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''European legislation on cross-border mergers, conversions, and divisions (Directive EU 2019/2121) and its implementation in Austrian law.''

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ABSTRACT

The paper analyses the development of rules on cross-border mergers, conversions, and divisions on the national and European levels. Facilitating cross-border enterprise aggregations allows firms to exploit economies of scope and scale through external growth, as a larger market provides more potential combinations. Cross-border mergers, conversions, and divisions can create European groups comparable in size to global competitors, making them essential for establishing an internal market. Recognizing this, the European Treaties have included cross-border reorganizations as a critical element since the early stages of European integration, with mergers, conversions, and divisions being typical forms of reorganization.

The European institutions and legislators created a harmonised legal framework for corporate restructure and mobility within the EU. This initiative was supported by the Treaty, which empowers European lawmakers to adopt directives to achieve freedom of establishment. This legal basis led to establishing Directive 2005/56/EC on cross-border mergers of limited liability companies and its following amendments in Directive (EU) 2017/1132 and Directive (EU) 2019/2121.

Austria implemented this legal framework for cross-border reorganisation through several different legal acts. As a result, cross-border mergers are governed by the EU-VerschG and specific provisions of the ArbVG concerning employee participation. In the context of the mandatory amendments caused by Directive 2019/2121/EU, Austria used this opportunity to create a more ambitious solution by creating a unified law on all restructuring operations based on secondary European Law. This paper aims to examine in detail the new Directive (EU) 2019/2121 and the effort to implement it under Austrian Law.

ZUSAMMENFASSUNG

Das Papier analysiert die Entwicklung der Regelungen zu grenzüberschreitenden Fusionen, Umwandlungen und Spaltungen auf nationaler und europäischer Ebene. Die Erleichterung grenzüberschreitender Unternehmenszusammenschlüsse ermöglicht es Firmen, durch externes Wachstum Größenvorteile und Synergieeffekte besser auszuschöpfen, da ein größerer Markt mehr potenzielle Kombinationen bietet. Grenzüberschreitende Fusionen, Umwandlungen und Spaltungen können europäische

Konzerne schaffen, die in ihrer Größe mit globalen Wettbewerbern vergleichbar sind, was sie für die Schaffung eines Binnenmarktes unerlässlich macht. In Anerkennung dessen haben die Europäischen Verträge grenzüberschreitende Reorganisationen seit den frühen Phasen der europäischen Integration als entscheidendes Element aufgenommen, wobei Fusionen, Umwandlungen und Spaltungen typische Formen der Reorganisation darstellen.

Die europäischen Institutionen und Gesetzgeber haben einen harmonisierten Rechtsrahmen für Unternehmensrestrukturierungen und -mobilität innerhalb der EU geschaffen. Diese Initiative wurde durch den Vertrag unterstützt, der die europäischen Gesetzgeber befähigt, Richtlinien zur Verwirklichung der Niederlassungsfreiheit zu erlassen. Diese Rechtsgrundlage führte zur Einführung der Richtlinie 2005/56/EG über grenzüberschreitende Verschmelzungen von Kapitalgesellschaften und deren nachfolgenden Änderungen in der Richtlinie (EU) 2017/1132 und der Richtlinie (EU) 2019/2121.

Österreich setzte diesen Rechtsrahmen für grenzüberschreitende Reorganisationen durch mehrere verschiedene Rechtsakte um. Infolgedessen werden grenzüberschreitende Fusionen durch das EU-VerschG und spezifische Bestimmungen des ArbVG zur Arbeitnehmerbeteiligung geregelt. Im Kontext der verpflichtenden Änderungen, die durch die Richtlinie 2019/2121/EU verursacht wurden, nutzte Österreich diese Gelegenheit, um eine ehrgeizigere Lösung zu schaffen, indem es ein einheitliches Gesetz für alle Restrukturierungsmaßnahmen auf Basis des sekundären europäischen Rechts erstellte. Dieses Papier zielt darauf ab, die neue Richtlinie (EU) 2019/2121 und die Bemühungen zu ihrer Umsetzung im österreichischen Recht im Detail zu untersuchen.

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

AG Aktiengesellschaft

AktG Aktiengesetz

Art. Article

dUmwG deutsches Umwandlungsgestz

EC Treaty establishing the European Community

ECJ European Court of Justice

EU European Union

EU-UmgrG Europäische Union Umgrundungsgesetz

EU-VerschG Europäische Union Verschmelzungsgesetz

GmbH Gesellschaft mit beschränkter Haftung

GmbHG Gesellschaften mit beschränkter Haftung Gesetz

HQ Headquarters

SpaltG Spaltungsgesetz

SE Societas Europa

TFEU Treaty on the Functioning of the European Union

M&A Mergers and Acquisitions

UCITS Undertakings for Collective Investments in Transferable Securities

UK United Kingdom

UmwG Umwandlungsgesetz

1. INTRODUCTION

1.1. Purpose and Focus of the Thesis

It is common practice in the business world for all companies and other undertakings, large and small, to enter alliances and conduct operations that span national borders. Some companies institute joint ventures, others form partnerships or marketing deals, and others merge or make acquisitions. These alliances are better known as cross-border mergers and acquisitions and are defined as:

"*Any transactions in assets of two firms belonging to two different economies or within one economy between two firms belonging to two different economies.*"[1]

The European Union's legal framework of transborder operations alliances of companies and other undertakings has been regulated by Article 49 of the Treaty on the Functioning of the European Union (TFEU), which provides companies with the fundamental right of freedom of establishment. Other than primary EU law, a significant new development in the above legal area was introduced in the form of Directive (EU) 2019/2121 of November 2019 (also known as the Mobility Directive). This Directive, which came into force in January 2020, has innovated the legal field in cross-border mergers and acquisitions and made it mandatory for all EU Member-States to implement it into national law, providing the same time a timeline for its adoption and by emphasizing its importance.[2]

As a result, the EU introduced Directive 2019/2121, with the purpose to amend the previous Directive (EU) 2017/1132 regarding cross-border conversions, mergers, and divisions. This Directive was issued with the purpose to regulate cross-border mergers of limited liability companies. However, after thoroughly examining and implementing Directive 2017/1132 from the Member States and the Commission, it became evident that changes and improvements were necessary, in order to safeguard the dynamic nature of the legal framework and the EU's commitment to adapt to an ever-demanding world of business changes.[3]

The new Directive 2019/2121 provides rules for regulating cross-border conversions and divisions since the previous Directive only provided for rules on domestic divisions of public limited liability companies and other merger operations,

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[1] Chunlai Chen, Christopher Findlay, A Review of Cross-border Mergers and Acquisitions in APEC (2003) 7 https://doi.org/10.1046/j.1467-8411.2003.00129.x .

[2] EY, Directive (EU) 2019/2121 on cross-border reorganizations guide, (2023).

[3] DIRECTIVE (EU) 2019/2121 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCI, (1).

such as cross-border demergers and conversions, were excluded from its scope of application. The new rules on cross-border mergers also intend to create a uniform legal framework within the European Union and to improve the exercise of the freedom of establishment for companies and other undertakings.[4] This directive is also part of the broader efforts of the EU to create a more integrated single market and promote economic growth and competitiveness within its borders.

Regarding the implementation of Directive 2019/2121 by the EU member states, even though the implementation deadline expired on January 31st, 2023, not all EU Member States have implemented the “Mobility Directive”[5]. At this point, the directive has been implemented in 7 of the 21 Member States, including Austria. In 9 countries (Czech Republic, Denmark, France, Italy, Latvia, Lithuania, Luxembourg, Netherlands and Poland) the respective bills have already been reviewed, but in 6 jurisdictions (Bulgaria, Croatia, Greece, Portugal, Romania and Slovakia), the draft laws implementing the Directive have not yet been published.[6]

1.2. Methodology and Literature analysis

This thesis researches the scope and application of Directive 2019/2121 and its implementation in Austrian Law. One of its main goals is also to examine any similarities or differences between European and Austrian Law regarding cross-border mergers and acquisitions. The main instrument that will allow an in-depth analysis of the above subject is the relatively new Directive of the European Union regarding cross-border conversions, mergers, and divisions.

The thesis paper will focus on the primary source of the Directive 2019/2121 regarding cross-border conversions, mergers, and divisions, as well as the existing Austrian law on the same subject. Since this Directive is still new and has yet to be fully implemented by many member states, it can be regarded as an under-researched topic. Therefore, exploratory research will define the Directive's central aspect. The Thesis will also examine the definition of a merger and acquisition and how they function within the EU Member-State of Austria. Moreover, all the recent updates and decisions of the Austrian political and legal system regarding the implementation of the "Mobility Directive" in Austria, will also be presented below.

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[4] DIRECTIVE (EU) 2019/2121 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCI, (2)
[5] Directive (EU) 2019/2121is also know as ‘Mobility Directive’.
[6] EY Guide - Directive (EU) 2019/2121 on cross-border reorganizations https://www.ey.com/en_pl/law/ey-guide-on-cross-border-reorganizations, By the time the thesis gets approved the number of countries that implement Directive (EU) 2019/2121 might change.

The methodology of this Thesis follows the standard scientific method of most academic papers in the field of law. It will draw from diverse sources to produce specific knowledge regarding the law that applies for cross-border mergers and acquisitions in the European Union, particularly in Austria. The arguments will be based on a comprehensive list of primary data such as academic sources, cases, legislation, and secondary data such as academic books and articles from European and Austrian sources. This wide range of sources will shed light on the subject. With the help of judicial cases and academic literature, there will be a substantive interpretation of the Directive's 2019/2121 influence in the process of cross-border mergers and acquisitions in the European Union.

The thesis will also clarify the legal framework regarding cross-border mergers and acquisitions in the European area and measure their importance for the Member State of Austria. As a critical instrument, Directive 2019/2121 regarding cross-border conversions, mergers and divisions will be described at length and compared with Austrian law and possible Austrian court decisions and decisions of the European Court of Justice.

Finally, the Thesis not only provides an analysis of the current legal framework of the EU and Austria regarding cross-border operations but also aims to present an accurate interpretation of the existing European and Austrian law. It will assess whether the existing legal framework can create and introduce significant changes and innovations, making cross-border restructure in the EU more profitable, safe, and efficient for companies and undertakings. This practical aspect of the research will enable the reader to form an opinion about the different scopes of European law for cross-border operations as implemented in Austria. Therefore, the present Thesis is intended to stimulate an in-depth study of the rules applicable to cross-border mergers, transformations, and divisions of public companies within the EU and particularly within the Austrian Jurisdiction.

2. PROCESS AND BASIC CONCEPTS OF CORPORATE RESTRUCTURE

Company mobility can be divided into two scenarios. First, there is the group of corporate movements involving the transfer of a company's headquarters to another country while maintaining the legal form provided by the country of formation. The goal for those companies is to look for the most attractive legal framework applicable to the company. The second scenario of company mobility is a group of corporate movements that result from cross-border reorganizations, such as mergers, conversions, acquisitions, and divisions. These cross-border reorganisations are aiming to reduce the complications, times and costs associated with different forms of consolidation especially when the efforts to consolidate two companies occurs across national borders.[7]

Moreover, through the practice of corporal restructure, different companies combine their activities and succeed on developing new products more efficiently, which leads to the reduce of production and distribution costs and ultimately to better prices and quality of products for the consumers. Corporal restructure between companies are more than welcome in the business and legal world if they don't impede competition, which can impose higher prices for consumers and becomes an obstacle to innovation and product quality.

2.1. Mergers and acquisitions

The term merger is defined as an agreement that brings together two existing companies to form a new one.[8] In European legal tradition, a merger is an operation whereby a company, without liquidating its assets, ceases to exist and transfers all its assets and liabilities to another company. The shareholders of the ceased company receive shares in the new company, as a means of reimbursement.[9]

According to EU Law[10], a narrow definition of a merger is when one or more companies, upon being disbanded without proceeding to liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for issuing securities or shares representing the capital of the acquiring company to their members. Alternatively, a merger can happen when two or more companies, upon being disbanded without proceeding to liquidation, transfer all their assets and liabilities to a new company, in exchange for issuing securities or shares representing the capital of the new company to their members.[11]

The Merger Taxation Directive provides a broad definition of merger. This Directive broadens the definition of merger by including all four methods of M&A. The

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[7] Papadopoulos Thomas, The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive, European Business Law Review Volume 23, Issue 4 (2012) pp. 525. https://doiorg.uaccess.univie.ac.at/10.54648/eulr2012029

[8] Investopedia https://www.investopedia.com/terms/m/merger.asp

[9] Fomcenco A. Mergers & Acquisitions: Counseling and Choice of Method. Aalborg Universitetsforlag (2015) 8.

[10] Art. 2, Directive 2005/56/EC, Art. 2,3,4, Directive (EU) 2011/35.

[11] Dobos, I., Mergers and acquisitions in the law of the European union and their economical background, ACTA JURIDICA HUNGARICA 53, No 3 (2012) pp. 218–235. https://doi.org/10.1556/AJur.53.2012.3.4

definition of merger in this Directive includes all the different ways that imply acquisition by control without liquidating the assets of the participating companies.[12] Depending on whether the target company already existed or was only founded during the merger, a distinction must be made between merger by absorption and merger through new formation.

In the first case, namely merger by absorption[13], the assets and liabilities of one or more transferring companies, without going into liquidation, are sold to an (already existing) acquiring company against granting shares in this company and possibly cash payments.

In the second case, namely merger through new formation[14], a new company is formed to which the assets and liabilities of two or more companies, without going into liability, are transferred in return for shares in the new company or possible cash payments. One of these will be dissolved due to the merger. Its assets will be transferred to the acquiring company, which continues to exist. Lastly, in the case of merger by consolidation[15], a company dissolves without going into liquidation and transfers all its assets and liabilities to another company that already holds all the shares representing its capital.

Basically, when one company buys another and clearly establishes itself as the new owner, this purchase is called an acquisition. From a legal perspective, the purchased company ceases to exist as an independent entity; the buyer absorbs the company, and the buyer's stock continues to be traded, as usual. In this scenario, when a company sells its majority stake to another company, it does not technically merge.

A merger occurs when two companies, ideally of similar size, agree to combine their operations into a single new company rather than continuing to exist as separately owned and operated entities. In a merger, both companies' stocks are going out of circulation, and new stock is issued for the newly formed company.[16]

Finally, it is worth noticing that EU law enables the merger of primarily public companies, while many Member States have extended the scope of application of these

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[12] Art. 2(a)(i)(ii), Directive 2009/133/EC.
[13] Art. 2(a)(i), Directive 2009/133/EC.
[14] Art. 2(a)(ii), Directive 2009/133/EC.
[15] Art. 2(a)(iii), Directive 2009/133/EC.
[16] Dobos, I., Mergers and acquisitions in the law of the European union and their economical background, ACTA JURIDICA HUNGARICA 53, No 3 (2012) pp. 218–235, 219.

rules to mergers involving private companies and other legal entities;[17] some countries, like Germany, even allow the merger of partnerships.[18]

2.2. Divisions of companies (demergers)

The opposite act of corporate transaction to the merger is the division. The method of division facilitates the split of a company into business units. These business units can be sections or departments, which can, immediately after the division, either be transported into possession of existing corporations or become independent legal entities. In any case, they acquire their own legal personality.[19]

A company may be split into two or more companies by transferring its assets and liabilities to the newly incorporated companies. In that Case, we have a full division[20], and the members of the companies are issued shares in the newly incorporated companies. In the Case of partial division[21], the members of the dividing company are again issued shares in the recipient company/companies. However, a partial division of assets and liabilities is transferred to one or more newly incorporated companies. Finally, there is the case of division by separation, whereby the dividing company transfers part of its assets and liabilities to one or more recipient companies in exchange for the issue of shares in the recipient company/companies.[22]

The EU Law Directive 2017/1132[23] introduces a distinction between division by acquisition, and division by forming new companies or a combination of these two. Therefore, there is division by acquisition per Section 2 Chapter III Title II of the Directive 2017/1132 and divisions by formation of new companies per Section 3 Chapter III Title II of the same Directive.

Furthermore, Article 135 (3) allows a combination of corporate divisions. In the case of division by acquisition, the recipient companies already exist. In contrast, in the case of division, by forming new companies, new companies are established only after the time of the division. Article 156 provides that the procedure to be followed in the event of a division by acquisition per Articles 137 to 153 applies mutatis mutandis to

[17] Teichmann, C., Corporate Restructuring under the EMCA. European Company and Financial Law Review,Vol. 13 Issue 2 (2016) 283.
[18] Under § 3 (1) German Transformation Act (Umwandlungsgesetz) the chapter on mergers covers, inter alia, private and public companies, cooperative societies, partnerships and associations.
[19] Fomcenco A. Mergers & Acquisitions: Counseling and Choice of Method. Aalborg Universitetsforlag (2015) 10.
[20] Art. 2(b), Directive 2009/133/EC.
[21] Art.2(c), Directive 2009/133/EC.
[22] Teichmann, C., Corporate Restructuring under the EMCA. European Company and Financial Law Review, Vol. 13 Issue 2 (2016) 283.
[23] Art. 134,136 Directive (EU) 2017/1132

divisions by forming new companies, with several transaction-specific exceptions. This distinction between the two types of corporate divisions is of fundamental importance for the whole scope of application of the Directive.[24] In all cases, the companies receiving contributions (in the form of assets and possibly liabilities) due to the division will distribute shares to the company's shareholders.

Moreover, the German Law (Umwandlungsgesetz) distinguishes more forms of division, such as Ausgliederung[25]. According to Ausgliederung, a company transfers one or more parts of its assets and liabilities to one or more existing or newly formed companies (subsidiaries) which distribute shares in their capital not to the shareholders of the company being divided but to that company itself.[26]

Finally, under division, a company can divide itself without being immediately acquired by another company, especially when this is considered an intermediate step in a restructuring strategy. The divided business parts or units are not transferred into legal limbo but are in the possession of other companies as subsidiaries of the divided company until their sale.[27]

2.3. Conversions

A third way of corporate restructuring is the change of the company form, also known as conversion. In those Member States that draw a clear line between private and public companies, the change from one form to another requires a formal company transformation. According to the Austrian company law doctrine, private companies (Gesellschaft mit beschränkter Haftung) and public companies (Aktiengesellschaft) are different forms of company.

These company forms are regulated in different acts (GmbHG and AktG, respectively) with different requirements for incorporation and internal organization. The alteration of the company form – from private to public or vice versa – is regarded as a conversion and is subject to the conversion procedure as laid down in the Austrian Act on Transformations (UmwG – Umwandlungsgesetz)[28].

[24] Lieder, J. and Kindler, P. European Corporate Law: Article-by-Article Commentary. 1. Auflage 2021. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG. (2021) 691.
[25] § 1 Paragraph 1 Number 2 UmwG.
[26] Storm, P. "Scope and Limitations of the Cross-Border Merger Directive." Chapter. In Cross-Border Mergers in Europe, edited by Dirk Van Gerven, 54–78. Law Practitioner Series. Cambridge: Cambridge University Press (2010) 69.
[27] Fomcenco A. Mergers & Acquisitions: Counseling and Choice of Method. Aalborg Universitetsforlag (2015) 62.
[28] Bundesgesetz über die Umwandlung von Handelsgesellschaften (UmwG).

Member States that follow the "one company" model, such as the United Kingdom, consider the change from a private to a public company, or vice versa, a simple re-registration. Private and public companies are both subject to the Companies Act, the main difference being that the private company must not offer its securities to the public.[29] When incorporating the company, the founders decide whether it should be "private" or "public". Any company that is not a public company in the Companies Act will automatically be a private company.[30] In such a system, a company that started as private may re-register by altering its articles, thereby becoming a public company.

However, the differences between the "two companies" and the "one company" model are not really significant. The conversion procedures, on the one hand (as in Austria), and re-registration, on the other (as in the UK), are similar. They require a special resolution of the shareholders, an increase of the share capital to the amount required for public companies, a change of the company name, and, finally, formal acknowledgment of the new company form by the registrar.[31]

2.4. Motives for corporal restructure

An essential aspect of understanding the need for corporal restructure in cross-border mergers and acquisitions, divisions, and conversions is to look at the motives that drive the companies to take those measures. These motives can be strategic, market, economic, and personal. [32]

Through strategic acquisitions, companies can improve the strength of their position in an economic market. This means that a company takes skill, expertise, or knowledge and uses it by expanding to additional industries where it can increase its competitiveness and strategic position. Strengthening the position of a company means that this company can increase market power or provide the company with more resources and products.

The definition of Market power is the result of having a high market share. Another definition of increasing the firm's power is its relationship with customers by offering various products. If a company has high market power, this helps put the

[29] Sec. 755 (1) UK Companies Act.
[30] Sec. 4 UK Companies Act.
[31] Teichmann, C., Corporate Restructuring under the EMCA. European Company and Financial Law Review,Vol. 13 Issue 2 (2016) 285.
[32] H. Donald Hopkins, Cross-border mergers and acquisitions: Global and regional perspectives, Journal of International Management 5 (1999) pp 207–239, 212.

company in a stronger position to deal with customers and competitors, resulting in a better strategic position.[33]

Companies also use cross-border M&A, division, and conversion methods as tools to enter new markets in new countries. Companies use these methods to establish themselves in a market in another territory in the fastest and least risky way possible. In addition, and primarily through acquisitions, companies succeed in establishing themselves in a foreign market without adding additional capacity to an already formed market. The recipient countries also welcome the above practices since they are among the most successful ways to increase direct foreign investment input.[34]

Finally, economic reasons are another significant motive for companies to expand their operations abroad through cross-border M&A, divisions, and conversion. These economic reasons can be opportunities for companies to move their operations to lower-cost countries or to countries where the government and their regulations are more friendly to foreign investors in order for them to manage economic risks and market changes. It is common for companies to expand their operations in other countries so they can diversify their operations and risks and increase their profits.

Other economic reasons can be learning different practices and taking advantage of innovative practices from other businesses and other markets so they can improve their products and services and, therefore, increase their market share and profits.[35]

3. PRIMARY EUROPEAN LEGISLATION ON CORPORATE MOBILITY

3.1. Freedom of Establishment

Article 49 and of the Treaty on the Functioning of the European Union (TFEU) regulates the principle of freedom of establishment, which provides the legal basis for corporate mobility within the EU. Based on this principle, a legal entity formed by the laws of an EU member state (and having its registered office, central administration, or principal place of business within the EU) is free to carry on economic activity in one or more other member states without being subject to any discriminatory or restrictive

[33] Ibid, 213.
[34] Ibid, 214-215.
[35] Ibid, 217.

measures. In principle, any restrictions on the freedom of establishment in the territory of another member state are prohibited.[36]

More specifically, Art. 49 TFEU states that:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on setting up agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its nationals by the law of the country where such establishment is affected, subject to the provisions of the Chapter relating to capital."[37]

Practically, Article 49 TFEU enables individuals and companies to establish and operate a business on a stable and continuous basis in any EU Member State, under the same conditions as the nationals of that state. The freedom to establish in another Member State is better applied when accompanied by the necessary flexibility for corporate restructuring. This flexibility means that the cross-border nature of the establishment should not involve excessively high costs or burdensome bureaucracy. Under these considerations, companies should be able to freely exercise their right of establishment by conducting cross-border mergers and other operations, which serve as an effective method of corporate restructuring.[38]

Moreover, Art. 49 TFEU provides the right for self-employed activities so that individuals can move to another Member State to establish their own business or professional practice, the right to establish and manage an undertaking such as companies, firms, and other types of organizations, including the opening of subsidiaries, branches, or agencies, the right for a permanent activity characterized by stability and continuity and the right for non-discrimination so that these individuals

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[36] Papadopoulos Thomas, The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive, European Business Law Review Volume 23, Issue 4 (2012) pp. 518.

[37] EUR-Lex - 12008E049 - EN. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E049:en:HTML

[38] Papadopoulos Thomas, The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive, European Business Law Review Volume 23, Issue 4 (2012) pp. 517 – 546.

and companies who exercise the right of establishment should be treated equally to nationals of the host Member State. This means they are subject to the same legal conditions and requirements as local businesses and individuals.[39]

Understandably, one of the main aims of the principle of freedom of establishment is to discourage discrimination on the grounds of nationality and create measures to enable the free movement of professionals and companies inside the EU, including the harmonization of national rules to make this corporate mobility easier.

Meanwhile, the concept of freedom of establishment, according to Art 49 TFEU, is relatively broad, which allows the nationals of an EU Member State to participate, on a stable and continuous basis, in the economic activities of another Member State and to make profit from these activities, contributing in that matter to the economic and social life of the European Community;[40] most member states of the EU hesitate to allow free corporate cross-border mobility. The main reason for such hesitation is the concern that restriction-free cross-border corporate mobility could create disadvantages for creditors and other stakeholders' rights.

Therefore, most EU member states attempt to impose their legal framework on inbound migrating companies and, in doing so, effectively constrain corporate mobility, which forced the ECJ to act by interpreting and clarifying the scope of the freedom of establishment regarding restricting measures imposed by EU member states.[41]

3.2. The ECJ´s interpretation of the Freedom of Establishment

The ECJ's interpretation of the freedom of establishment and its efforts to harmonize company law are of grave importance, because these rulings are not just legal decisions, but they can also affect the field of European business. They ensure that companies and undertakings can exercise the freedom of establishment efficiently in other Member States too. The ECJ's groundbreaking decisions, such as the Centros[42],

[39]Freedom of establishment and freedom to provide services | Fact Sheets on the European Union | European Parliament. https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services

[40]C-2/74, Reyners v Belgium [1974] ECR 631 para 21.

[41]Xuereb, P.G. (2021). Article 49 [Freedom of Establishment]. In: Blanke, HJ., Mangiameli, S. (eds) Treaty on the Functioning of the European Union – A Commentary. Springer Commentaries on International and European Law. Springer, Cham.

[42]C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen (1999).

Überseering[43], and Caertesio[44] , led to unimaginable positive changes for the legal and business community.

After those rulings came into force, it became part of the European law regarding the freedom of establishment that destination States may not refuse to register a branch of a company incorporated in the departure States, even if the company conducts all its business through that branch[45], that, on the other side, the destination States have to recognise a company as a legal entity, even if it remains incorporated under the laws of its departure State[46] and, finally, that the departure State may require that a company withholds its main place of business within its territory if it wishes to hold its status as a legal entity under the departure State's laws.

This, however, precludes the departure State to prohibit companies from moving their main place of business and registered HQ into the destination State, and thereby assuming a new legal form under the laws of the destination State, if this is according to the destination State's laws.[47]

3.3. ECJ`s interpretation of Cross-Border Mergers based on the Sevic case

In the Sevic[48] case, a significant ruling by the ECJ, established that EU Member States must treat cross-border mergers with the same criteria as they treat a merger of companies within their jurisdiction.[49] This case is a prime example of the importance of the case-law that ruled in favour of a cross-border merger to be directly supported by the freedom of establishment of the EC Treaty (Art. 43 EC Treaty/now Art 49 TFEU).[50]

The SEVIC ruling handled the issue of prevention of cross-border mergers by the Member State of one of the companies. A German company (SEVIC) attempted to merge with a Luxembourgish company (Security Vision SA), with Sevic acquiring the Security Vision SA. As a result, all the assets of Security Vision were to be transferred

[43]C-08/00, Überseering BV v Nordic Construction Company Baumanagement GmbH [2002] ECR I-9919.
[44] C-210/06. Cartesio Oktató és Szolgáltató bt (2008).
[45] C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen (1999) para. 17, Rothe, Nicole. "Freedom of Establishment of Legal Persons Within the European Union: An Analysis of the European Court of Justice Decision in the Überseering Case." American University Law Review 53, no.5 (2004).
[46] C-08/00, Überseering BV v Nordic Construction Company Baumanagement GmbH [2002] ECR I-9919 para. 70.
[47]C-210/06. *Cartesio Oktató és Szolgáltató bt* [2008] paras 110-118.
[48] C-411/03 SEVIC Systems AG [2005] ECR I-10805.
[49] Ibid., para 23.
[50] JL Hansen, 'Merger, Moving and Division Across National Borders-When Case Law Breaks through Barriers and Overtakes Directives' European Business Law Review Vol. 18 no. 1[2007], 187.

to SEVIC without liquidation, and Security Vision would be terminated. The main obstacle to the merger plans was German Law that allowed only domestic mergers and did not permit cross-border mergers, thus bringing the case before the ECJ.[51]

The ECJ had to answer the following questions regarding the merger of the two companies: first, can a cross-border merger be considered as established within the meaning of Article 43 EC (Treaty establishing the European Community)? Given a positive answer, the second question arises and thus can the error of German legislation, which does not allow for cross-borders mergers, be regarded as a “restriction” on the freedom of establishment. Finally, if there is a positive answer to the second question as well, the third question would be whether it is possible to justify such a restriction.[52]

During the main proceedings, the ECJ concluded that both Articles 43 and 48 EC are applicable to cross-border mergers. The ECJ´s main argument was that “cross-border mergers constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market,” and accepted the fact that there is a distinction between the manner on which that national law of each Member State treats the internal and cross-border mergers.[53]

However, such discriminatory treatment can only be allowed and overseen if specific conditions are met and not overextended their application any further than it is necessary. These conditions can be the pursuing of a legal objective the justification by imperative and overriding reasons in the public interest, such as creditors', minority shareholders', and employees' interests, or fairness in commercial transactions and fiscal supervision.[54]

Regarding proportionality, ECJ concluded that the German law on transformation, which prevented cross-border mergers, was not proportional. German law prohibits all inbound and outbound cross-border mergers, claiming the protection of the public interests, which the ECJ saw as disproportionate and going beyond what is necessary to protect those public interests. The main problem in this case, therefore, was the lack of a connection between total prohibition of cross-border mergers and the

[51] C-411/03 SEVIC Systems AG [2005] ECR I-10805 paras 6-10.
[52] Peter Behrens 'Case C-411/03, SEVIC Systems AG, Judgment of the Grand Chamber of the Court of Justice of 13 December 2005, [2005] ECR I-10805', (2006)” in Common Market Law Review, vol. 43, Issue 6, pp. 1673.
[53] C-411/03 SEVIC Systems AG [2005] ECR I-10805, para. 19.
[54] Ibid., para 23.

protection of public interests, the existence of which could then be verified in every individual case.[55]

The ECJ made clear that mergers are an important as a method of corporate restructuring and a fine example of the freedom of establishment. Moreover, the ECJ stated that the right of establishment fulfils all conditions which permit or even merely facilitate access to another Member State and the pursuit of economic activity in that State by allowing the individuals and companies concerned to include themselves in the economic life of the destination Member state effectively and under the same conditions as national market participants.[56]

3.4. ECJ`s interpretation of Cross-Border Conversions based on the Vale case

The Vale[57] case handles a cross/border conversion of VALE Construzioni Srl, an Italian company specialising in constructions, established under Italian Law, into a company incorporated under Hungarian Law. Instead of opening a new branch in Hungary or establish only an administrative seat in Hungary, Vale chose to bring its operations to Hungary and to transform into a limited liability company. Even though under Italian law is allowed for a company to convert into a company under the law of a foreign country, Hungarian Law only gives this option to companies established under Hungarian Law and there is no provision providing the same application to cross-border conversions.[58]

The Hungarian courts referred the case to the ECJ for a preliminary ruling, where the ECJ tried to answer the following questions. 1) whether Articles 49 TFEU and 54 TFEU don't apply for cases, where national legislation, although allowing a company established under national law to convert, does not allow a company established by the law of another Member State to convert to a company governed by that foreign national law by incorporating such a company[59] and 2) whether Articles 49 TFEU and 54 TFEU allow, in the context of a cross-border conversion, the host Member State to decide about the national law applicable to such an operation and as a

[55] Peter Behrens 'Case C-411/03, SEVIC Systems AG, Judgment of the Grand Chamber of the Court of Justice of 13 December 2005, [2005] ECR I-10805', (2006)" in Common Market Law Review, vol. 43, Issue 6, pp. 1686.
[56]C-411/03 SEVIC Systems AG [2005] ECR I-10805, para. 18., B Angelette, 'The Revolution that Never Came and the Revolution Coming-De Lasteyrie du Salliant, Marks & Spencer, Sevic Systems and the Changing Corporate Law in Europe' (2006) 92 Virginia Law Review 1188 at 1204.
[57] C-378/10 VALE Építési kft. [2012]
[58] VALE: a never-ending story on free movement of companies within the EU finally ended?, European Law Blog (2012). https://europeanlawblog.eu/2012/07/19/vale-a-never-ending-story-on-free-movement-of-companies-within-the-eu-finally-ended/
[59] C-378/10 VALE Építési kft. [2012] para. 23.

result to apply the national law provisions on domestic conversions governing the incorporation and administration of a company, such as the requirements of formulating a list of assets and liabilities and property inventories[60].

The ECJ did not ruled in favour of Hungary as it held that Hungarian Law, restricted cross-border conversions, operating contrary to Articles 49 and 54 TFEU. Therefore, the Court concluded that the Hungarian Law discriminates against foreign companies and does not enable them to establish themselves within Hungarian territory, and, as a result, they are not allowed to exercise the fundamental freedom of establishment. Indeed, considering the previously mentioned Sevic case, in which the ECJ ruled that cross-border mergers shall be legal and admissible among E.U. countries, the Court emphasized that cross-border conversions face many legal obstacles, difficulties, and uncertainties as two different national legal provisions are applicable.

However, the ECJ indicated that there needs to be sufficient ground to restrain such operations and limit free movement disproportionally and highlighted that it would be satisfactory and adequate if the Hungarian legal system provided companies with suitable procedural and substantive provisions. Those criteria shall ensure adequate protection for consumers, employees, and most importantly – creditors.[61]

The Vale case ruling has significant implications. It establishes that a Member State has the authority to regulate a company's transition to the status of a company established under the Law of that Member State, even if the company decides to transfer its seat to another Member State. The Vale ruling effectively breaks the link between them, as the national Law of the Member State of incorporation requires.

However, it's important to note that the original Member State, while it doesn't have the power to stop the company's decision, is also restricted in its intervention to the extent that the national Law of the other Member State permits it to do so. This means that the company's decision to convert itself into a company governed by the Law of the other Member State is legally binding, but the Member State of origin still has some limited rights.[62]

[60] Ibid. para 42.
[61] VALE: a never-ending story on free movement of companies within the EU finally ended? – European Law Blog (2012). https://europeanlawblog.eu/2012/07/19/vale-a-never-ending-story-on-free-movement-of-companies-within-the-eu-finally-ended/
[62] Ibid.

3.5. ECJ`s interpretation of Cross-Border Conversions based on the Polbud case

The ECJ's decisions regarding company law have been very complex and are a very unclear legal matter within the EU. With the Polbud[63] case the EU had the opportunity to further develop and interpret its jurisprudence on the freedom of establishment of companies.[64] The main problem that the Court has been dealing with for many decades was the problem of the relocation of the real seat of a company, or in other words the free movement of a company.

The ECJ has stated so far that a company incorporated in one Member State must be granted the same status in other Member States irrespective of the connecting factors used, as far as the incorporation Member State preserves its right to choose the appropriate connecting factor.[65]

In the Polbud case, however, the Court takes the matter one step further by making clear that companies are not prohibited changing their registered offices, and at the same time change their applicable legal order, thus allowing companies a cross-border conversion without moving their establishment or having a connecting factor with the host Member State.[66]

The Polbud case, which presents a significant legal challenge, is about a Polish company's attempt to change its legal structure to that of a company governed by Luxembourg law while maintaining its legal identity.

However, the company's removal from the Polish commercial register, a prerequisite for the conversion, was hindered by the requirement in the Member State's law that removal from the commercial register is contingent on the company's prior liquidation and debt settlement.[67]

Therefore, the Supreme Court of Poland referred the case to the ECJ for the preliminary ruling as Article 267 TFEU dictates and brought three questions before the ECJ to be answered[68]: (i) whether the State of Incorporation shall demand that the company which plans to be re-incorporated in a foreign State be first liquidated, and if

[63] C-106/16 Polbud [2017] EU:C: 2017:804.

[64] Aleksandrs Fillers „Free Movement of Companies After Polbud Case" in European Business Organization Law Review, vol 21 (2020) pp. 571-572.

[65] C-378/10 VALE Építési kft. [2012]

[66] Aleksandrs Fillers „Free Movement of Companies After Polbud Case" in European Business Organization Law Review, vol 21 (2020) pp. 572-573.

[67] Opinion of Advocate General Kokott in case: C-106/16 Polbud [2017] EU:C: 2017:351, para. 2.

[68] C-106/16 Polbud [2017] EU:C: 2017:804, paras, 29,45.

the answer is negative, (ii) whether the liquidation and sale of its assets, with all the outcomes determined by the Polish legal system, was necessary and proportionate to the interests of the company's stakeholders: creditors, minority shareholders, etc, and (iii) Is freedom of establishment applicable in this case if the company leaves its head office in the domestic Member State and only transfers its registered office to the destination Member State?

The ECJ ruled that as Polbud was legally incorporated in Poland, it had the right to exercise its freedom of establishment in accordance with Articles 49 and 54 TFEU. The ECJ stated that, even though the company is moving its operation abroad and has not relocated its establishment, it falls under the scope of Article 49 as that fundamental freedom applies to companies' cross-border reincorporation.[69]

Moreover, the ECJ determined that the obligation to conduct the liquidation process, which is forced by Polish legislation, obstructs or even prevents companies from proceeding to a cross-border conversion of a company. The obligation to liquidation leads to a limitation on exercising the freedom of establishment. Mandatory general liquidation is not only undoubtedly beyond what is significant and required to safeguard the interests of the creditors and members, but it could also be easily substituted with less limiting measures, which would not operate contrary to Article 49 TFEU.[70]

Nevertheless, ECJ is a judiciary body; therefore, it may neither establish procedures that would enable such conversions and mergers nor draft essential conditions. The next step would be for the member states to take the initiative and introduce their own rules on cross-border conversions and mergers.

However, one of the consequences of such an individual approach by the Member- States would be legal uncertainty and a need for harmonization of the law, which might result in unsuccessful or insufficient protection of the companies and their goals.

Therefore, in the event of a transborder operation, laws of different Member States might have been incompatible, impossible to combine, or overlapping. The efforts of the EU to harmonize the law and eliminate such obstacles come through the

[69] C-106/16 Polbud [2017] EU:C: 2017:804, para 51.
[70] C-106/16 Polbud [2017] EU:C: 2017:804, para. 59-64.

introduction of directives for cross-border mergers, conversions, and divisions, with the latter being directive (EU) 2019/2121, which I will present in the next chapter.

4. THE NEW CROSS-BORDER MERGERS, CONVERSIONS, AND DIVISIONS DIRECTIVE (EU) 2019/2121

4.1. Introduction and Legal Background

After analysing the EU primary law and cases about their function and application regarding the right of establishment, this chapter will handle the secondary EU law and its use for the exercise of the freedom of establishment in cases of companies' mergers, divisions, and conversions. The main reason for the existence of the secondary legislation in the form of directives is to materialize and give effect to the freedom of movement based in the TFEU Treaty and the case law. Cross-border mergers involving companies established and operating in different Member States are directly linked to the subject of freedom in corporate mobility within the EU.

The EU Directive No. 2019/2121, which amends Directive 2017/1132 concerning cross-border conversions, mergers, and divisions, was published on December 12, 2019. This new directive aimed to be transposed into national laws by Member States by January 31, 2023.[71] It forms a crucial part of the European Union's significant initiatives to improve cross-border mobility and the freedom of establishment, thereby supporting the growth of the Single Market.

The 2017 Directive (Directive 2017/1132) was created primarily to regulate cross-border mergers of limited liability companies and simplify that process. The rules of the Directive 2017/1132 on cross-border mergers drastically improved the functioning of the internal market for public limited liability companies and their exercise of the freedom of establishment. However, it was acknowledged that the lack of a legal framework for cross-border conversions and divisions resulted in legal fragmentation and uncertainty, that can affect the stakeholders such as employees, creditors and other members.[72] There was a need to introduce harmonized rules on cross-border conversions and divisions across the EU while further harmonizing the current framework applicable to cross-border mergers.[73]

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[71] The Belgian implementation of Directive (EU) 2019/2121 on cross-border conversions, mergers and demergers | KPMG Law. https://www.kpmglaw.be/news/posts/2023/june/the-belgian-implementation-of-directive-eu-20192121-on-cross-border-conversions-mergers-and-demergers/

[72] Recital 6 of Directive (EU) 2019/2121.

[73] Recital 1 of Directive (EU) 2019/2121.

The new Directive tries to remedy these faults and thus introduces some novelties. As such, Directive 2019/2121 not only provides a revision of the previous secondary law of the EU Company Law but also introduces two new chapters on cross-border conversions and divisions.[74] This means that it provides not only the opportunity for companies to merge with foreign companies but also conduct cross-border divisions or formations and to convert into a corporate form of another EU Member-State.

Another novelty introduced in the Directive 2019/2121 is the harmonisation of the minimum protection standards for employees, minority shareholders, and creditors. The system of pre-conversion certificates, which is already used for cross-border mergers, is now extended to the "new" forms of restructuring. Additionally, legal compliance and the purpose of the restructuring are to be examined. If such restructuring is carried out for abusive or fraudulent purposes aimed at evading Union or national law, the Member State must not issue such a pre-conversion certificate.[75]

This signifies that even if the restructure is according to the laws of the recipient Member State, the Member State has the right not to issue a pre-merger/conversion certificate if said merger/conversion is carried out for abusive, fraudulent, or criminal purposes, leading to the failure of the cross-border conversion.[76]

It should also be noted that the mobility directive applies only to capital companies and not partnerships. Although partnerships are recognised as legal entities within the meaning of Art. 54 TFEU and they are allowed to use the “freedom to merge” as a result of the freedom of establishment (Art. 49, 54 TFEU) based on the CJEU’s decision in the Sevic case, the lack of a clear and secure EU legal framework and the resulting legal uncertainty, high risks, and costly legal advice render the “freedom to merge” largely illusory for partnerships.[77]

With the Mobility Directive, namely Directive 2019/2121, which came into effect on January 1, 2020, the EU is trying to achieve legal harmonization and the associated legal certainty for cross-border restructurings. The new Directive, in combination with the existing case law and the EU Treaties, raises the trust for a harmonized legal framework regarding European company law, which will increase the

[74] Art. 86a, 160a Directive (EU) 2019/2121.

[75] Article 86m (8) Directive (EU) 2019/2121.

[76] Schmidt, Grenzüberschreitende Unternehmensmobilität 2.0: Die MobilRL eröffnet ab 2023 neue Wege, https://betriebs-berater.ruw.de/bb-standpunkte/standpunkte/Grenzueberschreitende-Unternehmensmobilitaet-2.0- Die-MobilRL-eroeffnet-ab-2023-neue-Wege-40024

[77] Schmidt, J. "Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package" European Company and Financial Law Review 16, no. 1-2 (2019) 223-224.

competitiveness of European business not only inside the union market but also in contrast with third countries such as the US and China.

4.2. Scope of Application and Amendments to Directive (EU) 2017/1132

The existing scope of application of this Directive regarding which types of companies could benefit from the new and harmonised legal framework for cross-border conversions and divisions and the amended rules on cross-border mergers applies only for limited liability companies, and that seems to provide the most effective solutions for all cross-border operations, despite some opinions that the scope of application should be broadened to cover partnerships and cooperatives.

Arguably, it is regrettable that even after the amendment of the EU legal Framework with the introduction of Directive 2019/2121. the scope of application is still restricted to limited liability companies. The Commission tried to justify its decision by arguing that limited liability companies are most likely to conduct cross-border mergers and that an extension of the scope would lead to practical difficulties related to EU company law and accounting rules, which only apply to limited liability companies.[78]

However, the opinion of the Commission is often debated. The lack of existence of a harmonised EU legal framework for legal entities other than the limited liability companies, can discourage that companies from any cross-border operations due to legal uncertainty and high risks as a result of the absence of clear rules and procedures. Moreover, even though an extension of the application to all legal entities is within the meaning of Art 54 TFEU and may cause or create several problems, there are appropriate ways to solve them. [79]

The crucial point is that freedom of establishment– and thus the freedom to merge, divide, and convert– applies for limited liability companies and all legal entities within the meaning of Art. 54 TFEU; consequently, the EU legislator should provide a clear and secure EU legal framework for these legal entities to effectively exercise their freedom of establishment by carrying out cross-border mergers, divisions, and conversions. It can hardly be denied that there is a real practical and economic need for this.

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[78] COM (2018) 241, p. 18.

[79] Schmidt, J. "Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package" European Company and Financial Law Review 16, no. 1-2 (2019), 230.

Finally, other notable amendments[80] in Directive 2019/2121 can be found in the following points:

i. In Article 1, the sixth passage is replaced by' *cross-border conversions, cross-border mergers and cross-border divisions of limited liability companies.'* The above change introduces the cross-border element in the measures that apply to all limited liability company transactions, especially those regarding divisions.

ii. In Article 18(3) regarding the availability of electronic copies of documents and particulars, the following point on a search service in all the official languages of the Union is introduced: *'(aa) the documents and information referred to in Articles 86g, 86n, 86p, 123, 127a, 130, 160g, 160n and 160p.*

iii. Article 24 about implementing acts is amended in point (e), which is replaced by: *'(e) the detailed list of data to be transmitted for the purpose of exchanging information between registers, as referred to in Articles 20, 28a, 28c, 30a and 34;';,* (ea) is replaced as follows: *'(ea) the detailed list of data to be transmitted for the purpose of exchanging information between registers and for the purposes of disclosure, as referred to in Articles 86g, 86n, 86p, 123, 127a, 130, 160g, 160n and 160p;';,* and in the third paragraph the following passage is added:: *'The Commission shall adopt the implementing acts referred to in point (ea) by 2 July 2020.';,* and finally,

iv. Title II is replaced by the following: '*CONVERSIONS, MERGERS, AND DIVISIONS OF LIMITED LIABILITY COMPANIES.'*

From the above changes that were introduced to Directive 2019/2121 regarding the amendments to the previous Directive, we can notice that the most significant one is the insertion of the corporal transaction of conversion and the insertion of the cross-border term, that makes the regulations of the Directive 2019/2121 transnational and broadens its application to cross-border mergers, divisions, and conversions for limited liability companies. The rest of the amendments have more to do with procedural matters that complement the core amendments.

4.3. Cross- border Mergers

The regulations on cross-border border mergers were thoroughly presented in the Directive 2017/1132. In this paper I will try to present any significant alternations and amendments that were introduced in the new Directive 2019/2121.

[80] Art. 1 Directive (EU) 2019/2121.

A significant addition that Directive 2019/2121 introduces is a new definition to the already three existing definitions of merger that we find in the previous Directive[81]. The new definition of a merger is the following:

"(*d) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, without the issue of any new shares by the acquiring company, provided that one person holds directly or indirectly all the shares in the merging companies, or the members of the merging companies hold their securities and shares in the same proportion in all merging companies.*"[82]

This addition broadens the scope of application of the Directive and thus more categories of mergers are available to companies. This new category is the category of side-step mergers.[83]

In the spirit of the harmonised rules on cross-border mergers, Article 120(4) is replaced by a more detailed provision explaining more clearly that companies in liquidation distributing assets to their shareholders, as well as financial institutions subject to resolution tools, powers, and mechanisms provided by the Bank Recovery and Resolution Directive (BRRD Directive 2014/59/EU), are excluded from the scope of the Directive.[84]

Additionally, according to a new paragraph 5 added to Article 120, Member States could choose not to implement the provisions of this Directive to companies which are: (a) the subject of insolvency proceedings or subject to preventive restructuring frameworks; (b) the subject of liquidation proceedings other than those referred to in point (a) of paragraph 4; or (c) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU. This choice allows Member States to exclude their companies falling within these categories from the application of the Directive. They can also exclude companies falling within the scope of all or only some of these three categories.[85]

This new paragraph aims to prevent companies from exploiting cross-border mergers to evade insolvency proceedings, preventive restructuring frameworks, or

[81] Art 119(2) Directive (EU) 2017/1132.
[82] Art 119 (2)(d) Directive 2019/2121.
[83] Papadopoulos, T. Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121 (September 8, 2023). European Business Law Review (Kluwer), Volume 34, Issue 5 (2023) 4.
[84] Art 120 (4) Directive 2019/2121.
[85] Art.120 (5) Directive 2019/2121.

other similar procedures to the detriment of their creditors' interests. However, the possibility of excluding companies operating under preventive restructuring frameworks is criticized as financially harmful because cross-border mergers often constitute an effective corporate restructuring method. [86]

Another amendment takes place on Art.121 (1)(a). The following statement of that article is deleted:

"cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States."

One reason behind this deletion could be the alleged discriminatory or restrictive effects of this provision on the application of the freedom of establishment through cross-border mergers by some companies in the light of Sevic and Vale. In light of these ECJ decisions, the European legislator decided to remove this provision because cross-border mergers constitute an exercise of the EU's fundamental freedom of establishment of companies.[87]

Moreover, Art. 121(1)(b) of the Directive 2017/1132 outlines specific requirements and protections concerning cross-border mergers. According to this article, Companies involved in a cross-border merger must obey the provisions and formalities of the national law to which they are subject.

Other provisions and requirements of the national law to which the merging companies were subject, included, in particular, the procedures for approving the merger, such as board resolutions and shareholder meetings, ensured that creditors' rights are safeguarded during the merger process, preventing any potential loss or disadvantage, the extension of similar protections to debenture holders and those holding securities or shares in the merging companies and, the protection of the rights of employees, other than those governed by Article 133, ensuring that their interests are not adversely affected by the merger.[88]

Finally, Directive 2017/1132 allowed the Member States to adopt provisions for the protection of minority shareholders of companies that take part in the cross-border

[86] Papadopoulos, T. Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121, European Business Law Review (Kluwer), Volume 34, Issue 5 (2023) 897.
[87] Ibid. 899.
[88] Papadopoulos, T. Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121, European Business Law Review (Kluwer), Volume 34, Issue 5 (2023) 900.

merger but are against said merger.[89] The novelty introduced by Directive 2019/2121 is the removal of the protection of creditors and the protection of minority shareholders from the exclusive competence of Member States. The regulations regarding these two issues are now harmonised under European law by Art. 126a and 126b of the Directive 2019/2121.[90]

The above-mentioned change came to Art. 121(2) of Directive 2019/2121 and states that:

'The provisions and formalities referred to in point (b) of paragraph 1 of this Article shall, in particular, include those concerning the decision-making process relating to the merger and the protection of employees as regards rights other than those governed by Article 133.'

Therefore, the reduction in the areas covered by national law in the context of mergers is evident as creditor and minority shareholder protections have been harmonised. However, national law still plays a crucial role in the decision-making process for mergers and, to a lesser extent, in employee protection. The multi-level regulatory model previously established by old Art. 121(2) in coexistence with old Art. 121(1)(b) continues to be applicable, as reflected in the amended provisions. These provisions maintain that the decision-making process and employee protection are governed by national law, ensuring that legal diversity persists in these areas. [91]

In conclusion, even though EU legislation has led to an extended harmonisation of company law, which in turn has streamlined certain aspects of merger law, the preservation of legal diversity in some areas is a testament to the adaptability of the system and the free room that the EU provides to the Member States for them to apply EU law.

4.4. Cross- border Conversions

With Directive 2019/2121, it is the first time that there is a harmonised EU legal framework on cross-border conversions. [92] At the same time, Article 86b (2) of the

[89] Art. 121(2) Directive (EU) 2017/1132.
[90] Papadopoulos, T. Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121, European Business Law Review (Kluwer), Volume 34, Issue 5 (2023) 900.
[91] Ibid, 900.
[92] Art.86a Directive (EU) 2019/2121.

same Directive provides a specific definition of the term "cross-border conversion", which is the following:

(2) "cross-border conversion" means an operation whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality.[93]

The above definition not only clarifies that a nearly formal relocation of the registered office could be sufficient, but also underscores its alignment with the ECJ's decision in the Polbud case. This alignment provides a sense of reassurance about the legal consistency and the adherence to established case law. As previously stated, the ECJ ruled that, within the framework of the freedom of establishment, it must be possible to relocate only the registered office without also moving the actual administrative seat or "genuine link" to another Member State. In light of the Polbud decision, such a restriction to a "genuine link" – that is, actual economic activity – in the host state would be impermissible. The current legal situation in the new Mobility Directive fully aligns with the existing ECJ case law on this point. Because of this, it's important to note that there is no conflict with the primary law-enshrined freedom of establishment according to Article 49 TFEU, providing a clear understanding of the legal implications.[94]

Moreover, Article 86b (2) about cross-border conversions also provides two more aspects that make the application of the provision of cross-border mergers more efficient: Firstly, there is no dissolution, winding-up, or liquidation, and secondly, the company retains the identity of its legal entity.

Finally, it should also be noted that, according to Article 86a (3), certain cases are not covered by its scope. For example, this includes situations where the company is in liquidation and has already begun distributing assets to shareholders and when a company is already in the winding-up phase. Furthermore, Article 86a (4) allows member states to exclude additional cases from the scope of the directive, for example, in the event of the opening of insolvency proceedings or preventive restructuring, other

[93] Art. 86b (2) Directive (EU) 2019/2121.

[94] Schmidt, J., Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package. *European Company and Financial Law Review*, *16*(1-2) (2019) 233.

liquidation proceedings, or crisis prevention measures.[95] A complete exclusion of cross-border restructuring measures is not economically sensible, as they can be an essential restructuring tool. Ultimately, the possibility of cross-border restructuring measures in the form of a (voluntary) member state option was retained.[96]

It is essential to express the conviction that although the German text of the Directive uses the word "Umwandlung" (conversion), the more precise and correct term that the Directive refers to is "Formwechsel" (change of legal form), a term that is most commonly used in Germany. This personal belief is legally insignificant.

4.5. Cross-border Divisions

Directive 2019/2121 also introduces regulations on cross-border divisions, as found in Art. 160a. Under the scope of application, we understand that the same rules apply for cross-border divisions as for the other two structure methods (cross-border mergers and conversions). Therefore, the regulations of Article 160a shall apply to the cross-border division of limited liability companies formed according to the law of a Member State while having their registered office, central administration, or principal place of operations within the EU, provided that the laws of different Member States govern at least two of the limited liability companies involved in the division.[97]

Directive (EU) 2019/2121 recognises three different types of divisions which are also referred as: full division for the purpose of founding a new company, partial division for the purpose of acquisition, and division by separation. According to the provisions of Directive (EU) 2019/2121 a division is defined as an operation whereby:
‘(a) a company being divided, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more recipient companies, in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, a cash payment not exceeding 10 % of the accounting par value of those securities or shares (“full division”);
(b) a company being divided transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies, in the company being divided

[95] Art. 86a (3), (4) Directive (EU) 2019/2121.
[96] Opinion ECON, PE625.345v03-00, pp. 35, 37, 91 f.
[97] Art. 160a (1) Directive (EU) 2019/2121.

or in both the recipient companies and the company being divided, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, a cash payment not exceeding 10 % of the accounting par value of those securities or shares ("partial division"); or

(c) a company being divided transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the company being divided of securities or shares in the recipient companies ("division by separation").'[98]

However, Directive 2019/2121 covers only cross-border divisions through the formation of new companies and not cross-border divisions by acquisition.[99] The Commission attempts to justify this restriction by arguing that cross-border divisions by acquisition would be viewed as very complex, require the involvement of competent authorities from several Member States, and entail additional risks in terms of fraud and circumvention.[100]

This Commission's argument needs to be more convincing. Cross-border divisions are, by their very nature and, as explained in Chapter 2, generally very complex transactions—regardless of whether they are by acquisition or by the formation of new companies. The involvement of competent authorities from several Member States is, therefore, also necessary in the case of cross-border divisions by the formation of new companies, which shatters the argument of the Commission that only cross-border divisions by acquisition require the involvement of the national authorities.

The Commission does not explain why the risks in terms of fraud and circumvention would be significantly higher in the case of cross-border divisions by acquisition (or why appropriate rules could not mitigate such potentially higher risks). Nevertheless, as cross-border divisions by acquisition offer important and attractive opportunities for companies, they should, by all means, be included in the further legislative process

The exceptions to the scope of cross-border divisions according to Article 160a paragraphs 4 and 5 of the Mobility Directive are exactly the same to those for cross-

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[98] Art. 160b (4) Directive (EU) 2019/2121.
[99] Schmidt, Jessica. "Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package" European Company and Financial Law Review 16, no. 1-2 (2019) 234.
[100] COM (2018) 241, p. 8.

border conversions. Therefore, they will not be discussed in detail here, as reference is made to the above chapter.

4.6. Protection of Creditors and Shareholders

Directive 2019/2121 offers a set of harmonization rules to protect creditors and shareholders. According to the new regulations, Member-States may maintain or introduce new rules to protect creditors and shareholders, as long as they do not come across the rules of Directive 2019/2121 or with the freedom of establishment. The protection of the members of a company is taken into consideration because those members, after a corporate restructuring, which might take place across- borders, might be part of a company governed by the laws of another company, and therefore, their rights might be negatively affected.[101]

A common example is that in case of a cross-border conversion, shareholders might have had the right to exercise some minority rights according to the law of the departure country. However, according to the law of the recipient Member-State, a higher percentage of share ownership might be required to exercise these rights. The above example is why the EU Law must provide a minimum set of rules to all member states to secure the protection of creditors and shareholders and legal certainty.[102]

Furthermore, in the case of the creditors of a company, they could also see their claims affected negatively by a cross-border restructuring. The laws of the Member-States on recovery or satisfaction of claims are notoriously famous for being different.[103] Their claims can also be negatively affected because of the changes in the composition of assets and creditors after a merger or a division. Therefore, the merger of divisions might be a wrong business decision, and the change of the company's seat could also mean a change of jurisdiction and applicable insolvency law in case of an insolvency of the company.[104]

To deal with the above problems, Directive 2019/2121 introduces two general safeguards designed to protect both creditors and shareholders. The first measure against such practices is the provisions that oblige companies to disclose the draft terms

[101] Recital 17 Directive (EU) 2019/2121.
[102] Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. *ERA Forum* 22 (2021) 10.
[103] Recital 22 Directive (EU) 2019/2121.
[104] Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. *ERA Forum* 22 (2021) 11.

of the cross-border operation and a notice informing the members, creditors, and employees of those terms and make them publicly available in the register of the departure Member-State one month before the date of the general meeting.[105] The Directive also describes the minimum safeguards, that the draft terms must contain for the protection of the creditors and the shareholders.[106] The disclosure of the draft terms is important for the protection of members and creditors. It gives them the opportunity to assess the terms of the operation on time before the general meeting, to evaluate how the operation will affect their rights, and to pursue adequate safeguards, if necessary.[107]

Another general measure of the Directive to protect creditors and shareholders is the requirement of a company to apply to the competent national authority of the departure Member-State to issue a pre-operation certificate.[108] This national authority could be the business register, the court or a tax authority. The task of this authority is to determine the legality of the cross-border operation in accordance with the national and EU law and to determine whether the cross-border operations are fraudulent or abusive. The aim of a pre-operation certificate is the protection of the public interest, as well as the protection of minority shareholders and creditors. [109]

Additionally, from the general protection measures for both creditors and shareholders, the Directive also provides tailor-made provisions for each of them. The major provisions that protect the members of a company during a cross-border operation is the Report of the administrative or management body.[110]

In this case, the management of the company must issue a report and officially inform at least six weeks before the general meeting both the shareholders and the employees about the legal and economic aspects of the cross-border operation. [111]This report allows the shareholders access to all the necessary information to help them make an informed decision in favour of the cross-border information. For the approval of the cross-border operation, there must be a qualified majority of at least 2/3 of the

[105] Art 86g (1),123 (1), 160g (1) Directive (EU) 2019/2121.
[106] Recital 12, ibid.
[107]Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. *ERA-Forum* 22 (2021) 11.
[108] Art. 127 Directive (EU) 2017/1132; Art 86m, 160m Directive (EU) 2019/2121.
[109] Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. *ERA-Forum* 22 (2021) 11-12.
[110] Art. 124 Directive (EU) 2017/1132, Art. 86e, 160e, Directive (EU) 2019/2121.
[111] Ibid.

represented share capital, where the members must decide upon the draft terms and any amendments thereof in the general meeting. [112]

On the other hand, if company members oppose a cross-border operation, they have the right to decide whether to exercise their exit right, demand higher cash compensation, or negotiate a better share exchange ratio. The members who are against the cross-border operation have the right to dispose of their shares in exchange for cash compensation only when, as a result of the cross-border operation, they would acquire shares in a company that the law of another Member-State would govern.[113]

Moreover, members who did not exercise their right to compensation or who didn't have that right are allowed to challenge the adequacy of the share exchange ratio. These members are also allowed to individually claim a challenge to the share exchange ratio, even if they haven't voted against the cross-border operation. However, a court decision on this matter might be binding for all other members who decided to exercise this right and the company. Proceedings of such a claim are taking place before the competent authority or body mandated under the law of the Member-State, to which the relevant cross-border operation is subject.[114]

Finally, an expert must also conduct an independent report addressed and delivered to the members at least one month before the meeting and after examining the draft terms of the cross-border operation to determine whether the cash compensation offered to those who exercise their exit right and the share exchange ratio are adequate.[115]

Regarding the specific measures of Directive 2019/2121 for the protection of creditors and the discouragement of shareholders from using a cross-border operation to benefit themselves, Member-States should provide an 'adequate system of protection' for the creditors' interests and especially for those creditors whose claims predate the disclosure of the draft terms and have not yet fallen through on the time of disclosure.[116] According to the provisions of Directive 2019/2121, if the creditors are not satisfied with the adequate safeguards offered in the draft terms, they have the right to apply to a competent judicial or administrative authority of the Member-States

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[112] Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. *ERA-Forum* 22 (2021) 12-13.
[113] Art. 86i, 126a, 160i Directive (EU) 2019/2121.
[114] Art. 126a (6), 160i (6), 86i (5), ibid.
[115] Art. 86f,125,160f, ibid.
[116] Art. 86(j), 126(b), 160(j) Directive (EU) 2019/2121.

within three months from the date of the draft terms' disclosure for other appropriate and sufficient safeguards. These competent authorities can only grant such safeguards if the creditors can show that the satisfaction of their claim is at peril due to the cross-border operation and the company has not provided for such adequate safeguards.[117]

With the 'adequate system of protection,' the EU legislator wanted to give the creditors safeguards before the completion of a cross-border operation. Under the term safeguards, it is to understand various protective mechanisms that can be raised by the creditors to satisfy their claims against a company. Such mechanisms can be, for example, a guarantee or a pledge by the debtor company or a third party or the debtor's right to demand satisfaction of his/her claim in an accelerated way prior to the completion of the operation, etc.[118]

Directive 2019/2121 includes another mechanism designed for the protection of the creditors' interests via a provision called 'solvency declaration'.[119] According to this provision, the national legislators have the right to request from the administrative or managerial body of the company to issue a signed declaration (together and at the same time with the draft terms) containing the financial status of the company with a date that does not exceed the date of the disclosure of the declaration by a month. The declaration should state all the financial information available at the date of the disclosure and the declaration of the administrative or the managerial body of the company that after the cross-border operation, the company should be able to meet its liabilities in case of insolvency.[120]

The liability of the administrative or managerial body for the accuracy of this declaration will be governed by the national law of the departing Member State. If the national legislator introduces this provision into national law, it should be expected that such an obligation would make members of the administrative or management body particularly reluctant to sign the declaration and, therefore, to proceed with the operation.[121]

[117] Ibid.
[118]Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. *ERA-Forum* 22 (2021) 17.
[119] Art. 86(j)(2),126(b)(2), 160(j)(3) Directive (EU) 2019/2121.
[120] Ibid.
[121] Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. ERA-Forum 22 (2021) 19.

The last safeguard, in relation to the creditors' protection, refer to the issue of jurisdiction.[122] Regarding cross- border mergers and divisions the only comment on the matter of jurisdiction is that paragraphs 1 and 2 of Articles 126(b)(3) and 160(j)(4) do not limit the application of the legal provisions of the Member State participating in the merger or division. This specifically refers to the satisfaction or securing of monetary or non-monetary liabilities owed to public entities.[123]

On the other hand, the Directive provides a provision about jurisdiction especially for cross-border conversions. Creditors of a company that has undertaken a cross-border conversion will have the possibility to institute proceedings relating to their claim also in the departure Member State within two years after the cross-border operation takes effect. This allows creditors to pursue their claims in the same jurisdiction even after the cross-border conversion and not be forced to pursue them in a different jurisdiction due to the cross-border operation, which could create practical difficulties and higher costs. This provision protects, of course, only those creditors whose claims have fallen due within these two years.[124]

To close the chapter on the protection of shareholders and creditors based on Directive 2019/2121, it is worth mentioning that the scope of this protection does not apply to scenarios where companies have already started distributing assets.[125] Moreover, the Member States are provided with the power to choose companies to exclude if they are bound by other insolvency, liquidation proceedings, or crisis precaution procedures.[126]

5. THE AUSTRIAN LAW ON COMPANY MOBILITY AND THE IMPLEMENTATION OF DIRECTIVE (EU) 2019/2121

5.1. Introduction to the EU- Reorganisation Act (EU-UmgrG)

The EU Company Reorganization Act (EU-UmgrG) governs cross-border reorganizations of capital companies based in different Member States. It now provides a legal framework for cross-border conversions (cross-border transfer of the registered office) and cross- border Divisions. Although this was previously permissible under

[122] Art.86(j)(3)(4), 183, 126(b)(3), 160(j)(4), Directive (EU) 2019/2121.
[123] Alexandropoulou, A. Protection of members and creditors after the Mobility Directive: challenges in the implementation. ERA-Forum 22 (2021) 19-20.
[124] Art.86(j)(3)(4), ibid.
[125] Recital 9, Directive (EU) 2019/2121.
[126] As defined in Directive (EU) 2014/59.

ECJ case law, practical implementation often encountered difficulties due to the lack of a legal framework.

Austria has implemented the previous European legal framework on domestic and cross-border mergers into several legal acts. Mergers on a national level are governed by the provisions of the Public Limited Company Act (AktG) and the Limited Liability Company Act (GmbHG). Conversely, cross-border mergers must comply with the EU Merger Act (EU-VerschG) and the Labour Constitution Act (ArbVG) provisions concerning employee participation.[127]

The cases regarding the transfer of registered offices within the EU were allowed based on case law, but certain hardships with the registry office would come up. Cross-border divisions were also not regulated and practically unfeasible. Additionally, the practical implementation of cross-border transactions in Austria was always possible only in close coordination with the commercial court, which means that there were always legal uncertainties regarding the harmonisation of Austrian case law on cross-border transactions.[128]

After the mandatory amendments of Directive 2019.2121 came into force, there was a debate among Austrian legislators and legal intellectuals on whether Austria should take this opportunity to create a more ambitious solution by enacting a unified law on all restructuring operations. For this reason, many political forces were criticised for the delay in implementation, stating that this delay affects the entrepreneurial freedom in a negative way. This debate led to the decisive action of the Austrian Federal Ministry of Justice, which took the responsibility to implement these changes and create a uniform law for cross-border mergers, conversions, and divisions.[129]

Since, there was already some existing legal regulations of Austrian company reorganisation law, there would be only the necessary changes to implement Directive 2019/2121. Consequently, the old EU Merger Act (EU-VershG) should be replaced by

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[127] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) V.

[128] Hubner, C. "Gläubigerschutz bei grenzüberschreitenden Umgründungen nach dem EU-Umgründungsgesetz: Eine erste Bestandaufnahme." *Zeitschrift für Gesellschaftsrecht* 22, no. 3 (2023) 115.

[129] Ibid. 115

a new unified piece of law, which will include regulations for cross-border mergers, conversions, and divisions. [130]

On January 23, 2023, the Austrian Ministry of Justice announced the delayed implementation of the EU Directive through the enactment of the new EU Company Reorganization Act ("EU-Umgründungsgesetz – EU-UmgrG"). This new law would introduce rules on cross-border conversions, mergers, and divisions and amend several existing company law and reorganization laws. After the publication of the draft legislation by the Ministry of Justice, the evaluation date was set for February 24, 2023, and the legislation was expected to come into force as soon as possible, as Austria was already late in implementing Directive 2019/2121.[131]

As a result, the new EU Company Reorganisation Act (EU-UmgrG), which implements Directive 2019/2121 into Austrian law, came into force on August 1. 2023 and regulates the cross-border mergers, conversions, and divisions of companies within the EU.[132] The Austrian government has made it clear that the implementation of the above law reflects its commitment to promoting a modern and business-friendly regulatory environment according to the goals of the EU's Single Market. Therefore, the EU- UmgrG provided August 2023 uniform and harmonized regulations for cross-border mergers, conversions, and divisions, strengthening the protection of employees, creditors, and minority shareholders of the involved companies.[133]

For the first time, the EU-UmgrG includes regulations that recognise a misuse of control, allowing the court to examine whether the mergers, conversions, or divisions are carried out for abusive or fraudulent purposes, that intend to evade EU or national law, or for criminal purposes. All the above will also apply for the first time to intra-group mergers, and divisions in preparation for an M&A transaction and for the transfer of the seat of a company to an EU Member-State with more favourable company laws for the majority shareholders.[134]

5.2. Scope of application of the EU-UmgrG

[130] Parlament Österreich, EU-Umgründungsgesetz – EU-UmgrG; Gesellschaftsrechtliches Mobilitätsgesetz – GesMobG, Ministerialentwurf- Erläuterungen (247/ME) https://www.parlament.gv.at/gegenstand/XXVII/ME/247

[132] Bernhard Rieder, Das neue EU-Umgründungsgesetz (Teil I), ecolex, Heft 8 (2023) 673.
[133] Perner R., Simonishvili Z., Das neue EU-Umgründungsgesetz, GesRZ , Heft-Nr 3 (2023) 148.
[134] Parlament Österreich, EU-Umgründungsgesetz – EU-UmgrG; Gesellschaftsrechtliches Mobilitätsgesetz – GesMobG, Ministerialentwurf- Erläuterungen (247/ME) https://www.parlament.gv.at/gegenstand/XXVII/ME/247

The regulations for cross-border restructures in the EU-UmgrG apply to companies as defined in Annex II of Directive 2017/1132. In Austria, these companies are the limited liability companies (GmbH), stock corporations (AG), and already existing European companies (SE)[135], even though the last form of companies is not mentioned in the Annex II of Directive 2017/1132/EU.[136] Other kind of corporations, that are not listed in Annex II of Directive 2019/1132 are also covered under mergers, provided they meet the definition of a company under the regulations of the same Directive (e.g.Cooperatives or Genossenschaften in German).[137] The explanatory notes to § 2 EU-UmgrG state, that in § 2(1), the term 'corporation' is defined as prescribed by Article 86b(1), Article 119(1)(a), and Article 160b(1) of the Directive 2017/1132.[138] However, § 3 EU-UmgrG includes the reasons where a corporal entity (Kapitalgesellschaft) is not permitted to perform any cross-border operations.

According to §3 EU-UmgrG the law states:

'A corporation is not permitted to carry out or participate in a cross-border reorganization in the following cases:

1, The purpose of the company is to jointly invest the funds deposited by the public according to the principle of risk diversification, and its shares are redeemed or paid out at the request of the shareholders directly or indirectly at the expense of the company's assets. Actions intended to ensure that the stock market value of its shares does not significantly deviate from their net asset value are considered equivalent to such redemptions or payouts.

2. The company is in liquidation and has begun distributing its assets to its shareholders.

2. The company is subject to resolution tools, powers, and mechanisms as provided for in Title IV of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173 of 12.6.2014, p. 190.

4. A bankruptcy proceeding has been legally opened over the company's assets, or a decision not to open or to terminate the insolvency proceedings due to insufficient assets to cover the costs has become legally binding.'

[135] The European company, Societas Europa.

[136] Van Gerven, D. (ed.) Cross-Border Mergers in Europe. Cambridge: Cambridge University Press (Law Practitioner Series) (2010) p 83.

[137] Article 119(1)(b), Directive (EU) 2019/1132.

[138] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 5.

According to the above paragraph, the regulations exclude Undertakings for Collective Investments in Transferable Securities (UCITS), companies that are in liquidation and have already begun distributing their assets, companies that are subject to resolution tools, powers, and mechanisms (such as the resolution of credit institutions and investment firms), and companies for which a bankruptcy proceeding has been legally initiated; in the case of restructuring proceedings, cross-border reorganization is generally permissible.[139]

Therefore, Austrian companies can now merge, split or move their seat across EU borders. As mentioned on the previous chapter, Partnerships (Personengesellschaften) are not included in the scope of application of the Directive 2019/2121, and as a result, not in the EU-UmgrG. In Germany, they haven't extended implementation for partnerships either. The geographical scope also continues to exclude cross-border restructure involving third countries. Therefore, mergers with companies from non-EU states, such as Switzerland, remain legally unregulated and thus practically challenging to implement.[140]

5.3. Other General Provisions of the EU-UmgrG

The EU-UmgrG's first main chapter, in addition to the scope of application and the exceptions for corporations allowed to perform cross-border operations, also contains more general provisions and definitions regarding the regulations for those cross-border operations.

The first paragraph § 1 of the EU-UmgrG includes the purpose of these sets of rules, stating that the term 'cross-border reorganizations '(grenzüberschreitende Umgründungen) is the overtitle for the cross-border mergers, conversions, and divisions. The definitions for those terms are a bit different in Germany. According to German law, the term for both national and cross-border operations is Umwandlung[141], while cross-border conversion is defined as a cross-border change of form (grenzüberschreitende Formwechsel)[142].

139 § 3 EU-UmgrG.
140 Herzog, M., Die Umsetzung der EU-Mobilitätsrichtlinie – Wesentliche Neuerungen, Streitfragen und Kritikpunkte, GES-Zeitschrift für Gesellschaftsrecht, Volume 22, issue 1 (2023) 4.
141 § 1 dUmwG
142 § 333, ibid.

Another significant point examined in the new EU-UmgrG are the rules about the judicial jurisdiction regarding cross-border operations in Austria, which can be found under §4EU-UmgrG.

According to §4 Abs 1 EU-UmgrG, the legality of several matters, such as the legal actions and formalities preceding a cross-border restructuring and the issuance of a pre-certification, are negotiated and decided by the 1st instance court. This court is competent for matters of commerce in the area where the Austrian company has its seat according to the non-litigious proceedings. This underscores the significant role of the 1st instance court in cross-border corporate restructurings.[143]

Moreover, §4 Abs 2 EU-UmgrG regulates that in case of a cross-border merger that involves both a transferring company and a company resulting from the merger with their seat in Austria. The local jurisdiction is determined by the court district where the resulting company has its seat.[144]

The above provisions on judicial jurisdiction in Austrian cross-border restructuring are on par with the former Austrian set of rules, specifically with § 2 EU-VerschG. The first part of §4 EU-UmgrG has been reformulated to cover all cross-border restructurings. The jurisdiction for issuing the pre-certification for cross-border restructurings is also explicitly mentioned.[145]

In the first instance, the regional commercial court is always competent, and the domestic company's seat determines the local jurisdiction. It is an extrajudicial proceeding to be conducted, mainly according to the FBG and the AußStrG provisions. The second part of §4 EU-UmgrG further covers the case where a cross-border merger involves a transferring company and a company resulting from the merger.[146]

Finally, another significant general provision is § 5 EU-UmgrG, which is assigned to the first main section, "General Provisions," and thus applies to transformations and mergers. Paragraph § 5 EU-UmgrG regulates the liability of the members of the management board of a company, where the members of the management board and, where applicable, the supervisory board of the domestic

[143] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 9.
[144] Ibid.
[145] Ibid.
[146] Ibid.

company involved in a cross-border reorganization are liable to the company in analogous application of § 41 AktG.[147]

Furthermore, they are liable to the shareholders for the compensation of the damage that they suffer due to the cross-border reorganization; they can exonerate themselves from the liability for damages by proving that they observed their duty of care. The claims expire five years from the day on which the registration of the cross-border reorganization in the commercial register is deemed to be announced in accordance with § 10 UGB.[148]

At first glance, it is noticeable that the provision is almost identical in wording to §3 Abs 5 SpaltG. Unlike § 3 Abs 5 SpaltG, the personal scope of application is generally extended to the organs of a company and not, as in the SpaltG, to the organs of the transferring company. Consequently, the liability of the organs of an acquiring company in import transactions is also conceivable. Furthermore, the reference, according to which only those shareholders who meet the requirements of § 225c Abs 3 lit 2 AktG are entitled to claims (§ 3 Abs 5 SpaltG), has not been adopted because the VfGH repealed this provision.[149]

Particularly for cross-border mergers, this results in a significant innovation: through the reference in § 3 Abs 2 EU-VerschG, § 227 AktG was previously applicable at least in export transactions, which is known to provide for the liability of the management board and supervisory board of the transferring company towards the company, shareholders, and (third-party) creditors. Liability towards creditors, among other conditions under § 227 AktG, mainly exists when a merger leads to the insolvency of a debtor. Due to the lack of a reference by the EU-UmgrG to the AktG, this claim basis will no longer be available to creditors.[150]

5.4. Cross-Border Mergers according to EU-UmgrG

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[147] § 5 EU-UmgrG; Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 11.
[148] Ibid.
[149] Hubner, C., "Gläubigerschutz bei grenzüberschreitenden Umgründungen nach dem EU-Umgründungsgesetz: Eine erste Bestandaufnahme." Zeitschrift für Gesellschaftsrecht 22, no. 3 (2023)117.
[150] Ibid.

5.4.1. Scope of Application and Merger Plan

The legal framework for cross-border mergers has been the EU Merger Act (EU-VerschG), based on Directive 2005/56/EC (Cross-border Mergers Directive). Before implementing the Cross-border Mergers Directive through the Corporate Law Amendment Act 2007 (GesRÄG 2007), cross-border mergers were carried out as transformations to the principal shareholder within the meaning of § 2 UmwG, who could also be a foreign corporation.

The regulations for mergers in the EU-UmgrG are contained in the third main section of the legal text. The first segment contains the general provisions (§§ 26-38), followed by the provisions for outbound mergers (§§ 39-42) and then for inbound mergers (§§ 43-45).

The scope of application can involve either a merger by the formation of a new company (§ 27 Z 3 lit. b) or a merger by absorption (§ 27 Z 3 lit. a). Multiple companies may also be involved as the transferring companies, and these must be corporations. The law further defines as special cases the "merger into the sole shareholder"[151] and the "merger without the granting of shares"[152]. This refers to the types of corporate mergers frequently occurring in practice (upstream, downstream, and side stream mergers).[153]

According to the provisions of EU-UmgrG a merger plan is a requirement.[154] The merging domestic company must conduct this merger plan alongside with the foreign company's governing body. The law distinguishes between the "merger plan" and the "merger agreement," even though they have the same content. The requirement for notarization by a notarial deed is found only in § 34 Abs 1 EU-UmgrG and is about the merger agreement.[155] If the merger plan is initially drafted and published without the form of a notarial deed, the notarial deed must be completed later, at the latest when the merger is registered, and submitted to the commercial court. Therefore, the binding

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[151] § 27 Z 3 lit. C EU-UmgrG.
[152] § 27 Z 3 lit. d, ibid.
[153] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 396.
[154] § 28 EU-UmgrG.
[155] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 207.

nature of the merger is not yet established when the merger plan is drawn up without a notarial deed.[156]

The minimum requirements of the merger plan are outlined in § 28 Eu-UmgrG and are very similar to the previous EU Merger Act (EU-VerschG) and also familiar to domestic merger law. Some of the information that a master plan must contain according to § 28 EU-UmgrG are the details of the merging companies as well as the new one resulting from the merger, plans for the protection of the employees, details from the shares and the rights of the shareholders, information by any securities offered to creditors, such as guarantees or commitments etc.

The mandatory disclosure of the merger plan is regulated in § 33 EU-UmgrG for both inbound and outbound mergers in the same way, with the provision merely referring to the regulation on cross-border conversions (§ 15 EU-UmgrG). The regulation applies equally to the acquiring or transferring domestic company. The management board of the company must submit (i) the merger plan and (ii) a so-called "notification" to the commercial register court responsible for the company at least one month before the date of the shareholders' meeting at which the merger will be resolved.[157]

As before, except from a merger plan, a merger report must also be prepared, explaining and justifying the legal and economic purposes of the merger. This report must also address the impact on employees and the future development of the business operations.[158]A significant difference from previous law is that this merger report is not directed at creditors but only at shareholders and employees. Therefore, it no longer serves as a creditor protection provision, which it did under the previous legal situation.[159]

Another crucial point, which will have significant practical implications, is the possibility of omitting the preparation of a merger report. Under the EU-VerschG, the report was previously mandatory in cross-border, intra-group mergers. However, under the EU-UmgrG, the report can be entirely omitted under specific conditions. These

[156] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 397.
[157] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 400.
[158] § 29 EU-UmgrG.
[159] § 6 EU-VerschG.

conditions include having no employees other than the managing directors, shareholders' waiver, or having only a sole shareholder.[160] If any of these conditions apply, the relevant part of the report directed at the shareholders or employees can be omitted.

5.4.2. Shareholders' and Creditors' Protection

One more essential matter that the EU-UmgrG handles in terms of the cross-border mergers is the creditor protection which is regulated in § 37 and applies to both inbound and outbound mergers. Previously, the EU-VerschG only regulated creditor protection for outbound mergers,[161] while for inbound mergers, the domestic merger regulation applied, which only provided for subsequent protection after the registration of the merger.[162]

According to § 37 EU-UmgrG, creditors of domestic companies, which could be either the transferring or the acquiring company, can demand additional securities from the company other than those already voluntarily offered by the company in the merger plan. If the demand is not met, the security can be claimed against the company by filing a lawsuit within three months after the disclosure of the merger plan. The creditor must provide credible evidence that their claim has arisen, that they cannot demand satisfaction, and that the fulfilment of their claim is jeopardized by the merger. If the merger does not take effect, the merging domestic company can request the return or dissolution of the granted securities [163]

5.4.3. Outbound Cross-Border Mergers

The following paragraphs (§ 39–42 EU-UmgrG) regulate specific provisions for outbound cross-border mergers.

The right to cash compensationm which provides shareholders with a safety net in the event of a cross-border merger, is a fundamental right under the EU Merger Act (EU-VerschG) and other types of restructuring, remains unchanged.[164]

This right is granted to every shareholder of a domestic company in the event of a cross-border merger. The shareholder can object to the merger resolution, a crucial step in exercising their right to cash compensation. By doing so, they can demand to

[160] § 29 Abs 2, § 11 Abs 4, 6, 7 Eu-UmgrG.
[161] § 13 EU-VerschG.
[162] § 226 AktG.
[163] § 37 Abs 1 EU-UmgrG.
[164] § 10, 11 EU-VerschG.

exit the company, meaning they no longer participate in the merged company and instead receive cash compensation. The withdrawal of the shareholder has the meaning that this shareholder prevents his involvement to a foreign company governed by another company's company law.[165] A shareholder can exercise this right when he expresses an objection during the merger resolution, and his claim for compensation can be filed within one month after the merger resolution[166]. The claim becomes due upon the registration of the merger and is subject to a three-year statute of limitations.[167]

The following provisions regulate the registration and entry of an outbound cross-border merger. No significant changes have been made here either and the provisions mainly follow the rules of the former § 14 of the EU Merger Act (EU-VerschG).

Therefore, according to §41 EU-UmgrG the board of directors of the transferring Austrian company must file the merger with the competent commercial court. The documents that the board must submit include the protocol of the merger resolution of the domestic transferring company, alongside with the merger plan. When these documents are notarised, they become the merger agreement according to the legislator, even though their content remains the same. More required documents are also any necessary regulatory approvals, the merger report along with any statements provided, unless the preparation of the report was omitted, the report of the merger auditor, remarks submitted by the recipients of the notice, and the final balance sheet of the domestic transferring company.[168]

One thing that complicates the whole process is the unknown reason of the need to submit "proof of disclosure of the merger plan for the transferring company". Disclosure can only occur beforehand at the commercial court, which is responsible for making the necessary registration in the commercial register and depositing it in the document collection, as § 33 EU-UmgrG dictates in conjunction with §15 EU-UmgrG The publication of the registration of the merger in the Edict archive (Ediktsdatei) is done ex officio. Therefore, nothing can be submitted that the commercial court does

[165] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 228.
[166] § 41 EU-UmgrG.
[167] § 40 Abs 2 EU-UmgrG.
[168] § 42 Abs.2 EU-UmgrG, Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 250.

not already know because of the previous disclosure in accordance with § 33 in conjunction with § 15.[169]

In addition to reviewing prior legal actions, the EU-UmgrG also introduces a review of abuse of cross-border mergers. [170] In case there are no concrete indications, the court may assume that no abuse has occurred and there is no need for it to investigate further. Then the court is free to issue the pre-merger certificate and can proceed with the registration of the intended merger, and once the cross-border merger falls through, the court deletes the transferring company.[171]

5.4.4. Inbound Cross-Border Mergers

For inbound mergers, the EU-UmgrG includes provisions §§ 43 to 45, which regulate those kinds of mergers. Although it is hard to notice, § 44 Abs. 1 refers to acquiring a company in a merger by absorption, while § 44 Abs. 2 applies to the acquiring company by formation of a new company. The rare case where an Austrian transferring company is also involved in an inbound merger is regulated by § 44 Abs. 3. Which applies only if at least two transferring companies are taking part into the merger.[172]

The EU-UmgG draws its provisions for the inbound merger regulations from the Austrian company law for domestic mergers and acquisitions. Many of these regulations and the conclusions that we made above are also contained in the Austrian AktG (Stock Corporation Act) and GmbHG (Limited Liability Companies Act).[173]

As such, in case of a merger by absorption, the EU-UmgrG refers to §§ 223 and 224 of AktG and § 101 of the GmbHG. The provisions of Austrian company Law on contributions in kind under stock corporation law are, therefore, applicable in the case where a capital increase takes place at the acquiring company, because the transferring of these assets to the acquiring company through a merger represents a contribution in

[169] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 402.
[170] § 42 Abs. 3 EU-UmgrG in connection with § 21 Abs. 3-8 EU-UmgrG.
[171] § 42 Abs. 3 EU-UmgrG in connection with § 21 Abs. 12 EU-UmgrG.
[172] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 403.
[173] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 261.

kind. Moreover, the above AktG provisions also regulate those situations where no new shares need to be issued, especially in intra-group mergers such as downstream or upstream mergers.

In cases of merger by the formation of a new company, § 44 Abs. 2 EU-UmgrG refers to the application of the provisions on the incorporation of stock corporations (§§ 17, 21 to 23, 32, and 34 Abs. 1 AktG), which its process is the same as in domestic mergers. The transferring company is considered the "founder".[174] All Provisions about special advantages, incorporation expenses, contributions in kind, and acquisitions of assets included in the statutes of the merging companies must be incorporated into the statutes of the Austrian company law.[175]

According to Austrian company law, such provisions only need to be incorporated if they were originally included in the statutes. Different legal systems do not have such strict requirements for provisions in statutes, even though advantages may still be granted or costs assumed. In such cases, no retroactive inclusion in the statutes of the Austrian company is required. For the newly formed company, an incorporation audit must be conducted by a court-appointed auditor, who may also serve as the merger auditor.[176]

Finally, § 45 EU-UmgrG refers to the registration of the merger to the relevant authorities, where the boards of the merging companies including the board of the foreign transferring company, must apply for the registration of the merger with the competent Austrian court. The difference to cross-border outbound mergers, is that the Austrian court is responsible for the final review of the entire process in inbound mergers. Therefore, except from the merger resolutions of the foreign companies or similar proof that the companies have approved the merger plan [177], the final balance sheet of each transferring company must also be submitted[178].

Moreover, the documents required for the formation of the acquiring company must be submitted,[179] particularly the articles of association, the founding report, and the appointment documents of the supervisory board members and the management

[174] § 44 Abs. 2 EU-UmgrG.
[175] Ibid.
[176] § 25 Abs. 3 – 5 AktG, §§ 26, 27, 42, 44 AktG, Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 403.
[177] § 45 Abs. 2 lit.2 EU-UmgrG.
[178] § 45 Abs. 2 lit.8 EU-UmgrG
[179] § 45 Abs. 2 lit.10 EU-UmgrG

board or directors. The board members of the acquiring company must declare to the court that no lawsuit has been filed to challenge or annul the merger resolution. In addition, evidence of the outcome of the proceedings with the employee representatives must be attached.[180]

Once all the above parameters are met, the court reviews the Austrian and cross-border aspects of the merger process and proceeds with all necessary registrations.[181] The legal actions and formalities of the departure company are considered done if a valid pre-merger certificate is conducted. This means, in particular, that the examination of whether the merger is for abusive or fraudulent purposes is not repeated but is only conducted by the court of the departure state as part of the pre-merger certificate.[182]

5.5. Cross-Border Divisions according to the EU-UmgG

5.5.1. General Provisions

The EU-UmgrG introduces and regulates the conditions for the application of cross-border divisions for the first time. The first part of the general provisions regarding cross-border mergers contains relevant definitions, but these definitions provide little new information.

They explain that only a cross-border division to form new companies is permitted, and not the division by absorption that is well-established in domestic law.[183] Meanwhile, the new provisions of the EU-UmgrG permits the existence of both the split, where the transferring company ceases to exist and its assets are divided between at least two acquiring companies, and the spin-off, where the transferring company continues to exist.[184]

Finally, the EU-UmgrG also contains provisions regarding the process of carve-out, in which a transferring company transfers assets to one or more newly established companies through universal succession, and the company itself takes ownership of the

[180] § 45 Abs. 4 EU-UmgrG.
[181] § 45 Abs. 5-6 EU-UmgrG
[182] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 404.
[183] § 47 Abs. 1-2 EU-UmgrG.
[184] § 47 Abs. 3-4 EU-UmgrG.

shares.[185] In this process, subsidiary companies are created without the shareholders of the transferring company being involved in the acquiring company. Under the Austrian Demerger Act (SpaltG), such a procedure is not an option for domestic demergers. Instead, a subsidiary would first need to be established prior to the division, and then the division would proceed downstream, with the shareholders of the transferring company withdrawing from their rights to receive shares.[186]

5.5.2. Demerger plans and balance sheets

In the same manner as the merger plan with cross-border mergers, cross-border divisions also demand the submission of a demerger plan. They are both very similar in their core, with some noteworthy deviations: i) the demerger plan must always include the founding documents of the companies established through their division, as the division to create a new company involves the establishment of at least one new entity[187], ii) the precise description of the assets, which is necessary due to the partial universal succession[188], iii) the demerger plan must specify the allocation of shares to the respective shareholders. [189] A disproportionate demerger is also allowed but requires higher resolution quorums, just as in domestic law.[190] The demerger plan must be prepared in writing and, unlike a demerger plan in a domestic division for the establishment of a new company, does not require notarisation.[191]

The provisions of the EU-UmgrG regarding balance sheet preparation are slightly different from those of the Austrian Demerger Act (SpaltG). According to the SpaltG, the managing boards must prepare a final balance sheet for the transferring company, as well as a demerger balance sheet and an acquisition balance sheet, all of which must be attached to the demerger agreement[192].

[185] § 47 Abs. 5 EU-UmgrG.
[186] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 404.
[187] § 49 Abs.1 lit. 10 EU-UmgrG.
[188] § 49 Abs.1 lit. 12 EU-UmgrG.
[189] § 49 Abs.1 lit. 13 EU-UmgrG.
[190] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 405.
[191] Ibid.
[192] §2 Abs, 2 lit12 SpaltG.

On the other side, § 49 Abs, 2 of the EU-UmgrG only requires the preparation of a final balance sheet, which does not necessarily have to be attached to the demerger plan. A demerger balance sheet and an opening balance sheet are not mandatory under the EU-UmgrG. The mandatory final balance sheet must, as in the domestic Demerger Act (SpaltG), be drawn to a date no more than nine months before the filing of the intended demerger.[193]The provisions of the Austrian Commercial Code (UGB) apply to these statements, and no publication is required.[194]

5.5.3. Capital Maintenance

The capital maintenance provisions under § 50 deviate from the domestic regulations for company divisions to form new entities. The nominal capital of the transferring company in a spin-off can only be reduced if the rules on ordinary capital reduction are observed. Bound reserves cannot be transferred to the benefiting companies. [195] This means that the nominal capital and bound reserves of the transferring Austrian company must still be covered even after the division unless the residual asset review cannot be conducted.[196]

Regarding the rare case of a split-up, the capital reduction rules do not apply since the capital in the case of a split-up division is reduced to zero. The legislator considers this, since § 50 Abs, 1 EU-UmgrG refers only to the more common spin-offs and carve-outs. This solution is acceptable since no capital remains in the split company. Furthermore, the application of liquidation rules is not necessary, as the process is not comparable to liquidation. The company's assets and liabilities transfer to the receiving company via universal succession, and creditors are protected by the capital maintenance rules of the receiving company.[197]

[193] § 49 Abs, 2 EU-UmgrG.
[194] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 298,
[195] § 50 Abs, 1 EU-UmgrG
[196] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 301.
[197] Schörghofer, P., and Christian Z., “Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II).” *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 405.

Therefore, the provisions of the EU-UmgrG for divisions to form new entities essentialy correspond to the provisions of the Austrian Demerger Act (SpaltG) for domestic demergers for the purpose of absorption. Under domestic law, however, the so-called "Summegrundsatz"[198] would apply, which allows the nominal capital of the transferring company to be reduced without following capital reduction rules, provided that the sum of the nominal capitals of all the companies involved in the demerger does not decrease.[199] The Austrian legislator could not retain this principle, as it would also have to apply to the receiving foreign company, which is not covered by the EU directive.

5.5.4. Demerger Report, Demerger Audit and Demerger Resolution

The board of the transferring company is required to prepare a demerger report but only in case of spin-offs and split-ups, and not for carve-outs. The demerger report is addressed to employees and minority shareholders, but not to creditors (unlike the merger report under the EU Merger Directive). [200]

Moreover, an independent expert must conduct a demerger audit for both spin-offs and split-ups, but not for carve-outs. The report focuses on the appropriateness of the share exchange ratio and any cash compensation. The valuation method and any difficulties in the valuation must be specifically addressed.[201] As in domestic law, a demerger audit is not required if all shareholders waive it or if there is only one shareholder involved.[202] For the appointment of the auditor, § 5 Abs. 2 and 3 of the SpaltG (Austrian Demerger Act) apply accordingly.

Finally, the division of a company must generally be approved by the shareholders of the transferring company.[203] Typically, the resolution requires the approval of 75% of the votes cast. However, in the case of a non-proportional demerger, § 8 Abs. 3 of the SpaltG (Austrian Demerger Act) applies. According to this provision, the resolution requires 90% approval. If a squeeze-out demerger or a cashbox demerger

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198 § 3 SpaltG.
199 Hanns F. Hügel Spaltungsverlust, Kapitalherabsetzung und „Summengrundsatz" bei der Abspaltung Ein deutsch-österreichischer Rechtsvergleich, Festschrift für Wilhelm Haarmann. Düsseldorf: IDW Verlag (2015) 207-230.
200 § 51 Abs. 1 EU-UmgrG.
201 § 52 Abs.1-2 EU-UmgrG.
202 § 52 Abs, 3 and § 12 Abs. SpaltG.
203 § 52 Eu-UmgrG.

is carried out, the resolution must be unanimous.[204] Although the demerger plan does not require notarization, the demerger resolution, even for a GmbH (limited liability company), must be notarized.[205]

5.5.5. Cash Compensation, Exclusion of Legal Actions and Share Allocation

In the case of the division of a company, the right for cash compensation after exiting the demerger process has both the shareholders who receive shares in companies located in other Member States as part of a demerger and those who receive shares in a different shareholding ratio in a non-proportional demerger.[206] What remains unclear under the provisions of EU-UmgrG is the fact that for the first case a formal objection to the demerger is enough, but the only thing needed against the demerger plan in the second case is a vote.[207] Otherwise, the provisions that regulate cash compensation in case of an exit from a demerger and its review are very similar to those already provided in cases of cross-border mergers on the above chapters.

In a familiar manner, the same applies to the exclusion of nullification and legal challenge in cases of inappropriate cash compensation and additional cash payments.[208]The reason of the exclusion of legal challenges and nullification lawsuits against the demerger resolution comes from the fact that problem with the demerger resolution usually comes from the cash settlement offer on the checking procedure of the cash settlement. The only reasons for a justified legal challenge or nullification against the demerger resolution can stem only from § 58 EU-UmgrG if the offer for a cash settlement or share distribution is not reasonable or if the written or oral explanations about the share distribution or the cash settlement offered by the company, or the demerger auditor do not meet the legal requirements. In any other case where the

204 § 52 Abs. 3 EU-UmgrG in conjunction with § 12 Abs. 4 SpaltG.
205 § 52 Abs. 3 EU-UmgrG in conjunction with § 12 Abs. 3 SpaltG.
206 § 57 Abs. 1-2 EU-UmgrG
207 Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 407.
208 § 57 Abs. 8 EU-UmgrG

claim is not based on a reason of § 58 EU-UmgrG, the court has to dismiss the lawsuit.[209]

Finally, shareholders cannot bring forward a legal challenge or nullification for an inappropriate allocation of shares.[210] In such cases, shareholders are permitted to request a review of the share allocation as per § 60 EU-UmgrG, which only leads to a claim for additional cash payments. Shareholders in a non-proportional demerger have the choice to either exercise their right to exit and receive cash compensation or remain as shareholders and request a review of the share allocation.[211]

5.5.6. Creditor Protection and Protection of Shareholders

The protection of creditors and shareholders in case of a company division is regulated in § 61 EU- UmgrG. The regulations contained in this Article do not contain any significant differences than those regulations for protecting creditors during mergers and company transformations. So, for example we find that as for mergers and transformations, the insurance of the pre-certification may only take place after the securities have been provided[212] or that the holders of bonds and profit-sharing rights are to be compensated with equal rights or if that is not possible, with equivalent right of their choice[213].

The innovation in creditors protection in a demerger comes from § 61 Abs. 2 EU-UmgrG. This regulation is based on § 15 of the Demerger Act (SpaltG) but only to the extent that it doesn't affect the regulations of the Mobility Directive, which consequently means that institutional creditor protection in cross-border divisions is different than in domestic divisions. What § 15 of the Demerger Act (SpaltG) stipulates is about assets and liabilities allocation. According to that paragraph, for liabilities established before the registration of the demerger, all companies are equally liable regardless of the allocation of assets in the context of the demerger process. The

[209] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023)353-354.
[210] § 58 EU-UmgrG.
[211] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 407.
[212]§61 Abs. 4 EU-UmgrG.
[213]§61Abs. 3 EU-UmgrG.

difference with European law is that under national law this consists of a primary liability when, according to European law a simple secondary liability would suffice.[214]

What is worth mentioning is some other significant points that separate the national law of the Austrian Demerger Act (SpaltG) from the Mobility Directive. According to § 15 of the Demerger Act companies can be released from liabilities when a company has "it has settled debts for other companies."[215] This is not recognised from § 61 Abs. 2 EU-UmgrG. Moreover, the Austrian legislator suggests that this stipulation would contradict the Mobility Directive.[216]

In a few words, according to § 61 Abs. 2 EU-UmgrG, if a company is only liable up to the amount of the assets allocated to it, then its liability is also limited in that amount; the liability must, still be reduced, at least when a creditor directly claims the company. However, it is not the same when a company settles the debts of another company on its own. In this case, the liability is not reduced, a stipulation that § 15 Abs. 1 of the Demerger Act contrary to § 61 Abs. 2 EU-UmgrG doesn't recognise. Therefore, the company will likely wait for the creditor to demand payment so as not to settle debts that do not reduce its liability.[217]

Moreover, each company remains liable even if a creditor has received securities according to § 61 Abs. 1 EU-UmgrG. On the other hand, § 15 Abs. 1 of the Demerger Act, does not require any liability of the other companies involved in the demerger for liabilities for which securities have already been provided to the creditors.[218]

5.5.7. Registration and Entry of the Demerger

Regarding the registration of the demerger and according to § 62 EU-UmgrG, the board of directors of the transferring company must register the division plans to the business registry (Firmenbuch) through an application of the registration of the intended demerger at the competent commercial court. For the required documents and

[214] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 407.
[215] § 15 Abs. 1 SpaltG.
[216] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 407.
[217] Ibid 408.
[218] Ibid 408.

declarations, §62 Abs, 3 EU-UmgrG refers to the application of § 21 Abs. 3 EU-UmgrG, thereby, about the documents and declarations to be submitted, the registration usually demands to be submitted by all members of the board of directors. If, for any reason, these submissions happen separately, an authorised number of representatives are permitted to proceed with the registration.[219]

Unlike to mergers, the court is more cautious and doesn't merely issue a pre-certification for demergers. Instead, the court demands that all beneficiary companies are registered in the other member states first. Only then does the competent court enter the demerger in the Austrian commercial register, and in the case of a split-up, it also registers the dissolution of the company.[220] This thorough process, is designed to ensure a detailed due diligence and proves the caution of the Austrian legal system in demerger cases.

The division of the companies becomes effective upon its entry in the Austrian commercial register.[221]The entry by the Austrian court is necessary so that the demerger can gain effectiveness of in all jurisdictions. The legal consequences, such as shares allocation and employment contracts, are regulated in § 63 Abs. 2 EU-UmgrG for the split-up and in Abs. 3 for the spin-off. In addition to the partial universal legal succession, the allocation of shares is adjusted based on the demerger plan.[222] In the case of transferring the assets or business to a subsidiary, the transferring company holds the shares of the beneficiary company. [223]

Finally, the regulations of § 63 Abs. 5 Eu-UmgrG are worth mentioning, which includes another rule regarding a further allocation for assets and liabilities that are not explicitly assigned in the demerger plan. Whenever an asset or liability is not clearly assigned based on the provisions and interpretation of the plan, it shall be allocated proportionally to the assumed net assets. This regulation is an innovation not known in the Demerger Act (SpaltG) and should under normal circumstances not apply, because

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[219] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 386.
[220] § 62 Abs. 4 EU-UmgrG.
[221] § 63 Abs.1 EU-UmgG.
[222] § 63 EU-UmgrG, Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 408.
[223] § 63 Abs. 4 lit 2 EU-UmgrG.

according to § 49 Abs. 1 lit 12, a demerger plan must already contain a provision for unallocated assets.[224]

5.6. Cross-border Conversion of Companies

5.6.1. General information

The cross-border conversion is regulated in § 8 Z 1. According to its legal definition, a conversion takes place when a corporation that has been established under or is governed by the law of an EU Member State and has its registered office, principal place of business, or main establishment in a Member State, turns into a corporation governed by the law of another Member State while retaining its legal personality. The main focus of the cross-border conversion lies to the relocation of the registered office to another EU-Member State.[225]

Moreover, in § 8 Z 2 and § 8 Z 3, the law makes the distinction between outbound and inbound conversions. An outbound conversion occurs when a corporation governed by Austrian law is converted into a corporation governed by the law of another Member-State. Accordingly, an inbound conversion takes place when a corporation governed by the law of another member state is converted into a corporation governed by Austrian corporate law.[226]

The result of this regulation is the facilitation of corporate mobility within the EU and without compromising their legal personality and avoiding dissolution and re-establishment during the conversion process.

5.6.2. Cross-border Conversion Plan and Report

As with mergers, companies must also issue a conversion plan. According to § 10 Abs. 1 EU-UmgrG the company's management board must prepare a conversion plan but is not obligated to notarise it. The conversion plan must include a minimum content and information in a similar manner to that of a merger plan, such as: the legal form, name, and (registered) office of the company in Austria, an indicative timeline of the conversion process, the rights to be granted to shareholders and other special rights

[224] Schörghofer, P., and Christian Z., "Das neue EU-Umgründungsgesetz – eine Einführung in alle Umgründungsarten (II)." *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht* 22, no. 8 (2023) 408.
[225]Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 332.
[226] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 13-14.

to holders of securities other than shares, and any guarantees or assurances offered to creditors.[227] The company must prepare a closing balance sheet as of the conversion date, which must be completed no more than mime months before the registration of the intended conversion.[228]

Another obligation of the management board of a company during a conversion is to prepare a report for shareholders and employees.[229] This conversion report must contain information about the legal and economic aspects of the cross-border conversion and especially its impact on the company's future business operations.[230] The information must also include details about cash compensation, the impact of the cross-border conversion on shareholders, and on employment relationships, and the rights and remedies available to shareholders.[231]

The conversion report is not always required. The reasons why a report might be unnecessary could be when either all shareholders of the company waive the requirement in writing or in the minutes of the shareholders' meeting or when the company has only one shareholder. The report is not necessary for employees when the company and its subsidiaries have no other employees apart from the members of the management board.[232]

5.6.3. Information and Disclosure to Shareholders and Employees

The shareholders must gain knowledge of all information regarding the company's conversion. For this reason, the shareholders' meeting, where the resolution on the conversion is to be decided, must come together six weeks before the scheduled date. Each shareholder will get a notice containing specifications regarding how and when the documents listed in § 14 Abs. 2 will be available.[233]

All the relative documents mentioned above must be conveyed within specific timeframes. As a result, documents such as the conversion plan, the annual financial statements and management reports for the last three financial years of the company,

[227] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 332.
[228] § 10 Abs. 2 EU-UmgrG.
[229] § 11 Abs. 1 EU-UmgrG.
[230] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 333.
[231] § 11 Abs. 3,5 EU-UmgrG.
[232] Ibid Abs. 6.
[233] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 53.

the closing balance, an interim balance sheet and the conversion report must be provided six weeks before the shareholders' meeting, while the conversion auditor's report and the supervisory board's report must be provided one month before the shareholders' meeting.[234] During the meeting and before the resolution, the documents must be presented to the shareholders, and the management board must present and discuss the conversion plan and inform them of any significant changes to the company's assets or earnings during the preparation of the conversion plan.[235]

It is interesting to point out that for GmbH companies, the above documents must be available in electronic form, and it is optional to make them available only if all shareholders unanimously agree in writing or during the meeting.[236]

On the other hand, the documents above, with the exception of the conversion auditor's or supervisory board's reports, must be sent to the employees' representatives six weeks before the shareholders' meeting. In their order, the employees and their representatives have the right to issue a statement on the conversion report within four weeks of receiving the documents. The management board must notify the shareholders about the statement without any delay.[237]

Finally, one month before the shareholders' meeting, the management board has to disclose to the competent court the conversion plan and the notice to shareholders, creditors, and to the employee representative body that they may submit comments on the plan to the company no later than five days before the shareholders meeting. At this point the court transfers the submission in the commercial register, and the documents are added to the repository, where they can be accessed free of charge.[238]

5.6.4. Resolution on the Conversion and Registration in the Registry

The effectiveness of a cross-border conversion depends on the approval and adoption of a conversion resolution from the shareholders. [239] Depending on the form of the company, different requirements are necessary for the approval and adoption of a resolution for conversion. Thus, for public limited companies (AG), a majority

[234] § 14 Abs. 2 EU-UmgrG.
[235] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 335.
[236] Ibid.
[237] § 14 Abs. 7-8 EU-UmgrG.
[238] § 15 EU-UmgrG.
[239] § 16 EU-UmgrG.

representing at least three-quarters of the share capital present at the meeting is necessary for the resolution to pass. Sometimes, the statutes or bylaws of the company may require a higher capital majority or other stipulations.[240]

On the other hand, for limited liability companies (GmbH), adopting the resolution requires a majority of three-quarters of the votes cast. Besides the majority of the votes cast, additional requirements may be in order according to the company's bylaws.[241] Furthermore, the conversion plan must be included in the resolution for the conversion of the company, and in the case of a GmbH, it must also be notarised. [242]

Finally, the shareholders meeting can condition the acceptance of the conversion on the parameter that the modalities for employee participation must be accepted and confirmed in the converted company of the destination member state.[243]

Alongside the resolution on the conversion, the management board of the company must also file the intended conversion with the competent court where the company has its registered office for entry in the commercial register.[244]

The registration of the conversion must be accompanied by a plethora of documents as originals, copies, or certified copies. There are nine different kinds of documents, which are the following: 1) A copy of the resolution along with the transformation plan, 2) any required approval document from official authorities, 3) the conversion report, and if applicable, the statement under § 14 (8) EU-UmgrG, which includes all relative legal and financial details for the employees and the shareholders, 4) the report from the auditor responsible for the conversion, 5) any comments submitted by the shareholders, creditors and employees under § 15 (1)(2) EU-UmgrG, 6) the company's final balance sheet, 7) proof of publication of the conversion plan, 8) evidence of the provision of cash compensation for dissenting shareholders, 9) evidence

[240] § 16 Abs. 2 lit. 1 EU-UmgrG, Vicente, L., "The Requirement of Consent for the Transfer of Shares and Freedoms of Movement: Toward the Liberalization of Private Limited Liability Companies: a Comparative Study of the Laws of Portugal, France, Italy, Spain, the United Kingdom and the United States and Its Interplay with EU Law." (2014). <https://doi.org/10.2870/15421.>
[241] § 16 Abs. 3 lit. 1 EU-UmgrG.
[242] § 16 Abs. 3 lit. 3, 4 EU-UmgrG.
[243] § 16 Abs. 4 EU-UmgrG, Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 71.
[244] § 21 Abs. 1 EU-UmgrG.

of creditor safeguards and a declaration confirming no lawsuits for security have been filed by other than satisfied or secured creditors.[245]

Furthermore, the management board has also the obligation to declare to the court the absences of any open lawsuits against the cross-border conversion. In more detail, there must be no filling or withdrawal of a lawsuit or an annulment of the conversion resolution within a month of its adoption. Shareholders must also declare that they haven't waived their right to sue through notarised statements.[246] The management board must also present the number of shareholders exercising their right to cash compensation, as well as the number of employees at the time of drafting the cross-border conversion plan, the existence and locations of subsidiaries and the liabilities to public authorities.[247] These three last requirements are demanded in order to avoid any abuse control.[248]

After successfully reviewing all the above documents, the court shall register the intended conversion and move forward by issuing a pre-certification of compliance[249], both of which must not occur before the expiration of the deadlines of the acceptance of the cash compensation offer[250] and the assertion of the creditor security loans[251].

Moreover, § 21 Abs. 9 EU-UmgG stipulates that registration should be completed within three months of filing it. If the court needs more time to review because of additional information or investigations, this period may be extended by no more than three months. If this extension is not enough because of the complexity of a case, the court is obliged to inform the company of the delay reasons before the expiration of the deadline.[252] Once the destination Member State confirms via the register interconnection system that the cross-border conversion is completed, the court

[245] § 21 Abs. 2 EU-UmgrG, Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 108-111.
[246] § 21 Abs. 3 EU-UmgrG.
[247] § 21 Abs. 4 EU-UmgrG.
[248] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 337.
[249] § 21 Abs. 6, 9-12 EU-UmgrG.
[250] § 17 Abs. 2 EU-UmgrG.
[251] § 20 Abs. 1 EU-UmgrG.
[252] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 337.

must within a reasonable time delete the company from the registry without submitting a separate application.[253]

Finally, we should mention the court's duty to verify that all preconditions, legal actions, and formalities have been properly executed and that the rights of creditors and shareholders have been protected.[254] A novelty in this piece of legislation is the introduction of the court's responsibility regarding abuse control. The court must investigate and confirm if the cross-border conversion is planned for abusive or fraudulent purposes, such as evasion of EU or national law or criminal objectives, and deny registration if abuse is found.[255]

5.6.5. Shareholders' and Creditors' Protection

The primary definition of a cross-border conversion is when the shareholders of a corporation in Austria, or in another Member-State, become shareholders of a company governed by foreign law. The EU-Law addresses these difficulties arising from this arrangement by providing shareholders with an exit right in exchange for cash compensation. This framework is also adopted by Austrian law, and it's based on the earlier § 10 EU-VerschG.[256]

Under § 17 EU-UmgrG, which is only applicable to outbound conversions[257], every shareholder of the company that is about to be converted has the right to appropriate cash compensation in exchange for their shares offered by the company or a third party, conditioned that the shareholder has objected to the conversion resolution in time, have been a shareholder from the time of the resolution of the shareholders meeting to when the right is asserted and have not waived their right in writing or during shareholders meeting.[258]

The cash compensation offer can be accepted during the shareholders' meeting or when the offer is not accepted during that meeting it can happen subsequently, with

[253] § 21 Abs. 12 EU-UmgrG.
[254] § 21 Abs. 6 EU-UmgrG.
[255] § 21 Abs. 7 EU-UmgrG, Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 337.
[256] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 337.
[257] Rieder, B. et al. EU-Umgründungsgesetz (EU-UmgrG): Kurzkommentar: erlassen durch das Gesellschaftsrechtliche Mobilitätsgesetz - GesMobG. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung (2023) 75.
[258] § 17 Abs. 1 EU-UmgrG.

the submission of a written[259] or electronic acceptance to the company or third party within one month of the resolution.[260] This means that companies must provide an electronic address for such submissions.[261] For limited liability companies (GmbH), written acceptance suffices, and notarization is not required.

The shareholders' claim for cash compensation becomes valid upon registration of the cross-border conversion, is due upon registration, and expires after three years. It is also mentioned in the law that for the successful completion of the compensation cash, the company must cover the costs of transferring the shares and also provide security for the said compensation.[262]

According to § 21 Abs. 6 EU-UmgrG, a preliminary certificate for the cross-border conversion may only be issued if all shareholders' compensation claims are satisfied or all shareholders have provided proof that they have waived their claims for cash compensation.[263] Moreover, according to § 17 Abs. 4 EU-UmgrG shareholders that object to the resolution about a cross-border conversion are not bound by any statutory restrictions for the sale of their shares during the objection and acceptance period of the cross-border conversion.[264]

Finally, the resolution in favour of the cross-border conversion is not possible to be annulled or declared invalid for reasons of insufficient compensation or non-compliance with oral or written explanations of the management board or other statutory requirements regarding the compensation offer. [265] Nevertheless, the shareholders who accepted the compensation offer may request a court review of the cash compensation within a month of the resolution.[266]

Regarding creditors' protection, they may demand additional security besides the one included in the conversion plan according to § 10 Abs. 1 Z 6 EU-UmgrG. If the company does not comply, creditors have the right to file a claim for additional security in court within three months of the conversion plan's disclosure. In this case, the creditors must present the court with valid arguments about the existence of their claim,

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[259] § 13 Abs. 2 AktG.
[260] § 17 Abs. 2 EU-UmgrG.
[261] § 17 Abs. 1 EU-UmgrG.
[262] § 17 Abs. 2 EU-UmgrG.
[263] § 17 Abs. 3 EU-UmgrG.
[264] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 338.
[265] § 18 EU-UmgrG.
[266] § 19 EU-UmgrG

their inability to demand cash compensation, and that because of the cross-border conversion the fulfilment of their claims is endangered.[267]

A difference between the earlier EU-VerschG provision and the new EU-UmgrG is that creditors have to substantiate both the existence of their claim and the potential risk.[268] The reason behind this is the opinion that in case of an insolvency, the creditors will likely have no difficulty demonstrating a risk. Following this reasoning, there is also no provision granting creditors an exemption from the right to demand security as it was the norm, which dictates that, in the event of insolvency, creditors have a preferential right of satisfaction from a coverage fund established and supervised by authorities for their protection, according to the previous law in § 13 Abs. 1 EU-VerschG.[269]

Finally, the preliminary certificate[270] for the cross-border conversion is only allowed to be issued after appropriate security has been provided to creditors who requested or claimed security, and they have given assurance that rights holders under § 20 Abs. 2 EU-UmgrG have been adequately compensated § 20 Abs. 3 EU-UmgrG. As to all claims brought to the court before the disclosure of the conversion plan, the company shall be considered a company with a legal domicile in the country at its previous registered office, given that the lawsuit is filed within two years after the conversion becomes effective.[271]

6. CONCLUSION

In summary, the cross-border mobility of companies has gained very significant importance over the past decades, and it is now an indispensable piece of today's economic life. To harmonise all the regulations and the ECJ's judgments for cross-border mergers, conversions and divisions, the EU created many EU Directives for the member states to implement.[272] The newest of these Directives, the Mobility Directive, undoubtedly constitutes a significant achievement, which has the potential to improve

[267] § 20 Abs. 1 EU-UmgrG.
[268] Ibid.
[269] Schörghofer; Zwick, Das neue EU-Umgründungsgesetz – Eine Einführung in alle Umgründungsarten (I), GES-Zeitschrift für Gesellschaftsrecht, Band 22, Heft 7 (2023) 338.
[270] § 21 Abs. 6 EU-UmgrG.
[271] § 20 Abs. 4 EU-UmgrG.

[272] Directive 200 5/56/EC, Directive 2009/133/EC. Directive (EU) 2017/1132.

and advance cross-border company restructures and mobility inside the EU market and to promote the freedom of establishment.

Because of the existence of Directive 2019/2121, Limited liability companies will finally be able to carry out not only cross-border mergers, but also cross border divisions and cross-border conversions upon the basis of harmonised EU rules, providing a secure legal framework for companies as well as protection mechanisms for members, creditors, and employees. Directive 2019/2121 enables companies to respond more flexibly to economic and legal challenges, enhancing the competitiveness and integration of the European economic area.

However, based on all the information presented in this paper, Directive 2019/2121 still needs to improve, the principal of which are the numerous 1inconsistencies and highly problematic lack of company law aspects. As such, its scope needs to be narrower in several important issues: It only covers some of the different forms of a company (its legal entities) within the meaning of art. 54 TFEU (in particular partnerships), which, in my opinion, the reasons behind this decision are not comprehensible; it does not provide for cross-border divisions by acquisition, and it fails to harmonise the conflict-of-laws rules for corporations. There is no doubt that the European legislators will have to make some adjustments in the future.

Nevertheless, a fully functional EU legal framework has finally been created for cross-border mergers, divisions, and conversions of corporations, which provides the necessary legal certainty and protection for both legal practitioners and those subject to the law.

In Austria, the legislators have consistently implemented those EU Directives into National Law, aiming to ensure a uniform level of protection for Austrian and foreign shareholders and creditors. Austrian reorganization law has generally proven effective. Therefore, there was no reason for fundamental changes in implementing Directive 2019/2121. Thus, in this implementation—including the exercise of Member State options—the fundamental decisions of the historical legislator in merger and division law should essentially be maintained. The previously unregulated cross-border conversion—which in Austria has mostly been referred to as a cross-border transfer of the registered office—had to be structured accordingly.

However, a significant new aspect of EU law was the abuse control, which will need to be conducted by the competent authority of the departure member state (by the commercial register court or Firmenbuchgericht) for all three types of cross-border reorganizations. [273]

Directive 2019/2121 and its implementation in the EU-Umgründungsgesetz (EU-UmgrG), provides expanded possibilities for carrying out cross-border operations to or from Austria. This piece of law has tremendous benefits, and we can safely conclude that many of its objectives have been met. Consequently, the EU-UmgrG makes sure that the rights of shareholders and employees are well protected, promotes economic growth and integration, and supports entrepreneurship and businesses of all sizes by enabling and facilitating cross-border operations in Austria and throughout the EU.

The EU-UmgrG represents, therefore, a much-needed advancement of Austrian company law on corporate restructuring, which will facilitate within the EU. Its aim is to enhance the flexibility and ease the process for conducting cross-border business activities, as well as eliminate bureaucracy and other previous uncertainties in practice, such as relocations of registered offices due to the lack of legal regulations or their restriction from national law, thereby fostering a more integrated and dynamic internal European market. The Ministry of Justice of Austria, therefore, assumes that the number of cross-border reorganizations will increase from the current approximately 70 to around 90 per year.[274]

Finally, in light of the latest developments in the USA after the presidential elections, as well as the intense geopolitical situation that is also driving the cost of energy and the cost of living to new heights, it is more imperative than ever that the EU needs some innovative legislation such as the above Directive or other pieces of legislature such as a common capital market, that will guarantee the economic growth and financial success of EU citizens in the near future.

[273] Parlament Österreich, EU-Umgründungsgesetz – EU-UmgrG; Gesellschaftsrechtliches Mobilitätsgesetz – GesMobG, Ministerialentwurf (247/ME) https://www.parlament.gv.at/gegenstand/XXVII/ME/247

[274] Bernhard Rieder, Das neue EU-Umgründungsgesetz (Teil I), ecolex, Heft 8, 2023/428, 676.

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