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Structure

List of abbreviations

AktG	Aktiengesetz (Stock Corporation Act)
AG	Die Aktiengesellschaft (stock corporation)
Art.	Article
BeurkG	Beurkundungsgesetz (Notarisation Act)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBl.	Bundesgesetzblatt (Federal Law Gazette)
BRIS	Business Registers Interconnection System
BT-Drucks.	Bundestagsdrucksachen (documents of the German Bundestag)
BR-Drucks.	Bundesratsdrucksachen (documents of the German Bundesrat)
ed.	editor/edition
eds.	editors
e.g.	exempli gratia (for example)
EEA	Europea Economic Area
EU	European Union
f.	following (page)
ff.	Following (pages)
GbR	Gesellschaft bürgerlichen Rechts (civil law partnership)

GG	Grundgesetz (Basic Law for the Federal Republic of Germany)
eGbR	eingetragene Gesellschaft bürgerlichen Rechts (registered civil law partnership)
GmbH	Gesellschaft mit beschränkter Haftung (limited liability company)
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Act on Limited Liability Companies)
HGB	Handelsgesetzbuch (Commercial Code)
i.e.	id est (that is)
InsO	Insolvenzordnung (Insolvency Code)
KG	Kommanditgesellschaft (limited commercial partnership)
MgVG	Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung (Law on Employee Co-Determination in Cross-border Merger)
MgFSG	Gesetz über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitendem Formwechsel und grenzüberschreitender Spaltung (Act on the Co-Determination of Employees in Cross-Border Change of Legal Form and Cross-border Division)
n.	note
no.	number
OJ	Official Journal
SE	Societas Europaea (European Company)
SpruchG	Gesetz über das gesellschaftsrechtliche Spruchverfahren (Act on Corporate Appraisal Proceedings)
TFEU	Treaty on the Functioning of the European Union

UmRUG	Gesetz zur Umsetzung der Umwandlungsrichtlinie und zur Änderung weiterer Gesetze (Act on the Implementation of the Conversion Directive and on the Amendment of Further Acts)
UmRMitbestG	Gesetzes zur Umsetzung der Bestimmungen der Umwandlungsrichtlinie über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitenden Umwandlungen, Verschmelzungen und Spaltungen (Act on the Implementation of the Provisions of the Conversion Directive on the Co-determination of Employees in Cross-border Conversions, Mergers and Divisions)
UmwG	Umwandlungsgesetz (German Conversion Act)
UmwRL	Umwandlungsrichtlinie (Conversion Directive)

Chapter 1: Introduction

Cross-border mobility is becoming increasingly important for entrepreneurs and companies. Especially against the backdrop of increasingly frequent crises, companies have no choice but to rethink and relocate. For a long time, cross-border conversions were only possible in the form of cross-border mergers. Following the "Polbud-case"[1], on 27 November 2019 the European Union adopted the Directive (EU) 2019/2121 (Conversion Directive) amending the Directive (EU) 2017/1132 with regard to cross-border conversions, mergers and divisons.[2] It amended the regulations on cross-border mergers and, for the first time, introduced a standardised Europe-wide regulatory regime for cross-border divisions and cross-border changes of legal form.[3] The newly created legal framework servers to protect minority shareholders, creditors and employees.[4]

According to Art. 288 (3) TFEU, the Directive requires the implementation into national law. The National implementation by the "UmRUG" had to take place by 31 January 2023, but the law did not come into force until 1 March 2023. On 1 March 2023, the German legislator implemented the Directive (EU) 2019/2121 with the "Gesetz zur Umsetzung der Umwandlungsrichtlinie und zur Änderung weitere Gesetze (UmRUG)".[5] The "UmRUG" removes the provisions for cross-border mergers from the previous regulatory framework of sections 122a ff. of the "UmwG" (old version) and now governs all cross-border conversions (mergers, divisons and changes of legal form) in a new sixth book of the "UmwG" (Sections 305-345).

Cross-border divisons by acquisition and cross-border conversions of partnerships are not harmonised.[6] Nevertheless, when implementing the Conversion Directive (EU) 2019/2121, the German

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[1] Case 106/16 *Polbud v. Wykonawstwo* (2017) ECLI:EU:C:2017:804.

[2] 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 L321/1ff.

[3] Oliver Tim Brandi/Mike Karl Schmidt, 'die grenzüberschreitende Spaltung nach dem UmRUG' (2023), Volume 68, Issue 9, Die Aktiengesellschaft: Zeitschrift für das gesamte Aktienwesen 297, 297 <https://doi-org.uaccess.univie.ac.at/10.9785/ag-2023-680906> accessed 8 February 2024.

[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 L321/2, 6th recital.

[5] BGBl. 2023 I, No. 51 <https://www.recht.bund.de/eli/bund/bgbl_1/2023/51> accessed 8 February 2024.

[6] Susanne, Zwirlein-Forschner, 'Grenzüberschreitende Umwandlungen außerhalb der Mobilitätsrichtlinie' in Alfred Bergmann, Ingo Drescher, Holger Fleischer, Stephan Harbarth, Jens Koch, Gerd Krieger, Hanno Merkt, Christoph Teichmann, Jochen Vetter (eds), *Unternehmensmobilität im EU-Binnenmarkt* (De Gruyter 2023), 195ff. <https://doi.org/10.1515/9783110780895-012> accessed 4 March 2024.

legislator has made the division by acquisition into Germany possible, at least for those companies that do not require co-determination protection.[7]

With the “Gesetz zur Umsetzung der Bestimmungen der Umwandlungsrichtlinie über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitenden Umwandlungen, Verschmelzungen und Spaltung (‘UmRMitbestG’)”, the legislator implemented the provisions of the “UmwRL” on employee co-determination in cross-border mergers, divisions and conversions on 31 January 2023.[8] It introduced a new law (“MgFSG”) to implement the provisions on co-determination for cross-border divisions and cross-border changes of legal form and adapted the existing provisions of the “MgVG” on co-determination in cross-border mergers to the requirements of the “UmwRL”.

Chapter 2: Cross-border Mergers, Divisions and Changes of Legal Form

A. Freedom of Establishment, Art. 49, 54 TFEU

The Freedom of Establishment is one of the fundamental principles of the Union Law. According to Art. 49 (2) TFEU, read in conjunction with Art. 54 TFEU, Freedom of Establishment for companies or firms includes, inter alia, the right to form and manage such companies or firms in accordance with the rules of the Member State of establishment. The Court of Justice of the European Union has interpreted this as meaning that the Freedom of Establishment includes the right of a company formed under the law of a Member State to be converted into a company governed by the law of another Member State, as long as the requirements of the law of that other Member State are met and, in particular, that the criterion required in that other Member State for a company to be subject to its national legal system is satisfied.[9] It allows EU companies to freely choose their form of organisation and guarantees full cross-border market access, allowing companies to choose their location without disproportionate obstacles and freely according to economic motives.[10]

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[7] Sections 320 (1), 332 UmwG.

[8] BGBl. 2023 I, No. 10 <https://www.recht.bund.de/eli/bund/bgbl_1/2023/10> accessed 8 February 2024.

[9] 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 L321/1, 2nd recital.

[10] Brandi/Schmidt (n 3) 297, 298.

According to Art. 54 TFEU, the registered office, the head office and the principal place of business of a company are considered as connection factors. It does not preclude the applicability of the Freedom of Establishment if only the registered office and not the head office or principal place of business has been transferred.[11] In this development, it is important that the rights of companies to cross-border conversion, merger or division should go along with the protection of employees, creditors and shareholders and be balanced.[12]

However, the lack of a legal framework for cross-border divisons and cross-border change of legal form leads to legal uncertainty and obstacles to exercise the Freedom of Establishment.[13]

B. Directive (EU) 2019/2121

In addition to the new rules on conversions, the Directive (EU) 2019/2121 regulates cross-border divisions, both partial and full divisions, but these provisions only apply to cross-border divisions involving the formation of new companies.[14] Yet, this Directive does not cover cross-border divisions where a company transfers its assets and liabilities to one or more existing companies, as such complex proceedings require an involvement of the competent authorities of several Member States and entail additional risks of circumvention of Union and national rules.[15]

The competent authorities of the Member States involved should guarantee that the decision on whether to authorise a cross-border transformation is taken in a fair, objective and non-discriminatory manner and on the basis of all relevant elements required by Union law and national law.[16]

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[11] 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 L321/1, 3rd recital.

[12] 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 L321/2, 4th recital.

[13] 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 L321/2, 5th recital.

[14] 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 L321/2, 8th recital.

[15] ibid.

[16] 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 L321/2, 10th recital.

In order to take into account all the legitimate interest, the company should prepare and disclose the plan for the cross-border conversion with the relevant information about it.[17] In this regard, representatives of employees should be involved in the decision of making a plan, if provided by national law or practice, or both.[18] This information should include, at least, the proposed legal form of the company or companies, the act of constitution, the indicative timetable for the conversion and details of any protection.[19] A statement should be published in the register informing the shareholder, creditors and employees' representatives or the employees themselves that they may comment on the proposed project.[20] A report should explain and justify the legal and economic aspects of the proposed cross-border conversion.[21] The shareholders are often confronted with a situation where the law applicable to their rights changes, because they become shareholders in a company governed by the law of a Member State other than the one whose law was applicable before the conversion. The report should therefore address safeguards, in particular, provide information on their right to withdraw from the company.[22] Furthermore, it should explain whether there will be any significant changes in the terms and conditions of employment laid down in law, collective agreements or transnational company agreements and the location of the companies' establishments, such as the location of the head office.[23]

The information disclosed should be comprehensive and enable to assess the impact of the propose cross-border conversion.[24] However, companies should not be required to disclose confidential information, which would harm their business position.[25]

The general meeting of the company or companies must decide whether or not to approve this plan and what changes are necessary to the acts of constitution, including the articles of association.[26]

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[17] 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 L321/3, 12th recital.

[18] ibid.

[19] ibid.

[20] ibid.

[21] 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 L321/3, 13th recital.

[22] ibid.

[23] ibid.

[24] 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 L321/4, 15th recital.

[25] ibid.

[26] 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 L321/4, 16th recital.

For this purpose it is essential that the required majority for the vote is sufficiently large to ensure that the decision is taken by a solid majority.[27]

In order to protect the creditors from the risk of insolvency of the company following a cross-border conversion, Member States should be allowed to require the company or companies to make a solvency declaration that they are not aware of any grounds why the company or companies resulting from the cross-border conversion should not be able to meet the liabilities.[28] To ensure that employee co-determination is not affected by the cross-border conversion in case where the company undertaking has established a system of employee co-determination, the company or companies resulting from the cross-border conversion should be required to adopt a legal form allowing the exercise of such co-determination rights.[29]

To ensure an appropriate division of task between Member States and efficient control for cross-border conversions, it should not be possible for the competent authorities of the Member State of the company or companies resulting to complete the procedure without a prior certificate.[30] The responsible authority should verify whether all relevant conditions are fulfilled and that all procedures and formalities have been completed correctly in the Member State.[31] Within three months after the company's application, it should be decided whether to grant a prior certificate. If, in the process of reviewing the legality of a cross-border conversion, the responsible authority becomes aware that it is to be undertaken for abusive, fraudulent or criminal purposes, it should not grant the prior certificate.[32]

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[27] 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 L321/4, 16th recital.

[28] 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 L321/5, 25th recital.

[29] 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 L321/6, 30th recital.

[30] 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 L321/6, 33rd recital.

[31] 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 L321/6, 34th recital.

[32] 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 L321/6, 35th recital.

After the examination, the company should be registered in the Member State where the company is to be entered after the cross-border conversion.[33] Only after this registration the responsible authority of the former Member State should delete the company from its own register.[34]

As a result of the cross-border merger, the assets and liabilities and all rights and obligations arising from contracts, acts or omissions should be transferred to the acquiring company or new company, and the members of the the merging companies who do not exercise their rights of withdrawal should become members of the acquiring or new company.[35] Following the cross-border division, the assets and liabilities and all rights and obligations arising from contracts, acts or omissions should be transferred to the beneficiary in accordance with the allocation set out in the draft terms of division.[36] The members of the company proceeding with the division who do not exercise their rights of withdrawal should either remain members in that company or become members in the benefiting companies or members in both companies.[37] The consequence of the cross-border change of legal form is that the company resulting from this should retain its legal personality, assets, liabilities and all its rights and obligations, including any rights and obligations arising from contracts, acts or omissions. [38]

Overall, while the provisions of the Directive 2017/1132/EU for the protection of the shareholders in cross-border merges were limited to a formal right of co-decision and a right to information, the Directive 2019/2121/EU now provides a uniform protection concept for all three cross-border conversion types. This consists of a right to withdrawal in return of cash compensation, a right to improve the exchange ratio in return for an additional cash payment or in return for additional shares in the case of cross-border merger and division, as well as an exclusion of avoidance in the case of valuation objections.[39]

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[33] 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 L321/8, 45th recital.

[34] ibid.

[35] 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 L321/8, 48th recital.

[36] 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 L321/9, 49th recital.

[37] ibid.

[38] 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 L321/8, 47th recital.

[39] Max Noack, 'Nationaler Rechtsrahmen für grenzüberschreitende Umwandlungen - Eine tour d'horizon durch das Gesetz zur Umsetzung der Umwandlungsrichtlinie (UmRUG)' (2003), Volume 77, Issue 8, Monatsschrift für Deutsches Recht 465, 466 <https://doi.org/10.9785/mdtr-2023-770803> accessed 11 March 2024.

C. Mergers

I. Problems with the old provisions

With regard to the merger, it was criticised that although the determination of exchange ratio between the legal entities involved is of decisive importance, the shareholders of the transferring legal entity were prevented from challenging the merger resolution on the basis of a valuation objection.[40] They were referee to the appraisal proceedings. In contrast, the shareholders of the acquiring legal entity could only file an action for recession based on an incorrect determination of the exchange ratio.[41] This provided these shareholders with an opportunity to block the merger, as a challenge to the approval resolution generally prevents the merger from being entered in the commercial register.[42] If the shareholders of the merging legal entity were successful with their valuation objection in the appraisal proceedings, they did not receive any additional shares to rectify the situation, but rather mandatory compensation in cash in accordance with Section 15 UmwG. There were demands for a possibility to improve the exchange ratio by adding shares.[43] In view of the length of appraisal proceedings, it appears to be a not insignificant burden on the shareholder if the general price risk of the subsequently granted shares is imposed on him until the time of his compensation adjustment.[44] However, the permanent withdrawal of voting rights remains uncompensated in the case of a subsequent improvement in cash.[45] Furthermore, an additional cash payment has a direct effect on the company's assets due to the outflow of capital.[46] The obligation to pay compensation in cash can therefore result in a considerable financial burden as well as problems for liquidity and investment planning.[47]

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[40] Alexander Herzog/Bero Gebhard, 'Grenzüberschreitende Verschmelzungen von Aktiengesellschaften nach dem UmRUG' (2023), Volume 68, Issue 9, Die Aktiengesellschaft: Zeitschrift für das gesamte Aktienwesen 310, 310 <https://doi-org.uaccess.univie.ac.at/10.9785/ag-2023-680907> accessed 8 February 2024.

[41] ibid.

[42] Section 16 (2) sentence 2 UmwG.

[43] Victor Habrich, 'Die Verbesserung des Umtauschverhältnisses mit Zusatzaktien: Eine kritische Würdigung des Regierungsentwurfs zur (überschießenden) Umsetzung der Umwandlungsrichtlinie' (2022), Volume 67, Issue 16, Die Aktiengesellschaft: Zeitschrift für das gesamte Aktienwesen 567, 570 <https://doi-org.uaccess.univie.ac.at/10.9785/ag-2022-671613> accessed 8 February 2024

[44] Herzog/Gebhard (n 40) 310, 311.

[45] Habrich (n 43) 567, 570.

[46] ibid.

[47] Herzog/Gebhard (n 40) 310, 311.

II. Cross-border mergers under the UmRUG

1. Claims for subsequent improvement

The German legislator has reacted to these problems and implemented a new regulation in the "UmRUG" with a reorganisation of the improvement mechanism for domestic and cross-border mergers. According to Section 14 (2) UmwG, the exclusion of avoidance also applies to the shareholders of the acquiring legal entity, who are now also referred to the appraisal proceedings under Section 15 (1) sentence 1 UmwG. In addition, the merging parties now have the right to choose whether to grant additional shares instead of an additional cash payment.[48] In this case, only partial compensation is not possible and the form of the subsequent improvement must already be bindingly stipulated in the merger agreement.[49]

2. Procedure for cross-border mergers under the UmRUG

According to Section 307 UmwG, a joint merger plan must first be drawn up by the legal entities involved. It is thereby decisive that the information required by Section 307 (2) UmwG are included, although in certain constellations the amount may be shorter.[50]

In order to protect the shareholders and employees of the company, a merger report must be prepared in accordance with section 309 (1) sentence 1 UmwG, which is divided into a general paragraph (2), a paragraph for the shareholders (4) and a paragraph for the employees (5). The respective paragraphs may be dispensable under the conditions of section 309 (6) UmwG.

Furthermore, Section 311 (1) sentence 1 UmwG requires a merger audit in accordance with Sections 9-12 UmwG. This may also be dispensable under certain circumstances.[51] The audit report must be made available to the shareholders at least one month before the general meeting relevant for the merger resolution.[52]

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[48] Section 72a (1) sentence 1 UmwG.

[49] Section 72a (1) sentence 1, (3) UmwG.

[50] Section 307 (3) UmwG.

[51] Section 311 (2) UmwG.

[52] Section 311 (1) sentence 2 UmwG.

The review of the merger by the registry courts takes place in a two-stage control procedure. Firstly, the legality in the Member State of the transferring legal entity is checked. In accordance with Section 316 (3) UmwG, the registry court will carry out an abuse check to determine whether the merger is intended to serve "abusive or fraudulent purposes". If no "abusive or fraudulent purpose" is identified during this review, a merger certificate is issued pursuant to Section 316 (1) UmwG. Then, in a second stage, a final review of the legality of the merger is carried out at the register court of the acquiring legal entity.[53] It will then officially inform the register court of the transferring legal entity when the merger becomes effective. Thereafter, this will be entered in the commercial register of the transferring legal entity.[54]

3. Protection of the shareholders, employees and creditors

a) Shareholders

The new legal framework grants the shareholders of the transferring legal entity a right of withdrawal in return for cash compensation in order to prevent the unwanted shareholders position in a company with a foreign legal form.[55] As a result, in the case of a cross-border merger, the shareholders who exercise the right of withdrawal do not become shareholders of the acquiring legal entity.[56] This differs from the regulation for domestic mergers, according to which all shareholders automatically become shareholders of the acquiring legal entity, but then have a right of withdrawal in accordance with Section 20 (1) no. 3 sentence 1 UmwG.[57]

b) Employees

The employee rights are strengthened in particular through procedural changes. The deadline for making the merger report available increased to six week under Section 310 (1) sentence 1 UmwG. Furthermore, the employee participation procedure will be brought forward in accordance with Section 315 (3) sentence 1 no. 3 UmwG.

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[53] Section 318 UmwG.

[54] Section 316 (5) UmwG.

[55] Section 313 UmwG.

[56] Section 313 (4) UmwG; Government draft of the UmRUG, BT-Drucks. 20/3822, 96 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 14 February 2024.

[57] Herzog/Gebhard (n 40) 310, 312.

c) Creditors

In terms of creditor protection, Section 314 (1) UmwG provides that creditors of the transferring legal entity are entitled to security claims that are jeopardised by the merger. For this purpose, ins-tead of the previous two-month period, a three-months period from the announcement of the merger plan is envisaged as a substantive preclusion period for assessing the claim.[58] According to Section 307 (2) no. 14 UmwG, the merger plan must already contain information on the securities offered to creditors.

d) Interim conclusion

Some of the literature calls for compensation not to be organised according to the "all-or-nothing principle", but to allow partial cash and share compensation (mixed compensation).[59] This would increase flexibility, in particular with regard to liquidity planning for the acquiring legal entity. The shareholders involved would not be disadvantaged either, provided that the form of compensation is determined in advance and the have sufficient planning certainty. However, the gains in flexibility for the legal entities corresponded to a considerable effort in determining and subsequently granting compensation.[60]

The creditor procedure for cross-border mergers holds a further risk. According to Section 315 (3) no. 1, 2 UmwG, the management board of the transferring legal entity must, when registering the cross-border merger, give an assurance under penalty of perjury that security have been provided to all creditors requesting it and that no claims for security have been made in court. The registration of the merger pursuant to Section 316 (2) sentence 3 UmwG is excluded as long as court procee-dings on the claim for the provision of security are pending. The creditors could take advantage of such block on the register in order to block the merger.[61] This could lead to companies being forced to grant securities even in the case of groundless requests in order to prevent a delay in proceedings.[62]

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[58] Section 314 (3) UmwG.

[59] Herzog/Gebhard (n 40) 310, 315.

[60] ibid.

[61] Herzog/Gebhard (n 40) 310, 316.

[62] ibid.

D. Divisions

I. Problems with the old provisions

Before the new provisions existed, companies in practice had to choose the less legally secure way across the border by invoking the Freedom of Establishment (Art. 49, 54 TFEU). This approach only worked without individual regulations, merely by applying comparable standards accordingly. Although the previous judgements of the ECJ only concerned cases of cross-border mergers and changes of legal form, it was possible to draw the conclusion that cross-border divisions as “actus contrarius” of a cross-border merger are also covered by the scope of protection of the Freedom of Establishment under Art. 49, 54 TFEU.[63]

Within the EU, some Member States had already implemented the legal institution of cross-border divisions in national legislation prior to the adoption of the “UmwRL” or had authorised cross-border divisions for other reasons.[64] Before the “UmRUG” came into force, the prevailing opinion in Germany was that cross-border divisions were permissible, at least in relation to other EU or EEA states, due to EU case law on Freedom of Establishment.[65] Compared to cross-border mergers, changes of legal form and relocations of registered offices, which were able to rely on harmonised regulations as a result of the Company Law Directive 2017/1132/EU[66] or on the decision-making practice of the ECJ, the practical relevance of cross-border divisions was still very low due to the uncertain legal situation.[67] At that time, the total proportion of cross-border divisions was only 0.3-percent of all cross-border conversions carried out during this period.[68]

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[63] Brandi/Schmidt (n 3) 297, 298.

[64] ibid.

[65] ibid.

[66] Directive (EU) 2017/1132 of the Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L169/46ff.

[67] Brandi/Schmidt (n 3) 297, 299.

[68] ibid.

II. Cross-border divisions under the UmRUG

1. Cross-border divisions

All cross-border conversions are regulated in a new sixth book of the UmwG. The second part of the book regulates cross-border divisions (Sections 320-332). The provisions on cross-border mergers served as the basis for this.[69]

According to Section 321 UmwG, companies capable of being divided for the purposes of cross-border divisions are corporations within the meaning of Annex II of the Company Law Directive 2017/1132/EU. In Germany this means the "AG", the "KGaA" and the "GmbH", which have their registered office, head office or principal place of business in an EU or EEA Member State.[70] Furthermore, the "SE" also falls within the scope of application.[71] For cross-border divisions of partnerships, the only remaining option is to derive the applicable substantive rules solely on the basis of the Freedom of Establishment, Art. 49, 54 TFEU.

The "UmRUG" recognises the forms of division already known in Germany as forms of cross-border division.[72] These include the full division[73], the partial division[74] and the division by separation[75].

2. Cross-border divisions for acquisition

The Directive 2019/2121/EU only regulates the variant of the cross-border division for new formation, but not the division in which a company transfers assets and liabilities to one or more existing companies, as such cases have been viewed as being very complex, requiring the involvement of competent authorities from several Member States and entailing additional risks in terms of the cir-

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[69] Brandi/Schmidt (n 3) 297, 298.

[70] Government draft of the UmRUG, BT-Drucks. 20/3822, 108 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 14 February 2024.

[71] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294/6, art. 9 (1) (c) (ii).

[72] Section 320 (1) UmwG.

[73] Section 123 (1) UmwG.

[74] Section 123 (2) UmwG.

[75] Section 123 (3) UmwG.

cumvention of Union and national rules.[76] However, the division by acquisition is of considerable importance for corporate practice. Like the division for new formation, the division for acquisition is a suitable method of adapting the corporate structure to changing economic requirements.[77] In particular, it avoids the intermediate step of separating to form a new company and then merge the new company with the actual taget legal entity.[78] This cross-border division is only feasible if the legal provision of the other company involved also permit this.[79]

Consequently, the German legislator has decided to deviate from the Directive 2019/2121/EU and authorise cross-border divisions by acquisition.[80] For reasons of co-determination law, this only applies if the transferring company and the acquiring company (a) in the case of the division out of Germany, each employed an average of less than 400 employees in the last six months prior to the announcement of the division plan or (b) in the case of the division into Germany, each employed an average of less than four fifths of the number of employees relevant for co-determination under the law of the State to which the transferring company is subject.[81]

3. Procedure for cross-border divisions under the UmRUG

The procedure for cross-border divisions to form a new company is regulated in Sections 320-331 UmwG. The procedure largely follow the already familiar procedure for cross-border merger.

a) Division plan

According to Section 322 (1) and (4) UmwG, the basis for the cross-border division is the division plan to be drawn up and notarised by the representative body of the transferring company. The division plan must contain at least the information listed in Section 322 (2), Section 307 (2) no. 1-14 and no. 16 UmwG.

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[76] 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 L321/2, 8th recital.

[77] Government draft of the UmRUG, BT-Drucks. 20/3822, 113 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 14 February 2024.

[78] ibid.

[79] ibid.

[80] Section 320 (1) no. 2 UmwG in conjunction with Section 332 UmwG.

[81] Section 332 UmwG; Christian Speckert, Amélie Ungerer, ‘Erweiterung grenzüberschreitender Reorganisationsmaßnahmen durch den Gesetzgeber’ (2023) Rödl & Partner <https://www.roedl.de/themen/grenzueberschreitende-umwandlungen/erweiterung-grenzueberschreitender-reorganisationsmassnahmen> accessed 5 March 2024.

Parallel to the new regulations on claims for subsequent improvement in Sections 72a and 72b UmwG for national mergers of public limited companies, there is also an option for cross-border divisions to provide for the granting of additional shares by the “AG”, “KGaA” or “SE” in the division plan instead of an additional cash payment to fulfil the claim for compensation according to Section 15 (1) UmwG.[82]

In contrast to the cross-border merger, an indicative timetable must be specified in the draft terms of division.[83] However, this is a non-binding timetable.[84]

According to Section 322 (2) no. 3 UmwG, the division plan must contain a precise description of the assets of the transferring company and their allocation between the companies involved. In addition, information must be provided on the valuation of the assets and the liabilities to be transferred to the new company.[85] The information on the valuation of the assets and liabilities remaining with the transferring company is also required.[86]

In the event of a partial or full division pursuant to Section 322 (2) no. 5 UmwG, the allocation of the shares of the transferring company and the new companies to the shareholders of the transferring company and the scale for the allocation must be stated.

The division plan must be submitted in accordance with Section 323 UmwG in conjunction with Section 308 (1) UmwG at least one month before the meeting of shareholders that is to decide on the approval pursuant to Section 13 UmwG. The court must then immediately publish a notice of registration under Section 10 (3) HGB. The notice regarding the submission of the division plan or its draft must also be published.[87] The court is now required to notify the shareholders, creditors and the relevant works council or employees that they may submit comments on the division plan to the company no later than five working days before the date of the meeting of shareholders.[88]

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[82] Section 320 (2) UmwG in conjunction with Section 125 (1) sentence 1 UmwG in conjunction with Sections 72a, 72b UmwG.

[83] Section 322 (2) no. 1 UmwG.

[84] Government draft of the UmRUG, BT-Drucks. 20/3822, 108 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 15 February 2024.

[85] Section 322 (2) UmwG in conjunction with Section 307 (2) no. 11 UmwG.

[86] Section 322 (2) no. 4 UmwG.

[87] Section 323 UmwG in conjunction with Section 308 (1) sentence 2 UmwG.

[88] Section 323 UmwG in conjunction with Section 308 (1) sentence 2 no. 4 UmwG.

For listed companies, the division plan must also be made available on the company's website.[89]

b) Division report

According to Section 324 (1) UmwG, the representative body of the transferring company must prepare a division report in which the legal and economic aspect of the cross-border division are to be explained and justified. The content of this report is based on the provisions of the cross-border merger.[90] Pursuant to Section 324 (1) and Section 309 (2), (4) and (5) UmwG, the division report consists of three parts: In a general chapter, the effects of the cross-border division on the future business activities of the company are explained. This is followed by a shareholder-specific and an employee-specific chapter. The company can decide whether to prepare a uniform division report or separate reports for the shareholders and employees.[91]

In addition to the contents of the report specified in Section 8 (1) UmwG, the chapter specific to the shareholders also contains explanations and justifications of the effects of the cross-border division on the shareholders as well as the cash compensation, the exchange ratio, the right to a judicial review of the compensation and the right to an improvement of the exchange ratio.[92] In cases where there is a notarised waiver or the transferring company has only one shareholder, this reporting section is not required.[93] The same applies to cases of cross-border carve-outs for new formation.[94]

In the employee-specific section, the effects of the cross-border division on the employment relationships and, if applicable, the measures to secure these employment relationships, the material changes to the applicable employment conditions or the locations of the company's branches and the respective effects of the above-mentioned aspects on any subsidiaries of the company must be explained and justified.[95] According to Section 324 (2) sentence 2 UmwG, the report for the employees is not required if the transferring company and any of its subsidiaries have no employees other than those who belong to the respective representative body. The division report as a whole is

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[89] Section 124a sentence 1 no. 3 AktG in conjunction with Sections 320 (2), 125 (1) sentence 1, 63 (1) and (4) UmwG.

[90] Section 324 (1) sentence 2, Section 309 (1)-(5) UmwG.

[91] Section 324 (1), Section 309 (3) UmwG.

[92] Sections 324 (1), 309 (4), 305 (2), 15, 72a, 327, 313 UmwG, Section 1 no. 4 SpruchG.

[93] Section 324 (2) sentence 1 UmwG in conjunction with Section 8 (3) sentence 1, 2 and 3 no. 2 UmwG.

[94] Section 324 (2) sentence 1 UmwG in conjunction with Section 135 (3) UmwG.

[95] Section 324 (1), Section 309 (5) UmwG.

dispensable if the requirements for dispensability are met cumulatively for the shareholder-specific and employee-specific chapters of the report.[96]

The division report must be made available electronically to the shareholders and the responsible works council or, if there is no works council, to the employees at least six weeks before the resolution of the shareholders on the division plan.[97] However, making the division report available on the company's website is only sufficient if the addresses have been informed separately in advance of the opportunity to take note of it.[98]

4. Protection of the shareholders, employees and creditors

a) Shareholders

The shareholders must pass a resolution on the division plan with a qualified majority. The resolution requires a three-quarters majority of the votes cast in the case of a GmbH and a three-quarters majority of the share capital represented in the case of an "AG", "KGaA" or "SE".[99] The division report, the audit report and any opinions pursuant to Sections 323, 308 (1) sentence 2 no. 4 UmwG must be acknowledge before the division plan is approved. In the case of a partial or full division, where the shares in the new company are not allocated to the shareholders of the transferring company in the same proportion as their shareholding in the transferring company, the division plan only becomes effective if those shareholders for whom the allocation is disadvantageous agree to it.[100] This declaration of consent to the non-proportional division requires the notarised form.[101] For the shareholders' entitlement to cash compensation in the event of a cross-border partial or full division, Section 327 sentence 1 UmwG refers to the provision for cross-border merger pursuant to Section 313 UmwG. According to Section 327 sentence 2 UmwG, however, a compensation offer is not required in the case of a cross-border carve-out. In the division plan or its draft, the transferring company must offer each shareholder who objects to the company's division resolution for the re-

[96] Section 324 (2) sentence 3 UmwG.

[97] Section 324 (1) sentence 2, Section 310 (1) sentence 1 UmwG.

[98] Government draft of the UmRUG, BT-Drucks. 20/3822, 92 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 16 February 2024.

[99] Section 320 (2) UmwG in conjunction with Section 125 (1) sentence 1, Section 50 (1) sentence 2 UmwG; Section 320 (2) UmwG in conjunction with Section 125 (1) sentence 1, Section 65 (1) sentence 1 UmwG.

[100] Section 326 (3) UmwG.

[101] Section 320 (2), Section 125 (1) sentence 1, Section 13 (3) UmwG.

cord the acquisition of their shares in return for appropriate cash compensation.[102] In contrast to a national division, however, the dissenting shareholders who accept the cash offer do not become shareholders of the new company, but instead leave the transferring company by operation of law when the division takes effect.[103] The shareholders will already leave the company when the division takes effect, but their compensation claim will only become due two weeks later.[104] They are consequently burdened with an advance performance risk, meaning that the creditor protection provision of Section 314 UmwG applies accordingly to the shareholder's compensation claim.[105] Furthermore, the right to an improvement in the exchange ratio is not only available to the shareholders of the transferring company, but now also to the shareholders of the acquiring company.[106] In addition, the "UmRUG" has now created the possibility for national and cross-border conversion measures in which the acquiring or new company is an "AG", "KGaA" or "SE" to grant the dissenting shareholders additional shares to improve the exchange ratio.[107] The granting of such additional shares must already be announced in the division plan.[108] The shareholders of both the transferring company and the acquiring company have sole access to appraisal proceedings, while actions for avoidance based on valuation objections are excluded.[109] Only in the case of carve-out are the shareholders of the transferring company still entitled to file an action for avoidance regrading the assertion of an incorrect exchange ratio.[110]

b) Creditors

The creditors of the transferring company may demand that they be granted security for their claims jeopardised by the division that arose prior to the announcement of the division plan or its draft but

[102] Section 327 sentence 1, Section 313 (1) UmwG.

[103] Section 327 sentence 1, Section 313 (4) UmwG.

[104] Section 327 sentence 1, Section 313 (5) sentence 1 UmwG.

[105] Government draft of the UmRUG, BT-Drucks. 20/3822, 96 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 16 February 2024.

[106] Section 320 (2), Section 125 (1) sentence 1, Section 15 UmwG.

[107] Section 320 (2), Section 125 (1) sentence 1, Section 72a UmwG; Jessica Schmidt, 'Schutz der Minderheitsgesellschafter bei grenzüberschreitenden Umwandlungen: Vorgaben der GesRRL und Umsetzung durch den UmRUG-RegE' in: Alfred Bergmann, Ingo Drescher, Holger Fleischer, Stephan Harbarth, Jens Koch, Gerd Krieger, Hanno Merkt, Christoph Teichmann, Jochen Vetter (eds) *Unternehmensmobilität im EU-Binnenmarkt*, (De Gruyter 2023) 229, 257 ff. <https://doi-org.uaccess.univie.ac.at/10.1515/9783110780895-014> accessed 6 March 2024.

[108] Section 320 (2), Section 125 (1) sentence 1, Section 72a (1) sentence 1 UmwG.

[109] Section 320 (2), Section 125 (1) sentence 1, Section 14 (2), Section 15 (1) UmwG or Sections 32, 34 UmwG.

[110] Section 125 (1) no. 4 UmwG; Government draft of the UmRUG, BT-Drucks. 20/3822, 82 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 16 February 2024.

were not yet due at the time of the announcement.[111] The endangerment can only be assumed if a concrete endangerment of claims exists or can be made credible.[112] According to Section 329 sentence 1 UmwG in conjunction with Section 316 (2) sentence 3 UmwG, the registration of the division is blocked as soon as a claim for security pursuant to Section 314 (1) UmwG has been asserted in court. In this case, the division may not be registered until the application for security has been finally rejected or the requested application for security has been provided. This blocking of the register is to be criticised due to the potential for abuse.[113] The creditors of the German acquiring company will continue to be protected in accordance with the creditor protection concept pursuant to Section 305 (2) sentence 1 UmwG in conjunction with Section 22 (1) UmwG in the event of a division by acquisition.[114]

c) Employees

The "Gesetz über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitendem Formwechsel und grenzüberschreitender Spaltung (MgFSG)"[115], which came into force on 31 January 2023, aims to secure the co-determination rights acquired by employees in the company undergoing the change of legal form or division.[116] The co-determination in the company resulting from the cross-border conversion is to be regulated primarily by an agreement to be negotiated between a special negotiating body of the Employees ("SNB") an the company management.[117] If no such agreement is reached, co-determination is determined by the statutory fall-back solution according to Section 1 (1) sentence 4 MgFSG. The provisions of the "MgFSG" apply primarily to the case of an inward conversion, meaning the company resulting from a cross-border division or such change of legal form in Germany.[118] In addition, the "MgFSG" regulates, among other things, the steps of the employee participation procedure to be carried out in Germany in the event of an outward conversion.[119] As a general rule, the co-determination regime of the state in which the company is domiciled applies to

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[111] Sections 328, 314 UmwG.

[112] Brandi/Schmidt (n 3) 297, 305.

[113] ibid 297, 306.

[114] Government draft of the UmRUG, BT-Drucks. 20/3822, 97 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 19 February 2024.

[115] BGBl. 2023 I no. 10 <https://www.recht.bund.de/bgbl/1/2023/10/VO> accessed 19 February 2024.

[116] Section 1 (1) sentence 2 MgFSG.

[117] Section 1 (1) sentence 3 MgFSG.

[118] Section 3 (1) sentence 1 MgFSG.

[119] Section 3 (1) sentence 2 no. 2, Sections 6ff. MgFSG.

the company resulting from the cross-border conversion.[120] A different rule applies if Section 5 MgFSG is applicable. This is the case if the converting company employs an average number of employees in the last six months prior to disclosure of the draft terms of conversion that corresponds to four fifths of the threshold that would trigger national co-determination under the law of the converting company[121] or the application of the state of domicile principle leads to a reduction in the level of co-determination at the company resulting from the conversion compared to the level at the converting company[122] or the national law of the company resulting from the conversion puts employees of foreign companies at a disadvantage in terms of co-determination[123].

5. Register audit

a) Divisions out of Germany

According to Sections 329, 316 (1) sentence 1 UmwG, the registry court must examine within three months of the registration of the division out of Germany whether the legal requirements for registration have been met. In particular, it must examine whether all procedural requirements and formalities under the German Law for the division have been complied with. In addition to the division plan, the transferring company must submit any comments from shareholders, creditors, the works council or employees as well as the division report, including any comments from the works council or employees, to the registry court.[124] Furthermore, the declarations and documents pursuant to Section 125 UmwG in conjunction with Section 16 (2), (3) and Section 17 UmwG must be submitted with the registration.

Furthermore, the members of the representative body must assure that all creditors have been provided with the security offered[125], that the employees' rights to information have been complied with[126], that a procedure to be conducted to negotiate future co-determination has already begun[127]

[120] Section 4 MgFSG.

[121] Section 5 no. 1 MgFSG.

[122] Section 5 no. 2 MgFSG.

[123] Section 5 no. 3 MgFSG.

[124] Section 315 (2) No. 1 UmwG in conjunction with Section 308 (1) sentence 2 no. 4 UmwG; Section 315 (2) no. 2 UmwG in conjunction with Section 310 (3) UmwG.

[125] Section 322 (2), Section 307 (2) no. 14 UmwG.

[126] Section 308 (1) sentence 2 no. 4 (b) UmwG; Section 310 (1), (3) UmwG

[127] In accordance with the provisions transposing Art. 133 (3), 4 of the Directive (EU) 2017/1132.

and that the transferring company is not in a state of insolvency, imminent insolvency or over indebtedness[128].[129] According to Sections 329 sentence 1, 315 (4) UmwG, the representative body must also inform the registration court about the number of employees, the number of subsidiaries and their respective geographical locations as well as the existence of liabilities to the public sector.

The other important innovation introduced by the "UmRUG" is the mandatory abuse review provided for cross-border divisions in accordance with Sections 329 sentence 1 and 316 (3) sentence 1 UmwG, if there are indications of abusive, fraudulent or criminal purposes of the cross-border conversion. Prior to the implementation of the Conversion Directive, the ECJ had already ruled that certain measures could be taken to prevent the circumvention of national legislation.[130] The register court can extend the standard period of the register audit to a total of six months to carry out the abuse audit.[131] If the register court determines after the audit that abusive purposes exist, it rejects the registration.[132] According to Sections 329 sentence 1 and 316 (3) sentence 4 UmwG, there are indications of abuse in particular if

No. 1: A negotiation procedure to be conducted regarding employee co-determination has only been initiated at the request of the court;

No. 2: the number of employees is at least four-fifths of the relevant threshold for the applicability of co-determination, no value is created in the target country and the registered office remains in Germany; or

No. 3: a foreign company will be the debtor of occupational pensions or occupational pension entitlements as a result of the cross-border division and this company has no other operating business

The existence of abusive purposes is the exception to the rules of cross-border divisions and therefore further factual investigations are only necessary if there are actual indications of abusive purposes.[133]

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128 Section 17 (2), Section 18 (2) or Section 19 (2) InsO.

129 Section 329 sentence 1, Section 315 (3) UmwG.

130 Brandi/Schmidt (n 3) 297, 308.

131 Sections 329 sentence 1, 316 (3) sentence 3 UmwG.

132 Sections 329 sentence 1, 316 (3) sentence 2 UmwG.

133 Government draft of the UmRUG, BT-Drucks. 20/3822, 103 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 20 February 2024.

If the registration requirements and formalities described above are met, the register court will register the cross-border division and issue a certificate of division "ex officio".[134] The division only becomes finally effective after the company resulting from the division has been entered in the foreign register responsible for it. The division may then be entered in the register of the transferring company.[135] The register of the transferring company must then inform the register of the acquiring company that the division has taken effect.[136]

b) Divisions into Germany

According to Section 331 (1) sentence 1 UmwG, the new company resulting from the division must be filed for registration in the German commercial register by the representative body of the transferring company. The division plan and, if the negotiation procedure for employee co-determination is applicable and has been successfully concluded, the agreement on employee co-determination concluded between the "SNB" and the management of the transferring company must be attached to the notification in the form specified in Section 17 (1) UmwG.[137] The general registration requirements of Section 16 (2), (3) UmwG and Section 17 UmwG do not apply to the registration of the new company.[138] During the registration procedure, the German commercial register must, in addition to the conclusion of any necessary agreement on co-determination, check in particular whether the regulations for the formation of the new company have been complied with.[139] However, the German commercial register does not have to re-examine the requirements of the foreign law of the transferring company for the legality of the division. Instead, it is bound in this respect by the certificate of the division from the foreign court transmitted via the "Business Registers Interconnection System - BRIS"[140], without which the new company cannot be registered.[141] According to Section 318 (1) sentence 3 UmwG, the provisions on the abuse review in Section 316 (3) and (4) UmwG are also declared applicable accordingly to the register procedure for an inward merger for cross-border

[134] Section 329 sentence 3 UmwG.

[135] Section 330 (1) sentence 2 UmwG.

[136] Section 330 (2) UmwG.

[137] Section 331 (1) sentence 2 UmwG.

[138] Section 331 (1) sentence 3 UmwG.

[139] Section 331 (3) UmwG.

[140] The European e-justice Portal, Interconnection of EU Business Registers, Last updated on 6 October 2020 <https://e-justice.europa.eu/105/EN/business_registers_at_european_level?init=true> accessed 20 February 2024

[141] Section 331 (2) UmwG.

mergers.[142] In contrast to the division out of Germany (Section 329 Sentence 1 UmwG), the division into Germany lacks a regulation that declares the provisions of the cross-border merger, including Section 316 (3) and (4), to be applicable accordingly. As a result, a further abuse review by the German commercial register should be neither necessary nor lawful.[143]

E. Changes of legal form

I. Problems with the old provisions

Although the group of shareholders generally remains the same during the change of legal form, the conversion of individual shares or other membership rights into new types of shareholding can be difficult.[144] In such cases, there is a particular risk that the new shareholding or membership is not equivalent to the legal position previously held by the shareholders. According to Section 195 UmwG (old version), only an "underestimated" allocation of shares in the legal entity undergoing the change of legal from expressly led to the exclusion of legal action.

The UmwG states that no shareholder is forced to remain in the legal entity undergoing the change of legal form against their will. In particular, Section 207 UmwG stipulates an exit option against the changed legal entity itself. There are two ways in which the shareholder can separate from its shareholding, either by selling the changed shares or memberships to the changed legal entity itself or, if such an acquisition is not permitted by law, by simply leaving it.[145] The sale of the changed shares to the company can only be considered if the legal entity can acquire its own shares or memberships due to its new legal form. This is the result of a reversal of Section 207 (1) sentence 2 UmwG. This is only the case for corporations with the meaning of Section 3 (1) no. 2 UmwG, i.e. the "AG"[146], the "KGaA"[147] and the "GmbH"[148]. Until the "UmRUG" came into force, the diffe-

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[142] Government draft of the UmRUG, BT-Drucks. 20/3822, 106 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 20 February 2024.

[143] Brandi/Schmidt (n 3) 297, 309.

[144] Government Draft of the UmwBerG, BT-Drucks. 12/6699, 140 <https://dserver.bundestag.de/btd/12/066/1206699.pdf> accessed 22 February 2024.

[145] Cornelius Simons, 'Die Neuerung durch das UmRUG (sowie das MoPeG und das DiRUG/DiReG) im Recht des innerstaatlichen Formwechsels' (2023), Volume 68, Issue 21, Die Aktiengesellschaft: Zeitschrift für das gesamte Aktienwesen 754, 757 <https://doi.org/10.9785/ag-2023-682108.> accessed 21 February 2024.

[146] Section 71 AktG.

[147] Section 278 (3) AktG in conjunction with Section 71 AktG.

[148] Section 33 GmbHG.

rence between the situation with the “GmbH” and that with an “AG” and “KGaA” arose in the event of a breach of the statutory repurchase provisions. In this case, the acquisition of the company’s own shares was not effective in rem, but was ineffective under the law of obligations.[149] The company must therefore refuse to pay the cash compensation in accordance with Section 30 GmbHG and reclaim any cash compensation already paid, but without legal grounds, concurrently with the retransfer of the acquired shares pursuant to Section 31 GmbHG.

As an alternative to leaving the company in return for a cash compensation due to the change of legal form, the shareholder is free to sell their share to a this party. According to Section 211 UmwG, disposals by the shareholder willing to leave the company during a certain period are also declared permissible if this wish conflicts with statutory or contractual restrictions on disposal.

II. Procedure for changes of legal form under the UmRUG

The area of “minor” conversation law, namely the change of legal from, has received little attention to date. However, a number of notable innovations and newly arising disputes can also be found there. The legal institution of the change of legal form is also affected by the latest reforms in the area of the digitalisation of the notary’s office and the register system as well as the fundamental reorganisation of partnership law.[150] Therefore, a complete picture of the new law only emerges if, in addition to the “UmRUG”, the new provisions of the “DiRUG”[151] that came into force, including the “DiREG”[152] and the changes introduced by the “MoPeG”[153] on 1 January 2024, are also taken into account.[154] In particular, the introduction of the “MoPeG” expands the circle of legal entities that can change their legal form by including the registered civil law partnership (“eGbR”) among the legal entities that can change their legal form, as well as those that can be merged or divided.[155]

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149 Section 33 (2) sentence 3 GmbHG.

150 Simons (n 142) 754, 754.

151 BGBl. 2021 I No. 52 <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl121s3338.pdf%27%5d> accessed 21 February 2024.

152 BGBl. 2022 I No. 26 <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl122s1146.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl122s1146.pdf%27%5D__1708523845819> accessed 21 February 2024.

153 BGBl. 2021 I No. 53 <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl121s3436.pdf%27%5d> accessed 21 February 2024.

154 Simons (n 142) 754, 754.

155 Section 191 (1) sentence 1 UmwG in conjunction with Section 705 (2) BGB; Government Draft of the MoPeG, BT-Drucks. 19/27635, 263 <https://dserver.bundestag.de/btd/19/276/1927635.pdf> accessed 21 February 2024.

According to Section 214 (1) UmwG, the “eGbR” can the acquire the legal form of a corporation or a registered cooperative.

According to Section 192 (1) sentence 1 UmwG, the representative body of the legal entity undergoing the change of legal form must prepare a detailed written report in which, among other things, the change of legal form and the amount of cash compensation to be offered and the valuation methods chosen to determine it are explained and justified in legal and economic terms. The resolution to change the legal form must be notarised pursuant to Section 193 (3) sentence 1 UmwG.

Prior to the “UmRUG”, only an “underestimated” allocation of shares in the changed legal entity expressly led to the exclusion of legal action, whereas the same legal consequence is now to occur in the chase of an “inappropriate ratio”. According to Section 195 (2) UmwG, the action directed against its validity is excluded in two cases, namely if it is based on the lack of appropriateness of the shares in the new legal entity or on the fact that the new membership does not represent sufficient consideration for the shares or memberships in the legal entity changing its legal form. The purpose of this is to mitigate the consequences for the legal entity and the majority of shareholders of the blocking of the register triggered by an action by limiting the admissible grounds for action.[156] As compensation for the disadvantage suffered by the shareholder, the affected shareholder is instead entitled to an additional cash payment in accordance with Section 196 sentence 1 UmwG. The German legislator has now created the alternative of granting additional company shares in the event of a change of legal form.[157] However, this option is only available to corporations with easily fungible shares (“AG, KGaA, SE”), as there is no comparable practical need for other company forms, including the predominantly personalised limited liability company (“GmbH”).[158] Therefore it only applies to the change of legal form of a corporation within the meaning of Section 3 (1) no. 2 UmwG into a public limited company or a partnership limited by shares. According to Section 248a (1) sentence 2 UmwG, the company must already announce in the resolution of the change of legal form that it intends to make use of the option to grant shares.

The “UmRUG” has now rectified the incorrect unequal treatment of “GmbHs” compared to “AGs” and “KGaAs” that have changed their legal form. From now on, Section 207 (1) sentence 1 UmwG determines that Section 33 (2) sentence 3 alt. 2 GmbHG is to be excluded, which means that such

[156] Simons (n 142) 754, 756.

[157] Section 248a in conjunction with Sections 72a, 72b UmwG.

[158] Government draft of the UmRUG, BT-Drucks. 20/3822, 74 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 22 February 2024.

cash compensation will also be effective in future. The cash compensation claim has been synchronised with the cash compensation claim in the context of the merger and division as part of the change of legal form.[159] There is no objective reason for a different treatment for the change of legal form.[160] The legal situation is therefore no different to that of “AGs” and “KGaAs”.

With regard to the disposal of the shareholder’s share to a third party, the “UmRUG” has reformed the statutory regulation in two ways. Firstly, the exemption from the restrictions on disposal should only apply to those who could otherwise leave the company by means of a cash compensation.[161] Consequently, the disposal privilege should only apply to those shareholders who are addressees of the settlement offer in accordance with Section 207 UmwG. This in turn requires that the shareholder has either declared an objection to the resolution on the change of legal form of the record[162] or that such objection was dispensable[163]. Secondly, the previous legal situation, according to which statutory restrictions on disposal could be overridden for years, was to be brought to an end. Since the “UmRUG” came into force, the disposal privilege has only been limited in time by one, namely the first of two previous disposal periods set out in Section 209 UmwG.[164] The pending status of rights in rem between the first deadline that had already expired and a possible second deadline that was yet to start was fraught with undesirable legal uncertainty.[165] After the expiry of the deadline, the shareholder still has the option of disposing of his shares by selling them to the legal entity that has changed its legal form in return for the cash compensation offered or determined by the court.[166]

According to Section 198 (1) UmwG, every change of legal form must be registered with the competent (commercial, cooperative, partnership or association) register for the legal form concerned. With regard to the form of the application, it must first be signed in person by the applicant. In order to comply with the publicly notarised form required by Section 12 (1) sentence 1 HGB, the notary then draws up the notarisation note in a further step and attaches it to the application.[167]

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[159] Government draft of the UmRUG, BT-Drucks. 20/3822, 85f. <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 23 February 2024.

[160] ibid 86.

[161] Simons (n 142) 754, 759.

[162] Section 207 (1) sentence 1 UmwG.

[163] Section 207 (2) in conjunction with Section 29 (2) UmwG.

[164] Simons (n 142) 754, 760.

[165] Government draft of the UmRUG, BT-Drucks. 20/3822, 71f. <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 23 February 2024.

[166] ibid 72.

[167] Section 39 BeurkG.

The provisions governing the formation of the new legal form shall apply to the change of legal form.[168] This includes the register notifications required to complete the conversion. When changing the legal form to a corporation, the managing directors of a “GmbH”[169] and the members of the management board of an “AG”[170] must therefore ensure, among other things, that they have neither misinterpreted nor concealed the circumstances of the legal entity, including its relationships with affiliated companies, in the change of legal form report. The provisions on the criminal liability of misrepresentations have been moved to the new Section 346 UmwG with the “UmRUG”.[171]

A suitable register is required for each legal entity involved in the conversion. With the introduction of the “MoPeG” on 1 January 2024, there is a “company register” in addition to the existing registers in which civil code companies (“BGB-Gesellschaften”) can register.[172] The group of legal entities eligible for conversion is also expanded to include the registered civil law partnership (“eGbR”).[173] Changes between legal form between registered partnerships take place outside of the UmwG.[174]

According to Section 198 (2) UmwG, the mandatory registration for the change of legal form is carried out in different ways, depending on the registry entry of the entity changing its legal form and the register obligation of the entity whose legal from has changed. Since the “GbR” only provides a suitable target legal entity in its registered form “eGbR”[175], the previously required registration variant pursuant to Section 235 (1) UmwG, which was exclusively required for the conversion into the “GbR”, is now obsolete.[176] Instead, the procedure for the change of legal form to an “eGbR” must from now on proceed in the same way as for legal entities to be entered in a register other than the previous one.[177]

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168 Section 197 sentence 1 UmwG.

169 Section 6 (1) sentence 2 no. 3 (d) GmbHG.

170 Section 76 (3) sentence 2 no. 3 (d) AktG.

171 Government draft of the UmRUG, BT-Drucks. 20/3822, 33. <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 23 February 2024.

172 Section 707 (1) BGB.

173 Section 197 (1) no. 1 UmwG.

174 Section 707c BGB; Section 106 (3-5) HGB.

175 Section 191 (2) no. 1 UmwG.

176 Government Draft of the MoPeG, BT-Drucks. 19/27635, 268 <https://dserver.bundestag.de/btd/19/276/1927635.pdf> accessed 23 February 2024.

177 Government Draft of the MoPeG, BT-Drucks. 19/27635, 268 <https://dserver.bundestag.de/btd/19/276/1927635.pdf> accessed 23 February 2024.

According to Section 202 UmwG, only the entry in the commercial, partnership, association, cooperative and, from now on, company register is decisive for the effectiveness of the change of legal from. The change of legal form triggers a number of legal consequences, in particular various deadlines, which may be of significance for the shareholders and creditors of the legal entity. However, for them it is not the registration but its publication that is the decisive turning point.[178] Of particular importance is, for example[179]:

The two-month period for the acceptance of the cash compensation offer[180]; the two-month period for the utilisation of a privileged disposal option[181]; the three-month period for initiating appraisal proceedings[182]; the five-year period for the assertion of personal liability against former shareholders who have left the company or only have limited liability[183]; the five-year period for asserting claims for damages against the members of the executive bodies of the legal entity undergoing the change of legal form[184]; the two-year obligation of the former members to make additional contributions in the event of the insolvent of the legal entity changing its legal form[185].

Section 201 UmwG stipulates that the announcement of the entry should be made in accordance with Section 10 HGB. This was revised by the "DiRUG".[186] Since then, the information in question no longer has to be published separately, but made available for the first time in the electronic information and communication system provided for this purpose in accordance with Section 9 HGB.[187] This eliminates the separation between the entry in the register and its publication. The reference in Section 10 (1) HGB to Section 9 (1) HGB clarifies that a separate publication portal is no longer required, but that it is the same system that was intended for the retrieval of commercial re-

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178 Simons (n 142) 754, 762.

179 ibid.

180 Section 209 sentence 1 UmwG; Martin Schaper, 'Cross-Border Conversions - New Legal Framework Enters Into Force' (2023) YPOG <https://www.ypog.law/en/insight/cross-border-conversions-new-legal-framework-enters-into-force> accessed 5 March 2024.

181 Sections 211, 209 sentence 1 UmwG.

182 Section 4 (1) sentence 1 no. 4 SpruchG.

183 Section 224 (3), Sections 237, 249, 257 UmwG.

184 Section 205 (2) UmwG.

185 Section 271 UmwG.

186 Government Draft of the DiRUG, BT-Drucks. 19/28177, 93 <https://dserver.bundestag.de/btd/19/281/1928177.pdf> accessed 26 February 2024.

187 Government Draft of the DiRUG, BT-Drucks. 19/28177, 93 <https://dserver.bundestag.de/btd/19/281/1928177.pdf> accessed 26 February 2024.

gister data.[188] It is different for facts that cannot be registered, which must still be published separately as so-called “register announcements”[189]. In the case of a change of legal form, these includes in particular Sections 204 and 22 (1) sentence 3 UmwG. The creditors of the legal entity changing its legal form must be informed that and under what conditions they can demand security from the legal entity changing its legal form.[190]

The change of legal form is regarded as a formation process, meaning that the need to form any necessary Supervisory Board is also included in Section 197 sentence 1-3 UmwG. An exception exists if, in the event of a change of legal form, a Supervisory Board is formed and composed in the same way at the legal entity with a new legal form as at the legal entity changing its legal form.[191] In this case, the Supervisory Board members remain in office without the shareholders or, in the case of a co-determined Supervisory Board, the employees having to take action in this respect.[192]

F. MgVG and MgFSG

I. Introduction

On 6 July 2022, the German government presented a draft law to implement the Conversion Directive (“UmRUG”).[193] It did not include the regulations on co-determination, instead, these provision of the Conversion Directive were implemented independently.

The provisions of the Conversion Directive (EU) 2019/2121 (“UmwRL”) on employee co-determination were implemented by the “Gesetz zur Umsetzung der Bestimmungen der Umwandlungsrichtlinie über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitenden Umwandlungen, Verschmelzungen und Spaltungen - UmRMitbestG”, which came into force on 31 January 2023.[194]

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[188] Government Draft of the DiRUG, BR-Drucks. 144/21, 102 <https://dserver.bundestag.de/brd/2021/0144-21.pdf> accessed 26 February 2024; Currently the Common Register Portal of the German Federal States <https://www.handelsregister.de/rp_web/welcome.xhtml> accessed 26 February 2024.

[189] Section 10 (3) HGB.

[190] Government Draft of the DiRUG, BR-Drucks. 144/21, 157 <https://dserver.bundestag.de/brd/2021/0144-21.pdf> accessed 26 February 2024.

[191] Section 203 sentence 1 UmwG.

[192] ibid.

[193] Government draft of the UmRUG, BT-Drucks. 20/3822 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 27 February 2024.

[194] BGBl. 2023 I, No. 10 <https://www.recht.bund.de/bgbl/1/2023/10/VO.html> accessed 14 February 2024.

The “UmRMitbestG” amends and supplements the existing law on Employee Co-determination in Cross-border Merger (“MgVG”) and, for the first time introducing a Law on Employee Co-Determination in Cross-border Changes of Legal Form and Cross-border Divisions (“MgFSG”).[195]

The “MgFSG“ largely parallel to the provision of the “MgVG”. The rules for the composition of the special negotiating body, which have only been simplified in the “MgFSG”, contain deviations.[196] Also important to emphasise is that the subsequent co-determination guarantee has been restructured, with both laws being interlinked by means of references.[197]

In principle, the law of the country of domicile applies to the company resulting from a cross-border conversion. Therefore, German co-determination law, in particular the “Drittelbeteiligungsgesetz - DrittelbG”[198] and the “Gesetz über die Mitbestimmung der Arbeitnehmer - MitbestG”[199], applies to the company being converted into Germany in accordance with Section 4 MgVG or Section 4 MgFSG. In the case of cross-border mergers, the special negotiating body was already able to enforce the application of national law by deciding by qualified majority not to enter into or to terminate negotiations on co-determinations.[200] This has recently been transferred to cross-border divisions for new formation and cross-border changes of legal form.[201]

Negotiations on co-determinations in the resulting company are necessary to safeguard the existing co-determination of employees at the time of the cross-border conversion if the application of the law of the country of domicile leads to a deterioration in co-determination.[202] In some EU Member States, the so-called one-third participation of the employees in the supervisory or administrative body applies from significantly lower thresholds than in Germany.[203]

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[195] Max Noack, ‘Nationaler Rechtsrahmen für grenzüberschreitende Umwandlungen - Eine tour d’horizon durch das Gesetz zur Umsetzung der Umwandlungsrichtlinie (UmRUG)’ (2003), Volume 77, Issue 8, Monatsschrift für Deutsches Recht 465, 466 <https://doi.org/10.9785/mdtr-2023-770803> accessed 11 March 2024.

[196] Claudia Schubert, ‘Mitbestimmungssicherung bei grenzüberschreitender Umwandlung - Arbeitnehmerbeteiligung nach Maßgabe des MgVG und des MgFSG’ (2023), Volume 54, Issue 3, Die Aktiengesellschaft: Zeitschrift für das gesamte Aktienwesen, 339, 341 <https://doi-org.uaccess.univie.ac.at/10.1515/zfa-2023-540304> accessed 27 February 2024.

[197] ibid.

[198] BGBl. 2004 I, No. 25 <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl104s0974.pdf%27%5d> accessed 27 February 2024.

[199] BGBl. 1976 I, No. 51 <https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__//*[@attr_id='bgbl176s1153.pdf']> accessed 27 February 2024.

[200] Section 18 MgVG.

[201] Section 19 MgFSG.

[202] Section 5 MgVG; Section 5 MgFSG.

[203] Schubert (n 193) 339, 341.

The Conversion Directive (EU) 2019/2121 is implemented in the Member States for those cross-border conversions as a result of which the resulting company has its registered office in Germany. Therefore, the "MgVG" covers the merger[204] and the "MgFSG" the change of legal form[205] and the division to form a new company[206] in Germany. However, both laws also apply to mergers, divisions and changes of legal form out of Germany. In these cases, the implementing law in the country of domicile of the resulting company generally applies.[207] The regulations also apply to cross-border conversions between other Member States, provided that there is a subsidiary in Germany for which an employee representative is to be elected to the special negotiating body.[208]

The division for acquisition is a special case. Here, the law does not lead to the application of co-determination law, as such a conversion is only covered by the "UmwG" insofar as no co-determination safeguard is required.[209] Although Section 3 (1) MgFSG and Section 2 (3) MgFSG would apply, Section 2 (2) MgFSG is limited to the division for new formation pursuant to Section 320 sentence 1 no. 1 UmwG. At the same time, Section 332 UmwG restricts the division for acquisition to cases in which the national co-determination law does not intervene and no deterioration in co-determination occurs as a result of the cross-border division.

II. Negotiated co-determination in cross-border conversions

1. Obligation to negotiate

According to Section 5 no. 1 MgVG and Section 5 no. 1 MgFSG, there is an obligation to negotiate co-determination in the resulting company of the company changing its legal form or dividing itself employs an average number of employees in the six months prior to the disclosure of the plan for the cross-border conversion that corresponds to at least four-fifths of the threshold value that would

[204] Sections 315 (1) sentence 1 no. 2, 3, 306 (1) no. 2, 318 UmwG, Section 3 (1) sentence 1 MgVG.

[205] Sections 335 (2) no. 12-14, 337 (1) in conjunction with Section 310 (1), 337 (3), 339 (1), 342 UmwG, Section 3 (1) sentence 1 MgFSG.

[206] Sections 320 (1) No. 1, 329 UmwG, Section 3 (1) sentence 1 MgFSG.

[207] Schubert (n 193) 339, 343.

[208] Section 3 (1) sentence 2 MgVG, Section 3 (1) sentence 2 no. 3 MgFSG.

[209] Sections 320 sentence 1 no. 2, 332 UmwG.

have led to employee co-determination in the country of departure. This is intended in particular to protect the company from fleeing co-determination.[210]

If employee co-determination in the country of destination odes not lessen in comparison to co-determination in the county of departure, the cross-border conversion is not an escape from co-determination, meaning that an obligation to negotiate is not necessary and would therefore be in breach of Art. 49 and Art. 63 TFEU.[211] In this respect, Section 5 no. 1 MgVG and Section 5 no. 1 MgFSG must be teleologically reduced so that the law of the State in which the resulting company is domiciled applies.[212]

There is also an obligation to negotiate if the law of the country of destination does not provide for at least the same level of employee co-determination as in the country of departure. According to Section 5 no. 2 MgVG and Section 5 no. 2 MgFSG, the decisive factor is the proportion of employee representatives in the supervisory or administrative body[213], in committees in which employee co-determination takes place[214] or in the management body responsible for the profit units of the companies[215].

The obligation to negotiate is not required if co-determination would not apply even in a domestic situation or if there are no employees whose co-determination would have to be ensured.[216]

According to Section 5 no. 3 MgVG and Section 5 no. 3 MgFSG, there is also an obligation to negotiate if the law of the destination country does not provide for the same right to exercise co-determination for the foreign employees of the converted company as for domestic employees. The obligation to negotiate only applies if the foreign employees already had co-determination rights

210 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 L321/6, 31st recital.

211 Schubert (n 193) 339, 346.

212 ibid.

213 Section 5 no. 2 (a) MgVG, Section 5 no. 2 (a) MgFSG.

214 Section 5 no. 2 (b) MgVG, Section 5 no. 2 (b) MgFSG.

215 Section 5 no. 2 (c) MgVG, Section 5 no. 2 (c) MgFSG.

216 Schubert (n 193) 339, 348.

prior to the conversion.[217] Therefore, Section 5 no. 3 MgVG and Section 5 no. 3 MgFSG must be reduced teleologically.[218]

2. Negotiation procedure

According to Section 6 (1), (2) MgVG and Section 6 (1), (2) MgFSG, the negotiations on co-determination shall begin with the written information provided by the management of the company involved in the conversion to the national employee representatives, the spokesperson's committees and the trade unions represented in domestic companies in this company an the subsidiaries concerned. In addition, it is imperative that a special negotiating body must be formed.[219]

The negotiations shall take place between the management of the companies affected by the conversion and the special negotiating body as the employee representative body in the negotiation procedure. The special negotiating body shall be formed pursuant to Sections 7ff. MgVG, Sections 7ff. MgFSG. According to Section 8 MgVG and Section 9 MgFSG, the regulations in the Member State in which the employees are elected or appointed are decisive. In Germany, the employees of the converting company and the subsidiaries and operations concerned as well as the trade union representatives.[220]

In order to ensure that all employees of the participating companies, affected subsidiaries and establishments are adequately represented, the principle of representativeness applies to the composition of the special negotiating body.[221] Section 7 (2) MgVG and section 8 (2) MgFSG stipulate that an employee representative must be elected for each share of employee in a Member State that exceeds 10 per cent of the total workforce. For corse-border mergers, it must be ensured that participating companies whose workforce does not exceed 10 per cent are nevertheless represented as far as possible without these companies gaining a voting weight in the special negotiating body that is contrary to proportionality.[222] Section 8 (2) sentence 3 MgVG and Section 9 (2) sentence 2 MgFSG stipulate that the seats are allocated to men and women according to their proportion in the compa-

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[217] Schubert (n 193) 339, 348.

[218] ibid.

[219] ibid 339, 351.

[220] Section 8 (2) sentence 1 MgVG, Section 9 (2) sentence 1 MgFSG.

[221] Section 7 (1) MgVG, Section 8 (1) MgFSG.

[222] Schubert (n 193) 339, 351f.

nies. This requirement is a special feature of German Law, but can be justified under Article 3 (2) sentence 2 GG[223] as a measure to promote women, who tend to be underrepresented in employee representative bodies[224]

The special negotiating body must be set up for each resulting company.[225] In the event of a partial and full division for the purpose of founding a new company, several special negotiating bodies are therefore generally required pursuant to Section 7 sentence 1 MgFSG, the composition of which is determined in accordance with Sections 8-10 MgFSG. The negotiation of co-determination takes place for the respective resulting company, with the consequence that the special negotiating body must represent the employees of the resulting company. This is only unnecessary if the composition of the negotiating bodies is identical pursuant to Sections 8 and 10 (3) MgFSG. Such identity exists in particular if the company involved, the subsidiaries and operations concerned are the same or an equal composition of the special negotiation body can be considered.[226] This is the case if the same dividing company, affected subsidiary and operations are covered.[227] In this respect, it is sufficient if the special negotiating body can be composed in the same way during the negotiations without violating applicable law.[228]

According to Section 10 MgVG and Section 11 MgFSG, the employee representative body at the highest level in the company or group is the competent electoral body for the election of employee representatives to the special negotiating body.

The negotiations can end with three different outcomes:

The management and the special negotiation body come to an agreement on co-determination[229], or there is no positive outcome to the negotiations during the negotiation period, so that the statutory standard rules apply[230], or the special negotiating body decides by qualified majority not to enter

[223] Basic Law for the Federal Republic of Germany <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> accessed 1 March 2024.

[224] Schubert (n 193) 339, 352.

[225] ibid.

[226] ibid.

[227] ibid.

[228] ibid 339, 353.

[229] Sections 22, 23 (1) no. 1 MgVG, Sections 24, 25 no. 1 MgFSG.

[230] Section 23 (1) no. 2 MgVG, Section 25 no. 2 MgFSG.

into or to terminate the negotiations, so that the law in the destination country applies[231]. According to Section 23 (1) sentence 1 no. 3 MgVG, the companies involved in cross-border mergers can avoid the negotiation procedure if the management decided to apply the statuary standard rules.

When drafting the co-determination agreement, the minimum content stipulated in Section 22 (1) MgVG and Section 24 (1) MgFSG that is required to realise co-determination must be regulated. If this is not the case, the statutory standard rules apply to fill in the gaps. In addition, the co-determination agreement must guarantee the same level of employee co-determination as before the cross-border change of legal form or the cross-border division.[232] In the case of cross-border mergers, however, a reduction in co-determination is permitted.[233] Sections 23ff. MgVG and Sections 25ff. MgFSG contain a statutory standard rule which applies if the co-determination agreement refers to them or the negotiations end without result.

Section 29 MgVG and Section 31 MgFSG provide that the co-determination agreements that were concluded prior to the cross-border conversion in the company involved or the subsidiaries affected shall continue until the new co-determination agreement or statuary standard rule take effect.[234]

3. Safeguarding co-determination

In order to avoid an escape from co-determination through repeated conversion processes, the subsequent domestic or cross-border conversions are again subject to a procedure to ensure co-determination in accordance with the “MgVG” and the “MgFSG”.[235] This requires a new negotiation procedure pursuant to Sections 30, 30a MgVG and Sections 32, 33 MgFSG, whereby the same rules apply as for the first cross-border conversion. However, these provisions regulate a number of modifications. In the case of a subsequent domestic merger that follows a previous cross-border change of legal form or division for new formation, the special provisions in Sections 7, 9, 10, 12, 23 (2), (3), 24 and 27 (3) MgVG apply to the negotiated co-determination in addition to the “MgFSG”.[236]

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[231] Section 18 MgVG, Section 19 MgFSG.

[232] Section 22 (2) MgVG, Section 24 (2) MgFSG.

[233] Schubert (n 193) 339, 356.

[234] Government Draft of the UmRMitbestG, BT-Drucks. 20/3817, 56 <https://dserver.bundestag.de/btd/20/038/2003817.pdf> accessed 1 March 2024.

[235] Schubert (n 193) 339, 357.

[236] Section 32 (2) MgFSG.

Section 32 (1), (2) MgFSG covers all domestic conversions within the four-year period following a cross-border conversions.

In the event of a subsequent domestic conversion by change of legal form or division to form a new company after a previous merger, the negotiations must be conducted in accordance with the "MgVG", whereby the special provisions in Sections 7, 10, 11 and 13 MgFSG apply accordingly instead of Sections 9, 10, 12 MgVG.[237]

In cases in which the resulting company has its registered office in Germany, the national legislator can regulate an extension of co-determination protection due to the principle of territoriality.[238] In particular, this prevents a deterioration in co-determination due to repeated cross-border conversions of companies originally domiciled in Germany which, at the end of these processes, have their registered office in Germany again.[239]

Section 30a (1), (2) MgVG stipulates that the negotiation procedure under the "MgVG" must be carried out for subsequent cross-border mergers. Where the merger is preceded by a cross-border change of legal form or a cross-border division for new formation, however, any deterioration of the co-determination provisions is not permitted in the first four years after the first cross-border change of legal form or the division for new formation.[240] All later mergers may be associated with a deterioration, but require a resolution with a qualified majority in accordance with Section 17 (3) MgVG.

If a cross-border change of legal form or a division for new formation takes place after a cross-border conversion, the negotiation procedure under the "MgFSG" applies pursuant to Section 33 MgFSG, irrespective of the specific conversion process. Therefore, unlike in the case of a subsequent cross-border merger, no deterioration of co-determination is possible.[241]

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[237] Schubert (n 193) 339, 359.

[238] ibid.

[239] ibid.

[240] Section 30a (2) sentence 2 MgVG.

[241] Schubert (n 193) 339, 360.

4. Abuse protection

According to the Conversion Directive (EU) 2019/2121, Member States must take measures to prevent cross-border conversions from being used to deprive employees of their participation rights. Only Section 36 MgFSG contains a prohibition of abuse, whereas the general prohibition of abuse of rights under the EU law applies to cross-border mergers.[242] Section 36 sentence 1 MgFSG provides for a general prohibition of abuse that relates to cross-border conversions. According to Section 36 sentence 2 MgFSG, an abuse exists in particular if, within four years of the cross-border conversion taking effect, structural changes are made that result in a threshold value of the co-determination laws in the country of domicile being exceeded or employees are otherwise deprived of co-determination rights. The manipulation of employee figures in order to conceal the co-determination obligation of the company involved in the conversion or to avoid negotiations on co-determination is one of the most important cases.[243]

As the legal consequence of misuse, Section 36 sentence 3, 4 MgFSG requires negotiations to be conducted. The court of registration must ultimately refuse to enter the conversion in the commercial register.[244] This does not give the employees and their representatives any means of preventing the entry itself, but restricts the enforcement of rights to the proceedings before the registry courts. However, effective enforcement of rights requires that the persons affected in their legal position can assert them.[245] In this respect, Section 36 sentence 1 MgFSG gives rise to a claim for injunctive relief in favour of the employees.[246] The negotiations can end with a co-determination agreement, but also with the application of the statutory standard rules pursuant to Section 36 sentence 4 MgFSG.

According to Sections 316 (3) sentence 1, 329 sentence 1 or 343 (3) sentence 1 UmwG, the registry court must examine whether the conversion is carried out for abusive or fraudulent purposes and is intended to evade or circumvent Union law or national law when issuing the certificate of merger, division or change of legal form. The registry court only have to take action "if there are indicati-

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242 Schubert (n 193) 339, 361.

243 Government Draft of the UmRMitbestG, BT-Drucks. 20/3817, 58 <https://dserver.bundestag.de/btd/20/038/2003817.pdf> accessed 1 March 2024.

244 Sections 316 (3), 329 sentence 1, 343 (3) UmwG.

245 "effet utile" Art. 4 (3) TEU

246 Schubert (n 193) 339, 362.

ons"[247]. This is initially the case if a negotiation procedure in accordance with the "MgVG" or "MgFSG" only took place at the request of the court.[248] This means that the court dispute about the necessity of a co-determination guarantee is seen as an indication of a circumvention of the law.[249] In this case, however, the registration court must deny abuse if the co-determination safeguarding procedure was carried out correctly. If there are no other indications of a circumvention of the law, there is no reason to refuse advance certification.

According to 316 (3) sentence 4 no. 2, 329 sentence 1 or 343 (3) sentence 4 no. 2 UmwG, the case is also covered if the company involved has exceeded four-fifths of the threshold for co-determination in the country of departure, the administrative office remains in Germany and no added value is created abroad. Union law guarantees the Freedom of Establishment and the Free Movement of Capital, meaning that it is generally permissible to change the company's place of business without relocating the administrative office.[250] If the company can demonstrate the objective legal reasons for this change, there is no abuse of rights. Only if the aim of the measure is precisely to avoid co-determination is there an abuse of rights.[251]

Finally, according to 316 (3) sentence 4 no. 3, 329 sentence 1 or 343 (3) sentence 4 no. 3 UmwG, an abuse test must be carried out if a foreign company becomes the debtor of company pensions and entitlements as a result of the conversion and this company has no other operating business. This could jeopardise employees' claims and entitlements. Therefore, this does not serve to safeguard the negotiated co-determination, but is an independent group of cases.[252]

5. Interim conclusion

The implementation of the Conversion Directive (EU) 2019/2121 leads to an increase in the protection against abuse, which provides for additional negotiation obligations in the case of cross-border conversions as well as protection in the case of subsequent conversions or structural changes. In

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[247] Sections 316 (3) sentence 1, 329 sentence 1, 343 (3) sentence 1 UmwG.

[248] Sections 316 (3) sentence 4 no. 1, 329 sentence 1, 343 (3) sentence 4 no. 1 UmwG.

[249] Schubert (n 193) 339, 364.

[250] ibid.

[251] ibid.

[252] ibid 339, 365.

addition, the general prohibition of abuse applies and the registry court have a greater role to play in enforcing the protection against abuse.

Chapter 3: Summary

A. Overview

In Germany, the implementation of the Conversion Directive (EU) 2019/2121 was based on the concept of two complementary laws.[253] The company law aspects are standardised in the Act on the Implementation of the Conversion Directive and the Amendment of other Laws ("UmRUG"). Regarding the aspects of co-determination law, the draft for implementing the provisions of the Conversion Directive on Employee Co-determination in Cross-border Divisions and Changes of Legal Form ("MgFSG") was prepared, which also provided for selective amendments to the Act on Employee Co-determination in Cross-border Merger ("MgVG").

The cross-border structural measures of mergers, divisions and changes of legal form are now regulated together in a new sixth book. In addition, the "UmRUG" also adapts corresponding regulations for purely national conversions.

The "UmRUG" standardises the requirements for changes of legal form and division (partial, full and carve-outs) across one or more internal EU/EEA border in the Conversion Directive (EU) 2019/2121 together with the cross-border merger. Previously, the only option open to the companies was the less legally secure route across the border by invoking the Freedom of Establishment, meaning only by applying comparable standards accordingly.[254]

In Germany, the provisions on cross-border conversions apply to stock corporations ("AG") , Societas Europaea ("SE"), partnerships limited by shares (‚KGaA") and limited liability companies ("GmbH"). Partnerships are still only covered in the case of cross-border mergers to form a general

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[253] Jessica Schmidt, 'Schutz der Minderheitsgesellschafter bei grenzüberschreitenden Umwandlungen: Vorgaben der GesRRL und Umsetzung durch den UmRUG-RegE' in: Alfred Bergmann, Ingo Drescher, Holger Fleischer, Stephan Harbarth, Jens Koch, Gerd Krieger, Hanno Merkt, Christoph Teichmann, Jochen Vetter (eds) *Unternehmensmobilität im EU-Binnenmarkt*, (De Gruyter 2023) 229, 231 <https://doi-org.uaccess.univie.ac.at/10.1515/9783110780895-014> accessed 6 March 2024.

[254] Ralph Schila, Patrick Mückl, Sebastian Seier, Elisabeth Dworschak, 'Grenzüberschreitende Umwandlung (Verschmelzung, Spaltung und Formwechsel) bieten rechtssichere Gestaltungschancen' (2023) NOERR <https://www.noerr.com/de/insights/grenzuberschreitende-umwandlungen-verschmelzung-spaltung-und-formwechsel-bieten-rechtssichere-gestaltungschancen> accessed 4 March 2023.

partnership (“OHG” or “KG”) with generally fewer than 500 employees and are otherwise referred to Articles 47, 54 TFEU and the case law on freedom of establishment.[255]

A major innovation is that with the “MoPeG”, which came into force on 1 January 2024, the German legislator will in future enable civil law partnerships that are entered in the newly crated company register (“eGbR”) to carry out mergers, divisions and changes of legal from as a transferring or acquiring legal entity within the “UmwG” system.[256] Section 3 (1) UmwG therefore extends the group of legal entities eligible for conversions to include “eGbRs”.

The digital, EU-wide communication between participating register authorities is ensured by the Business Registers Interconnection System (”BRIS”). This allows the participating commercial registers or competent foreign authorities to communicate directly with each other.[257]

B. Mergers

Cross-border mergers were already possible on the basis of secondary legislation and its German implementation and have proven their worth in practice. These regulations have been partially revised and adapted to the regulatory system.

New provisions include the possibility for creditors to submit comments on the merger plan, which also must be attached to the application to the commercial register, as well as the mandatory abuse control, which now also applies to merger.

The “UmRUG” stipulates the exclusion of the shareholders of the acquiring legal entity from a challenge to the merger based on an incorrect valuation and determines the referral appraisal proceedings. In this way, the “UmRUG” ends and inappropriate unequal treatment.

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[255] Tobias Harzenetter, Peter Steffen Karl, Gabriele Roßkopf, Joscha Meyer, ‘Conversion Directive Implementation Act adopted: Legal framework for cross-border changes of legal form and divisions of corporations - Simplification of mergers - Acceleration of shareholder compensation appraisal proceedings’ (2023) Gleiss Lutz <https://www.gleisslutz.com/en/news-events/know-how/conversion-directive-implementation-act-adopted-legal-framework-cross-border-changes-legal-form-and-divisions-corporations> accessed 6 March 2024.

[256] Patrick Satzinger, Oliver Saha, ‘Ab 2024 wird die (eingetragene) Gesellschaft bürgerlichen Rechts (endlich!) umwandlungsfähig’ (2023) Rödl & Partner <https://www.roedl.de/themen/gesellschaft-buergerlichen-rechts-umwandlungsfaehig> accessed 6 March 2024.

[257] Tobias Harzenetter, Peter Steffen Karl, Gabriele Roßkopf, Joscha Meyer, ‘Conversion Directive Implementation Act adopted: Legal framework for cross-border changes of legal form and divisions of corporations - Simplification of mergers - Acceleration of shareholder compensation appraisal proceedings’ (2023) Gleiss Lutz <https://www.gleisslutz.com/en/news-events/know-how/conversion-directive-implementation-act-adopted-legal-framework-cross-border-changes-legal-form-and-divisions-corporations> accessed 6 March 2024.

The subsequent improvement of the exchange ratio in shares eliminates liquidity risks for the practice. However, it imposes the general share price risk on the shareholder without any possibility of influencing it. Therefore, the possibility of granting mixed compensation appears conceivable.

C. Divisions

The implementation of the Conversion Directive (EU) 2019/2121 has now generally enabled the cross-border divisions of corporations within the EU/EEA. With the implementation, the low practical relevance of cross-border divisions should change. Germany is one of the first Member States in which the Directive has now been transposed into national law. The “UmRUG” goes beyond the minimum standard under secondary law, which was only limited to divisions for the formation of new companies. This means that cross-border divisions for acquisition are now possible, thus an existing corporation can also be the acquiring company. However, the cross-border division for acquisition is subject to certain conditions in order to protect co-determination.

Now Sections 320ff. UmwG and the “MgFSG” create a legal basis for the realisation of cross-border divisions. This leads to an increase in legal certainty and creates an overall more transaction-friendly environment for the mobility of companies within the EU.

D. Changes of legal form

The provisions on cross-border changes of legal form had become necessary because the European Court of Justice deemed such conversions to be permissible in several rulings on freedom of establishment, most recently in the “Polbud-Case”.[258] With the entry into force of the “UmRUG”, the case law has been codified and there is now clarity on how cross-border changes of legal form are to be organised. The complete picture of the new law only emerges if, in addition to the “UmRUG”, the new provisions of the “DiRUG” that came into force, including the “DiREG” and the changes introduced by the “MoPeG” on 1 January 2024, are also taken into account.[259]

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[258] Robert Dorr, Dirk Krome, ‘UmRUG: Neuerung im grenzüberschreitenden und nationalen Umwandlungsrecht’ (2023) PwC Legal Deutschland <https://legal.pwc.de/de/news/fachbeitraege/umrug-neuerungen-im-grenzueberschreitenden-und-nationalen-umwandlungsrecht> accessed 5 March 2024.

[259] Simons (n 142) 754, 754.

E. Protection of shareholders, creditors and employees

In all three conversion types, each shareholders of the transferring or changing company is granted a right to withdrawal in return for appropriate cash compensation, excluding actions against the conversion that suspend its implementation.[260] Therefore, the shareholder must file an objection for the record and notify the company within one month whether he or she accepts the cash compensation offer.[261] This cash compensation offer is conditional on the cross-border conversion becoming effective.[262] However, this declaration does not yet constitute the acceptance of the cash compensation offer, but is a declaration of intent, which is merely a legal prerequisite for subsequent acceptance.[263] The information enables the company to asses the liquidity outflow caused by the compensation payment.[264]

The claim for improvement of the exchange ratio of shareholders of an "AG", "SE" or "KGaA" determined in the appraisal proceedings can be fulfilled in both national and cross-border mergers and divisions by granting additional shares instead of an cash compensation. The resolution to fulfil this claim for improvement cannot itself be contested with a valuation objection.

The appraisal procedure is now also available to shareholders of the acquiring company in both national and cross-border mergers and divisions. The conversion measure cannot be contest with a valuation objection. The amendment of the appraisal proceedings is intended to improve the quality and speed up the proceedings on the one hand and, on the other, to extend the protection of shareholders in accordance with the declared aim of the legislator.[265]

The draft terms of the conversions must state what security will be offered to the creditors of a German transferring or changing company for claims arising prior to the announcement of the draft

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[260] Sections 313, 327, 340 UmwG.

[261] Sections 313 (1) sentence 1, 327 sentence 1, 340 (1) sentence 1 UmwG; Sections 313 (2), 327 sentence 1, 340 (2) UmwG.

[262] Martin Schaper, 'Cross-Border Conversions - New Legal Framework Enters Into Force' (2023) YPOG<https://www.ypog.-law/en/insight/cross-border-conversions-new-legal-framework-enters-into-force> accessed 5 March 2024.

[263] Government draft of the UmRUG, BT-Drucks. 20/3822, 95 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 27 February 2024.

[264] ibid.

[265] Mario Schulz, Moritz Sippel, 'Das UmRUG und die Änderung für innerstaatliche Umwandlungen' (2023) Rödl & Partner <https://www.roedl.de/themen/grenzueberschreitende-umwandlungen/umrug-innerstaatliche-umwandlungen> accessed 6 March 2024; Ralf B. Tietz, 'Neuregelung des Umwandlungsrechts durch das UmRUG' (2022) TaylorWessing <https://www.-taylorwessing.com/de/insights-and-events/insights/2022/10/neuregelungen-des-umwandlungsrechts-durch-das-umrug> accessed 6 March 2024.

terms of conversion that are not yet due and whose fulfilment is jeopardised by the conversion measure.[266] If no security is provided or is insufficient in the opinion of the creditors, the creditors may demand the provision of appropriate security within three months of the announcement of the conversion plan.[267] If the claim is asserted in court, as long as such proceeding have not been concluded, a block on the register applies.[268] The registry court may only issue the preliminary conversion notice for registration once the creditors' application period has expired, their application has been legally rejected or the prescribed security has been provided. If requested by the court, the members of the representative body must affirm that the security offered has been provided to all creditors. Making a false affidavit is a criminal offence.[269]

According to Sections 314 (1), 328, 341 (1) UmwG, the creditors of the transferring or changing company may, under certain conditions, demand that they be granted security for claims that have arisen prior to the announcement of the conversion plan or its draft, but are not yet due at that time of its announcement, if the fulfilment of the claim is jeopardised by the conversion. As long as any proceedings regarding the enforcement of the claim for security have not yet been concluded, the conversion may not be entered in the commercial register.[270] Therefore, it may be advisable to proactively submit an acceptable offer in the conversion plan. The manner in which the security may be provided shall be determined in accordance with the general provisions of Sections 232 ff. BGB.[271]

Employees or their representatives have extended information and consultation rights. The conversion report, for example, must be made available to the works council or the employees six weeks before the conversion resolution is passed and any comments returned within one week before the resolution is passed must be forwarded immediately by the representative body to the shareholders

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[266] Tobias Harzenetter, Peter Steffen Karl, Gabriele Roßkopf, Joscha Meyer, 'Conversion Directive Implementation Act adopted: Legal framework for cross-border changes of legal form and divisions of corporations - Simplification of mergers - Acceleration of shareholder compensation appraisal proceedings' (2023) Gleiss Lutz <https://www.gleisslutz.com/en/news-events/know-how/conversion-directive-implementation-act-adopted-legal-framework-cross-border-changes-legal-form-and-divisions-corporations> accessed 6 March 2024.

[267] ibid.

[268] ibid.

[269] Tobias Harzenetter, Peter Steffen Karl, Gabriele Roßkopf, Joscha Meyer, 'Conversion Directive Implementation Act adopted: Legal framework for cross-border changes of legal form and divisions of corporations - Simplification of mergers - Acceleration of shareholder compensation appraisal proceedings' (2023) Gleiss Lutz <https://www.gleisslutz.com/en/news-events/know-how/conversion-directive-implementation-act-adopted-legal-framework-cross-border-changes-legal-form-and-divisions-corporations> accessed 6 March 2024.

[270] Sections 316 (2) sentence 3, 329 sentence 1, 343 (2) sentence 3.

[271] Government draft of the UmRUG, BT-Drucks. 20/3822, 97 <https://dserver.bundestag.de/btd/20/038/2003822.pdf> accessed 27 February 2024.

involved. In addition, compliance with employee rights is ensured by the assurance to be submitted by the representative body of the converting legal entity when registering with the commercial register. Employees are granted various information and consultation rights.[272] Concerning the corporate co-determinations, the "MgVG" regulates cross-border mergers and the "MgFSG" governs cross-border divisions and changes of legal form in accordance with the provisions of the Conversion Directive (EU) 2019/2121.

F. Register audit

A new element is the abuse audit, which must be carried out by the German registry court or the competent foreign authority for all cross-border conversions. In this context, it must be examined whether the cross-border conversion is set up for abusive or fraudulent purposes that lead to or are aimed at circumventing or evading EU or national law, or for criminal purposes, if there are indications of this. If there are indications of abusive or fraudulent purposes of the cross-border conversion, the abuse audit can lead to a considerable delay in issuing the certificate or to a complete refusal of registration. In this event, the court may extend the maximum period of three months provided for the registration procedure by a further three months.

G. MgVG and MgFSG

The "UmRUG" amends the "MgVG" and creates a new law on employee co-determination in the event of cross-border division and cross-border change of legal form ("MgFSG").

As has already been the case for cross-border mergers under the "MgVG", the co-determination rules of the Member State in which the company resulting from the conversion has its registered office apply, i.e. the principle of residence applies. Therefore, the rules of the "MgVG" and the "MgFSG" on the negotiated procedure and the fall-back solution only apply to cross-border herein conversions.

Negotiations on co-determination in an converting company are required for all types of cross-border conversion, in the event of a reduction in co-determination, discrimination against foreign employees and now also if a participating company employs a number of employees that corresponds

[272] Sections 310, 324, 337 UmwG.

to at least four-fifths of the threshold value that triggers company co-determination in the departing Member State.

The procedure for the formation and composition of the special negotiating body (“SNB”) under the “MgFSG” corresponds to the provisions of the “MgVG” for cross-border mergers. However, a distinctive rule applies if, in the case of a cross-border division, several companies emerge from the dividing company. In this case, an “SNB“ must be formed for each of these companies.

The employee co-determination procedure must be carried out in the case of structural changes that take place within four years of the registration of the company resulting from the cross-border division or change of legal form if they have effect of withholding or withdrawing co-determination rights from employees.

H. Conclusion

The “UmRUG“ has supplemented the “UmwG” by summarising the provisions relating to cross-border conversions separately in a sixth book. Due to the reference technique, which is typical for the “UmwG”, the logic is preserved and unnecessary complexity is avoided.[273]

The cross-border change of legal form was already permitted, but was associated with considerable administrative challenges and uncertainties. With the entry into force of the “UmRUG”, the case law has been codified and there is now clarity on how cross-border changes of legal form are to be organised.[274]

Particularly noteworthy are also the opening of the appraisal proceedings to the shareholders of the acquiring company as well as the possibility to fulfil the subsequent improvement claim of shareholders of an “AG”, “SE” or “KGaA” by granting additional shares instead of an cash compensation. A disadvantage from the company’s point of view is the structure of creditor protection through a register block for the duration of the court proceedings for the assertion of security deposits. However, an important innovation for both domestic and cross-border conversion is that it is now

[273] Robert Hörtnagl, Philip Rinke, Katharina Mönius, ‘Gesetz zur Umsetzung der Umwandlungsrichtlinie (UmRUG) - ein erster Überblick’ (2023) Kleeberg <https://www.kleeberg.de/2023/03/30/gesetz-zur-umsetzung-der-umwandlungsrichtlinie-umrug-ein-erster-ueberblick/> accessed 5 March 2024.

[274] Robert Dorr, Dirk Krome, ‘UmRUG: Neuerung im grenzüberschreitenden und nationalen Umwandlungsrecht’ (2023) PwC Legal Deutschland <https://legal.pwc.de/de/news/fachbeitraege/umrug-neuerungen-im-grenzueberschreitenden-und-nationalen-umwandlungsrecht> accessed 5 March 2024.

no longer only possible to challenge the validity of the conversion in the case of the transferring legal entity, but also in the case of the acquiring legal entity. The shareholders of both the transferring and the acquiring legal entity can subsequently have the appropriateness of the exchange ratio reviewed in appraisal proceedings.[275]

The comprehensive concept for the protection of the shareholders, creditors and employees involved in the conversion should be emphasised as an advantage. The "UmwG", "MgVG" and "MgFSG" secure existing and even potential rights in the event of a conversion. The rights are also protected by the fact that the German registry court must check whether there are any indications of abusive or fraudulent proposes before issuing the conversion certificate. Strengthening participation through extended information rights and co-determination have the advantage that a more intensive examination of the cross-border conversion takes place.

In practice, the relevance of the overriding national regulation on the division by acquisition will depend on whether the possibility of cross-border divisions by acquisition is also implemented or recognised in the respective other EU/EEA Member States. If no legal regulations are created, divisions for acquisition on the part of the respective foreign company could in turn only take place on the basis of and in compliance with the case law of the European Court of Justice on Freedom of Establishment that has been issued to date.[276]

The application of the Business Registers Interconnection System ("BRIS"), in which the registers involved communicate digitally with each other, simplifies the registration process. The greater role of the registry role in cross-border conversions is also to be encouraged. This is the appropriate way to effectively ensure abuse control.

The impact on the implementation period of cross-border conversions must be taken into account when drawing up the conversion schedule.[277] Cross-border conversions will remain challenging and complex. With regard to the necessary coordination with the registry courts as well as the various submission, information and publication deadlines, they must be prepared carefully and in a timely

[275] Martin Schaper, 'Cross-Border Conversions - New Legal Framework Enters Into Force' (2023) YPOG <https://www.ypog.law/en/insight/cross-border-conversions-new-legal-framework-enters-into-force> accessed 5 March 2024.

[276] Christian Speckert, Amélie Ungerer, 'Erweiterung grenzüberschreitender Reorganisationsmaßnahmen durch den Gesetzgeber' (2023) Rödl & Partner <https://www.roedl.de/themen/grenzueberschreitende-umwandlungen/erweiterung-grenzueberschreitender-reorganisationsmassnahmen> accessed 5 March 2024.

[277] Martin Schaper, 'Cross-Border Conversions - New Legal Framework Enters Into Force' (2023) YPOG <https://www.ypog.law/en/insight/cross-border-conversions-new-legal-framework-enters-into-force> accessed 5 March 2024.

manner in any case.[278] Nevertheless, cross-border conversions can be carried out with greater legal certainty in the future.[279] Only by observing the provisions amended or created by the "UmRUG" the conversion measure can be planned carefully and with foresight.

It is also to be welcomed that the newly introduced "MoPeG" gives the "eGbR" comprehensive access to identity-preserving conversion under the "UmwG" for the first time.[280]

Overall, the UmRUG represents the biggest change to German company law in the last 15 years and creates a legal framework for cross-border conversions, for which there is a practical need in the current difficult times.[281] A standardised legal framework provides legal certainty, protects the legitimate interests of third parties and promotes the competitiveness of European Companies.[282]

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[278] Tobias Harzenetter, Peter Steffen Karl, Gabriele Roßkopf, Joscha Meyer, 'Conversion Directive Implementation Act adopted: Legal framework for cross-border changes of legal form and divisions of corporations - Simplification of mergers - Acceleration of shareholder compensation appraisal proceedings' (2023) Gleiss Lutz <https://www.gleisslutz.com/en/news-events/know-how/conversion-directive-implementation-act-adopted-legal-framework-cross-border-changes-legal-form-and-divisions-corporations> accessed 6 March 2024.

[279] Thomas Kollruss, 'The Cross-Border Change of Legal Form as an Alternative to Transnational Mergers? A Comparative Study' (2024) Liverpool Law Review <https://doi.org/10.1007/s10991-023-09361-7> accessed 7 March 2024.

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[281] Jana Hupfer, Nikolaus Malottke, Fleur J. Prop, 'The legal basis for cross-border divisions and changes of legal form is coming soon - German Parliament (Bundestag) passes law to implement the EU Mobility Directive (UmRUG)' (2023) Deloitte <https://www2.deloitte.com/dl/en/pages/legal/articles/umrug-umsetzung.html> accessed 5 March 2024.

[282] Andreas Jentgens, Jana Hupfer, Nikolaus Malottke, Klaus Heeke, Malte Jüllich, Merten Zenker, 'The UmRUG is here: More flexibility for cross-border corporate structural measures - What opportunities does the new law create?' (2023) Deloitte Legal Webcast, 15 <https://www2.deloitte.com/content/dam/Deloitte/dl/Documents/legal/Deloitte%20Legal%20Webcast%2015.2.2023-EN.pdf> accessed 5 March 2024.

Abstract

This Master’s thesis presents the main changes resulting from the Directive (EU) 2019/2121 and the associated laws (UmwG, UmRUG, MgFSG, MgVG).

In times of globalisation, the internationalisation of business activities and the cross-border choice of the legal from play an increasingly important role in the field of business law.

The fundamental principle of the “ Umwandlungsgesetz (UmwG)“ remains unchanged. A new sixth book has been created for cross-border mergers, divisions and changes of legal form. The previous provisions on cross-border mergers have been reorganised and, together with the new provisions uniformly regulated in Sections 305 ff. UmwG. For cross-border divisions and changes of legal form, the law contains many references to the law on cross-border mergers.

For the first time, standardised regulations on the cross-border divisions and changes of legal form are being introduced at EU level.

Die vorliegende Masterarbeit behandelt die wesentlichen Änderung, welche durch die Richtlinie und der damit verbundenen Gesetze (UmwG, UmRUG, MgFSG, MgVG) entstanden sind.

In Zeiten der Globalisierung spielen die Internationalisierung der Geschäftstätigkeit und die grenzüberschreitende Wahl der Rechtsform eine immer wichtigere Rolle im Bereich des Wirtschaftsrechts.

Das Grundprinzip des Umwandlungsgesetzes (UmwG) bleibt unverändert. Für die grenzüberschreitenden Verschmelzungen, Spaltungen und Formwechsel wurde ein neues sechstes Buch geschaffen. Die bisherigen Vorschriften zur grenzüberschreitenden Verschmelzung wurden angepasst und zusammen mit den neuen Vorschriften einheitlich in den §§ 305ff. geregelt. Für die grenzüberschreitenden Spaltungen und Formwechsel enthält das Gesetz zahlreiche Verweise auf das Recht der grenzüberschreitenden Verschmelzung.

Erstmals werden auf EU-Ebene einheitliche Regelungen für die grenzüberschreitende Spaltung und den grenzüberschreitenden Formwechsel eingeführt.

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