border transaction remains open.

6.2. Protection of Creditors

Conscious of the potential danger for creditors of a cross-border division, the future Belgian Code has opted for an *ex ante* (i.e. starting prior to the operation becoming effective) protection mechanism. It consists in (1) the possibility to apply within two months following the publication of the division deed for an

adequate collateral for creditors having either a certain, but not yet payable claim against the relevant entity or a claim being the object of judicial or arbitration proceedings (i.e. so called *sub iudicis* actions¹⁶⁴) combined with (2) a joint and several liability of the recipient companies if the relevant collateral is not granted in due course¹⁶⁵ or if a liability of the divided entity has not been allocated in the draft terms and the interpretation thereof does not allow for an allocation.¹⁶⁶ The most interesting feature of this twofold mechanism lies with its enforceability. In order to guarantee its effectiveness, it is explicitly foreseen that the public notary in charge of the legal scrutiny is prohibited from delivering the pre-division certificate, thus preventing the operation from becoming effective, for as long as a creditor's claim for collateral has not been either satisfied or dismissed by an enforceable court decision.¹⁶⁷ Taking into account the fact that creditors benefit from a two-month period starting on the day of the publication of the division deed,¹⁶⁸ this entails that creditors may stall-mate an operation deemed essential for the economic survival of an entity for a significant period of time, especially in the light of the fact that such opposition period may only be reduced with the unanimous consent of creditors entitled to apply for a collateral.¹⁶⁹ A similar highly protective right of opposition was established for emigration cases,¹⁷⁰ but not for cross-border mergers.¹⁷¹ Such procedure certainly guarantees a high level of protection of creditors in connection with operations generally considered to be more detrimental to creditors than a merger, but one may wonder whether this cumbersome protection regime established *expressis verbis* in order to protect the creditors of the Belgian entity¹⁷² would pass the proportionality test imposed on all national legislative measures restricting a company's freedom of establishment.

In opposition to this highly defensive stance, Luxembourg Law does not provide for a right to block the transaction and, in the case of cross-border divisions, only applies the protective regime applicable to national divisions, i.e. an *ex post* protection

159 See Art. 126a for cross-border mergers, Art. 160l for cross-border divisions and Art. 86j for cross-border conversions of the Directive Proposal.

160 Since 2016 such beneficiary shares can also be created in S.à r.l. (private limited liability companies) and cooperative companies in Luxembourg: see Art. 430-1 (1) (SA), 710-5 (1) (S.à r.l.) and 812-9 (cooperative companies) Luxembourg Law. In Belgium see Art. 7:58 and 7:59 (SA) of the future Belgian Code.

161 The French wording of the Directive Proposal would seem to exclude them when referring to 'associés détenant des actions sans droit de vote'. Indeed in both Belgian and Luxembourg statutes 'actions sans droit de vote' are clearly to be distinguished from 'parts bénéficiaires'.

162 See Art. 2:59 and 2:67-2:68 of the future Belgian Code.

Such procedure is unknown in Luxembourg Law and was refused in the course of the preparatory works that lead to the adoption of the 2016 reform of Luxembourg's company law statute as a result of lobbying pressures exerted by private investment funds representatives: see Corbisier, 'La réforme du droit luxembourgeois des sociétés', *supra* n. 2, at 445-447.

163 See I. Corbisier, *La société et ses associés, Droit des sociétés: les lois des 7 et 13 avril 1995*, 105-245 and no. 30.3 (Louvain-la-Neuve/Bruxelles, Academia/Bruylant 1995). On exit (and expulsion) rights in Belgian Company Law, see f.e., E. Pottier & A. Coibion, *Le règlement des conflits entre actionnaires: exclusion, retrait et modes alternatifs de règlement des conflits*, (2d ed., G.U.J.E, Kluwer 2011) (annually updated by I. Corbisier).

164 Belgian Code, explanatory memorandum, 301 and 302.

165 Art. 12:15, §1, (5) of the Belgian Code.

166 Art. 12:60 (2) and 12:76 (2) of the Belgian Code.

167 Art. 12:73, §3 and 12:90, §3 of the Belgian Code.

168 Art. 12:15, §1 of the Belgian Code.

169 See Maresceau, *supra* n. 32, at 64, no 24 in connection with emigration cases.

170 Art. 14:18; 14:19; 14:23 and 14:26 of the Belgian Code.

171 Art. 12:15 of the Belgian Code.

172 Belgian Code, explanatory memorandum, 310.

mechanism articulated around (1) the possibility for creditors owning a claim dated earlier than the division deed to apply for an adequate collateral within two months following the publication of the division deed,¹⁷³ (2) the claim becoming immediately payable if the collateral is not provided in due course¹⁷⁴ and (3) a joint liability of the recipient companies limited to the net assets allocated to each of them in case a creditor has not been satisfied by the relevant recipient entity¹⁷⁵ or a liability of the divided entity has not been allocated in the draft terms and the interpretation thereof does not allow for an allocation.¹⁷⁶ In connection with cross-border conversions, the notary will simply verify that the relevant company satisfies the minimum applicable share capital requirements and, in furtherance thereof, will request as recent as possible interim accounts along with a statement from the board certifying that since the date of the interim accounts, no event having an impact on the company's financial situation has occurred.¹⁷⁷

Finally, the Commission, conscious that both public consultations conducted on the subject showed a clear need for harmonization,¹⁷⁸ decided to introduce harmonized rules to protect creditors combined with the possibility for Member States to provide for additional safeguards.¹⁷⁹ Consequently, as a first protection mechanism, Member States now have the possibility to require that the management or administrative organ of the relevant entity provides, at the earliest one month prior to the disclosure of the draft terms, a declaration that on the basis of the information available to them and after having made reasonable enquiries, they are unaware of any reason why, after completion of the operation, the company's liabilities would not be satisfied when they fall due.¹⁸⁰ Secondly, if creditors are dissatisfied with the protection of their interests as must now be outlined in the draft terms,¹⁸¹ they may apply to the appropriate authority for adequate safeguards within one month of the disclosure of the draft terms.¹⁸² By doing so, the Commission has clearly expressed its preference for an *ex ante* protection mechanism as it clarifies the creditors' situation

prior to the operation becoming effective while at the same time addressing its main default, being the delaying of the operation¹⁸³ as in the Belgian case, by limiting the duration to one month starting already on the date of the disclosure of the draft terms. Similarly to what is provided for under the Belgian Code¹⁸⁴ and Luxembourg Law¹⁸⁵ in the case of a cross-border division, when a liability was forgotten in the division plan¹⁸⁶ or when a creditor did not obtain satisfaction from the recipient company,¹⁸⁷ all recipient companies will be jointly and severally liable for the relevant obligation, such liability being however limited to the value, at the date on which the division takes effect, of the net assets allocated to that company.¹⁸⁸

However, the most fundamental innovation of the creditor protection regime under the Directive Proposal compared to the future Belgian Code and Luxembourg Law is the introduction of two rebuttable¹⁸⁹ presumptions that the contemplated operation will not prejudice the creditors where (1) the company discloses together with the draft terms an independent expert report concluding that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced¹⁹⁰ or (2) creditors are offered a right to payment of at least equivalent value to their original claim, which may be brought in the same jurisdiction as their original claim, and which is of a credit quality at least commensurate with the creditor's original claim immediately after the completion of the operation.¹⁹¹

7. CONCLUSION

It is surprising to note that despite explicitly basing its legal initiative on Article 50, §2, (f) of the TFEU¹⁹² allowing the Commission to provide for progressive abolition of restrictions on freedom of establishment, it comes out of the above analysis that the cross-border conversion and division procedures enshrined in the Directive Proposal are significantly more cumbersome and restrictive (especially in connection with the

173 Art. 1031–10, §1 of the Luxembourg Law.

174 *Ibid.*

175 Art. 1031–10, §2 of the Luxembourg Law.

176 Art. 1031–1, §3 of the Luxembourg Law.

177 Bellamine & Pauwels, *supra* nn. 122, 114 and 115 and I. Corbisier, *supra* n. 16, at 38.

178 Directive Proposal, explanatory memorandum, at 16 and *Summary of Responses to the Public Consultation on Cross border Mergers and Divisions*, 5 and 6 (Oct. 2015), <http://ec.europa.eu> (accessed 22 June 2018).

179 Directive Proposal, explanatory memorandum, 19.

180 Art. 86k, §1; 126b, §1 and 160m, §1 of the Directive Proposal.

181 Art. 86d, §1, (f); 122, (n) and 160e, §1, (r) of the Directive Proposal.

182 Art. 86k, §2; 126b, §2 and 160m, §2 of the Directive Proposal.

183 Bech-Bruun Study, *supra* n. 9, at 38; G. T. M. J. Raaijmakers and Th. P. H. Olthoff, *Creditor Protection in Cross-border Mergers: Unfinished Business*, 4(1) *Utrecht L. Rev.* 37 and 38 (Mar. 2008) and Schmidt, *supra* n. 11, at 19.

184 Art. 12:15, §1, (5); 12:60 (2) and 12:76 (2) of the Belgian Code.

185 Art. 1030–1, §3 and 1031–10, §2 of the Luxembourg Law.

186 Art. 160e, §3 of the Directive Proposal.

187 Art. 160m, §4 of the Directive Proposal.

188 Art. 160e, §3 and 160m, §4 of the Directive Proposal.

189 Directive Proposal, explanatory memorandum, 24, 27 and 30.

190 Art. 86k, §3, (a); 120b, §3, (a) and 160m, §3, (a) of the Directive Proposal.

191 Art. 86k, §3, (b); 120b, §3, (b) and 160m, §3, (b) of the Directive Proposal.

192 Directive Proposal, explanatory memorandum, 12.

anti-abuse provision) than the procedures under both the Luxembourg Law and the Belgian Code. Such anomaly can be at least partly explained by the resolutely liberal stance adopted in Luxembourg and in Belgium combined with the need to reach a politically acceptable compromise at the level of the European Parliament with Member States far less in favour of cross-border mobility and the ensuing regulatory competition. In any case, the adoption of the Directive Proposal would entail the need for (1) the Luxembourg legislator to resume a barely-closed modernization exercise and (2) the Belgium legislator to thoroughly amend its still ongoing company law reform.¹⁹³

Also considering the many cumbersome and costly aspects (multiple reports and possibilities for a judicial review on the way) one may legitimately ask oneself whether the objective of facilitation of cross-border transactions, in particular cross-border conversions for SMEs, is attained with the Directive Proposal.

Finally it remains to be seen whether some aspects of the procedure presented in the Directive Proposal, in particular the ones relating to the possibility for local authorities to block a transaction on the basis of some '*artificial arrangements*', will not incur the objection of running against the Court of Justice of the European Union's well established case law relating to freedom of establishment¹⁹⁴

193 For this observation relating to the future Belgian Code: D. Bruloot, *Editoriaal: het einde van de Europese winsterslaap*, RPS-TRV, 441–442, 442 (2018): '*Anders dan de Europese regelgever zal de Belgische vennootschapsjurist hoogstwaarschijnlijk dus geen langdurige regelgevende winterslaap worden gegund na de inwerkingtreding van het nieuwe Wetboek van vennootschappen en verenigingen*'.

194 Indeed the existing case law on the topic reveals that the Court eventually held to be inconsistent with freedom of establishment the fact for the State of origin of the company to block a cross-border conversion on the basis of its own legal apparatus, see for instance the already mentioned *Polbud* Case.

POSTSCRIPT

In view of the Working Party on Company Law on 7 January 2019, the Presidency elaborated a compromise proposal¹⁹⁵ tempering certain insufficiencies of the Directive Proposal. The most significant amendment introduced thereby is undoubtedly the dereliction of the compulsory anti-abuse procedure fighting so-called ‘artificial arrangements aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members’. The Presidency Compromise chose to leave it up to Member States to determine how to best tackle the risk of cross-border operations being used for abusive or fraudulent purposes.¹⁹⁶ This is definitely a welcomed evolution for those

Member States having entrusted the legality control to public notaries but it will probably lead to severe discrepancies between Member States, especially in light of the fact that the in-depth assessment procedure was not entirely banned from the Directive Proposal and now appears as an optional anti-abuse tool to be introduced by Member States.¹⁹⁷ Furthermore, the mere indication of the possibility for Member States to allow their competent national authority to refuse to issue a pre-operation certificate if the cross-border conversion,¹⁹⁸ division¹⁹⁹ or merger²⁰⁰ is set up for abusive or fraudulent purposes bears the intrinsic risk of generating disproportionate hurdles to the relevant entity’s freedom of establishment.

195 Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions – Presidency compromise proposal of 18 Dec. 2018, ST 15678 2018 INIT, <http://eur-lex.europa.eu> (23 Dec. 2018) (hereinafter referred to as the ‘**Presidency Compromise**’).

196 Recital 34 of the Presidency Compromise.

197 Recital 35 of the Presidency Compromise.

198 Art. 86m, §8 of the Presidency Compromise.

199 Art. 160o, §8 of the Presidency Compromise.

200 Art. 127, §8 of the Presidency Compromise.