MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

„European Legislation on Mergers and its Implementation into Austrian Law“

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2023 / Vienna 2023

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 548
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht / European and International Business Law
Betreut von / Supervisor:	Univ.-Prof. Dr. Dr. Thomas Ratka, LL.M.

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List of Abbreviations

AG	Aktiengesellschaft
AktG	Aktiengesetz
ArbVG	Arbeitsverfassungsgesetz
Art	Article
AVRAG	Arbeitsvertragsrechts-Anpassungsgesetz
BRIS	Business Registries Interconnection Services
CBMD	Cross-Border Mergers Directive (Directive 2005/56/EC)
CJEU	Court of Justice of the European Union
EC	European Community
edn	edition
EEC	European Economic Community
e.g.	for example
et seq	and the following
EU	European Union
EU-VerschG	EU-Verschmelzungsgesetz
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz über Gesellschaften mit beschränkter Haftung
lit	littera
mn	magin number
OGH	Oberster Gerichtshof (Austrian Supreme Court of Justice)
OLG	Oberlandesgericht (Austrian Higher Regional Court)
OJ	Official Journal of the European Union
para	paragraph
r	recital
SE	Societas Europaea
TEU	Treaty on European Union
TFEU	Treaty on the Function of the European Union
UGB	Unternehmensgesetzbuch
UK	United Kingdom
USA	United States of America

1. Introduction

Since the beginning, the facilitation of treat between the member states and the creation of one single internal market, including all previous national economies, has been at the centre of the European integration process. The importance of this goal is emphasized by its explicit mentioning as aim of the European Union (EU) in Art 3 (3) Treaty on European Union[1] (TEU). In order to achieve this ambitious goal, the EU stipulated fundamental freedoms for their citizens and national companies regarding different aspects of the economy.

The freedom of establishment as one of these fundamental rights focuses on the ability of European companies to move without restraints between the member states by prohibit all contrary restrictions according to Art 49 et seq Treaty on the Functioning on the European Union[2] (TFEU). Based on the freedom the European legislator has established an increasingly detailed European Company Law over the last decades. One of its most significant statute is Directive 2017/1132/EU[3] which codified several different European legal acts in this field of law. Chapter I and II of the directive´s Title II are the centre pieces regarding the company mobility by creating the European legal framework on domestic and cross-border merger. It provides a level of harmonization and enables national entities to perform certain restructuring operations within the internal market. This well-established legal framework was recently reformed in 2019. Resulting of a long lasting process the Directive 2019/2121/EU[4] as new Mobility Package has been adopted to renew the European provisions with the aim to facilitate company mobility even more within the EU and thereby strengthening the European internal market. The member states have the task to implement these changes in their national law until 31 January 2023.

The master´s thesis aims to provide a meaningful overview on this European legal framework on both domestic and cross-border mergers. Thereby it focuses on the scope of application, merger procedure, legal consequences, and protective measures for the merging companies´ shareholders, creditors, and employees to allow a comparison of the

[1] Consolidated version of the Treaty on European Union [2012] OJ C 326/13.
[2] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.
[3] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46.
[4] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions [2019] OJ L 321/1.

provisions. Furthermore, the implementation of these European provisions into Austrian law as an example for a member state will be examined. This includes not only the already transposed rules of Directive 2017/1132/EU but also the reforms of Directive 2019/2121/EU.

Regarding the structure, the thesis will begin with an outline of the general characteristics, purposes, and possible types of a merger to provide the necessary background information for this topic. Following that, the core of the thesis will be a detailed examination of European legislation on mergers. Starting with a brief summary of the historical development of this field of law to provide helpful information for a better understanding of the current rules. Individual sections will discuss different aspects of Directive 2017/1132/EU concerning the focus points mentioned above. Since the European legal framework has recently been amended significantly by Directive 2019/2121/EU, the resulting changes will be examined as well. The end of the thesis will focus on the Austrian legislation and its previous efforts to implement the described European provisions.

At this point it is to mention that restructuring operations, like a merger, are also subject to other fields of laws, like tax law or competition law. Due to the limited length of this thesis those aspects are outside the scope of the examination.

2. Merger: An Overview

As the major players of the economy, companies always thrive to create more value and thereby more revenues for their shareholders. In order to achieve this, they must be victorious in the competition for the favour of consumers and work towards growth. Within the financial, economic, and legal order they have several options to do this. Besides advancing internal factors, like cost optimisation or product quality, they can use several external operations to profit from other companies' capabilities.

One option of these extraordinary transactions is to perform a merger. Thereby at least two entities with all their assets and employees are fused to one company whereby at least one company is dissolved without going into liquidation. This restructuring operation is often the last step of the concentration process of the involved companies.[5] Typically, a merger procedure can be divided into two[6] or three[7] different phases.

A merger is a very complex operation concerning various interests of the involved stakeholders. Consequently, the legislators target several aspects of such transactions in various fields of law. Besides the stipulation of the merger process with its protective system, the transaction is as well subject to competition law, which focuses on the consequences of the merger on the market and the competition. Each of those legal acts includes its own legal definition of a merger.

In the context of such economic activities the terms "acquisition" or "takeover" are often used, even as synonym to merger. However, it is to emphasise that these words describe other operations with different outcome. An acquisition or takeover is the process to gain the control over the other entity by purchasing enough shares.[8] This results in a hierarchy of companies without eliminating one of them. At the end all corporation still exist but are embedded into a corporation group. Jurisdictions are also aware of this differentiation

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[5] Susanne Kalss, 'Vor § 219-236' in Kalss, *Kommentar zur Verschmelzung-Spaltung-Umwandlung* (3rd edn, Manzsche Verlags- und Universitätsbuchhandlung 2021) mn 1; Nicola de Luca, *European Company Law* (2nd edn, Cambridge University Press 2021) p 493.
[6] Arianna Ugliano, 'The New Cross-Border Merger Directive: Harmonisation of European Company Law and Free Movement' (2007) 18 EBLR 585, pp 602 and 607.
[7] Kalss 'Vor §§ 219-236' (n 5) mn 31.
[8] Andrea Vicari, *European Company Law* (1st edn, De Gruyter 2021) p 236; Mads Andenas and Frank Wooldridge, *European comparative company law* (1st edn, Cambridge University Press 2009) p 491.

and laid down different legal acts regarding these kinds of operation, like the so called Takeover Directive 2004/25/EC.[9]

2.1. Purpose of a Merger

As mentioned above, the purpose of a merger is to create economic advantages. The fusion of companies allows to restructure their assets in a more efficient way resulting in a range of benefits. A well planned merger enables the company to have an edge over its competition.

An example for such advantages is the range of synergies resulting from the combination of resources. At the end of a merger the company has access to a bigger productive volume offering the possibility of economy of scale. Consequently, based on this manufacturing synergy it can produce even more than the previous two separate companies combined.[10] Furthermore, companies can merger also for the purpose to combine specific resources. The fusion can lead to the preferable situation that special and unique production capacities are combined with rare experts who can work with the needed intellectual property rights. Such extraordinary composition of assets results also in an increase of value creation.

Moreover, synergies can also be utilised for research and development. The know-how of both companies will be concentrated in one organisation leading to a more resource-efficient and slimmed down structure.[11] Also regarding tax matters is such operation a helpful tool. The resulting entity has often more financial capacities and assets, which can be useful for further projects and their financing.[12] Additional to these examples, many more synergies can be the result of a merger, like concerning supply or marketing.[13]

As last example, a merger can be used to create strategic benefits by increasing the competitiveness of the company. It can expand its market share and power in the industry by taking over the competition. Another option is to grow through geographic, product or

[9] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L 142/12.
[10] Mohammed Ibrahimi, *Mergers & Acquisitions* (1st edn, Wiley 2018) pp 103-104; Bech-Bruun and Lexidale, *Study on the Application of the Cross-Border Mergers Directive* (2013) p 49.
[11] Ibrahimi (n 10) pp 101-102.
[12] David R. King, Florian Bauer and Svante Schriber, *Mergers and Acquisitions - A Research Overview* (1st edn, Routledge 2019) pp 12-13; Ibrahimi (n 10) pp 107-112; Bech-Bruun and Lexidale (n 10) p 9.
[13] Ibrahimi (n 10) pp 103 and 105.

market extensions. Thereby, it can enter new markets without the struggle of establishing and developing a foothold. A merger can as well serve as a defensive tool against upcoming competitors. By swallowing them at an early phase of their development the market position can be secured. Moreover, this takeover can also be a helpful impulse for new developments within the company.[14]

2.2. Merger Typology

A merger can be assessed from different points of view to create a typology. Due to diverging conditions in practice such operations can have different characteristics. In this section, several types of mergers are listed to give an overview of possible cases. Thereby should be noted that following list is based on the Austrian typology. Other jurisdiction can structure it differently.[15] Despite the segmentation, a combination of types is possible and in practice also common. Not every category has an influence on the legal assessment of the operation.

- Merger by Acquisition or Merger by the Formation of a New Company

This category focuses on the element of whether the acquiring company already exists or must be found during the merger procedure. Merger by acquisition is the more practically relevant alternative[16] and serves as the model for merger regulation which will be shown in section 3.2. regarding EU-legislation and section 4.1. concerning Austrian law.

- Horizontal and Vertical Merger

The classification can also be based on the position of the companies in the production chain. A merger between entities on the same level is called horizontal merger. Their dominant activities are identical or very similar because they sell similar products or serve the same market. In opposite, a vertical merger is between companies on different levels of the production chain, like e.g. a manufacturer fusing with its supplier or retailer. This approach focuses more on the economic aspect of such operation and is especially relevant concerning merger control.[17]

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[14] King, Bauer and Schriber (n 12) pp 14-15; Ibrahimi (n 10) pp 96-97.
[15] Compare: Patrick A Gaughan, Mergers, Acquisitions, and Corporate Restructurings (7th edn, Wiley 2018) pp 13-14.
[16] Harald Stingl, *Gesellschaftsrechtsnachfolge im Gesellschaftsrecht* (1st edn, Linde Verlag 2016) pp 26-27.
[17] Ibrahimi (n 10) pp 4-9.

- Inbound and Outbound Merger/Domestic and Cross-Border Merger

Mergers can also be categorised in terms of their geographical extent. Inbound or domestic merger is an operation entirely within one country. Outbound or cross-border merger is a transaction involving at least two different jurisdictions. This is of elementary importance for the legal assessment of the operation and will be a decisive element in this master´s thesis.[18]

- Intra-Group Merger and Inter-Group Merger

Another category which is relevant for the legal assessment of the transaction is the question whether the merger is performed within a corporate group. Legislations provide special rules for intra-group mergers since the group companies are already strongly interconnected. Intra-group mergers are significantly more common than inter-group mergers.[19]

- Up-Stream, Down-Stream and Side-Stream Merger

Inter-group merger can be further segmented based on the relation between the merging company within the corporation group. An up-stream merger is the case that a subsidiary is fused into the parent company. Exactly the opposite is the down-stream merger by which the parent company merges into the subsidiary. Sister companies with the same parent company can be subject of a side-stream merger. These different types are not insignificant for the legal assessment.[20]

- Legal-Form-Preserving and Cross-Legal-Form Merger

An additional classification can be based on the corporation forms of the involved entities. In case that all parties are the same corporation form, like two Aktiengesellschaften (AG) or Gesellschaften mit beschränkter Haftung (GmbH), the merger is called legal-form-preserving merger. However, also mergers with companies of different kind are possible which are then called cross-legal-form mergers. The Austrian jurisdiction provides specific rules for the second kind.[21]

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[18] Stingl (n 16) p 30.
[19] Stingl (n 16) p 28.
[20] Nora Aburumieh, Nikolaus Adensamer and Heinrich Foglar-Deinhardstein, *Praxisleitfaden Verschmelzung* (1st edn, LexisNexis-Verl. ARD Orac 2014) pp 34-38.
[21] Stingl (n 16) p 29.

- Triangular Merger

The last example is standing out of this list because it involves at least three companies. In this merger a company fuses into another, but the shareholders of the first company do not receive shares in the second corporation but of in a third one. This could be for example a parent company. Because of its special outline such operation is subject to specific legal issues, like regarding the protection of creditors. Triangular mergers are commonly used in the USA but are also allowed in EU and Austria.[22]

[22] Kalss 'Vor §§ 219-236' (n 5) mn 5.

3. Legislation of the European Union

The following section will describe the current legal framework of the EU concerning both domestic and cross-border mergers. They are covered by Chapter I and II of Title II of Directive 2017/1132/EU. To fully understand these provisions, it is necessary to be familiar with the historical development of the European rules on merger. At the end of this section the Directive 2019/2121/EU will be examined in detail, which introduces new amendments to the system.

3.1. Historical Development

During the early phase of the European integration process the aim to establish an internal market consisting of the Member States´ territories has been defined. Already the Treaty of Rome[23] of 25 March 1957 enshrined the fundamental freedoms to help creating and developing this ambitious project. Thereby each freedom focuses on a different aspect of the market. The freedom of establishment provides the enterprises with the option to move independently between all member states, which is a key factor to create one homogeneous market without boundaries between the former national markets. As a result, the relevant articles of the freedom of establishment in the treaties have served as an important legal basis for the further evolution and fostering of the European integration in the context of company law.[24] In addition, the Treaty of Rome included in its Art 220 third indent obligations for the member states to negotiate about aspects of company mobility, like mergers.[25]

A look at the current version of these relevant provisions illustrates lucidly the enormous potential that the freedom of establishment has as a legal basis for secondary legislation. Art 49 TFEU is of fundamental importance, as it states that restriction on the freedom of establishment shall be prohibited. In refence to Art 54 TFEU which extends the scope of the provision to “companies and firms” it rules as clarification that “the right to take up and pursue activities as self-employed persons and to set up and manage undertakings” shall be included in the freedom of establishment. In that context companies and firms are

[23] Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft (Treaty establishing the European Economic Community) [1957] Document 11957E/TXT.
[24] Carlos Gorriz, ‘EU Company Law: Past, Present and ... Future?’ (2019) 19 Glob Jurist 1, p 2.
[25] Jessica Schmidt, ‘Cross-border Merger, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package’ (2019) 16 ECFR 222, p 222.

defined in Art 54 TFEU as "companies or firms constituted under civil and commercial law, including cooperative societies, and other legal persons governed by public or private law." In order to realize these objectives of the primary law Art 50 (1) TFEU enables the European Parliament and the Council to "act by means of directives". As mentioned above, these provisions and their predecessors have been used to establish several legislations focusing on different aspects of EU Company Law. One of the most important pillars of this field of law is company mobility, of which merger and cross-border merger are the primary focus of this thesis.

The following paragraphs will outline the development of EU legislation on merger and cross-border merger. However, it should be noted that due to the level of complexity inherent to these operations many other provisions have had and now have influence on the operations´ process.

On the 9 October 1978 the Third Council Directive 78/855/EEC[26] marks the beginning of EU legislation on merger. It introduced provisions to harmonize the domestic laws on mergers of public limited liability companies. By defining fundamental terms and setting the cornerstones of the procedure, it contributed the first and essential steps to a harmonised EU-legislation on merger. It is important to note that this directive was part of a great number of legal acts in the field of EU Company Law, which were approved from 1968 to 1989 and had a significant impact on the legal systems of the member states.[27] However, this productive time period was followed by a decade of stagnation. Despite the necessity to solve pending issues and great efforts to draft new regulations, the legislative activity in this area of law came to a hold. This was caused by a number of different reasons. An important example is that criticism rose among the member states about the missing success of harmonization. Some believed that the competition between national laws could achieve better results for the economy. Additionally, the Treaty of Maastricht introduced the principles of subsidiarity and proportionality which added complication to the legislative process.[28]

[26] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies [1978] OJ L 295/36.
[27] Gorriz (n 24) p 2; Jan Cremers and Sigurt Vitols, *Exercising voice across borders: workers´ rights under the EU Cross-border Mergers Directive* (ETUI 2019) p 14.
[28] Gorriz (n 24) p 3; Cremers and Vitols (n 27) pp 14-15.

Fortunately, the crisis of EU Company Law ended with the beginning of the new millennium. The introduction of the Euro and a new legislative approach of the European Commission had certainly a positive effect on the situation, but of the most importance were several decisions of the Court of Justice of the European Union (CJEU) in the context of the freedom of establishment. The cases of *Daily Mail*[29] and *Centros*[30] are famous examples, by which the court broke with the previous established doctrines and created an impulse for a new phase of EU legislation in the field of company law. Moreover, the adoption of the Council Regulation 2157/2001/EC[31] of 8 October 2001 influenced the following area positively and was often used as a sample for a successful legislative process. It introduced the Societas Europaea (SE) as a supranational corporate type, which became an emblem of the EU. In addition, after 23 years it is the second act including provisions about cross-border merger. However, the relevant rules are only applicable on mergers used to form a SE.

As outcome of a year-long preparation process the European Commission published on 21 May 2003 the action plan "Modernising company law and enhancing corporate governance in the European Union – A plan to move forward".[32] It contained the design of the future of EU Company Law based on experts´ recommendations on the modernization of this field of law. The content was structured into three pillars. The focus of the third one was on company border mobility and declared the necessity of providing companies with the mechanisms of free movement and promoted intra-European cross-border operations. On the basis of the action plan and influenced by the CJEU-decisions the Directive 2005/56/EC[33], also known as Cross-Border Merger Directive (CBMD), was adopted, which introduced for the first time provisions on cross-border mergers. Its most significant achievements were "to facilitate exercise of right of establishment and of free movement of capital through the harmonisation of minimum requirements in order to carry out cross-border mergers" and "to guarantee legal certainty through common

[29] Case 81/87 *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR 1988-05483.
[30] Case C-212/97 *Centros Ltd and Erhvervs- og Selskabsstyrelsen* [1999] ECR 1999 I-01459.
[31] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1.
[32] COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward [2003] COM (2003) 284 final.
[33] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L 310/1.

safeguards”.[34] Furthermore, the EU simplified and modernized older directives to reach the set goals. Exemplarily, the Directive 2011/35/EU[35] of 29 April 2011 was adopted to codify the Third Council Directive 78/855/EEC, which had been amended several times since its creation.

At the same time the CJEU had again a crucial role in the development of the EU Company Law. Its decision in *Überseering*[36] and *Inspire Art*[37] continued to reduce barriers for an internal market and had a significant impact on the practice by facilitating the movement of a corporate between the member states.[38] In the context of mergers, the *SEVIC*[39]case of 1 December 2005 is particularly important. In this case the first instance the Administrative Court of Neuwied denied the German company SEVIC Systems AG and the Luxembourgian company Security Vision Concept SA to merge arguing that German Law only covers mergers between companies established in Germany. The Regional Court Koblenz as second instance referred to preliminary ruling concerning the interpretation of the articles on the freedom of establishment. The CJEU-ruling was in favour of the companies and stated explicitly that international mergers are covered by the freedom of establishment. The court emphasised that “the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.”[40] Consequently, national authorities shall treat domestic and cross-border mergers equally.[41] This conclusion was later affirmed for conversions by the CJEU-decision of *Vale*[42] of 12 July 2012. These two cases had a major influence on the further evolution of EU Company Law.

In the same year of 2012 the European Commission approved a new action plan called “European Company law and Corporate Governance – A modern legal framework for

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[34] Ugliano (n 6) p 614.
[35] Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies [2011] OJ L 110/1.
[36] Case C-208/00 *Überseering BV and Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR 2002 I-9943.
[37] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam and Inspire Art Ltd* [2003] ECR 2003 I-10155.
[38] Cremers and Vitols (n 27) p 15.
[39] Case C-411/03 *SEVIC Systems* [2005] ECR 2005 I-10805.
[40] *SEVIC Systems* (n 39) para 18.
[41] Gorriz (n 24) p 6.
[42] Case C-378/10 *VALE Építési kft* [2012] ECLI:EU:C:2012:440.

more engaged shareholders and sustainable companies".[43] With this document the EU decided to remain faithful to its previous objectives and formulated four principal points for the future of EU Company Law. The third one focuses on improving the regulatory framework of cross-border operations. Resulting from this ambition the EU-legislator achieved a major step forward by adopting the Directive 2017/1132/EU. It combined six previous directives on company law, including the Directive 2011/35/EU on mergers and the CBMD. Thereby it simplified the legal sources in this field of law and brought more legal certainty. However, it was criticised that it did not amend the content of the directives and could have implemented more directives in the codification. It is important to note that this legislative process led to a concentration of all provisions specific to mergers and cross-border mergers in one single directive and created a "clear, predictable and structured EU legal framework, providing the legal security essential for such complex transactions and significantly reducing the transaction costs".[44]

To improve the Directive 2017/1132/EU the European Commission published on 25 April 2018 the next Company Law Package, which consisted of a Digitalisation Package concerning the use of digital tools and processes in company law and a Mobility Package concerning cross-border mobility.[45] After the implementation of criticism[46] and detailed discussions in the European Parliament and the Council of the European Union two separate directives were adopted. Directive 2019/1151/EU[47] regarding digitalisation had only an indirect influence on the previsions concerning mergers by modernizing aspects of the merger processes, like disclosure requirements. In contrast, Directive 2019/2121/EU amended the Directive 2017/1132/EU significantly by reforming the EU legal framework for cross-border mergers and introducing new provisions on cross-border divisions and conversions. This constitutes a major achievement in providing the companies with a secure legal framework and facilitating company mobility in the

[43] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies [2012] COM/2012/0740 final.
[44] Schmidt 'Accomplishments and Deficits' (n 25) p 223.
[45] Schmidt 'Accomplishments and Deficits' (n 25) pp 226-227.
[46] Steef M. Bartman, 'The Adopted Proposal for an EU Directive on Cross-Border Operations: A Realistic Compromise' (2019) 16 Eur Co Law 140, p 141.
[47] Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law [2019] OJ L 186/80.

internal market.[48] At the moment, the member states must implement the changes caused by Directive 2019/2121/EU in their national jurisdictions until 31 January 2023.

For the sake of completeness, it should be noted that the last changes of Directive 2017/1132/EU were introduced by Regulation 2021/23/EU[49] of 16 December 2020. In the context of mergers and cross-border operations it only implanted references to provisions on resolution tools, powers and mechanisms provided by Directive 2014/59/EU[50] and Regulation 2021/23/EU itself.

In summary, right from the beginning of the European integration process the EU-legislator had the goal to facilitate the movement of companies within the Union and thereby fostering and developing the internal market. Based on the primary law provisions on the freedom of establishment the EU has adopted multiple directives on several aspects of mergers within and between member states. However, the developing process since the first directive on this topic, the Third Council Directive 78/855/EEC, has not been straightforward. Especially concerns of member states and the resulting dissent has harmed and slowed down the creation of a harmonized EU legal framework for mergers. Time periods of stagnation in this area of law could be overcome by decisive judgements of the CJEU, which often found itself in the position of the key driving force for the European integration process for EU Company Law. Particularly the *SEVIC* case was very influential for the EU-legislation on merger. Parallel to the impact of the CJEU-decisions the European Commission as well was eager to achieve progress in this field of law. Resulting from discussion with different institutions and organs of the Union and exchange with experts it concluded action plans in 2006 and 2012 to actively shape the future of the EU Company Law. Those years-long efforts resulted in the adoption of Directive 2017/1132/EU, which codified several aspects of EU Company Law in one document. By combining the most relevant provisions on merger and cross-border merger it is of great importance for handling those kinds of operations in the European market.

[48] Schmidt 'Accomplishments and Deficits' (n 25) p 271.
[49] Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 [2021] OJ L 22/1.
[50] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L 173/190.

However, the development did not stop there. The Directive 2019/2121/EU was adopted to improve the EU legal framework for merger even more by amending the provisions on cross-border mergers and introducing rules on cross-border divisions and conversions.

3.2. Directive 2017/1132/EU

At the current status of EU Company Law, the Directive 2017/1132/EU takes a prominent position by including rules relating to certain aspects of company law. Specifically, its provisions on domestic mergers and cross-border mergers are essential for the practical execution of those restructuring operations throughout the EU. In order to understand the EU-legislation on merger it is inevitable to analyse these provisions in detail. The directive in its original form adopted on 14 June 2017 will be subject of the following section.

With the approval of the Directive 2017/1132/EU the EU-legislator has brought together the Sixth Council Directives 82/891/EEC[51] on division of public limited liability companies, the Eleventh Council Directive 89/666/EEC[52] on disclosure requirements in respect of branches in another member state, the Directive 2005/56/EC on cross-border mergers of limited liability companies, the Directive 2009/101/EC[53] on coordination of safeguards for company members and third parties, the Directive 2011/35/EU on domestic mergers and Directive 2012/30/EU[54] on safeguards in respect of the formation of public limited liability companies. The content of the statutes was only codified on the basis of Art 50 (2) (g) TFEU and not amended in any substantial way. Attached to the directive in Annex IV the Correlation Table illustrates in detail which new numeration was given to the previous articles.

The primary purpose of this legislative act was to restructure the most significant statutes of EU Company Law "in the interests of clarity and rationality".[55] Previously, an individual had to research and understand those different directives, which had been

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[51] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies [1982] OJ L 378/47.

[52] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State [1989] OJ L 395/36.

[53] Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L 258/11.

[54] Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [2012] OJ L 315/74.

[55] Directive (EU) 2017/1132 (n 3) r 1.

amended several times, and ruminate over the interaction between them. This situation was intolerable and caused a lot of additional work for the subjects of those laws. The European Commission recognised this issue by stating in its proposal for the Directive 2017/1132/EU that the numerous provisions of EU Company Law “remain scattered” and “considerable research work, comparing many different instruments, is thus needed to identify the current rules”.[56] Moreover, it emphasised that it “attaches great importance to simplifying and clarifying the law of the Union so as to make it clearer and more accessible to citizens”.[57] The resulting codification of the named directives involved only formal amendments. Directive 2017/1132/EU “supersede the various acts incorporated in it”[58], but aims and content of the statutes remain intact. Consequently, the relevant recitals, the legislative materials and the connected academic literature are still relevant for the interpretation of the individual provisions and will be utilized for the further elaborations of this section.

The Directive 2017/1132/EU is structured into three main parts called Titles. The first one covers the general provisions and the establishment and functioning of limited liability companies. This is followed by rules on mergers and divisions of limited liability companies. Few final provisions form the end of the act. This thesis will focus exclusively on the second Title of Directive 2017/1132/EU and thereof only on the laws on merger and cross-border merger.

3.2.1. Domestic Mergers

Chapter I of Title II of the Directive 2017/1132/EU includes provisions on mergers of public liability companies in an exclusively domestic context. Prior to the codification of EU Company Law this segment of rules was covered by Directive 2011/35/EU but has an even older history dating back to 1978, as mentioned in section 3.1.

The creation of this harmonized legal framework for mergers wanted to achieve two objectives. Firstly, it obliged all member states to introduce the merger as a legal institute in their legislation. At the time of approval of the statute several member states already had rules on merger. However, the national legal acts differed significantly in scope and quality. For example, in Germany this issue had been regulated by law since 1884. In

[56] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL relating to certain aspects of company law [2015] COM/2015/0616 final point 1 2nd para.
[57] Proposal relating to certain aspects of company law (n 56) final point 1 1st para.
[58] Proposal relating to certain aspects of company law (n 56) final point 4.

opposite, in the Netherlands such operations were only subject to a voluntary code of conduct.[59] This objective is explicitly constituted in Art 88 and Art 110 of Directive 2017/1132. Secondly, the legal framework harmonized protection of the interests of members and third parties by coordinating the laws of member states relating to mergers.[60] Therefore, the directive includes a number of provisions for the protection of each group. This led to a minimum standard in the Union, based on which the economic players know what they can expect without investing to much effort into legal research.

This section aims to provide a meaningful overview of the merger provisions by focusing on the cornerstones of the European legal framework. For this purpose, the articles of the Directive are not analysed in chronological order but are grouped into appropriate thematic groups.

3.2.1.1. Scope of Application

The EU-legislator has laid down three criteria in the Chapter I of Title II to specify and limit the application of the rules on merger. These criteria are rather strict and lead to a sharp distinction to other restructuring operations, like the division of Chapter III or the cross-border merger of Chapter II. All components must be met to trigger the application.

The first criterion has already a big influence on the number of possible cases subject to the provisions. According to Art 87 (1) Directive 2017/1132/EU the coordination measures of this chapter only apply to "the laws, regulations and administrative provisions of the member states relating to the types of companies listed in Annex I". This list includes only public limited liability companies of each country, like the AG of Austria or the société anonyme of France. The directive obliges the member states only to establish rules for these listed corporations.

In addition to this already minor scope, the application is limited by the mandatory exemption of Art 87 (4) Directive 2017/1132/EU of companies subject to "resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU". By excluding these cases the quick actions of the authorities in case of a resolution are ensured.[61] Art 87 (2) and (3) Directive 2017/1132/EU open the voluntary option to limit

[59] Marcus Lutter, Walter Bayer and Jessica Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht* (De Gruyter 2017) mn 20.16 and 20.17.
[60] Directive (EU) 2017/1132 (n 3) r 49.
[61] Lutter, Bayer and Schmidt (n 59) mn 20.14.

the scope of application even further. The national legislators need not to apply this chapter to cooperatives formed as corporation listed in the annex or “in cases where the company or companies which are being acquired or will cease to exist are the subject of bankruptcy proceedings, proceedings relating to winding-up of insolvent companies, judicial arrangements, compositions and analogous proceedings”.

As second criterion the directive´s provisions are only applicable on companies “governed by their national law” according to Art 88 Directive 2017/1132/EU. This law sets the borderline between the scope of Chapter I about merger and of Chapter II on cross-border merger. International restructuring operations are subject to different provisions, which cover also other types of legal issues resulting from the interaction of different jurisdictions.

The third and last criterion is that the operation or transaction must correspond to a definition of merger of the chapter. As described at the beginning of the thesis a merger can be structured in a very different and complex way. Not every extraordinary transaction is seen as merger. Therefore, the directive includes two legal definitions of merger types and two operations treated as mergers.

The Directive 2017/1132/EU defines the type “merger by acquisition” first. It is treated as model case by referring to its provisions frequently in other types´ rules. A merger by acquisition is described by Art 89 (1) Directive 2017/1132/EU as “operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value”.

“Merger by formation of a new company” is the second type and is defined in Art 90 (1) Directive 2017/1132/EU as “operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.”

Based on these definitions the main difference between both types is obvious. In case of a merger by acquisition the receiving company already exists before the operation. Contrary, as part of the process, a new company is created in the second type. However, the two definitions also share three main characteristics. Firstly, the operations must result in a universal succession, so that the company at the end holds all rights and obligations of the former entities. Secondly, the fact that the transferring companies are wound up without liquidation. Thirdly, both types include a share exchange and, if the provided option is used, cash payments.[62] Moreover, it must be noticed that the national legislator has the option to extend the application to target companies in liquidation pursuant to Art 89 (2) and Art 90 (2) Directive 2017/1132/EU.

Additional to these two main types, the directive lists in Section 5 two other operations, which shall be treated as mergers. Art 116 Directive 2017/1132/EU expands the scope of application to operations fitting one of the definitions but with a cash payment exceeding 10%. According to Art 117 Directive 2017/1132/EU also operations "without all the transferring companies ceasing to exist" shall be treated as merger.

In summary and to simplify, the application of the provisions on merger is given in case that the companies involved are formed as cooperations listed in Annex I, the operation is pure domestic, and the case falls in one of the relevant legal definitions of merger provided by the Directive 2017/1132/EU.

3.2.1.2. Merger Procedure

The procedure described by the provisions of Section 2 of Chapter I is the core element of the EU legal framework on merger. Since its introduction in 1978 by the Third Council Directive 78/855/EEC it became the European model system for restructuring operations. It is strongly influenced by the principle of adequate information, which is present throughout the whole procedure.[63]

Before starting the merger procedure laid down in the directive the parties negotiate about the structure and planed outcome of the operation.[64] After an agreement is reached the process starts with the draw up of the draft terms of merger by the administrative or

[62] Lutter, Bayer and Schmidt (n 59) mn 20.21.
[63] Directive (EU) 2017/1132 (n 3) r 50; Lutter, Bayer and Schmidt (n 59) mn 20.29.
[64] Vicari (n 8) p 237.

management bodies of all merging companies in accordance with Art 91 (1) Directive 2017/1132/EU. The paragraph 2 of the same article stipulates points, which must be included in the draft terms. Important examples are “the share exchange ratio and the amount of any cash payment” (lit b) and “the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company” (lit e), which is of special significance for the practice.[65]

As a first influence of the principle of adequate information and pursuant to Art 92 Directive 2017/1132/EU the draft terms of merger must be published “at least one month before the date fixed for the general meeting which is to decide thereon” and for each of the merging companies. This can be done by entering the terms in the companies register, which is regulated in detail by Art 16 Directive 2017/1132/EU, or by publishing them on the company´s website.

To provide even more information, the directive demands two additional reports describing the merger. Firstly, the administrative or management bodies of each of the merging companies are obliged to create a written report explaining the draft terms according to Art 95 Directive 2017/1132/EU. It must be detailed and explain the legal and economic grounds, especially regarding the share exchange ratio. Secondly, a written report shall be drawn up by at least one expert examining the draft terms. However, the economic reasonableness of the operation shall not be subject of the report.[66] Depending on the national jurisdiction the expert can be a natural or legal person or company of firm. Essential is that the expert acts independently of the merging companies and that the member states provide the experts with the necessary competences for the investigation.[67] Art 96 (2) Directive 2017/1132/EU rules that the report at least includes the expert´s opinion on the share exchange ratio and the method to calculate it. However, both these reports are not required according to Art 95 (3) and Art 96 (4) Directive 2017/1132/EU if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have agreed. The EU legislator sees “no reason to require an examination […] if all shareholders agree that it can be dispensed with”.[68]

[65] Lutter, Bayer and Schmidt (n 59) mn 20.37.
[66] Lutter, Bayer and Schmidt (n 59) mn 20.57.
[67] John Temple Lang, ‘Three EEC Draft Directives on Company Law-Capital, Mergers and Management’ (1972) 7 Ir Jur 306, p 316.
[68] Directive (EU) 2017/1132 (n 3) r 50.

The next and most important step in the process is the approval of all involved companies´ general meetings. In order to prepare the shareholders for the decision, Art 97 Directive 2017/1132/EU rules that they are entitled to inspect the listed documents at least one month before the meeting. The documents concerned are the draft terms of merger, the annual accounts and annual reports for the preceding three financial years, the two reports mentioned above and, where applicable, an accounting statement.

Equipped with the information provided by those available documents the general meetings of at least each of the merging companies must approve the draft terms. In a dualistic system the supervisory board must do the same.[69] Art 93 (1) Directive 2017/1132/EU demands that such decision must require "a majority of not less than two thirds of the votes attached either to the shares or to the subscribed capital represented". A simple majority is only possible in case of the representation of at least half of the subscribed capital according to Art 93 (1) 2nd para Directive 2017/1132/EU. Moreover, each class of shares, if any, shall give the approval separately pursuant to Art 93 (2) Directive 2017/1132/EU. It is to highlight that Art 94 Directive 2017/1132/EU provides an important exception from the required approval for the acquiring company as an option for the national legislators. In situations where the draft terms are published timely, and the shareholders have been entitled to inspect the relevant documents, as Art 92 and Art 97 Directive 2017/1132/EU stipulates, the approval is optional if one or more shareholders of the acquiring company hold a minimum percentage of shares enabling to demand a general meeting to be called. The member states determine the threshold for the minimum percentage, but it shall not exceed five percent. Few jurisdictions used that option, like e.g. the Netherlands or Nordic countries.[70] These exception of Art 94 Directive 2017/1132/EU is the only provision which is not applicable to merger by formation of a new company in accordance with Art 109 Directive 2017/1132/EU because the major characteristics of this kind of merger is that such acquiring company is only in the process of formation.[71]

The approval of the terms does not mark the end of the process. To guarantee the legality of the merger the operation must be subject to a judicial or administrative preventive supervision of all legal acts required or the minutes of the general meeting and the

[69] Vicari (n 8) p 238.
[70] Vicari (n 8) p 239; Lutter, Bayer and Schmidt (n 59) mn 20.86.
[71] Lutter, Bayer and Schmidt (n 59) mn 20.137.

approved terms of merger must be drawn up a certified in due legal form according to Art 102 Directive 2017/1132/EU. This is a result of very diverging legal traditions of the member states and even a combination of both options is possible.[72] Furthermore, the merger must be published in the manner prescribed by national laws pursuant to Art 104 Directive 2017/1132/EU and for each merging company. Marking the final step of the merger procedure the determination of the date, at which the merger takes effect, is left by the directive to the national legislators. Although the date is of high significance for the legal certainty, this was a deliberate decision again resulting of the very diverging domestic legal systems.[73]

In Section 4 of Chapter I of Title II of Directive 2017/1132/EU provides several exceptions of the described legal framework for cases of up-stream acquisitions by a company which holds 90% or more of the shares of the company being acquired. These types of mergers occur typically within groups of corporations. The special provisions were implemented to facilitate this kind of merger based on its commonness in practice and the fact that in such cases the vulnerability of the specific groups is drastically lower, like of the sole shareholder who already has access to all information needed.[74] The directive distinguishes between up-stream mergers where the acquiring company holds 90% of the shares and where the acquiring company is the sole shareholder. Specific example for the exception is the lack of necessity of a report of the administrative or management body according to Art 95 Directive 2017/1132/EU or of a report of an independent expert pursuant to Art 96 Directive 2017/1132/EU. Each type has slightly different exemptions, but common to both is that cases of the indirect ownership through a middleman can use the facilitations in accordance with Art 112 and Art 115 Directive 2017/1132/EU.

3.2.1.3. Consequences of a Merger

The entire procedure described above leads to legal consequences which were intended by the parties from the beginning. The EU-legislator stipulates three main effects in Art 105 Directive 2017/1132/EU to harmonize the key elements of the outcome of a merger. In accordance with the rule´s first paragraph, they occur simultaneously and ipse iure.

[72] Lutter, Bayer and Schmidt (n 59) mn 20.88 et seq.
[73] Lutter, Bayer and Schmidt (n 59) mn 20.92.
[74] Lutter, Bayer and Schmidt (n 59) mn 20.142.

Firstly, all assets and liabilities of the company being acquired is transferred to the acquiring company. Thereby the article states explicitly in its paragraph 3 that this rule shall not affect any national requirement of "completion of special formalities for the transfer of certain assets, rights, and obligations". Secondly, the shareholders of the company being acquired become shareholders of the acquiring company. However, according to Art 105 (2) Directive 2017/1132/EU this exchange of shares does not happen in case the acquiring company or the company being acquired holds its shares itself or through a person acting in his own name but on the company´s behalf. Thirdly, the company being acquired ceases to exists without any additional liquidation procedure or any other legal acts necessary.[75] Those consequences mirror the definitions of a merger in Art 89 and Art 90 Directive 2017/1132/EU. Any different outcome would lead to a different type of operation, like the lack of the termination of the company being acquired is an essential characteristic of a division by separation.[76]

These consequences can only be reversed by the annulment of the merger. To harmonize conditions for such a declaration Art 108 Directive 2017/1132/EU lists few key elements for the nullification proceeding. The most important examples are the necessity of a court judgment (lit a), the time limit for a nullification proceeding of six months after the date on which the merger became effective (lit c and f) and the definition of the missing of the legality examination according to Art 103 Directive 2017/1132/EU as reason of annulment. Other laws of the member states on the nullity of a merger, like e.g. competition law[77], shall not be affected by the provisions of this article.

3.2.1.4. Protection of Shareholders

Inherent to the legal framework on merger is the purpose of protecting the shareholders´ interests during the operation. This aim was already formulated in the first proposal for the Third Council Directive 78/855/EEC of 12 June 1970[78] and is still a key goal in the Directive 2017/1132/EU. The harmonization of national laws relating to mergers of

[75] Lutter, Bayer and Schmidt (n 59) mn 20.104.
[76] de Luca (n 5) p 495.
[77] Lutter, Bayer and Schmidt (n 59) mn 20.107.
[78] Vorschlag einer DRITTEN RICHTLINIE DES RATES zur Koordinierung der Schutzbestimmungen, die in den Mitgliedstaaten den Gesellschaften im Sinne des Artikels 58 Absatz 2 des Vertrages im Interesse der Gesellschafter sowie Dritter bei Fusionen von Aktiengesellschaften vorgeschrieben sind (Proposal for a THIRD COUNCIL DIRECTIVE on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in the case of mergers of public limited liability companies) [1970] COM/1970/0633 final, p 1.

public limited liability companies is seen by the EU legislator as required to protect the shareholders.[79] As mentioned before the lead principle to achieve this is to keep the shareholders "adequately informed in as objective a manner as possible".[80] The provisions based on these considerations for the protection of shareholders are scattered throughout the whole Chapter I and can be grouped into four groups.

The first one puts the principle of adequate information into practice by making relevant documents and explanations available for the shareholders. Relating to this Art 97 Directive is of immense importance because it entitles them to inspect the listed documents at least one month before the general meeting. Part of the list are for example the draft terms of merger or the reports of administrative or management bodies and of experts pursuant to Art 95 and Art 96 Directive 2017/1132/EU. The purpose of those reports is to provide the shareholders with additional explanations of the draft terms, like whether the included share exchange rate is fair and reasonable, and the legal and economic grounds for them.[81] Moreover, the provisions stipulate that the shareholders have online access or can obtain copies of the documents, as e.g. in Art 97 (3) Directive 2017/1132/EU.

The second group of provisions with a protective effect are about the civil liability towards the shareholders. In case of misconduct of the members of the administrative or management bodies in preparing and implementing the merger or of the experts responsible for the report in the performance of their duties they shall be civil accountable. Art 106 and Art 107 Directive 2017/1132/EU oblige the member states to lay down rules regarding this issue and thereby establish an ex-post-protection for the shareholders.[82]

The provisions of Art 102 Directive 2017/1132/EU form the third group. They protect the shareholders of the merging companies by stipulating that the operation must be subject to a judicial or administrative preventive supervision or be certified in due legal form. Both these options lead to an examination of the existence and validity of the legal acts and formalities required to complete the merger.

[79] Directive (EU) 2017/1132 (n 3) r 49.
[80] Directive (EU) 2017/1132 (n 3) r 50.
[81] Vicari (n 8) p 238.
[82] Lutter, Bayer and Schmidt (n 59) mn 20.112; Lang (n 67) p 316.

The last group of protective rules provides a level of safeguards by assuring that the shareholders are actively involved in the decision making for the merger. A good example for this is the mandatory majority of at least two thirds for the approval by the general meeting. This sets incentives to involve as many shareholders as possible to ensure the approval. Nonetheless, the directive does not include specific safeguards for minority shareholders.[83]

In a nutshell, the safeguard for shareholders is well developed and includes various aspects of protection. However, the provisions often leave much room for the national legislator to deviate from the harmonized system.

3.2.1.5. Protection of Creditors

A merger not only raises concerns for shareholders, but also poses major risks for the companies' creditors. As elaborated above, the operation leads in any case to the termination of a corporation and the transfer of all its assets, rights, and obligations to the acquiring company. This change of control could endanger the creditors´ claims[84] and therefore special regulations regarding this risk are necessary. The merger shall "not adversely affect their interests".[85] However, the directive only includes on few fundamental rules, because the member states could not agree based on contradicting national concepts.[86]

As a very broad provision, Art 99 (1) Directive 2017/1132/EU obliges the member states to provide an adequate system of protection of creditors´ interests who hold claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication. The article only offers unspecific explanations regarding the term "adequate system". It sets a minimum requirement in Art 99 (2) Directive 2017/1132/EU that the member states must establish such system at least for cases with companies in a problematic financial situation. The second paragraph of the same article adds as clarification that creditors shall have the right to apply to the appropriate administrative or judicial authority for such adequate safeguards if they have not been provided with ones by the merging company. The vague provisions result only in a very basic level of

[83] Lutter, Bayer and Schmidt (n 59) mn 20.119 et seq.
[84] Martin Winner, 'Protection of Creditors and Minority Shareholders in Cross-border Transactions' (2019) 16 ECFR 44, pp 49-52.
[85] Directive (EU) 2017/1132 (n 3) r 51.
[86] Lutter, Bayer and Schmidt (n 59) mn 20.124.

harmonization. Additional to this, Art 99 (3) Directive 2017/1132/EU allows the domestic legislators to set different rules for creditors of the acquiring company and of the company being required.

The scope of these guidelines is extended on debenture holders of the merging companies according to Art 100 Directive 2017/1132/EU. The article only excludes cases where the merger has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

A special system of protection is established for holders of securities, other than shares, to which special rights are attached by Art 101 Directive 2017/1132/EU because their interests are especially vulnerable based on their inability to influence the process. The formulation is deliberately broad to cover the variety of national security types.[87] They shall be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired. It is to emphasise that the equivalence refers to the economical position of the holder.[88] Only if the holders approve the alteration of their rights similar to the option provided in Art 100 Directive 2017/1132/EU or are entitled to have their securities repurchased by the acquiring company.

3.2.1.6. Protection of Employees

The Chapter I of Title II of Directive 2017/1132/EU does not include a meaningful provision about the protection of employees and only refers to the regulations of Directive 2001/23/EC[89]. In the first proposal for the Third Council Directive 78/855/EEC the European Commission intended to incorporate a protective article, which demanded a report examining the situation for the employees.[90] However, the issue was highly disputed[91] and at the end the detailed provision was replaced by the reference in Art 98 Directive 2017/1132. As a result, only Directive 2001/23/EC is applicable for the protection of employees in case of a merger.

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[87] Lutter, Bayer and Schmidt (n 59) mn 20.132.
[88] Lutter, Bayer and Schmidt (n 59) mn 20.133.
[89] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees´ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.
[90] Proposal of the Third Council Directive 78/855/EEC (n 78) art 6; Lang (n 67) p 317.
[91] Lutter, Bayer and Schmidt (n 59) mn 20.122.

The Directive focuses solely on the safeguarding of employees´ rights in the event of transfers of undertakings, businesses or part of undertakings or businesses such as mergers. Resulting of such transfers the employer changes and in that case the EU legislator wants to ensure the employees´ rights are safeguarded.[92] Therefore, it includes several protection mechanisms. According to Art 7 Directive 2001/23/EC the transferor and transferee must inform the representatives of their respective employees about several listed data, like the date of the transfer or the legal, economic, and social implications of the transfer for the employees. Art 3 Directive 2001/23/EC rules that all rights and obligations arising from a contract of employment shall be transferred to the new employer. Additionally, the member states may provide that old and new employer shall be jointly and severally liable in respect of obligations which arose before the date of transfer. Moreover, pursuant to Art 4 Directive 2001/23/EC the transfer cannot "in itself constitute grounds for dismissal by the transferor or the transferee". In case of bankruptcy or analogous insolvency proceedings the provisions of Art 3 and 4 Directive 2001/23/EC shall not be applicable unless the national legislator decides otherwise. In any case Art 9 Directive 2001/23/EC stipulates at the end the obligation for the member states to establish measures to enable the employees and their representatives to pursue their claims by judicial process in case of considering themselves wronged by failure to comply with the obligations mentioned above.

These provisions are again only a broad legal framework with scattered detailed rules. As a result, Art 8 Directive 2001/23/EC states explicitly that the member states are allowed to establish more laws more favourable to employees.

3.2.1.7. Conclusion

The legal framework for domestic mergers of Chapter I of Title II of Directive 2017/1132/EU forms the very important European model for extraordinary transactions. Since its creation by the Third Council Directive 78/855/EEC it has influenced several other legislations on restructuring operations, like the division. It sets examples for all aspects of the process and harmonizes key points of the national jurisdictions on domestic mergers.

[92] Council Directive 2001/23/EC (n 89) r 2 and 3.

The provisions on the scope of application aims to define a domestic merger clearly by determining three criteria. Thereby, the directive sets fundamental definitions of merger types, like merger by acquisition. Those play an enormous role for both the distinction to other operations and as reference point for other merger related acts. However, the member states still have several options to extent or limit the appliance of the legal framework which undermines the goal of harmonization.

The biggest contribution is the creation of the model procedure. The characteristic step of the process has been copied for many different other extraordinary transactions. Throughout the entire procedure the directive follows the principle of adequate information. This can be seen in the publication provisions of Art 92 Directive 2017/1132/EU or the special rule to providing additional documents according to Art 97 Directive 2017/1132/EU. Furthermore, the legal framework provides only the corner stones for the procedure and leaves the detailed ruling to the member states allowing them to implement the provisions appropriately in their specific jurisdiction.

Moreover, the chapter stipulates the fundamental consequences of a merger, which mirror the three main characteristics of the definition of types of domestic merger. The operation results in a universal succession, whereby all rights and obligations are transferred to the acquiring company. Combined with that is the determination of the company being acquired without liquidation. The shareholder of that corporation shall profit from the mandatory share exchange and possible cash payments. To reverse those consequences by an annulment of the merger certain reasons must be given, which are specified by the directive. Therefore, a completed merger is quite definite, resulting of the high complexity of the procedure.

The legal framework on domestic merger aims furthermore to ensure the protection of shareholders, creditors and employees concerned by the merger because of their special vulnerability. Each group is subject of a specific adapted protectional system, which takes account of the group´s interests. The shareholders have for example unique right to access information necessary for the approval of the draft terms and additional certain civil liabilities of participants of the merger, like the members of the administrative or management bodies. This system is quite detailed and developed. Regarding creditors the directive only stipulates that they shall be entitled to obtain adequate safeguards and leaves the details to the member states. Consequently, this results only in a low level of harmonization. Even less says the Directive 2017/1132/EU about the protection of employees and only refers to Directive 2001/23/EC.

To conclude, the legal framework on domestic merger of Chapter I of Title II of Directive 2017/1132/EU determines the key characteristics of the operation. Thereby it focuses almost always on a broader perspective and giving guidelines for the member states, which then are obliged to introduce them appropriately in their jurisdiction. A full harmonization is not reasonable based on the fundamental differences between the member states´ legislations. The system and procedure formed by the provisions is seen as success and has influenced several other legal acts on extraordinary transactions. Consequently, it is a great achievement of the European Company Law.

3.2.2. Cross-Border Mergers

Immediately following the regulations on domestic mergers, Chapter II of Title II of Directive 2017/1132/EU covers cross-border mergers of limited liability companies. As mentioned in section 3.1., this legal framework has been part of Directive 2005/56/EC which was also called CBMD.

The main purpose of this segment of provisions is to facilitate the cross-border mobility by providing a secure legal framework for cross-border merger of limited liability companies and thereby reducing the transactions costs.[93] Before the introduction of CBMD there was no provision focusing on mergers of corporations from different member states. The parties of the operation had to find a suitable way to handle the issues arising of contradicting national jurisdictions. The Directive aims to provide a uniform and secure system and legal certainty to allow a "cross-border merger of a national limited liability company with a limited liability company from another member state if the national law of the relevant member states permits mergers between such types of company".[94] In order to achieve that the EU-legislator did not fully harmonize domestic laws, but only laid down broad guidelines, inspired by common principles of domestic jurisdictions.[95] Unless otherwise provided for in Directive 2017/1132/EU, national rules continue to apply to these cross-border cases. However, the member states are prohibited to introduce any restriction on freedom of establishment or on the free movement of capital especially regarding this kind of transnational transaction.[96]

Throughout the Chapter II the influence of the provisions of Chapter I on domestic mergers described above is strongly apparent. As a result, the following section will focus on the relevant differences and unique characteristics of the provisions on cross-border mergers. Thereby it as well aims to give a meaningful overview of the legal framework and at the end to illustrate criticisms it faced.

3.2.2.1. Scope of Application

The first articles of Chapter II on cross-border mergers sets the scope of application of the whole legal framework. They include three criteria which must be fulfilled to apply the

[93] Jessica Schmidt, 'Cross-border mergers and divisions, transfers of seat: Is there a need to legislate? Study for the JURI Commitee' (2016) p 16.
[94] Directive (EU) 2017/1132 (n 3) r 55.
[95] Ugliano (n 6) p 597.
[96] Directive (EU) 2017/1132 (n 3) r 56.

rules of the chapter and are all first mentioned in the general provision of Art 118 Directive 2017/1132/EU. Combining those conditions leads to a specific definition of cross-border merger in the meaning of the Directive 2017/1132/EU which separates this kind of operation from the similar ones, like domestic merger or divisions. Although the structure of the individual prescriptions is slightly different, the overall outline is very reminiscent of the Section 1 of Chapter I on domestic merger.

The first criterion determines the kind of corporation which can be subject of a cross-border merger. It is not codified in one provision but dispersed throughout the first articles. According to Art 118 Directive 2017/1132/EU parties of a cross-border merger must be "limited liability companies formed in accordance with the law of a member state and having their registered office, central administration or principal place of business within the Union". This general provision carries two major limitations of the scope.

Firstly, the legal framework covers only limited liability companies which are founded in accordance with national law of member states. Such type of company is further defined in Article 119 (1) of Directive 2017/1132/EU, which on the one hand refers to the list of public and private limited liability companies in Annex II and on the other hand provides an additional general definition of limited liability companies as a safety net. Annex II includes a more extensive enumeration of companies than Annex I regarding domestic merger, like e.g. as addition for Austria the GmbH. The definition of Art 119 (1) (b) Directive 2017/1132/EU consists of several typical characteristics of limited liability companies, as for example separate assets which alone serve to cover its debts, and thereby it shall be ensured that all limited liability companies of the member states are within the scope of application.[97] The interpretation of this definition entails a certain degree of uncertainty.[98] However, pursuant to Art 120 (4) Directive 2017/1132/EU companies that are subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU are excluded from the application. Art 120 (3) Directive 2017/1132/EU rules as well that undertakings for collective investment in transferable securities shall be outside the scope.[99] Similar to the scope of application of national mergers the exclusion of cooperatives societies according to Art 120 (2) Directive 2017/1132/EU is optional for the member states. As last addition to the

[97] Lutter, Bayer and Schmidt (n 59) mn 22.17; Ugliano (n 6) p 598.
[98] Andenas and Wooldridge (n 8) p 494.
[99] Lutter, Bayer and Schmidt (n 59) mn 22.21.

limitation Art 121 (1) (a) Directive 2017/1132/EU stipulates that a cross-border merger shall only be possible between company types which can merge under the national law of the relevant member states. This draws the bow back to the provisions on domestic mergers and serves as protective clause for the member states that they do not have to allow company combinations which are alien to their jurisdiction.[100]

Secondly, the limited liability companies must be located in a member state. Art 118 Directive 2017/1132/EU stats that the corporation must have "their registered office, central administrative or principal place of business within the Union". Consequently, foreign companies of 3rd countries are cut out of the application. Nevertheless, the formulation of provision allows "letter-box" companies which fulfil one of these components and operate entirely outside the EU to benefit from this legal framework.[101]

The second criterion is the international component of the merger. Such characteristic of an outbound merger is dictated by Art 118 Directive 2017/1132/EU ruling that at least two of the involved companies must be governed by the laws of different member states.

As third and final requirement the operation must fulfil a definition of merger provided by Chapter II. They are laid down in Art 119 (2) and are very similar to the definitions used in Chapter I on domestic merger. It repeats the definition of "merger by acquisition" in lit a and of "merger by formation of a new company" in lit b only with the addition of securities as option beside shares as exchange for the merger for the shareholders.[102] Similar to Art 110 Directive 2017/1132/EU lit c covers the cases of mergers with companies holding all the securities or shares representing the capital of the company being acquired. Art 120 (1) Directive 2017/1132/EU extend this definition on cases whereby the cash payment exceeds 10% and is thereby comparable to Art 116 Directive 2017/1132/EU.

In conclusion, to be subject of the legal framework on cross-border mergers the transaction in question must be performed by limited liability companies listed in Annex II or covered by the definition of Art 119 (1) (b) Directive and located in the EU, having an international component and fall under one of the definitions of a type of merger. From

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[100] Lutter, Bayer and Schmidt (n 59) mn 22.30.
[101] Andenas and Wooldridge (n 8) p 494; Ugliano (n 6) p 599; Jonathan Rickford, 'The Proposed Thenth Company Law Directive on Cross Border Mergers and its Impact in the UK' (2005) 16 EBLR 1393, p 1401.
[102] Ugliano (n 6) p 601.

a structural perspective these provisions are comparable to the rules of domestic merger, but in terms of content they form a unique combination characterising the operation of cross-border mergers.

3.2.2.2. Cross-Border Merger Procedure

The majority of articles of the Chapter II is dedicated to the procedural structure of cross-border mergers. Its underlaying principle is the right of adequate information for shareholders and creditors[103] as it is heavily influenced by the model procedure for domestic mergers. As result the process follows the same key steps and often refers to the relevant provisions of Chapter I.

After the negotiation phase the companies agree on the operations characteristics and details. Based on them Art 122 Directive 2017/1132/EU oblige the parties as first step of the procedure to draw up common draft terms of the cross-border merger. Therefore, the article lists several minimum requirements which must be part of the draft terms, but the companies are free to agree on additional terms.[104] Most of them are adopted from comparable provisions regarding national mergers and the SE.[105] Unique to cross-border mergers are the requirement of implementing “the likely repercussions of the cross-border merger on employment” (lit d), of “information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger” (lit k) and of “dates of the merging companies´ accounts used to establish the conditions of the cross-border mergers” (lit l). Furthermore, the issue of language choice is inherent to the international component of cross-border merger. Because of the European diversity of languages this issue is common in the practise, but unfortunately the provisions on cross-border mergers remain silent on it. Consequently, the national jurisdictions are competent to provide solutions and this leads to exactly the opposite of harmonization.[106]

The next step of the procedure is to publish the draft terms in accordance with Art 123 Directive 2017/1132/EU. Except minor differences in the first words of the paragraph resulting from the different label for the draft terms the provisions of the article are identical in wording to the counterpart on domestic mergers. Hence, it can be referred to

[103] Vicari (n 8) p 268.
[104] Directive (EU) 2017/1132 (n 3) r 57.
[105] Lutter, Bayer and Schmidt (n 59) mn 22.40.
[106] Schmidt ‘Is there a need to legislate?‘ (n 93) p 24.

the examination of them in section 3.2.1.3. However, Art 123 (2) Directive 2017/1132/EU includes additional rules comparable to Art 21 Council Regulation 2157/2001/EC about the SE. Particular information described in the articles, like the type, name, and registered office of every merging company, must be published in the national gazette of the member states to which the relevant company is subject to.

Similar to the structure of domestic mergers at this point two reports are mandatory as additional source of information. According to Art 124 Directive 2017/1132/EU the management or administrative organs of each merging companies must create a report explaining and justifying the legal and economic aspect of the merger. In contrast to the legal framework on national merger the organs are obliged to explain the implications of the merger for the creditors and employees. The representatives shall moreover have the right to inspect the report and even comment on it, if the national law implements this option. These special rights protecting the employees are the reason why in opposite to the provisions on domestic mergers a waiver for this kind of report is impossible.[107] As the second report, Art 125 Directive 2017/1132/EU mandates an examination of independent expert, who must follow again the similar rules on national mergers. Regarding the mandatory content the article even refers to Art 96 (2) Directive 2017/1132/EU. In principle, a separate report for each merging company is envisaged, but Art 125 (2) Directive 2017/1132/EU allows explicitly the creation of a common report for all involved corporations which is an option to limit the expert´s costs.[108] The report of independent experts can be waived if all the members of each of the companies involved in the cross-border merger have so agreed in accordance with Art 125 (4) Directive 2017/1132/EU. This option was implemented as a useful exception for small and medium-sized companies.[109]

On the ground of the information given by the previous steps the general meeting of each of the merging companies must approve the merger. In the case of a domestic merger the shareholders have the right to inspect additional documents in pursuant to Art 97 Directive 2017/1132/EU to form their opinion about the operation. However, the legal framework of cross-border mergers does not include a similar provision. Only companies, which are listed in both Annex I and Annex II of the Directive 2017/1132/EU, must

[107] Lutter, Bayer and Schmidt (n 59) mn 22.73.
[108] Directive (EU) 2017/1132 (n 3) r 59.
[109] Andenas and Wooldridge (n 8) p 497.

provide this special option to their shareholders because according to Art 121 (1) (b) Directive 2017/1132/EU in context of a cross-border merger all companies must comply to their national law as well which is of course again influenced by the provision on domestic merger.[110] Thereby this special right is introduced in the cross-border merger through the back door. It is further important to point out that the exception to the necessity of the approval ruled by Art 94 Directive 2017/1132/EU is also applicable on cross-border mergers in accordance with Art 126 (3) Directive 2017/1132/EU.

Like the domestic procedure of Chapter I following the approval of the relevant general meetings the completeness and legality of all previous steps must be examine. The legal framework on cross-border merger includes therefore a special scheme consisting of two steps. It is adopted from the Council Regulation 2157/2001/EC about the SE.[111] As first step the legality of the procedural steps concerning each merging company is scrutinised based on the companies´ respective national laws. Pursuant to Art 127 Directive 2017/1132/EU in case of a positive result that companies did comply properly the pre-merger acts and formalities the relevant member state shall issue a pre-merger certification to the check company. The second step focuses on the part of the procedure which concerns the completion of the cross-border merger, especially whether the merging companies have approved the common draft terms in the same way and the provisions regarding employee participation have been fulfilled. Art 128 Directive 2017/1132/EU provides the provision for this examination. For this legality check the merging companies are obliged to submit the common draft terms and each pre-merger certification within six months of its issue. In case of a merger by formation of a new company also the formation requirements are subject of examination. The member states shall designate a court, notary, or other authority for those two steps. Resulting from this structure, the examination of each corporation is done by competent national authorities, covers the entire procedure[112] and thereby facilitates the cross-border merger operation.[113]

The final steps are the entry in force and the registration of the completed cross-border merger. Domestic jurisdictions have the competence to determine both. The Directive 2017/1132/EU only states that the date of entry in force must be after the scrutiny mentioned in the previous paragraph. Art 130 Directive 2017/1132/EU has the

[110] Andenas and Wooldridge (n 8) p 495.
[111] Andenas and Wooldridge (n 8) p 497.
[112] Lutter, Bayer and Schmidt (n 59) mn 22.101.
[113] Directive (EU) 2017/1132 (n 3) r 60.

registration as subject and is similar to Art 104 Directive 2017/1132/EU described in section 3.2.1.2. of this thesis. The only addition is that the completed cross-border merger shall be notified through the system of interconnection of registers in accordance with Art 130 2nd para Directive 2017/1132/EU.

For cross-border merger by acquisition carried out by a company, which holds all or 90% or more, but not all, shares or securities conferring the right to vote at general meeting of the company being acquired, Art 132 Directive 2017/1132/EU allows simplified formalities. This aims as well as Section 4 of Chapter I to facilitate intra group merger which are common in practice.[114] As regarding domestic operations for example some content points of the draft or the report of an independent expert can be left out.

3.2.2.3. Consequences of a Cross-Border Merger

Resulting of the intricate and costly procedure the merging companies are subject of the legal consequences stipulated by Art 131 Directive 2017/1132/EU. They consist of three main points identical to the provisions regarding domestic mergers and mirror the common elements of the definition of merger.[115] To shortly repeat them, firstly, all the assets and liabilities of the company being acquired shall be transferred to the acquiring company as a universal succession. Secondly, the shareholders of the company being acquired shall profit of a share exchange and possible cash payments. Finally, the company being acquired shall cease to exist. For further details it can be referred to section 3.2.1.3. of this thesis.

The provision of Art 134 of Directive 2017/1132/EU on the possibility of annulment of the cross-border merger should be highlighted. Because of the complexity of the merging operation a restoration of the previous situation is virtually impossible.[116] Correspondingly, the model of Art 108 Directive 2017/1132/EU concerning national mergers determines a limitation of the acceptable reasons for the nullity of the transaction. Regarding cross-border merger the EU-legislator went one step further in the interest of legal certainty[117] and ruled in Art 134 Directive 2017/1132/EU that this kind of operation may not be declared null and void at all.

[114] Lutter, Bayer and Schmidt (n 59) mn 22.131.
[115] Andenas and Wooldridge (n 8) p 498.
[116] Lutter, Bayer and Schmidt (n 59) mn 22.128.
[117] Directive (EU) 2017/1132 (n 3) r 61.

3.2.2.4. Protection of Shareholders

Although the recitals about cross-border mergers do not include a such explicit commitment to the protection of the shareholders´ interests as the ones regarding domestic mergers, there is no doubt that the legal framework of Chapter II aims to achieve the same. It provides several mechanisms of safeguards for the shareholders because of the risk that the transaction may be a value-destroying operation.[118] However, the lack of a central provision about this topic leads to a dispersal of relevant rules across the chapter.

Once more, the similarities to the legal system on domestic mergers are apparent. In the first place, the cross-border merger procedure is as well heavily based on the principle of adequate information. This is apparent in the provisions on the minimum content of the common draft terms according to Art 122 Directive 2017/1132/EU and its publication as well as on the reports of Art 124 and 125 Directive 2017/1132/EU which serve as additional information source. The EU-legislator made clear that these mechanisms have the purpose to protect the interest of shareholders.[119] Furthermore, shareholders, equipped with the information provided, are actively involved in the procedure and must approve the common draft terms of merger in accordance with Art 126 of Directive 2017/1132/EU, similar to domestic mergers. Finally, the shareholders are again protected indirectly by the scrutiny of legality of the cross-border merger by the authorities stated by Art 127 and Art 128 Directive 2017/1132/EU. In this context, special mention must be made of Art 127 (3) Directive 2017/1132/EU which stipulates "procedure to scrutinise and amend the ratio applicable to the exchange of securities or share or a procedure to compensate minority members, without preventing the registration of the cross-border merger". This provision which was proposed by Germany and Austria is adapted from the Art 25 (3) Regulation 2157/2001/EC and offers further protection for shareholders.[120]

However, there are also significant differences to the protective system in the context of domestic merger. The most important one is that lack of provisions on civil liability in Chapter II. Such provision was original part of the proposal but was only a refence to the national laws and did not survive the legislation process.[121] In addition, there is no

[118] Winner (n 84) p 62; Bech-Bruun and Lexidale (n 10) pp 68-69.
[119] Directive (EU) 2017/1132 (n 3) r 58.
[120] Lutter, Bayer and Schmidt (n 59) mn 22.145.
[121] Lutter, Bayer and Schmidt (n 59) mn 22.130.

comparable rule to Art 97 Directive 2017/1132/EU that entitles the shareholders in the context of a national merger to inspect additional documents.

The Art 121 (2) last sentence Directive 2017/1132/EU is explicitly to mention. It empowers the member states to adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger. This rule is only regarding companies participating in a cross-border merger and governed by the member state´s law. As a result, minority shareholders are subject to further national safeguards, if the individual country used this option. Some member states did that and developed an elaborate protection system, like Germany but others did not, like the UK.[122]

3.2.2.5. Protection of Creditors

In the context of a cross-border merger the interests of creditors are subject to the same risks as in case of a domestic merger. In both situations the debtor, the company´s asset base, and the law governing the merging company changes which could lead to a drastic decline of the financial abilities of the company owing.[123] Different is however that Chapter II on cross-border merger, parallel to the situation regarding the protection of shareholders, does not include any central article dealing with these risks. The only mentioning of safeguards for creditors is written in Art 121 (2) first sentence Directive 2017/1132/EU which specifies that the companies shall comply especially with the provisions and formalities concerning the merger process, taking into account, inter alia, the protection of creditors, debenture holders and holders of securities.

The interpretation of this provision has been subject of controversy. Two different opinions faced each other. The first one stated that the rule empowers the member states to adopt special national provisions for protection of creditors. In contrast, the second one saw it as mere reference to the provisions governing the protection in case of national mergers in Art 99 to Art 101 Directive 2017/1132/EU. The CJEU favoured in the case *KA Finanz*[124] the later opinion.[125] Consequently, those articles are applicable to cases of

[122] Thomas Papadopoulos, 'Protection of shareholders in cross-border mergers: the new harmonized rules' (2021) 18 ECFR 980, pp 982-983; Lutter, Bayer and Schmidt (n 59) mn 22.15s et seq; Schmidt 'Is there a need to legislate?' (n 93) p 19.
[123] Winner (n 84) pp 50 et seq.
[124] Case C-483/14 *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group* [2016] ECLI:EU:C:2016:205.

cross-border merger. However, as described in section 3.2.1.5. of this thesis, those provisions only establish a basic level of harmonization. The resulting diverging national protective systems have been proved to be major obstacle in practice.[126]

3.2.2.6. Protection of Employees

In case of a cross-border merger the employees´ interests are especially at risk, because in addition to the change of their employers financial and legal conditions they could find themself subject of a different labour law as the result of the merger procedure. This area of law differs significantly between each member state based on their legal tradition, peculiarly the rights of employees within a company.[127] Those diverging ways of approaching of the member states were the reason for the protection of employees to be "the thorniest issue of the legislative process"[128] of the CBMD.

Opposite to the legal framework on domestic merger, the protective provisions concerning employees are not packed in an article only referring to another directive. The relevant rules are scattered over several articles targeting different aspects. It starts with the mandatory inclusion of "likely repercussions of the cross-border merger on employment" in the common draft terms according to Art 122 (d) Directive 2017/1132/EU. A greater impact has the rule of Art 124 Directive 2017/1132/EU which stipulates that the report of the management or administrative organ shall explain the implication of the operation also for employees and be made available to the representatives of the employees or the employees themselves. Their opinion on the report shall then be appended to the document. Furthermore, pursuant to Art 126 (2) Directive 2017/1132/EU the general meeting "may reserve the right to make implementations of the cross-border conditional on express ratification by it of the arrangement decided on with respect to participation of employees" in the new company. As well very notable is Art 131 (4) Directive 2017/1132/EU which rules that rights and obligations of the merging companies arising from contracts of employment or from employment relationships be transferred to the company resulting from the merger. Only condition is the existing of them at the date on which the merger takes effect.

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[125] Schmidt 'Is there a need to legislate?' (n 93) p 18; Bech-Bruun and Lexidale (n 10) pp 70-71.
[126] Vanessa Knapp, 'Cross border mobility: what do we need in practice?' (2018) 19 ERA Forum 63, p 65.
[127] Cremers and Vitols (n 27) p 29.
[128] Schmidt 'Is there a need to legislate?' (n 93) p 21.

The centrepiece of the protection of employees is Art 133 Directive 2017/1132/EU about employee participation. The term is thereby defined by a reference to Art 2 (k) Directive 2001/86/EC[129] as the influence of the body "representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ".[130] This is inter alia apparent because several provisions refer to it to ensure that it is exercised accordingly. The common draft terms shall include "information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the merger are determined" according to Art 122 (j) Directive 2017/1132/EU. Moreover, Art 128 (1) Directive 2017/1132/EU stipulates that the authority shall during the scrutiny of the legality ensure that "the arrangements for employee participation have been determined in accordance with Art 133 Directive 2017/1132/EU".

The system of employee participation stated by Art 133 Directive 2017/1132/EU is itself "overly complex, burdensome, protracted and costly".[131] This is the result of the long and difficult disputes during the legislative procedure. In principle, the registered office of the company resulting from the merger is decisive for the law on employee participation. However, different mechanisms are to comply with in the case that one of the three exceptions of Art 133 (2) Directive 2017/1132/EU are fulfilled which are quite complex and detailed. Simplified it can be said that an exception is given if at least one of the merging companies has more than 500 employees, the national law relating to the successor company does not provide for at least the same level of employee participation as operated in the merging companies or the national law relating to the successor company does not provide for employees of the new company's establishments situated in other member states the same participation rights as those enjoyed by the employees in the member state where the new company has its registered office.[132] The realization of one exception leads to the application of the procedure described in Art 133 (3) to (7) Directive 2017/1132/EU. At first the article refers to provisions of Regulation

[129] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L 294/22.
[130] Cremers and Vitols (n 27) p 34.
[131] Schmidt 'Is there a need to legislate?' (n 93) p 21; Bech-Bruun and Lexidale (n 10) p 73.
[132] Cremers and Vitols (n 27) p 35.

2157/2001/EC and Directive 2001/86/EC which concern the negotiation model in the context of the SE but then it modifies it significantly. For example, the increasing of the threshold for the fallback regulations of those two legal acts.[133] A more detailed description of the mechanism of Art 133 Directive 2017/1132/EU is outside the scope of this thesis. The practice found a way to handle this complex procedure.[134]

Last to mention is that the controversial Art 121 (2) Directive 2017/1132/EU includes provisions on the protection of employees as well. According to it national provisions and formalities regarding employees´ rights other than those governed by Art 133 shall as well be complied with. Like discussed in the previous section, this reference results in the application of provisions on domestic mergers through the back door.

3.2.2.7. Conclusion and Criticism

Because a cross-border merger is often connected with the same issues as a domestic merger, Chapter II of Title II of Directive 2017/1132/EU shows great similarities to the legal framework of Chapter I. This is especially apparent regarding the procedural provisions. A cross-border merger process follows the same key steps as a mere national one, like for example the two mandatory reports of Art 124 and Art 125 Directive 2017/1132/EU. Furthermore, the protective provisions regarding shareholders and creditors are comparable to the rules on domestic mergers and even refer indirectly to them over Art 121 (2) Directive 2017/1132/EU. But it must be highlighted that there are some differences in detail, like the lack of provisions on civil liability in case of a cross-border merger.

However, an international operation brings also specific additional problems with it. To resolve them, the chapter on cross-border merger also contains some unique rules distinguishing it from the provisions described in section 3.2.1. of this thesis. Of significant importance is in that regard Art 133 Directive 2017/1132/EU on employee participation. Nothing similar exists regarding domestic merger. Other differences are less profound, like Art 134 Directive 2017/1132/EU stipulates that cross-border may not be declared null and void and goes thereby one step further than the parallel provision on national merger.

[133] Lutter, Bayer and Schmidt (n 59) mn 22.163.
[134] Schmidt ‘Is there a need to legislate?‘ (n 93) p 21.

To conclude, Chapter II on cross-border merger has in principle achieved to reach the goals it was created for. By providing the European companies a legal framework for cross-border merger it facilitates company mobility within the internal market significantly. This effect has been observed after the entry into force of the CBMD by an increase of cross-border mergers.[135] It accomplished that by offering the merger procedural structure combined with safeguards for special groups at risks. Nevertheless, the legal framework on cross-border merger did not reach perfection and faced several voices of criticism as well as calls for further developments from market participants, legislative bodies, commissioned studies, and academics.[136] The identified issues range from complains about the general scope of the provisions, over issues of the safeguard mechanisms, to problems concerning procedural obstacles.[137]

It was argued that the success of both the legal framework on domestic merger and cross-border merger shows that the provided procedure works and is accepted by the practice. Based on these findings the system could be extended on to other operations, like cross-border divisions and cross-border conversions. Both are as well covered by the freedom of establishment and economic reasons speak in favour of creating a comparable legal framework for them. They could be further attractive tools for European companies regarding international reorganisation because an appropriate harmonization of the relevant provisions would lead to a reduction of costs and facilitation of the process.[138]

Furthermore, as mentioned in section 3.2.2.1., Chapter II only applies to limited liability companies. However, the freedom of establishment, which is the underlaying principle of company mobility, covers many more legal entities. It would be advisable to extend the scope of the legal framework on cross-border merger on all of them, like partnerships. Especially due to the CJEU-judgement in the *SEVIC* case which clarified that the freedom to merge is part of this fundamental freedom.[139] This would result in an even stronger fostering of the internal market of the EU. A number of member states have already done that in their national legislation, which shows the economical need for such an extension.[140]

[135] Schmidt 'Is there a need to legislate?' (n 93) p 16; Bech-Bruun and Lexidale (n 10) p 5.
[136] European Company Law Experts, 'The Commission´s 2018 Proposal on Cross-Border Mobility – An Assessment' (2019) 16 ECFR 196, pp 197 et seq.
[137] Schmidt 'Is there a need to legislate?' (n 93) p 16.
[138] Schmidt 'Is there a need to legislate?' (n 93) p 26.
[139] *SEVIC Systems* (n 39) para 19.
[140] Schmidt 'Is there a need to legislate?' (n 93) p 17.

Additional to the criticism regarding the scope, some saw room for improvement in the context of safeguards provided to shareholder, creditors, and employees. The protection mechanisms for shareholders and creditors are quite developed and cover several different aspects to preserve the interests of both groups. Despite these achievements, the relevant law is not nearly fully harmonized and especially in the context of the complex and disputed Art 121 (2) Directive 2017/1132/EU the national legislations diverge significantly. The resulting differences became in practice major obstacles for the merger procedure by causing "unnecessarily high costs and bureaucratic burdens".[141] Consequently, it was suggested to reach a higher level of harmonization, with respect to shareholders even full harmonization.[142] Criticism also concerned the protection system for employees. For example, a number of shortcomings regarding the information access for employees were identified.[143] However, even though the system is complex and costly, as described above, it must be acknowledged that it is based on a very fragile compromise. Even the critics were reluctant to suggest opening this "box of the Pandora" which could lead to another political standstill.[144]

In respect to procedure and practical obstacle a broad variety of suggestions came up. Some of them were of a general level, like the propose that the legal framework should implement a better use of digital technology throughout the merger process, as for example to use the Business Registries Interconnection Service (BRIS).[145] Additional suggestions of this type were common rule determining the accounting date, the valuation rules regarding the merger ratio and the transfer value, as well as a common language usage.[146] Others focused on specific issues. For instance, that a waiver of the requirement of a merger report of the management or administrative organ according to Art 124 Directive 2017/1132/EU should be possible at least in cases where the company does not have any employees or where the employee side consents to it.[147]

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[141] Christoph Teichmann, 'The Company Law Package - Content and State of Play' (2019) 16 ECFR 3, p 8.
[142] European Parliament resolution of 13 June 2017 on cross-border mergers and divisions [2016] OJ C 331/25, p 28; European Company Law Experts (n 136) p 209; Knapp (n 126) pp 65 and 67; Schmidt 'Is there a need to legislate?' (n 93) pp 18-20.
[143] COMMISSION STAFF WORKING DOCUMENT 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 [2018] SWD/2018/141 final, pp 21-22.
[144] Schmidt 'Is there a need to legislate?' (n 93) p 21.
[145] Knapp (n 126) p 68.
[146] Schmidt 'Is there a need to legislate?' (n 93) pp 22-24.
[147] Schmidt 'Is there a need to legislate?' (n 93) p 22.

3.3. Directive 2019/2121/EU

Reacting to the criticism about the Directive 2017/1132/EU the European Commission started to work on amendments of the European Company Law. As a result, on 25 April 2018 it published the Company Law Package which consists of two different proposals. The first one, called Digitalisation Package, concerns the use of digital tools and processes in company law.[148] The second one, named Mobility Package, focuses on the cross-border mobility of companies.[149] Both proposals were subject to intense discussions during the legislative procedure. At the end, on 20 June 2019 Directive 2019/1151/EU regarding the digitalisation and on 27 November 2019 Directive 2019/2121/EU regarding cross-border mobility of companies were adopted.[150] For this thesis only Directive 2019/2121/EU is of importance and will be further discussed in the following section.

In line with the concept that the Directive 2019/2121/EU introduces only further improvements and developments to the Directive 2017/1132/EU, its purpose is to strengthen the legal security and to further harmonize certain aspects of the relevant law. Thereby, cross-border mobility of European companies shall be facilitated based on the freedom of establishment, as the directives and CJEU-judgements before, like in *Polbud*[151] or *SEVIC*.[152] Parallel to these goals, it wants to balance the right of companies to exercise an international restructuring with the protection of employees, creditors, and shareholders, whose interests are threatened by the transaction.[153]

To achieve these aims, Directive 2019/2121/EU on the one hand introduces legal frameworks regarding cross-border divisions and cross-border conversions to the European Company Law for the first time and on the other hand amends comprehensively the existing provisions on cross-border mergers. By implementing all these changes into Directive 2017/1132/EU the EU-legislator expanded the directive "into a real general

[148] 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 [2018] COM/2018/239 final.
[149] 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 [2018] COM/2018/241 final.
[150] Schmidt 'Accomplishments and Deficits' (n 25) pp 226-227.
[151] Case C-106/16 *Polbud - Wykonawstwo sp. z o.o.* [2017] ECLI:EU:C:2017:804.
[152] Sabine Altmeyer, 'Neuere Entwicklungen im europäischen Gesellschaftsrecht' (2021) 24 ZEuS 99, p 107.
[153] Directive (EU) 2019/2121 (n 4) r 4 last sentence.

legal framework for cross-border mobility of companies".[154] Although the first point constitutes an astonishing accomplishment of the European Company Law and an influential development in this field of law, these kinds of operations fall outside the focus of this thesis. Only the reforms concerning cross-border mergers will be discussed in more detail.

In general, Directive 2019/2121/EU brings extensive and quite complex changes regarding the protective systems for shareholders, creditors, and employees. Besides that it introduces as well other notable amendments in respect to the procedural provisions of Directive 2017/1132/EU. The member states are obliged by Art 3 Directive 2019/2121/EU to implement these modifications until 31 January 2023 in their national jurisdictions. Furthermore, it must be highlighted that all amendments concern only the legal framework on cross-border merger of Chapter II of Title II of Directive 2017/1132/EU and not the provisions on domestic merger of Chapter I.

3.3.1. Amendments Regarding the Protection of Shareholders

As described in section 3.2.2.6., the provisions on the protection of shareholder, especially the old version of Art 121 (2) Directive 2017/1132/EU, gave leeway to the member states regarding some substantial protective rules. The resulting diversity of national rules became a significant obstacle in practice. The European Commission aimed to fix this by introducing Art 126a Directive 2017/1132/EU, which serves as central safeguard provision and leads to a harmonization by offering the same minimum level of protection among all member states.[155] It completely replaces the provision of Art 121 (2) Directive 2017/1132/EU regarding shareholders, resulting in the deletion of this subject matter from Art 121 Directive 2017/1132/EU. However, the member states have still some leeway regarding the implementation of the rules and are free to create additional safeguards in their national jurisdictions.[156] A possible option could be to extend the following rules to other categories of shareholders, like ones without voting right.[157]

[154] Schmidt 'Accomplishments and Deficits' (n 25) p 232.
[155] Papadopoulos 'Protection of shareholders' (n 122) p 985; Teichmann (n 141) p 9.
[156] Proposal Directive 2019/2121/EU (n 149) p 19.
[157] Papadopoulos 'Protection of shareholders' (n 122) p 989.

The protective structure of the new Art 126a Directive 2017/1132/EU provides all shareholders with three different mechanisms.[158] Firstly, Art 126a (1) Directive 2017/1132/EU obliges the member states to ensure that at least the shareholders "who voted against the cross-border merger have an exit right combined with the right to dispose of their shares for adequate cash compensation". Secondly, pursuant to Art 126a (4) Directive 2017/1132/EU shareholders who used the exit right and consider the cash compensation to be inadequate are entitled to claim additional money. Thirdly and finally, in accordance with Art 126 (6) Directive 2017/1132/EU even shareholders, who did not have or did not exercise the exit right and see the share exchange ratio as inadequate, shall have the right to challenge this ratio and to ask for a cash payment.

All three mechanisms have in common that they are only about monetary claims. Acknowledging the different national traditions and practices, the member states are provided a leeway regarding which company shall pay the monetary claims.[159] Hence, the protective structure of Art 126a Directive 2017/1132/EU does not include any option for shareholders to challenge the entire operation. Correspondingly, the also newly introduced Art 126 (4) (a) and (b) Directive 2017/1132/EU prohibits that the approval of a cross-border merger by the general meeting can be challenged solely on the basis of an inadequate share exchange ratio or cash compensation.

Besides the special provisions of Art 126a Directive 2017/1132/EU the Mobility Package brought also protective rules regarding the independence and civil liability of experts in the sense of Art 125 Directive 2017/1132/EU. Those rules cover an additional aspect regarding the protection of shareholders. Art 133a Directive 2017/1132/EU obliges the member states to create rules ensuring that the expert is independent from and has not conflict of interest with the relevant merging companies. Moreover, national laws shall guarantee the impartial and objective quality of the expert´s opinion. Especially important is the obligation of the member states to law down rules governing at least the civil liability of those experts because the absence of such provisions was previously criticised.[160]

[158] Papadopoulos 'Protection of shareholders' (n 122) p 885; Jessica Schmidt, 'The Mobility Aspects of the EU Commission´s Company Law Package: Or - The Good, the Bas and the Ugly' (2019) 16 Eur Co Law 13, p 16.
[159] Schmidt 'The Mobility Aspects' (n 158) p 16.
[160] Altmeyer (n 152) p 109.

3.3.2. Amendments Regarding the Protection of Creditors

The Directive 2019/2121/EU also restructured the protection of creditors by introducing Art 126b Directive 2017/1132/EU. Similar to the safeguards of shareholders, this new article replaced the provisions of Art 121 (2) Directive 2017/1132/EU regarding creditors entirely. However, the system of Art 126b Directive 2017/1132/EU does not lead to such a harmonised legal framework as the one for shareholders. In general, the provision for the protection of creditors in Art 126b Directive 2017/1132/EU is seen as "well-balanced and feasible"[161] *ex-ante* scheme[162]. It rose the level of harmonization in comparison to the previous system and still leaves the member states space for specific national legislation adjusted to their needs.

The protective system for creditors has two layers in the context of minimum harmonization.[163] On the one hand, it includes a general provision in Art 126b (1) Directive 2017/1132/EU stipulating that the member states are obliged to provide an adequate system of protection for creditors. Thereby they are only of relevance if their claims antedate the disclosure of the common draft terms and have not fallen due at the time of such disclosure. On the other hand, the provisions predefine very specific rules for the protection of the creditors´ interests. For instance, Art 126 (1) 2nd para Directive 2017/1132/EU obliges the member state to enable the creditors to apply to the authorities in case they are not satisfied with the safeguards offered. In addition to this obligation, the member states can implement the requirement for the administrative or management body of each merging company to provide a declaration of the current financial status according to Art 126b (2) Directive 2017/1132/EU. It shall include a statement that the body is unaware of any reasons preventing the satisfaction of the creditors´ claims. This construction paves the way for a personal liability of the members of the body in case of inaccuracy of the statement.[164]

Worthy to highlight is the exception of national rules regarding the satisfaction or securing of obligations of public bodies from the protective scheme. This is ruled in Art 126b (3) Directive 2017/1132/EU and allows the member states to adopt a more favourable national regime for public bodies, like the state itself, in comparison to private

[161] Schmidt 'The Mobility Aspects' (n 158) p 16.
[162] Thomas Papadopoulos, 'The New Harmonized Protection of Creditors in Cross-Border Mergers' (2022) 19 ECFR 422, p 430.
[163] Papadopoulos 'Protection of Creditors' (n 162) p 429.
[164] Directive (EU) 2019/2121 r 25; Papadopoulos 'Protection of Creditors' (n 162) p 431.

creditors.[165] Concerning the same topic, the EU-legislator stated as additional protection for such public creditors that the authorities must examine regarding the pre-merger certification “whether the company has fulfilled its obligations towards public creditors and whether any open obligations have been sufficiently secured”.[166]

3.3.3. Amendments Regarding the Protection of Employees

In opposite to the other protective systems described above, the mechanisms for the protection of employees were not subject to such fundamental amendments. The already existing system was primarily extended by rules regarding the information of the employees and their representatives. Consequently, the reforms of Directive 2019/2121/EU did not significantly raise the level of harmonization.[167]

The information access of employees shall be ensured by two main articles. Firstly, the rewritten Art 124 Directive 2017/1132/EU requires the report of the administrative or management body to explain the implications of the cross-border merger for employees. According to Art 124 (5) Directive 2017/1132/EU these explanations must cover the implications for employment relationships and related safeguards, any material changes to the applicable conditions of employment and how these two factors affect any subsidiaries of the company. Based on the information provided to the representatives of the employees or the employees themselves they can send their opinion to the administrative or management body, which then must inform the shareholders of it and appended it to the report, pursuant to Art 124 (7) Directive 2017/1132/EU. Notably, Art 124 (8) Directive 2017/1132/EU rules an exception of this required report in cases where the merging company and its subsidiaries have no employees.

Secondly, Directive 2019/2121/EU introduced Art 126c Directive 2017/1132/EU which obliges the member states to ensure the employees´ rights regarding information and consultation provided by Directive 2002/14/EC[168] and Directive 2001/23/EC as well as

[165] Papadopoulos ‘Protection of Creditors’ (n 162) p 434.
[166] Directive (EU) 2019/2121 r 39.
[167] Joti Roest, ‘Corporate Mobility - The Involvement of Employees’ (2019) 16 ECFR 74, p 85.
[168] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.

Directive 2009/38/EC[169] in case of community-scale undertakings or groups. This provision as sole reference is noteworthy because it establishes a connection to the legal framework on domestic merger as described in section 3.2.1.6. which also refers to one of those directives.

Besides these changes regarding the information access Directive 2019/2121/EU did not introduce other major amendments. The complex system of employee representation of Art 133 Directive 2017/1132/EU was only amended slightly, which was expected based on the difficulties it faced during its creation. As a result, the level of harmonization stayed the same. The member states still have some leeway for their national legislation.[170] This is also apparent in the fact that Art 121 (2) Directive 2017/1132/EU still mentions the national provisions and formalities regarding the protection of employees.

3.3.4. Other Remarkable Amendments

Additional to the significant amendments regarding the protection of shareholders, creditors and employees Directive 2019/2121/EU also implemented several other changes which are noteworthy. They range from small corrections of the wording of articles to entire provisions rewritten. Moreover, not only procedural rules were subject to change but also definitions and provisions concerning the scope of application. The following section will discuss few interesting examples.

As mentioned in section 3.2.2.1. the old legal framework did not apply on company subject to resolution tools, powers and mechanisms provided by Title IV of Directive 2014/59/EU. The reforms of Directive 2019/2121/EU expended this exclusion to corporations which are in liquidation and has begun to distribute assets by creating Art 120 (4) (b) Directive 2017/1132/EU. In addition, the newly added Art 120 (5) Directive 2017/1132/EU gives the member states the option to leave out companies subject of insolvency or other liquidation proceedings. However, it was pointed out that this change

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[169] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [2009] OJ L 122/28.

[170] Roest (n 167) pp 89 and 105.

could be economically counterproductive, because a restructuring operation can be used as a helpful tool.[171]

One of the entirely rewritten provisions is Art 130 Directive 2017/1132/EU ruling the registration of the cross-border merger. Its new version demands the use of the system of interconnection of registers. Especially, according to Art 130 (3) Directive 2017/1132/EU the member states shall ensure that the completed cross-border merger is notified in this system and the registration of the merging company is struck off or removed immediately. This was introduced to counteract the problem that the date of registration and deletion of the different merging companies were diverging in the individual national registers.[172]

The last example is the clarification of Art 134 Directive 2017/1132/EU regarding the validity of a cross-border merger. The unchanged first paragraph stipulates that any annulment of the operation is impossible. Additional to this the new second paragraph makes clear that this prohibition does not affect the competences of the member states to impose measures and penalties in the context of criminal law, terrorist financing, social law, taxation and law enforcement. Some academic voices interpretate this addition as possibility to circumvent the rule of the first paragraph.[173]

3.3.5. Conclusion and Criticism

The Directive 2019/2121/EU brought important changes to the European Company Law. It was not only a reaction to criticism against the former system, but also a tool to introduce needed developments. Thereby it pursued the goal to facilitate the mobility of companies within the Union strengthening the internal market as a whole. In short, the Mobility Package is seen as a great accomplishment.[174]

One of the greatest achievements resulting from Directive 2019/2121/EU was the creation of European legal frameworks for cross-border divisions and cross-border conversions. Even though these kinds of operations lay outside the topic of this thesis, they must be highlighted. Besides that, the reform focuses on the protective schemes, especially

[171] Schmidt 'Accomplishments and Deficits' (n 25) p 236.
[172] Altmeyer (n 152) p 108.
[173] Jessica Schmidt, 'Company Law Package: Collateral Damage' in Grundmann, Merkt and Mühlbert, *Festschrift für Klaus J. Hopt zum 80. Geburtstag am 24. August 2020* (2020) pp 1108-1109.
[174] Papadopoulos 'Protection of Creditors' (n 162) p 444; Teichmann (n 141) p 14; Schmidt 'Accomplishments and Deficits' (n 25) p 271.

regarding shareholders and creditors. For both groups it established new mechanisms to achieve a higher level of harmonization. Moreover, the protective system for employees could be improved regarding the information access, although this topic is always highly debated between the member states. Furthermore, the Directive 2019/2121/EU concerned several smaller but remarkable changes regarding the scope of application and the merger procedure. This underlines the all-encompassing characteristic of the reform.

Although, the Mobility Package is seen as a necessary and significant step in the right direction, several points are subject to critique. Some of them are already known from discussions concerning the previous version of Directive 2017/1132/EU, such as the proposal to extend the scope of application or the legal framework on other entities than limited liability companies[175] or the problem concerning the lack of language provisions[176]. For further details on them it can be referred to section 3.2.2.6.

However, the examination of the reformed provisions on cross-border mergers brought up several new points of critique. The legal frameworks for cross-border divisions and cross-border conversions of Directive 2017/1132/EU are based on the same general system and principles as the provisions on cross-border mergers. Nevertheless, there are serious differences between these frameworks. A very illustrative example is the exclusion of artificial arrangements in the context of the new operations according to Art 86c (3) and Art 160d (3) Directive 2017/1132/EU. These rules were created to address the concerns that such transaction could be used for abusive purposes.[177] A comparable provision is missing in Chapter II on cross-border merger. To correct such differences and to create an easier structured legal framework, some suggest establishing a general part concerning all three operations followed by specific rules for each one.[178] Another proposal is to develop the protective system for creditors even more. As described in section 3.3.3., Directive 2019/2121/EU achieved a higher level of harmonization by obliging the member states to provide an adequate system of protection. However, there are some calls to go even a step further and try a full harmonization of this aspect.[179]

[175] Schmidt 'Accomplishments and Deficits' (n 25) p 230; Schmidt 'The Mobility Aspects' (n 158) p 13.
[176] Schmidt 'Accomplishments and Deficits' (n 25) pp 243-244.
[177] Schmidt 'Accomplishments and Deficits' (n 25) pp 236-237.
[178] Schmidt 'Accomplishments and Deficits' (n 25) pp 232-233.
[179] Papadopoulos 'Protection of Creditors' (n 162) p 444.

4. Implementation into Austrian Law

The Republic of Austria as a member state of the EU is obliged under Art 288 TFEU to implement the Union´s directives in its own national legal system. Thereby each country has the freedom to choose the proper form and method for this transposition. The following section will give an overview about the transposition of the provisions of Directive 2017/1132/EU regarding domestic and cross-border merger into Austrian law. Additionally, it will be discussed which options Austria has to implement the changes brought by Directive 2019/2121/EU.

4.1. Current Legislation

The present Austrian legislation on mergers is strongly affected by the legal acts of the EU. This results from the strive to harmonize the company law of the EU-legislator, as mentioned in the previous sections. Regarding the form of the implementation Austria decided to incorporate the European provisions into several different statutes.

The Austrian law on mergers follows the layout of the Directive 2017/1132/EU and stipulates the two types of mergers in different groups of provisions. Firstly, domestic mergers are governed by provisions of the *Aktiengesetz*[180] (AktG), the *Gesetz über Gesellschaften mit beschränkter Haftung*[181] (GmbHG) and several other specific laws depending on the corporate form. Secondly, the Austrian legislator created the *EU-Verschmelzungsgesetz*[182] (EU-VerschG) as new law specifically regarding cross-border mergers. However, some provisions were implemented into other legal acts, especially in the *Arbeitsverfassungsgesetz*[183] (ArbVG). The following sections will describe each group in detail.

The separation has historical reasons, as Austria in 1995 on the occasion of joining the EU had the aim to reach compliance with the legal system of the Union and just amended its already existing provisions on merger in the relevant legal acts. Despite several calls for a separate codification of national merger law, especially after the entry of force of

[180] Bundesgesetz über Aktiengesellschaften BGBl 1965/98.
[181] Gesetz vom 6. März 1906, über Gesellschaften mit beschränkter Haftung RGBl 1906/58.
[182] Bundesgesetz über die grenzüberschreitende Verschmelzung von Kapitalgesellschaften in der Europäischen Union BGBl 2007/72.
[183] Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung BGBl 1974/22.

Directive 2005/35/EU regarding cross-border merger, Austria never created such central legal act, like Germany with its *Umwandlungsgesetz*.[184]

4.1.1. Domestic Mergers

At the time the Third Council Directive 78/855/EEC created the European legal framework on mergers Austria was not member of the EEC. Consequently, Austria implemented the rules not until it joined the then named EU. The transposition was accomplished by the *EU-Gesellschaftsrechtsänderugnsgesetz*[185] which was approved on 23 May 1996 and published on 28 June 1996. It brought a series of amendments to several different laws, from which the AktG and the GmbHG are the most important ones regarding mergers. Before the change, Austrian law had already included provisions on merger. The first law on such operations was created in 1862 by the *Allgemeine Handelsgesetzbuch* which were superseded by the rules on merger of the *Aktiengesetz*[186] *1937/38*.[187] This old national legal framework has been expanded in great extent by the implementation of European rules.

The central point of Austrian legislation on domestic merger is the ninth part of the AktG. The Sections 219 to 234b AktG stipulate the model case for all domestic merger and includes the majority of implemented European provisions currently governed by Directive 2017/1132/EU. The Austrian law complies fully with the rules of Chapter I of Title II of the directive, but occasionally diverge from it.

A good example for this deviation is the scope of application of the legal framework on domestic merger. The AktG includes all three necessary criteria defined by the Art Section 1 of Chapter I of Title II of Directive 2017/1132/EU which are discussed in section 3.2.1.1. of this thesis. Concerning Austria, the directive´s Annex I lists only the AG. Nevertheless, the Austrian legislator extended the scope of application over the GmbH by incorporate merger related provisions into the GmbHG. These refer to the

[184] Kalss ‘Vor §§ 219-236’ (n 5) mn 23 and 35.
[185] Bundesgesetz über Änderungen des Handelsgesetzbuchs, des Aktiengesetzes, des Gesetzes über Gesellschaften mit beschränkter Haftung, des EWIV-Ausführungsgesetzes, des Firmenbuchgesetzes, des Gerichtskommissärsgesetzes, der Jurisdiktionsnorm, des Genossenschaftsverschmelzungsgesetzes, des Gerichtsgebührengesetzes, des Bankwesengesetzes, des Sparkassengesetzes, des Versicherungsaufsichtsgesetzes und der Rechtsanwaltsordnung zur EU-bedingten Anpassung des Handels- und Gesellschaftsrechts sowie über die Spaltung von Kapitalgesellschaften und über die Umwandlung von Handelsgesellschaften BGBl 1996/304.
[186] Bundesgesetz vom 31. März 1965 über Aktiengesellschaften BGBl 1965/98.
[187] Kalss ‘Vor §§ 219-236’ (n 5) mn 6 and 8.

AktG and set own rules specific for the GmbH.[188] Besides that, there are several other legal acts on mergers regarding special corporations, like the *Versicherungsaufsichtsgesetz*[189] 2016 for insurance companies or the *Genossenschaftsverschmelzungsgesetz*[190] for cooperatives.[191] The last example shows that Austria also used the option of Art 87 (2) Directive 2017/1132/EU.

The national rules on the merger procedure are in line with the directive but Austria had to adjust some rules for the use in the domestic context. An example for this is the determination of competent authorities for the specific examination steps of the merger. Section 222 AktG requires a notarial certification of the merger agreement to fulfil Art 102 Directive 2017/1132/EU. The registration of the merger according to Art 104 Directive 2017/1132/EU is the task of the *Firmenbuchgericht* (Commercial Register Court) and laid down in Section 225 et seq AktG.[192] Additionally, the AktG includes competences of the court which are not prescribed by the European directive, like the examination of the exchange ratio (Section 225c AktG).[193] Moreover, Section 225a (3) AktG sets the registration of the merger as the date of effect according to Art 103 Directive 2017/1132/EU.

Regarding the protection of shareholders, creditors, and employees the Austrian law also transposed the meagre provision of the directive but added some specific national mechanism to it. Similar to the European legal framework, a central provision on the protection of shareholders is missing in the Austrian law. However, noteworthy are Sections 227 et seq AktG which implement a civil liability of members of the executive board and the supervisory board and thereby comply with Art 106 Directive 2017/1132/EU. Section 220b (3) AktG refers to Sections of the *Unternehmensgesetzbuch* (UGB) which include civil liability for experts. In addition, general liability provisions of the civil law can be used in that regard.[194] The protection of creditors is ruled in Section 226 AktG which fulfils the requirements of Art 99 and Art 101 Directive 2017/1132/EU.

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[188] Johannes Reich-Rohrwig, *EU-Gesellschaftsrechtsänderungsgesetz (EU-GesRÄG)* (Manzsche Verlags- und Universitätsbuchhandlung 1996) p 44.
[189] Bundesgesetz über den Betrieb und die Beaufsichtigung der Vertragsversicherung BGBl 2015/34.
[190] Bundesgesetz vom 7. Mai 1980 über die Verschmelzung von Genossenschaften und über die Änderung der Gewerbeordnung 1973 BGBl 1980/223.
[191] Kalss 'Vor §§ 219-236' (n 5) mn 21.
[192] Reich-Rohrwig (n 188) p 34.
[193] Susanne Kalss, '§225c AktG' in Kalss, *Kommentar zur Verschmelzung-Spaltung-Umwandlung* (3rd edn, Manzsche Verlags- und Universitätsbuchhandlung 2021) mn 1.
[194] Susanne Kalss, '§227 AktG' in Kalss, *Kommentar zur Verschmelzung-Spaltung-Umwandlung* (3rd edn, Manzsche Verlags- und Universitätsbuchhandlung 2021) mn 16.

This central provision provides the creditors with an adequate system of protection by entitling them to securities.[195]

As mentioned in section 3.2.1.6. of this thesis, concerning the protection of employees Directive 2017/1132/EU only refers to Directive 2001/23/EC. The AktG and the GmbHG remain silent about this topic. The Austrian law addresses the issue of employee protection in the *Arbeitsvertragsrechts-Anpassungsgesetz* (AVRAG) which Sections 3 et seq cover such change of employer in general.[196]

At the end of this brief overview on the Austrian legal framework one last speciality of Austrian law regarding domestic merger is to mention. Without any European legal basis Sections 234 to 234b AktG stipulate some specific provisions for the case of cross-legal-form mergers. Thereby the older Section 234 AktG covers a merger of a GmbH into an AG and Section 234a AktG the opposite operation of fusing an AG into a GmbH. In case of such transaction these special laws must be borne in mind.

4.1.2. Cross-Border Mergers

The Union´s legal framework regarding cross-border mergers original established by the CBMD and currently part of the Directive 2017/1132/EU was implemented into Austrian law by two separate legal acts. Firstly, the *Gesellschaftsrechts-Änderungsgesetz 2007*[197], which was approved on 27 September 2007, introduced the EU-VerschG and amended few other laws. Secondly, the 77. Bundesgesetz: *Änderung des Arbeitsverfassungsgesetzes, des Bundesgesetzes über die Post-Betriebsverfassung und des Arbeits- und Sozialgerichtsgesetzes*[198], which was approved on 17 Oktober 2007, transposed the provisions of currently Art 133 Directive 2017/1132/EU regarding employee participation into the ArbVG and slightly changed several other legal acts as well.

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[195] Hanns F. Hügel and Christian Zib, 'EU-Gesellschaftsrechtsänderungsgesetz (EU-GesRÄG) Prüfungsschwerpunkte' (1997) 3 JAP 189.

[196] Aburumieh, Adensamer and Foglar-Deinhardstein (n 20) pp 313-315.

[197] Bundesgesetz, mit dem ein Bundesgesetz über die grenzüberschreitende Verschmelzung von Kapitalgesellschaften in der Europäischen Union erlassen wird sowie das Firmenbuchgesetz, das Gerichtsgebührengesetz, das Rechtspflegergesetz, das GmbH-Gesetz, das Aktiengesetz 1965, das Umwandlungsgesetz, das Unternehmensgesetzbuch und das Übernahmegesetz geändert werden BGBl I 2007/72.

[198] Bundesgesetz, mit dem das Arbeitsverfassungsgesetz, das Bundesgesetz über die Post-Betriebsverfassung und das Arbeits- und Sozialgerichtsgesetz geändert werden BGBl I 2007/77.

In general, the Austrian law follows precisely the European legal framework and incorporates provisions complying to the directive´s stipulations. The majority of them were implemented into EU-VerschG which rules the scope of application, the merger procedure, the consequences and several provisions about the protection of shareholders, creditors and employees. In addition, Section 3 (2) EU-VerschG extends the application of the provisions of AktG and GmbHG to cross-border merger as well. This reference, the overall structure of the EU-VerschG and the similarities of the European provisions lead to a homogeneity of the two law groups on domestic merger and cross-border merger. Nevertheless, there are several noteworthy points of the Austrian legal framework on cross-border merger which are resulting for example again from the Austrian legislator seizing some of the leeway given by the directive.

Regarding the scope of application Austria followed the defining points of the legal framework on cross-border mergers and implemented all necessary elements. The first criterion mentioned in Art 119 Directive 2017/1132/EU about the type of corporations able to perform such operation is embedded in Section 1 (2) EU-VerschG. Despite it is not mentioned in the Annex II of Directive 2017/1132/EU companies formed as SE are also covered by the scope of the EU-VerschG.[199] Also concerning the company types subject to the legal framework, it is to note that Austria on contrast to the laws on domestic mergers did not use the option given by Art 120 (2) Directive 2017/1132/EU and excludes cooperative societies from the application of the EU-VerschG.[200] The second criterion regarding the international element of the cross-border merger can be found in Section 3 EU-VerschG. As mentioned above, the definitions of mergers as third criterion are implemented in Section 219 AktG and Section 96 GmbHG but Austria did not include the element of cash payments not exceeding 10 % stipulated by Art 119 (2) (a) and (b) Directive 2017/1132/EU.[201]

The Austrian provisions on the cross-border merger procedure are as well mainly governed by the EU-VerschG, but occasionally few provisions of the AktG are also applicable. The resulting legal process follows the same key steps as the directive. Few adjustments had to be done to completely fit the system into the Austrian legislation. For example, similar to domestic mergers the Austrian legislator determined in Section 15

[199] Clemens Hasenauer and Peter Hiller, ‘The New Legal Regime in Austria on EU/EEA Cross-Border Mergers’ (2008) 5 Eur Co Law 185, p 185.
[200] Bech-Bruun and Lexidale (n 10) p 243.
[201] Dirk van Gerven, *Cross-Border Mergers in Europe* (vol 1, Cambridge University Press 2010) p 83.

EU-VerschG the *Firmenbuchgericht* as competent authority for the pre-merger certification of Art 127 Directive 2017/1132/EU and the scrutiny of the legality of the cross-border merger ruled by Art 128 Directive 2017/1132/EU. Moreover, Section 3 (3) EU-VerschG rules that the date of effect is determined by the articles of association, which leads to the situation that the registration of the cross-border merger in the Austrian Commercial Register is as well the date of effect according to Art 129 Directive 2017/1132/EU.[202] The registration in the Austrian Commercial Register necessary to Art 130 Directive 2017/1132/EU takes place by the decision of the *Firmenbuchgericht* which shall then be published accordingly to Section 10 UGB in the online database named *Ediktsdatei* and the official gazette called *Amtsblatt zur Wiener Zeitung*.[203] To finish the examination of the procedural provisions of Austrian law it is to mention that the EU-VerschG does not include a general language requirement for any document. Only pursuant to Section 14 (5) EU-VerschG the notification of merger must be translated into German for the registration by the Austrian court.[204]

Furthermore, the protective aspect of the legal framework was transposed into Austrian law, too. As described in section 3.2.2.5. of this thesis, the Directive 2017/1132/EU only included Art 133 Directive 2017/1132/EU as one central provision for the protection of employees´ interests. Its implementation constitutes a particularity, as it was specially embedded into the Sections 258-263 ArbVG. The shareholders and creditors are only secured by the scattered rules throughout the chapter. The sole additional option is Art 121 (2) Directive 2017/1132/EU, which was utilised by Austria to establish national rules for those two groups of concern. For the shareholders EU-VerschG provides in its Section 10 a special exit right against appropriate cash compensation and Section 225c AktG stipulates the right to petition for the share-exchange ratio to be scrutinized and amended.[205] This system shows interesting similarities to the new provisions on this subject of Directive 2019/2121/EU. Regarding the protection of creditors´ interests Austria created Section 13 EU-VerschG as national rule which entitles them to request security within two months from the date of publication of the common draft terms for claims that already existed, but which are not yet due at this date.[206]

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[202] Sebastian Herrler and Susanne Herrler '§ 5 Grenzüberschreitende Verschmelzungen' in Süß and Wachter, *Handbuch des internationalen GmbH-Rechts* (4 edn, zerb verlag 2021) p 31.
[203] Bech-Bruun and Lexidale (n 10) p 253.
[204] Bech-Bruun and Lexidale (n 10) p 258.
[205] Bech-Bruun and Lexidale (n 10) pp 245-246; van Gerven (n 201) pp 96-98.
[206] van Gerven (n 201) p 98.

This legal framework which is based on the Union´s directives as secondary legal acts is, however, not the sole legal basis for cross-border merger. The prevailing opinion[207] posits that some mergers outside the scope of the EU-VerschG are permissible, especially international mergers with companies outside the EU or the European Economic Area. Such cases face the same issues as the operation covered by the European legal framework, but no provisions give guidelines how to handle them. Consequently, the specific combination of jurisdiction must be analysed and possible problems identified. It is not precluded that such an analysis attests an impracticability of the international merger.[208]

Besides that, Union´s primary law and related decisions of the CJEU are used to allow other transactions which have similar effects as a cross-border merger, like the international conversions and seat transfer. The Austrian Higher Regional Courts in Vienna and Innsbruck as well as the Austrian Supreme Court of Justiz referred in their decisions regarding this topic explicitly and directly to Art 49 and Art 54 AEUV as well as to cases as *SEVIC*, *Vale* and *Polbud*.[209] Thereby it can be observed that the Higher Regional Court (OLG) in Innsbruck is not as strict as the one in Vienna, which is well apparent in the difference between Case 3 R 93/08p[210] whereby the OLG Innsbruck allowed even a transaction of a partnership and Case 6 R 113/17g[211] in which the Viennese OLG stipulates strict conditions for the operation. The discussion of such scenarios in Austrian law started even before the creation of CBMD[212] but goes on till today resulting from the lack of statutory guidelines for them in Austrian law.[213] As mentioned in section 3.3., the implementation of Directive 2019/2121/EU will change that situation.

[207] Susanne Kalss, ‘Vor §§ 1-18’ in Kalss, *Kommentar zur Verschmelzung-Spaltung-Umwandlung* (3rd edn, Manzsche Verlags- und Universitätsbuchhandlung 2021), mn 43; Aburumieh, Adensamer and Foglar-Deinhardstein (n 20) p 436.
[208] Kalss ‘Vor §§ 1-18’ (n 207) mn 44-49.
[209] OGH 10.04.2014, 6 Ob 224/13d; Roman Perner and Leon Scheicher, ‘Von Wien nach München - grenzüberschreitende Umwandlung in der Praxis’ (2019) 12 ecolex 1038, p 1038.
[210] OLG Innsbruck 15.07.2008, 3 R 93/08p; Walter Brugger, ‘Grenzüberschreitende Verlegung des Satzungssitzes’ (2014) 8 ecolex 714.
[211] OLG Wien 24.11.2017, 6 R 113/17g; Martin Karollus, ‘Umstrukturierungen und Sitzverlegung über die Grenze - aktuelle Rechtlage (vor der Umsetzung der Richtlinie [EU] 2019/2121)’ in Artmann, Rüffler and Torggler, *Gesellschaftsrecht und IPR* (Manzsche Verlags- und Universitätsbuchhandlung 2020) p 111; also see OLG Wien 03.09.2019, 6 R 179/19s; Perner and Scheicher (n 209).
[212] Clemens Hasenauer, ‘Neue Rechtsprechung des OGH zur grenzüberschreitenden Umwandlung’ (2003) 7 RdW 357.
[213] Kalss ‘Vor §§ 1-18’ (n 207) mn 54 et seq.

4.2. Possible amendments based on Directive 2019/2121/EU

The reforms of the European Company Law stipulated in Directive 2019/2121/EU must be implemented into law of the member states until the 31 January 2023 according to its Art 3. At the time of writing this master´s thesis it is clear that Austria will fail to fulfil this obligation because of the time required for the legislative procedure. The proposal named *Gesellschaftsrechtsrechtliches Mobilitätsgesetz*[214] was not published by the Austrian Federal Ministry of Justice until 23 January 2023. The evaluation period ends on 24 February 2023. Sources with inside information claimed that this delay is caused by political reasons.[215] This is particular unfortunate, since the related Directive 2019/1151/EU about the aspect of digitalisation of the European Company Law Package was successfully transposed into Austrian law by the *Gesellschaftsrechtliches Digitalisierungsgesetz 2022*[216] which was officially published on 06 December 2022. As a result, this section discusses the possible amendments based on the European Mobility Package and a short summary of the recently published proposal.

At first the implementation obligation can be seen as opportunity to rethink the legislation on the restructuring operation in a more general way. As mentioned in section 3.3. of this thesis the Directive 2019/2121/EU introduces legal frameworks on cross-border divisions and cross-border conversions. According to Art 288 TFEU the member states are free in their choice which method and form they use for the transposition of a directive. Therefore, Austria can execute the change as it wishes. Thereby three different options can be considered.

Firstly, it could follow its current legislative approach, as it did with the EU-VerschG on cross-border merger. Consequently, the Austrian legislation would then include three laws specialised for each type of restructuring operation.[217] Secondly, the Republic could be more ambitious and create one legal act covering all three types. This would be

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[214] Ministerialentwurf betreffend Bundesgesetz, mit dem zur Umsetzung der Gesellschaftsrechtlichen Mobilitäts-Richtlinie 2019/2121 ein Bundesgesetz über grenzüberschreitende Umgründungen von Kapitalgesellschaften in der Europäischen Union (EU-Umgründungsgesetz – EU-UmgrG) erlassen wird und mit dem das Firmenbuchgesetz, das Rechtspflegergesetz, das Übernahmegesetz sowie das Gerichtsgebührengesetz geändert werden 247/ME 27. GP.

[215] Susanne Kalss, ‘Umgründungen über die Grenze’ (2023) 6 GesRZ 317, p 317.

[216] Bundesgesetz, mit dem das Unternehmensgesetzbuch, das Firmenbuchgesetz, das GmbH-Gesetz, das Aktiengesetz, das Spaltungsgesetz, das Genossenschaftsgesetz und das Gerichtsgebührengesetz geändert warden BGBl I 2022/186.

[217] Chris Thomale, ‘Die EU-Mobilitätsrichtlinie - ein Wachstumsimpuls für das österreichische Umgründungsrecht (Teil II)’ (2020) 5 RdW 424, p 427.

beneficial, as the individual legal frameworks in the directive share several characteristics and are even identical to some extent. The new act could include one general part and three different chapters covering the specialities of each operation type.[218] Thirdly, the Austrian legislator could reconsider its legislation on restructuring operation in general and could create one main legal act on all possible transactions, no matter whether domestic or cross-border. Currently, relevant provisions are scattered over a lot of different laws, as shown in the two previous sections. A codification would lead to a clearer structure and an improved accessibility of the provisions.[219]

In the context of the reform of the legal framework on cross-border merger also other fundamental ideas are considered. An example is the question whether Austria should rethink its inclusion of cooperative in its merger law. Furthermore, it is proposed that shareholders of companies performing a domestic merger may have the same rights of Section 10 et seq EU-VerschG.[220]

The proposal of the Austrian Federal Ministry of Justice correlates to the second option. In case of its approval, it will introduce the *EU-Umgründungsgesetz* which covers all three operation types. The first part will be dedicated to general provisions which is followed by separate chapters for cross-border conversions, mergers, and divisions. Noteworthy is that each chapter is split into provisions for the export and import variant of the individual operation. In addition, several related provisions of the *Firmenbuchgesetz*[221], the *Rechtspflegergesetz*[222], the *Übernahmegesetz*[223] and the *Gerichtsgebührengesetzes*[224] will be amended.

Regarding cross-border mergers the proposal brings only minor changes to the current Austrian legal framework. On the one hand, as noted in section 3.3. of this thesis the Directive 2019/2121/EU does not reform the legal framework on cross-border merger to the extant as the ones of the other two operations. On the other hand, the newly introduced European provisions develop the system further, especially regarding the

[218] Thomale (n 217) pp 427-428.
[219] Thomale (n 217) p 428.
[220] Thomale (n 217) pp 425-426.
[221] Firmenbuchgesetz BGBl 1991/10.
[222] Bundesgesetz vom 12. Dezember 1985 betreffend die Besorgung gerichtlicher Geschäfte durch Rechtspfleger BGBl 1985/560.
[223] Bundesgesetz betreffend Übernahmeangebote BGBl I 1998/127.
[224] Bundesgesetz vom 27. November 1984 über die Gerichts- und Justizverwaltungsgebühren BGBl 1984/501.

protective mechanism for shareholders, but those changes essentially do not go beyond the already existing Austrian legislation. The proposal structure the existing provisions in line with the other operations.[225]

Since the proposal was published shortly before the submission of this thesis and since modifications are still possible during the legislative process, a more detailed analysis of the proposal is not presented here.

[225] Matthias Potyka and Bernhard Rieder, 'Die Umsetzung der EU-Mobilitätsrichtlinie in Österreich' (2022) 11 RdW 742, p 746.

5. Conclusion

In conclusion, the European legal framework on domestic and cross-border mergers governed by Chapter I and II of Title II of Directive 2017/1132/EU provides the European companies with a useful legal system to perform such restructuring operation throughout the internal market. As a result, it can be stated that the aim of the European legislator to facilitate the company mobility is at least partially achieved. This can also be clearly observed in the increasing number of mergers since the creation of these two legal frameworks. However, the European provisions do not constitute a perfect system. For instance, room for improvement exists regarding the different levels of harmonization of the protective provisions.

The legal framework on domestic merger is stipulated in Chapter I of Title II of Directive 2017/1132/EU and is of great importance to the European Company Law in general because it became the model for all extraordinary transactions, like divisions and cross-border mergers. This is especially true for the procedural provisions which require a certain sequence of actions to be followed. Besides that, the legal framework provides shareholders, creditors, and employees with individual mechanisms to protect their interests. Thereby it focuses most of the time on broader principles and provides the member states with general guidelines.

Chapter II of Title II of Directive 2017/1132/EU covers the legal framework on cross-border mergers, which naturally faces many comparable issues and therefore shares many similarities with the Chapter I, especially regarding the procedure. Nevertheless, the international aspect of the operation causes a need for a unique mechanism, like Art 133 Directive 2017/1132/EU on employee participation.

The combination of the two legal systems result in a comprehensive European legislation on mergers, which covers almost every aspect of such operations. However, they faced several critical voices, particularly the framework on cross-border mergers. Most prominently, the limitations of the scope of application of the legal framework has been criticised. For example, it was suggested that the legal systems could be copied to allow other cross-border operations, like divisions or conversions. Furthermore, it was pointed out that partnerships as well could profit their coverage under the existing rules. As last example it must be mentioned that the leeway given by the legal framework causes obstacles in practice. A rise of the level of harmonization was proposed to solve this issue.

As a response to these points of critique, but also as further development of the European Company Law, the European legislator approved the Mobility Package consisting of Directive 2019/2121/EU which brought significant amendments. The most important example is the introduction of legal framework for cross-border divisions and cross-border conversions into Directive 2017/1132/EU. Unfortunately, these operations lay outside the scope of the thesis. Besides that, it changed several provisions ranging from small corrections of the wording to rewriting entire articles. Particularly noteworthy are the new protective mechanisms for shareholders in the new Art 126a Directive 2017/1132/EU.

Although, Directive 2019/2121/EU is seen as correct and needed step in the right direction, it is not free of flaws. On the one hand, it did not follow all points of critique concerning Directive 2017/1132/EU. For instance, the scope is still fixed to limited liability companies. On the other hand, it caused new disputes by introducing some unnecessary differences between the three types of cross-border operation. Nevertheless, the Mobility Package is a big achievement for the European Company Law. But further developments are still necessary to fully reach the goal of creating one unified internal market concerning the mobility of European companies.

Regarding the implementation of the European legal framework on domestic and cross-border mergers, it can be summarized that Austria transposed these two groups of provisions into several different legal acts. National mergers are governed by provisions of the AktG, GmbHG and several other specific laws. On the contrary, cross-border mergers must comply with the EU-VerschG and certain provisions of the ArbVG concerning the employee participation. In the context of the mandatory amendments caused by Directive 2019/2121/EU it is subject of debate whether Austria should use this opportunity to create a more ambitious solution by creating a unify law on all restructuring operations. Recently the Austrian Federal Ministry of Justice published finally a proposal for the implementation. If approved it will create an uniform law for cross-border conversions, mergers, and divisions. This would lead to an effective facilitation of company mobility in the practice.

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Abstract (English)

This master´s thesis examines the current European legislation on mergers and its implementation into the Austrian legal system. At the beginning, it is shown that a merger is an extraordinary transaction whereby at least two corporations with all their rights and obligations are fused to one without any company going into liquidation. The purpose of such operation is to cause an economical benefit for the merging entities resulting from synergies of the combined resources. Several different types of mergers are possible and are used in practice.

The core of the thesis forms the description of the European legal framework consisting of Chapter I and II of Title II of Directive 2017/1132/EU. To fully understand these provisions, it is necessary to be familiar with the historical development of European rules on merger. Chapter I covers the legal framework on domestic mergers and Chapter II the one on cross-border mergers. Both aim to facilitate the mobility of European companies within the internal market and are based essentially on the same principles, like the principle of adequate information. The master´s thesis examines both chapters in detail regarding the scope of application, the operation procedure, the legal consequences and the protection of shareholder, creditors and employees. At the end of the core segment, the new amendments introduced by the Directive 2019/2121/EU to the European legal framework are discussed. The resulting changes are the result of criticism on the previous legal system and are a significant advancement regarding the mobility of European companies.

The last section of the master´s thesis concerns the implementation of the European rules previously described into Austrian law. In the past, Austria decided to transpose those rules into several different legal acts. Consequently, at the moment domestic mergers are governed by provisions of the AktG, GmbHG and several other specific laws. Cross-border mergers must comply with the EU-VerschG and certain provisions of the ArbVG regarding the employee participation. The Directive 2019/2121/EU is seen as opportunity to discuss a general restructuring of Austrian law on merger. However, major material changes concerning cross-border merger are not to be expected, as Austrian law already complies mostly with the rules of the Directive 2019/2121/EU.

Abstract (Deutsch)

Diese Masterarbeit untersucht die aktuelle europäische Gesetzgebung zur Verschmelzung und deren Umsetzung in die österreichische Rechtsordnung. Zu Beginn wird aufgezeigt, dass bei einer Verschmelzung mindestens zwei Gesellschaften mit allen ihren Rechten und Pflichten zu einer einzigen fusioniert werden, ohne dass ein Unternehmen liquidiert wird. Dadurch soll ein wirtschaftlichen Vorteil für die fusionierenden Unternehmen geschaffen werden, der sich aus Synergien der kombinierten Ressourcen ergibt. Verschiedene Arten von Fusionen sind möglich und werden in der Praxis angewendet.

Den Kern der Arbeit bildet die Beschreibung des europäischen Rechtsrahmens, bestehend aus den Kapiteln I und II des Titels I der Richtlinie 2017/1132/EU. Um diese Bestimmungen vollständig zu verstehen, ist es notwendig, die historische Entwicklung der europäischen Fusionsvorschriften zu kennen. Kapitel I behandelt den Rechtsrahmen für inländische Verschmelzungen und Kapitel II den für grenzüberschreitende Verschmelzungen. Beide zielen darauf ab, die Mobilität der europäischen Gesellschaften im Binnenmarkt zu erleichtern und beruhen im Wesentlichen auf denselben Grundsätzen, wie dem Prinzip der angemessenen Information. Die Masterarbeit untersucht beide Kapitel detailliert hinsichtlich des Anwendungsbereichs, des Prozessablaufs, der Rechtsfolgen und des Schutzes von Aktionären, Gläubigern und Arbeitnehmern. Am Ende dieses Kapitels werden die neuen Änderungen des europäischen Rechtsrahmens durch die Richtlinie 2019/2121/EU diskutiert. Die sich daraus ergebenden Änderungen sind das Ergebnis der Kritik am bisherigen Rechtssystem und stellen einen bedeutenden Fortschritt für die Mobilität der europäischen Gesellschaften dar.

Der letzte Abschnitt befasst sich mit der Umsetzung der europäischen Regeln ins österreichische Recht. Österreich hat sich in der Vergangenheit dazu entschlossen, diese Regeln in verschiedenen Gesetzen einzuarbeiten. Infolgedessen unterliegen innerstaatliche Verschmelzungen derzeit hauptsächlich dem AktG und dem GmbHG. Bei grenzüberschreitenden Verschmelzungen sind das EU-VerschG und bestimmte Bestimmungen des ArbVG zu beachten. Die Richtlinie 2019/2121/EU wird als Anlass gesehen, eine generelle Neustrukturierung des österreichischen Verschmelzungsrechts zu diskutieren. Wesentliche Änderungen in Bezug auf die grenzüberschreitende Verschmelzung sind jedoch nicht zu erwarten, da das österreichische Recht bereits größtenteils die Vorschriften der Richtlinie 2019/2121/EU erfüllt.