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*CREDITOR PROTECTION IN CROSS-BORDER CONVERSIONS, MERGERS AND DIVISIONS***

This paper elaborates on the protection of creditors in cross-border conversions, mergers and divisions, according to Directive 2019/2121/EU as regards these cross-border operations. After presenting the protection mechanisms available to creditors in cross-border operations prior to the adoption of the 2019 Directive, as well as the risks faced by creditors in such events, the author presents the system of creditor protection introduced by the Directive. Both creditor protection mechanisms in the broader sense (which are not designed exclusively for creditors) and the ones in the narrower sense (which are created only for their protection) are presented in the central portion of the paper. Among the latter group, the general protection mechanisms available for each cross-border operation are analysed, followed by the mechanisms that are specific to individual operations.

Key words: *Creditors*. – *Protection of creditors*. – *Cross-border merger*. – *Cross-border division*. – *Cross-border conversion*.

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1. INTRODUCTION

Creditor protection is an important part of the legal framework for cross-border conversions, mergers and divisions. Creditors need to be protected regardless of the reasons for carrying out the specific operation. It is the cross-border element of the operation that makes the issue of creditor protection in the event of the restructuring of the debtor particularly complex. In any case, a cross-border restructuring, in the form of a cross-border conversion, merger and division, may be the result of adjusting to the economic factors or to a changed business framework, the aspiration to improve business activity or an effort to prevent bankruptcy (see Teichmann, 278). Therefore, it may be a tool for preserving and/or expanding the business or a mere strategy for its survival. Restructuring, as an answer to facing insolvency or being on the verge of insolvency, is especially relevant for creditors and thus requires special attention.

The long history of the harmonisation of legal rules on corporate restructuring in EU law dates back to 1978 and the enactment of the Third Company Law Directive on domestic mergers of public companies.[1] Soon after, in 1982, the Sixth Company Law Directive regulating domestic divisions of public companies was adopted.[2] Subsequently, the Member States were not obliged to permit divisions under their own jurisdiction, but if they opted for it, the division had to be carried out in accordance with that Directive.[3] Later on, the starting focus of the European legislator moved from the domestic restructuring of public limited liability companies to cross-border operations applicable to both public and private limited liability companies. This process culminated in 2005 with the adoption of the Tenth Company Law Directive on cross-border mergers of limited liabilities companies – the Cross-Border Merger Directive (see also Teichmann, 280–282).[4] Afterwards, the general rules on domestic mergers, domestic divisions and cross-border mergers all became part of Directive 2017/1132 – the codification Directive. Finally, a huge and, for now, final step forward considering the legal framework

[1] Third Council Directive 78/855/EEC based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, OJ L 295 of 20/10/1978.

[2] Sixth Council Directive 82/891/EEC based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, OJ L 378 of 31/12/1982.

[3] See Directive 2017/1132/EU relating to certain aspects of company law (codification), OJ L 169 of 30/6/2017, Art. 135 (former Art. 1 of the repealed Sixth Council Directive 82/891).

[4] Directive 2005/56/EC on cross-border mergers of limited liability companies, OJ L 310 of 25/11/2005.

of restructuring was taken in 2019 when Directive 2121/2019 as regards cross-border conversions, mergers and divisions amending the codification Directive (the new 2019 Directive) was adopted.[5] The significance of this action may easily be demonstrated by the recognition that harmonised general rules on cross-border conversions and cross-border divisions were adopted for the first time.[6] At any rate, creditor protection was an important driver for the long-awaited and heavily discussed harmonisation of cross-border corporate mobility in the EU.

The lack of unified procedures for cross-border conversions and cross-border divisions prior to 2019 was an obstacle for performing these operations, due to the legal uncertainty that surrounded them.[7] As put in the executive summary of the study drawn up by Ernst & Young (2018, 5), the companies involved were pushed to abandon the transfer of registered seat or to undertake this operation while accepting the legal uncertainty for the company and its stakeholders. Furthermore, the study of Ernst & Young reveals that carrying out the transfer of registered seat under those circumstances results in the increase of cost and duration of the procedure, regardless of whether it might have been performed directly or indirectly through other operations, for example, via a conversion into a *Societas Europaea – SE*. In the case of cross-border divisions, the possibilities were even more limited. As referred to in the abovementioned summary (Ernst & Young 2018, 7), companies were pushed to abandon the said operation or to perform it indirectly, for example by creating a new company in the host Member State and transferring assets and liabilities to it subsequently. Thus, the adoption of the new Directive is an enormous achievement in facilitating the undertaking of cross-border operations, protected under the freedom of establishment, which significantly improved the level of legal certainty for all interested persons, including the creditors. However, the overprotection of interested parties may have some negative effects. Companies faced with too many requirements may choose not to undertake the cross-border operation. Therefore, balancing between the protection of the stakeholders and the companies' rights to convert, merge and divide was quite a challenge for the drafters of the new Directive.

5 Directive 2019/2121/EU amending Directive 2017/1132/EU as regards cross-border conversions, mergers and divisions, OJ L 321 of 12/12/2019.

6 The new Directive provides for the rules on divisions involving the formation of new companies, while the cross-border division by acquisition is not regulated. See Directive 2019/2121, recital 8.

7 See Directive 2019/2121, recital 5.

This paper proceeds as follows: Part 2 presents the protection of creditors prior to the adoption of the new 2019 Directive. The risks faced by creditors are elaborated in Part 3. The newly adopted system of creditor protection is explained in Part 4. Creditor protection mechanisms in the broader sense are analysed in Part 5. The analysis of protection mechanisms in the narrower sense follows in Part 6. Part 7 concludes the paper.

2. PROTECTION OF CREDITORS PRIOR TO THE ADOPTION OF THE NEW 2019 DIRECTIVE

Before the adoption of the new Directive, only limited protection of creditors was available in the case of cross-border mergers, in accordance with the Cross-Border Merger Directive, on the one hand, while protection was provided by other rules in the case of formation by a cross-border merger and transfer of seat of a European Company (*Societas Europaea – SE*) and a European Cooperative Society (*Societas Cooperativa Europaea – SCE*), on the other hand. The former set of rules are general rules on creditor protection, while the latter rules are special. The latter are still applicable.

The Cross-Border Merger Directive provided a general rule regarding the protection of creditors.[8] A limited liability company that participates in a cross-border merger has to comply with the provisions and formalities of the national law to which it is subject, as long as the rules are applicable to the cross-border nature of the merger.[9] To put it differently, the rules on cross-border mergers refer to the national rules on the protection of creditors. The national legislator's choice to provide mandatory creditor protection in general likely depends on the prevailing domestic model of corporate governance – the protection of the stakeholder model of corporate governance is expected to lead to the mandatory protection of creditors (see Mucciarelli 2020, 58).

Rules on creditor protection in domestic mergers are only partially harmonised (Winner 2019b, 62). According to the rules on the protection of creditors in the case of domestic mergers of public limited liability companies, the Member States need to provide an adequate system of protection of creditors whose claims antedate the publication of the draft

[8] Directive 2005/56 was repealed by Directive 2017/1132, which was subsequently amended by the new 2019 Directive.

[9] See Directive 2017/1132, Art. 121 (1) (b) and (2) (former Art. 4 (1) (b) and (2) of Directive 2005/56).

terms of the merger and have not fallen due at that time.[10] The system of protection may be different for creditors of the acquiring company and for those of the company being acquired. This is allowed due to the fact that the interests of the creditors of the disappearing company are naturally in greater danger than those of the creditors of the surviving company (see Raaijmakers, Olthoff 2008, 37).[11] Namely, the Member States have to at least provide that creditors are entitled to obtain adequate safeguards if the following two conditions are met. First, only the creditors who do not already have such safeguards are entitled to obtain adequate safeguards, and second, obtaining these safeguards has to be necessary considering the financial situation of the company.[12] Creditors who may credibly demonstrate that the satisfaction of their claims is at stake due to a merger and that they did not obtain adequate safeguards from the company are entitled to apply to the competent authority for adequate safeguards. The same system of protection applies to the debenture holders of the merging companies, except when the merger is approved by a meeting of the debenture holders or by them individually.[13] Some authors (see, for example, Raaijmakers, Olthoff 2008, 35) consider these provisions on creditor protection too vague and thus not providing adequate guidance.

Creditors in cross-border mergers were generally protected through the rules on disclosure. Information regarding the evaluation of the assets and liabilities transferred to the company resulting from the cross-border merger are part of the common draft terms.[14] Moreover, the indications of arrangements that are made for the exercise of creditor rights, as well as the address at which complete information may be obtained free of charge, had to be published in the national gazette of the Member State whose national law applied to the merging company.[15] The management or administrative body was required to explain in its report the implications of this cross-border operation not only to the members and employees, but also to the creditors.[16] Although these rules are intended to enable creditors

[10] See Directive 2017/1132/EU, Art. 99 (1).

[11] See Directive 2017/1132, Art. 99 (3).

[12] See Directive 2017/1132, Art. 99 (2).

[13] See Directive 2017/1132, Art. 100.

[14] See Directive 2017/1132 before the 2019 amendments, Art. 122 (k) (former Art. 5 (k) of Directive 2005/56).

[15] See Directive 2017/1132 before the 2019 amendments, Art. 123 (2) (c) (former Art. 6 (2) (c) of Directive 2005/56).

[16] See Directive 2017/1132 before the 2019 amendments, Art. 124 (former Art. 7 of Directive 2005/56).

to understand the consequences of the cross-border operation on their interests, they are not enough since no specific creditor rights are provided in these rules.

According to the study conducted by Bech-Bruun and Lexidale (2013, 53), the rules on creditor protection in the Cross-Border Merger Directive resulted in the adoption of different procedures regarding creditor protection by the Member States (e.g. dissimilar commencement dates, duration consequences, and procedure of the protection), which created an obstacle for carrying out cross-border mergers. Furthermore, some Member States prescribed additional provisions on creditor protection in cross-border mergers, in addition to the rules on creditor protection available in the domestic mergers (Winner 2019b, 63). This was in accordance with the line of thinking that the Member States are authorised to prescribe these additional rules, although that possibility was not expressly mentioned in the Cross-border Merger Directive and therefore might lead to the opposite conclusion – that it was not permitted (Winner 2019b, 63). Unlike the situation with regard to creditors, it was clear from the wording of the Directive that prescribing rules on additional protection for shareholders was an available option.[17] The dilemma of whether the general rule refers to creditor protection in a domestic merger or whether the Member States may adopt additional provisions on creditor protection in a cross-border merger was resolved by the decision of the CJEU in the *KA Finanz AG* case, when the former interpretation prevailed: it was only in reference to the provisions on creditor protection in domestic mergers (Schmidt 2016, 18).[18]

Special rules on creditor protection are prescribed in the case of the cross-border transfer of seat of an SE or an SCE and the formation of these entities by a cross-border merger.[19] In the event of the transfer of seat of an SE, creditors are protected through the disclosure of the transfer proposal and the management or administrative report, as well as through the issuance of the certificate by the competent authority of the Member State where the SE has its registered office. The transfer proposal contains any rights provided to the protection of creditors, while the report of the management or administrative body has to explain, amongst others, the implications of

[17] See Directive 2017/1132 before the 2019 amendments, Art. 121 (2).

[18] CJEU, Case 483/14, *Ka Finanz AG v. Sparkassen Versicherung AG Vienna Insurance Group*, ECLI:EU:C:2016:205, paras. 60–62.

[19] See Council Regulation (EC) No. 2157/2001 on the Statute for a European Company – EC, OJ L 294 of 10/11/2001, Art. 8 and Arts. 17–31; Council Regulation (EC) No. 1435/2003 on the Statute for a European Cooperative Society – SCE, OJ L 207 of 18/8/2003, Art. 7, and Arts. 19–34.

the transfer to the creditors.[20] The creditors may examine these documents and obtain copies of them free of charge. The competent authority where the SE has its registered office issues the certificate if, amongst others, the interests of the creditors are adequately protected.[21] Namely, the creditors are protected in accordance with the national law requirements of the Member State where the SE has its registered office prior to the transfer of seat. This refers to the liabilities that arise prior to the publication of the transfer proposal, although it may be extended to include the liabilities that arise or may arise prior to the transfer, if the Member States choose to do so. Finally, the SE Regulation prescribes jurisdiction continuity for the claims arising before the transfer of seat (see Fuentes Naharro 2019, 43).[22] All these creditor protection mechanisms also exist in the case of the transfer of seat of an SCE.[23]

The rules on the protection of creditors and holders of bonds of merging companies, prescribed by the law of the Member States governing each merging company in the case of the merger of public limited liability companies, apply also in the case of the formation of an SE by a cross-border merger, taking into account its cross-border nature.[24] The indications of arrangements regarding the creditors, together with the address at which complete information may be obtained free of charge, have to be published in the national gazette of that Member State.[25] In the case of the formation of an SCE by a cross-border merger, the system of protection of creditors of the cooperative is the same as the one provided in the case of the formation of an SE by a cross-border merger. Namely, the creditors of the merging cooperatives are protected by the rules on creditor protection prescribed by the laws of the Members States involved, as in the case of mergers of public limited liability companies, while the indications of arrangements regarding the creditors, together with the address at which complete information may be obtained free of charge, have to be published in the national gazette of the Member State of which the actual cooperative is a subject.[26]

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[20] See Regulation No. 2157/2001, Arts. 8 (2) and (3).

[21] See Regulation No. 2157/2001, Art. 8 (7).

[22] See Regulation No. 2157/2001, Art. 8 (16).

[23] Regulation No. 1435/2003, Arts. 7 (2) (e), (3), (4), (7), and (16).

[24] See Regulation No. 2157/2001, Art. 24 (1) (a) and (b).

[25] See Regulation No. 2157/2001, Art. 21 (c).

[26] See Regulation No. 1435/2003, Art. 24 (1) (c) and Art. 28 (1).

3. RISKS FACED BY CREDITORS

Carrying out a cross-border operation affects the creditors of the company performing or participating in the cross-border operation. One of the consequences of a cross-border conversion is that the assets and liabilities of the company that carried out the conversion become those of the converted company; a cross-border merger by acquisition results in, amongst others, the transfer of assets and liabilities of the company being acquired to the acquiring company, while in the case of cross-border mergers by formation of a new company, the liabilities and assets of the merging companies are transferred to the new company; in the case of cross-border full divisions, the assets and liabilities of the company being divided are transferred to the recipient companies in accordance with the allocation stated in the draft terms, while in the case of partial divisions or divisions by separation, part of the assets and liabilities are transferred to the recipient company or companies, whereas the remaining part continues to be that of the company being divided.[27] It is evident that a change of debtor – or at least of the debtor's financial situation – may be a result of the cross-border operation. Also, the applicable company law may change.

A change of the applicable company law is a serious risk faced by creditors and thus this is a justified reason for prescribing special provisions regarding creditor protection in cross-border operations. Namely, the debtor may be governed by a different company law (Winner 2019b, 61). Generally speaking, the rules in the framework of contract law, company law, insolvency law, and accounting law all form a system of creditor protection (see Fleischer 2006, 30). Although creditor protection is not a specificity of company law, commonly at least some creditor protection rules are a part of it. However, these rules vary in different Member States (Gerner-Beuerle *et al*. 2016, 221). The wider the protection of creditors provided in the company law framework, the greater the likelihood that the change of the applicable company law will negatively affect them (Gerner-Beuerle *et al*. 2016, 221).

[27] See Directive 2017/1132, Art. 86r (a), Art. 131 (1) (a) and (2) (a), Art. 160r (1) (a), (2) (a) and (3) (a). Furthermore, there is a special rule for the assets and liabilities of the company being divided that are not allocated under the draft terms and where the interpretation of the draft terms does not make the decision on the allocation possible. In the case of a cross-border full division, they are allocated to all recipient companies, and in the case of a partial division or a division by separation, to all the recipient companies and the company being divided, in proportion to the share of net assets allocated to each of them in accordance with the draft terms. See Directive (EU) 2017/132, Art. 160r (4).

Another considerable risk connected to the cross-border operation is the change of jurisdiction and the applicable law in the case of insolvency (see Winner 2019b, 62). Namely, a change of insolvency law to the benefit of the shareholders and to the detriment of the creditors might follow the change of the location of the registered office and centre of main interest (Bech-Bruun, Lexidale 2013, 52). To conclude, creditors may be negatively affected not only by the different rules on creditor protection in the scope of company law (e.g. capital requirements, directors' liability, member's liability, distribution of profits, lifting the corporate veil), but also by the procedural rules regarding jurisdiction, i.e. change of defendant's domicile and change of presumption of debtor's centre of main interest (Garcimartín, Gandía 2019, 32–33; Davies *et al*. 2019, 208; Enriques, Gelter 2006, 433; Jevremović Petrović 2021, 73).

Even in cases where neither the change of applicable company law nor the change of the debtor occurs, protection may still be needed because of the change in the financial situation of the debtor when creditor interests may be at risk, via the change of the asset base and composition of creditors (see Winner 2019a, 50). This risk is limited to cross-border mergers and divisions: in a cross-border merger, the base of the assets increases as well as the number of creditors, whereas in a cross-border division, the exact opposite happens – the asset base decreases as well as the number of creditors (see Winner 2019a, 50–51). Therefore, cross-border divisions are considered more detrimental to creditors compared to cross-border mergers, bearing in mind that the intensity of the negative effects depends on the financial situation of each of the successor companies (Winner 2019a, 51). The interests of creditors have to be protected, since the assets are divided and allocated to debtors against whom different groups of creditors hold claims, while they have no influence on the distribution of assets and liabilities (Davies *et al*. 2019, 208).

The negative effects are not the same for the creditors of all the companies participating in the cross-border operation. They depend on the solvency and indebtedness of the actual debtor before and after the cross-border operation. Winner (2019a, 50) suggests that some creditors may not be at risk at all, but rather the operation may even affect them positively (e.g. the creditors of a company which merged with a much sounder company). However, if both companies are sound, sharing the increased asset base between all the creditors in the case of cross-border mergers will probably not be detrimental to any of them (see Winner 2019a, 50). Since the financial situation does not change in the cross-border conversion, this operation is less dangerous than a cross-border merger (Davies *et al*. 2019, 208). In fact, it is the least dangerous of the three cross-border operations, regarding creditors in this sense. The most dangerous one is a cross-border division, when the creditor protection issue is particularly delicate. This is especially true for cross-border division by acquisition. It this case, there are also the dangers related to the cross-border division by formation of new companies, regarding the ratio between the assets and liabilities and the level of liquidity of the successor companies (Alexandropoulou, Winner 2021, 590). Yet, in addition to this, the creditors of the company being divided will also share the same assets with the creditors of the recipient company (Alexandropoulou, Winner 2021, 590). However, the 2019 Directive does not regulate this type of cross-border division.[28]

In any case, the risks dictate the decision on which creditors should be protected. It is clear that these risks differ according to the cross-border operation at issue. In addition, it is also relevant whether the creditors are voluntary or involuntary. Voluntary creditors may be able to mitigate these risks since they can protect their interest through negative covenants in the lending contract (see Bratton 2006, 55). These creditors may require the debtor to not perform the operation without their approval (commitment clause) or stipulate the acceleration of the loan (acceleration clause) or stipulate the raising of the interest rate as a penalty for performing the operation (Enriques, Gelter 2006, 432–33). Also, the disclosure of the draft terms may influence a potential creditor when deciding whether to enter into a relationship with the company. Therefore, it is important to consider whether the voluntary creditors knew or might have known about the company's intention to undertake a cross-border operation. Unlike voluntary creditors, involuntary (tort) creditors cannot protect themselves in the way mentioned above. Furthermore, even some of the voluntary creditors, especially the smaller ones who are not professionals, may not be able to protect themselves with those covenants. (Winner 2019a, 52). Finally, the interests of the creditors may be in conflict with the interests of other stakeholders. Any distribution to the shareholders who exercised their rights connected to a cross-border operation also creates a risk for the creditors (Winner 2019b, 52–53). Therefore, even overprotection of the minority shareholders may constitute a risk for the creditors.

[28] See Directive 2019/2121, recital 8.

4. CREDITOR PROTECTION SYSTEM IN THE NEW 2019 DIRECTIVE

The protection of creditors is deeply rooted in the company law tradition of many Members States; therefore, it is not surprising that it found its way into the 2019 Directive. The system of creditor protection is available only to creditors of the limited liability companies that are formed in accordance with the laws of a Member State and that have their registered office, central administration or principal place of business within the Union, when these companies carry out the cross-border operation. Some of these companies are excluded or may be excluded from the scope of the Directive, which depends on the decision of the Member States. For example, the rules of the Directive do not apply to companies in liquidation when asset distribution to their members has already begun, while the Member States may decide not to apply the rules on cross-border operations – including the ones regarding creditor protection – to companies that are subject to insolvency proceedings or preventive restructuring frameworks.[29] The Directive Proposal was stricter in this regard, since it prescribed that companies are not allowed to carry out cross-border operations when they are subject to insolvency proceedings or preventive restructuring proceedings, which are initiated due to the likelihood of insolvency, and during suspension of payment.[30] Therefore, the Directive Proposal prevented companies that are insolvent or on the verge of insolvency from carrying out these operations, because of the vulnerability of the creditor interests (see Fuentes Naharro 2019, 44). In this regard, the Proposal was more favourable to creditors.

The new Directive does not provide the explicit protection of debenture holders or holders of securities, other than shares as a special type of creditors in its separate provisions, contrary to the regulation in the case of domestic mergers and domestic divisions, where this is the case (Alexandropoulou 2021, 17).[31] The lack of a reference to these types of creditors may be interpreted in two ways: that the protection mechanisms available to creditors in general are available to these creditors as well, or that only the protection measures that are available to them in national law apply (Alexandropoulou 2021, 17). Still, some types of creditors are mentioned in the Directive in order to clarify that they may be protected

[29] See Directive 2017/1132, Arts. 86a (3) and (4), 120 (4) and (5), and 160a (4) and (5).

[30] Directive Proposal, Art. 86c (2) (a), (b) and (c), Art. 120 (4) (a), (b) and (c), and Art. 160d (2) (a), (b) and (c).

[31] See Directive 2017/1132, Arts. 100, 101, and 146 (5), and Art. 147.

by the provided mechanisms of protection. Namely, the Member States may include current and former employees with occupational vested pension rights and persons receiving occupational pension benefits in the range of protected creditors.[32] Also, the interest of public creditors is especially taken into account in the process of issuing the pre-operation certificate. Furthermore, it seems that the EU legislator tends to especially provide protection for voluntary creditors. Recital 24 of the new Directive uses the phrase "creditors who entered into a relationship with the company". This wording implies that the voluntary creditors are the ones who should be entitled to the right to adequate safeguards. Furthermore, the provision of the Directive sets two conditions regarding the system of protection of creditors, while neither of them is related to the types of voluntary creditors. However, they are indirectly related to the limitation regarding the protection of tort creditors. It may be concluded that the protection is not limited to voluntary creditors who are not debenture holders or holders of securities other than shares. Yet, if debenture holders and holders of securities other than shares were not covered by the new Directive, they would still be protected by the rules of national laws in the case of cross-border mergers or cross-border divisions of a public limited liability company, according to the decision in the *KA Finanz AG* case (Alexandropoulou 2021, 18). Bearing in mind that this protection is limited to creditors of public limited liability companies (although Member States may extend the application of these rules to other companies as well), and that the new Directive does not contain the mentioned limitation, the broader interpretation (i.e. that the protection is available also to these creditors) should be accepted.

Most creditor protection mechanisms are available for each of the three cross-border operations. These may be called general protection mechanisms. Others are intended only for specific cross-border operations, due to their characteristics, and thus may be addressed as special protection mechanisms. The rule on jurisdiction in cross-border conversions and the rule on joint and several liability in cross-border divisions belong to the category of special protection mechanisms. The remaining protection mechanisms are available for each of the cross-border operations.

Besides this criterion of whether or not a creditor protection mechanism is available for each of the operations, there are other criteria that are also relevant for their classification. In legal theory, the protection of creditors is divided between institutional and individual protection, depending on whether any action by a creditor is required. According to Winner (2019b, 55–56), on the one hand, institutional creditor protection does not expect

[32] See Directive 2019/2121, recital 24.

any action by the creditors (e.g. capital maintenance rule as a general rule in the framework of company law). On the other hand, individual creditor protection requires action by the individual creditor before or after a specific date (Winner 2019b, 56–57). In general, the EU legislator has opted for the individual protection of creditors in cross-border operations.

Based on the time criterion, the protection mechanisms that may be applied before a specific date are *ex ante* mechanisms of protection, while the ones available after that moment are *ex post* protection mechanisms. The dividing line may be the date when the cross-border operation takes effect or the general meeting of shareholders (Winner 2019b, 57). To put it differently, *ex ante* protection means that protection starts prior to the general meeting with the publication of the draft terms, while in the *ex post* system of protection, the protection commences after the date of the general meeting at which the decision was delivered or after the date when the operation takes effect (Truli 2016, 38). For example, the rule on jurisdiction in a cross-border conversion is applicable after the operation takes effect, as prescribed by the new Directive. Also, the rule on joint and several liability is an *ex post* creditor protection mechanism. On the other hand, the right to obtain adequate safeguards may be exercised within three months from the disclosure of the draft terms and thus should be classified as an *ex ante* mechanism of protection, although it depends on whether the operation took effect or not (Winner 2019a, 56). The new Directive does not prescribe the strongest *ex ante* protection mechanisms – the creditors' right to block the cross-border operation, nor the exit right to creditors. Although the exit strategy is mostly related to shareholders, creditors may use it as well, if allowed. This implies the immediate reimbursement of their claims but it is not accepted as a mandatory protective provision in the new 2019 Directive (see Biermeyer 2015, 339). Both *ex ante* and *ex post* protection have certain advantages and disadvantages. *Ex ante* protection provides certainty regarding the operation, since the company will know what to expect after the operation takes effect, but this certainly goes hand in hand with delays because it is time consuming (Winner 2019b, 57; Papadopoulos 2012, 535). However, others (Binard, Schummer 2019, 34) suggest that turning to *ex ante* rules on the protection of creditors may lead to greater uncertainty when implementing operations in general. It is irrefutable that *ex post* protection generates no delays, but may create uncertainty for the creditors, who may only take action subsequently (see Papadopoulos 2012, 535–536). Moreover, *ex post* protection may even become available too late for them (Winner 2019b, 57). Furthermore, the duration of the protection period is also an important issue. It is well established that uncertainty and practical problems may arise, particularly if the companies participating in the cross-border operation are situated in Member States that apply different systems regarding the commencement and duration of the protection (see Truli 2016, 38). The new Directive contains the time framework for the application of creditor protection mechanisms.

Creditor protection mechanisms may be mandatory or optional. If a protection mechanism is mandatory, the Member State has to subscribe to it. On the contrary, the Member States may choose not to prescribe creditor protection mechanisms that are optional. The only optional protection mechanism in the new Directive is the issuance of declaration of solvency.

Some creditor protection mechanisms are not intended only for creditors. These protection mechanisms should be regarded as additional or as a precondition for the protection of creditors in the narrower sense. Moreover, they may be part of the procedure when a company undertakes the cross-border operation, which serves for the protection of all stakeholders and therefore should be addressed as creditor protection mechanisms in the broader sense. These are disclosure rules, the right to be consulted, and the issuance of a pre-operation certificate.

Mechanisms that are created only for creditor protection may be qualified as mechanisms of creditor protection in the narrower sense. The EU legislator set these rules in a single article on creditor protection per each of the cross-border operation separately. These mechanisms are the right to adequate safeguards, the solvency declaration, the rule on jurisdiction in cross-border conversions, and the rule on liability in the terms of cross-border divisions. The protection mechanisms in the broader sense are going to be analysed before the ones in the narrower sense, bearing in mind that the former are needed for the application of the latter. Creditor protection mechanisms in the narrower sense may be divided in two groups: the ones available for all the operations, and the ones available only for a particular operation. The general protection mechanisms will be elaborated before the special ones.

Finally, it is not entirely clear whether the rules on creditor protection are minimum harmonisation rules, i.e. whether the Member States may broaden the range of protected creditors and whether they may provide additional protection mechanisms that are not provided for in the Directive. Winner (2019a, 54) states that the Member States may introduce or maintain other protection mechanisms bearing in mind that the rules on creditor protection are minimum harmonisation rules. Garcimartín and Gandía (2019, 33 n. 56) raise some doubts although they admit that this conclusion may be drawn from the explanatory memorandum that accompanied the Directive Proposal.[33] They explain that this interpretation may lead to the different

[33] See Explanatory Memorandum to the Directive Proposal, 19.

treatment of creditors and thus undermine the purpose of the Directive, as well as that justifying the additional measures of protection would be difficult under the test of proportionality. The Directive's provisions on creditor protection do not contain the words "at least" when defining the range of protected creditors. On the contrary, these words are used when the protection of shareholders is prescribed, which undoubtedly leads to the conclusion that the range of protected shareholders may be broadened. Furthermore, the conditions regarding the range of protected creditors that are prescribed by the adopted Directive did not exist in the Proposal. Therefore, the range of protected creditors is narrowed in the adopted text. Moreover, the Directive contains one optional protection mechanism. This may be an indication that other additional protection mechanisms may not be provided by the national legislators. European Company Law Experts (the ECLE) also consider these rules as minimum harmonisation rules, although they failed to understand why the EU legislator empowered the Member States to provide an optional mechanism of protection if this is the case (Davies *et al*. 2019, 206). Winner (2019a, 54) opines that by prescribing the rules on optional protection mechanisms, the EU legislator intended only to push the Member States to include it in their legislation. Nonetheless, it should not be disregarded that the explanatory memorandum clearly mentions that the Member States may provide additional safeguards, which is a more flexible solution. Providing additional safeguards may comprehend both the range of protected creditors and the mechanism for their protection. Although it is far from clear from the adopted provisions of the new Directive, this interpretation should be accepted.

5. CREDITOR PROTECTION MECHANISMS IN THE BROADER SENSE

There are three creditor protection mechanisms in the broader sense: the rules on disclosure, the right to be consulted, and the issuance of the pre-operation certificate. All three are part of the procedure of the cross-border operation, which may be regarded as pre-conditions for exercising creditor rights in the narrower sense.

5.1. Disclosure

Generally speaking, disclosure is a common creditor protection mechanism. Its protective function is well known and broadly accepted (see, for example, Merkt 2006, 99). Nevertheless, disclosure itself is not enough for the proper protection of creditors and is thus accompanied by special protection rules. Creditors are protected through the disclosure of the draft terms of the actual cross-border operation – a document which is drawn up by the administrative or management body. The disclosure of the draft terms is a means of informing the creditors about the proposed operation.[34] It is a precondition for submitting the comments on the draft terms by the creditors and thus an *ex ante* mechanism of protection. However, protection through disclosure is available not only to creditors but also to other stakeholders. Therefore, it is a general protection mechanism.

The draft terms contain the information relevant to the creditors. Namely, the draft terms of each of the cross-border operations include, amongst others, any safeguards offered to creditors.[35] Guarantees and pledges are examples of safeguards that are explicitly mentioned in the 2019 Directive. Creditors who are not satisfied with the protection in the draft terms are expected to try to find a solution with the company before applying for a safeguard to the appropriate authority. Nevertheless, there are other pieces of information that are important to creditors in the case of cross-border mergers or cross-border divisions, aside from the abovementioned content. These elements of information are connected to changes regarding assets and liabilities. The draft terms need to contain the information on the evaluation of the assets and liabilities that are transferred to the company resulting from the merger, or that are going to be allocated to each company involved in the cross-border division, as well as the dates of the merging companies' accounts used to establish the conditions of the merger, or the date of the accounts of the company being divided in the case of cross-border divisions.[36] Furthermore, the draft terms of a cross-border division consist of the precise description of the assets and liabilities of the company being divided, together with the statement regarding their allocation between the recipient companies or the retaining of those by the company being divided in the case of partial divisions or divisions by separation, as well as information on the treatment of assets and liabilities that are not explicitly allocated.[37]

With regard to the cross-border division, the requirement regarding the detailed information mentioned above is at least in part the result of the recognised increased risks for the creditors. Settling the issue of assets and

34 See Directive 2121/2019, recital 12.

35 See Directive 2121/2019, Art. 86d (f), Art. 122 (n) and Art. 160d (q).

36 See Directive 2017/1132, Art. 122 (k) and (l) and Directive 2019/2121, Art. 160d (m) and (n).

37 See Directive 2019/2121, Art. 160d (l).

liabilities that are not included in the draft terms is particularly important in the event of the insolvency of any of these companies. Creditors need all the information related to the assets and liabilities of their debtor, since their interests are reflected in the company's ability to repay the debt once it becomes due. This crucial information is necessary in order for them to decide whether to apply for additional safeguards. The situation in a cross-border conversion is different, since the assets and liabilities remain the same. Still, creditors should be protected because of the change of applicable company law in the case of cross-border conversions.

The protection of creditors through disclosure was more comprehensive in the Directive Proposal compared to the adopted solution.[38] Unlike the adopted 2019 Directive, which contains only one mechanism of creditor protection in relation to disclosure, the Directive Proposal also included an additional one. In addition to the protection through the disclosure of the draft terms, creditors were also protected by the disclosure of the independent expert report. According to the Directive Proposal, creditors were presumed not to be prejudiced by the cross-border operation if the independent expert concluded that there was no reasonable likelihood that the rights of creditors would be unduly prejudiced.[39] The report containing this conclusion was to be disclosed together with the draft terms. When such conclusion is missing, it may be a signal to creditors that they should apply for adequate safeguards. This solution was abandoned and, therefore, the role of the independent expert is not significant for the protection of creditors.

5.2. The Right to be Consulted

Creditors have a right to be consulted in the form of submitting their comments on the draft terms to the company, no later than five working days before the date of the general meeting.[40] The company has to disclose the notice regarding this right at least one month prior to the general meeting. The right to be consulted is a creditor protection mechanism in the broader sense, since it is not created for their specific needs and is also

[38] Proposal for a Directive Amending Directive (EU) No. 1132/2017 as regards cross-border conversions, mergers and divisions, COM/2018/241 final – 2018/0114 (COD), Brussels, 25 April 2018.

[39] See Directive Proposal, Art. 86k (3) (a), Art. 126b (3) (a), and Art. 160m (3) (a).

[40] See Directive 2017/1132, Art. 86g (1) (b), Art. 123 (1) (b), and Art. 160g (1) (b).

available to shareholders and employees. This is the weakest mechanism of creditor protection. It is unlikely that shareholders will be influenced by the creditors' comments to such a degree that that the comments will affect the shareholders' decision regarding the voting on the cross-border operation. Shareholders are naturally concerned about the impact that the operation may have on their rights, and not about the specific claims that creditors may hold vis-à-vis the company. Therefore, the relevance of this protection mechanism is manifested only in the company receiving notice that the creditors are unsatisfied, which would leave enough time for the company and its management to find a solution and ensure the protection of their rights. Also, this may be an early indication that the creditors will likely apply for additional safeguards.

5.3. Issuance of The Pre-operation Certificate

The issuance of the pre-operation certificate is a part of the procedure of each cross-border operation. The competent authority of the Member State will scrutinise the legality of the cross-border operation regarding the parts of the procedure that are governed by its law and issue a certificate if all the conditions are met and all the procedures and formalities are completed. The issuance of the pre-operation certificate is particularly important for public creditors, since the competent authority may check whether there are any unfulfilled obligations towards them and whether these obligations are sufficiently secured, if this is part of the procedure and formalities.[41] As stated in recital 39 of the Directive, its aim is to ensure that the operation does not prejudice the creditors. Also, the proceedings initiated by the creditors may have consequences on the issuance of the pre-certification of the actual operation.[42] However, it is primarily connected to the public interest and only indirectly to the interests of the different stakeholders (see Alexandropoulou 2021, 11). All in all, this protection mechanism is not far reaching when it comes to creditor protection in general.

[41] Directive 2019/2121, recital 39, and Directive 2017/1132, Art. 86m (1), Art. 127, and Art. 160m (1).

[42] See Directive 2019/2121, recital 37.

6. CREDITOR PROTECTION MECHANISMS IN THE NARROWER SENSE

Creditor protection mechanisms in the narrower sense are concentrated in the provisions of the 2019 Directive which regulate solely the protection of creditors. Of the four mechanisms, two are available for all cross-border operations, while two are applicable only to one of these operations. Applying for safeguards and the issuance of a solvency declaration are general protection mechanisms that are available for every cross-border operation. One of the special protection mechanisms relates to jurisdiction in the case of cross-border conversions, while the other is the rule on liability that is available only for cross-border divisions.

6.1. The Right to Adequate Safeguards

Safeguards do not have to be provided to the creditors but if they are, the related information must be included in the draft terms. Some doubts regarding the interpretation of the Directive Proposal provision on the content of the draft terms regarding safeguards were raised by the ECLE. Nevertheless, the ECLE concluded that the words of the Directive Proposal should be interpreted as indicating that offering safeguards to creditors is not mandatory (see Davies *et al*. 2019, 206). Bearing in mind that this provision corresponds and is almost identical to the one in the adopted Directive, this position is also valid for the interpretation of the provision of the new Directive regarding the information on safeguards included in the draft terms.

Dissatisfied creditors, i.e. creditors who are not content with the safeguards provided by the company in the draft terms – if provided at all – may apply for adequate safeguards. These creditors should inform the company that they plan to apply to the appropriate authority for adequate safeguards.[43] The notification requirement enables them to find a solution with the company, which would make the application for adequate safeguards to the competent authority unnecessary. The Directive left it to the Member State to decide whether the appropriate authority should be administrative or judicial. The distinction between these possibilities should not be underestimated. Court proceedings are usually longer and more expensive compared to

[43] See Directive 2019/2121, recital 23.

administrative ones (Kyriakides, Fournari 2020, 214–15). Nevertheless, the Member States should take into account the tradition and particularities of the country at issue when making such decisions.

Still, not all creditors have the right to apply for adequate safeguards. The 2019 Directive sets two conditions regarding the claims of dissatisfied creditors that need to be met in order for them to be entitled to apply for adequate safeguards. The claim has to antedate the publication of the draft terms of the cross-border operation and not to have fallen due at that time. The range of protected creditors is narrowed in comparison with the Proposal, which did not include any of these conditions.[44]

The first requirement tends to exclude persons who became creditors after the disclosure of the draft terms, since they knew about the intended cross-border operation and still decided to enter into agreement with the company (Radović 2018, 652). Clearly, this explanation is limited to voluntary creditors and thus cannot be applied to tort creditors. The second requirement excludes from the system of protection creditors whose claims have fallen due at the said time. The underlying rationale is that they are able to ask for performance at once while being protected by the rules of enforcement (Radović 2018, 653). This requirement indirectly excludes the tort creditors from the range of protected creditors. Namely, their claims are generally considered due from the moment when the damage occurred (Vizner 1978, 832–834) To put it differently, the claims of tort creditors that antedate the disclosure of the draft terms have fallen due before the time of such disclosure. Therefore, the conditions set in this provision limit the range of protected voluntary creditors only in relation to the time criteria, while they indirectly exclude the tort creditors from the system of protection if according to the national law their claims are considered due from the moment when the damage occurred.

Creditors must apply for adequate safeguards within three months of the disclosure of the draft terms of the actual operation.[45] The competent authority should compare the value and credit quality of the claim against the company before and after the cross-border operation, since these should be equal, while taking into account whether the claim may be brought in the

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44 See Directive Proposal, Art. 86k (2), Art. 126b (2), and Art. 160m (2).

45 See Directive 2017/1132, Art. 86j (1), Art. 126b (1), and Art. 160j (1). The deadline was shorter in the Directive Proposal since creditors were supposed to petition for adequate safeguards within one month of the disclosure of the draft terms. See Directive Proposal, Art. 86k (2), Art. 126b (2), and Art. 160m (2).

same jurisdiction. For their claims to be awarded, creditors need to credibly demonstrate that the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the company.

Credible demonstration appears not to be easy to deliver by creditors. This is particularly true for proving that the satisfaction of creditors is at stake. The new Directive does not reveal what that means. Although this requirement may not be connected to the financial situation of the company in the case of cross-border conversions, since the assets and the liabilities of the company remain the same, it should be interpreted as such in cross-border mergers and divisions. This interpretation is in accordance with the rules on domestic mergers and divisions, where the financial situation is explicitly mentioned. Namely, creditors are protected if the protection is necessary due to the financial situation of the merging company, or of the company being divided and of the company to which the obligation is to be transferred.[46] It may be concluded that the wording "at stake" should be understood as referring to the financial situation of the company at issue, in cases of cross-border mergers and cross-border divisions. For example, the claims may be at stake when the basic capital of the company undergoing the cross-border operation is going to be decreased as a result of the cross-border division, or when a company merges with another whose financial situation is comparatively worse (see Radović 2018, 655). A credible demonstration that the creditors did not obtain adequate safeguards should include the presentation of the information regarding the safeguards provided in the draft terms, if there is one, followed by the description of the claim and the security, if it exists, together with an explanation why the additional safeguard is needed. Furthermore, obtaining the safeguard depends on whether the cross-border operation has taken effect or not. Namely, the safeguard may be obtained only if the cross-border operation takes effect.[47] To conclude, the decision will depend on the result of comparing the financial situation of the debtor before and after the operation. This explanation regarding the words "at stake" is not too helpful with regard to cross-border conversions, so it can be expected that creditors will hardly succeed in complying with

46 See Directive 2017/1132, Art. 99 (2) and Art. 146 (2).

47 The date on which the cross-border operation takes effect is determined by the law of the departure Member State in the case of cross-border conversions, by the law of the Member State to which the company resulting from the cross-border merger is a subject in the case of cross-border mergers, and by a Member State to which the company being divided is subject in the case of cross-border divisions. See Directive 2017/1132, Art. 86q, Art. 129, and Art. 160q.

this request in that specific cross-border operation. This is especially the case bearing in mind that the special rule on jurisdiction is a protection mechanism available to creditors only for this operation.

Finally, the adopted text of the Directive differs significantly from the one of the Proposal. The right to adequate safeguards was not available to creditors, i.e. they were considered not to be prejudiced in two alternative situations.[48] First, the creditors were presumed not to be prejudiced if the independent expert concluded that there was no reasonable likelihood that the rights of creditors would be unduly prejudiced when the company disclosed the report together with the draft terms. Second, creditors may not be awarded the additional safeguard when they are offered a right to payment and if the right to payment is of at least an equivalent value to the original claim, if it may be brought forward in the same jurisdiction as the original claim and if its credit quality is at least commensurate with the original claim. As noted by the ECLE, the Proposal did not indicate who should assess the credit quality and this exception is not suitable for cross-border conversions, since the change of assets and number of creditors does not occur (Davies *et al*. 2019, 207). This concept was abandoned.

6.2. Solvency Declaration

The solvency declaration is a statement of the management or administrative body of the company carrying out a cross-border operation declaring that they are not aware of any reason why the company after the conversion takes effect in the case of cross-border conversions, the company resulting from the merger in the case of cross-border mergers, or any recipient company in the case of full divisions and the company being divided in the case of partial divisions, would not be able to meet its liabilities or the liabilities allocated to them in accordance with the draft terms. Generally, this mechanism of protection tends to protect creditors from the risk of insolvency after the cross-border operation.[49] It is a declaration regarding the financial status of the company being converted, or of each of the merging companies or of the company being divided, no earlier than one month before the disclosure of that declaration.[50] The statement has to be based on the information available to the management or the administrative body at

[48] See Directive Proposal, Art. 86k (3) (a) and (b), Art. 126b (3) (a) and (b), and Art. 160m (3) (a) and (b).

[49] See Directive 2019/2121, recital 25.

[50] See Directive 2121/2019, Art. 86j (2), Art. 126b (2), and Art. 160j (3).

the date of the declaration. The body competent to issue the declaration is required to make reasonable inquiries in order to determine the financial status of the company.

As previously mentioned, this protection mechanism is optional. If the Member State opts to require the drafting of a solvency declaration, the company has to publish it together with the draft terms no more than one month before the general meeting. Furthermore, in the case of cross-border mergers, the solvency statement should be the same for all merging companies, bearing in mind that it should be published together with the common draft terms (Jevremović Petrović 2020, 269). If the laws of the Member States to which the merging companies are subjects have chosen different approaches, in a manner that this protection mechanism is not available in each of the Member States, the issuing of a solvency declaration would still be required. The wording of the Directive is clear – the Member States may require this from each of the merging companies. If this requirement is not met, it might be considered a lack of the procedure. Also, this is in accordance with the private international law rule on cumulative application of national laws (Jevremović Petrović 2020, 269).

Bearing in mind that the solvency declaration may be inaccurate or misleading, the Member States should provide rules on liability of the members of the management or administrative bodies. These rules should be detailed, which is especially important in the case of cross-border mergers, where this declaration is the same for all merging companies. Although the directors of one company may not know enough about the financial status of the other merging company, they may still be liable (see Jevremović Petrović 2020, 269). However, the provisions of the 2019 Directive do not set any rules regarding liability. Yet, in recital 25, the Directive provides the general instruction that penalty and liability have to be effective and proportionate in accordance with the EU law.[51]

Finally, opting for this protection mechanism may also produce some negative effects. The directors may decide not to proceed with the operation in order to avoid possible liability connected to the signing of the declaration

[51] The rules on the liability of directors where there is a likelihood of insolvency are not harmonised. Nevertheless, the rule regulating the duties (but not the liability) of the directors regarding their actions during that period is set in Article 19 of Directive 2019/1023 (Directive 2019/1023/EU on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive 2017/1132/EU (Directive on restructuring and insolvency), OJ L 172 of 26/6/2019).

of solvency (Alexandropoulou 2021, 19). However, this deterring effect may be regarded as positive from the point of view of the creditors. Furthermore, proceeding with the operation while providing protection for the directors will lead to the increase of costs connected to the fees for consultants and D&O insurance policies (Alexandropoulou 2021, 19). In conclusion, its optional nature and the under-regulation regarding liability make this protection mechanism weak and not too attractive for the Member States.

6.3. Jurisdiction

The creditors of a company performing a cross-border conversion are additionally protected by the special rule on jurisdiction. There is only one requirement regarding the creditor's claim that has to be met – the claim needs to antedate the disclosure of the draft terms of the cross-border conversion. All creditors whose claims antedate the disclosure of the draft terms may institute proceedings against the company in the departure Member State within two years of the cross-border conversion takes effect.[52] To put it differently, creditors may sue the company in the Member State of its origin. This protection mechanism applies to all creditors whose claims became due in the period of two years from the cross-border conversion taking effect (same as Alexandropoulou 2021, 19). This is significant for smaller creditors who did not protect themselves by choice-of-forum clauses (Winner 2019a, 60).

This possibility should be without prejudice to the rules on jurisdiction set in Union law, national law, or arising from a contract. It is an additional rule to other rules on the choice of jurisdiction. Creditors may not use this protection mechanism when jurisdiction is exclusive according to Regulation (EU) No. 1215/2012 (Alexandropoulou 2021, 20).[53] The reason why this protection mechanism is available only in cross-border conversions may be that the EU legislator considered this operation more dangerous than others since the applicable law may change without the transfer of assets (Winner 2019a, 60).

52 See Directive 2019/2121, Art. 86j (4).

53 Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20/12/2012 (Brussel I-bis Regulation).

6.4. Joint and Several Liability

In the case of cross-border divisions, a special protection rule is provided for creditors whose claims are not settled by the company to which the obligation is allocated. This mechanism of protection is designed to counteract the specific risks faced by creditors in the case of cross-border divisions performed by their debtors. The draft terms of the cross-border division have to contain the information on which company is liable to which creditor. Namely, if a creditor of the company being divided does not obtain satisfaction from the company to which the liability is allocated, the other companies involved – i.e. the recipient companies in a full division and the company being divided in the case of partial division and divisions by separation, will be jointly and severally liable with the company to which the subsidiary liability is allocated.[54] Therefore, the creditor needs to try to settle with the main debtor – the company to which the liability is allocated – before demanding fulfilment from the other debtors. Only if the main debtor fails to fulfill its obligation, the creditor may receive satisfaction from the other liable companies. The maximum amount of joint and several liability of any company involved in this cross-border operation is limited to the value of the net assets allocated to it at the date on which the division takes effect.

Unlike in the case of domestic divisions of public limited liability companies where many different options were available, the EU legislator decided to prescribe two mandatory creditor protection mechanisms in cross-border divisions: the right to obtain safeguards, and the rule on joint and several liability of the companies involved in the cross-border division, when the obligation is not fulfilled by the main debtor (subsidiary liability), plus the optional mechanism regarding the solvency declaration.[55] Also, the legislator did not refer to the complicated system of protection in domestic divisions, where the right to obtain the additional safeguard may be combined with the rule on joint and several liability when the main debtor does not fulfill its obligation or with the rule on joint and several liability of the recipient companies for the liabilities of the company being divided, which is not a subsidiary liability. Bearing in mind the complicated system of creditor protection in national divisions, the adopted system of creditor protection in cross-border divisions should be welcomed.

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[54] See Directive 2019/2121, Art. 160j (2).

[55] Compare Directive 2019/2121, Art. 160j (2), and Directive 2017/1132, Art. 146.

7. CONCLUSION

Previous rules on cross-border mergers were improved by the new Directive while completely new rules were prescribed for the other two cross-border operations. Nevertheless, the rules of the 2005 Directive on cross-border mergers were a foundation for future development regarding the rules on all three cross-border operations. The European legislator chose a technique of regulating them one by one while not combining domestic with cross-border operations. The protection of creditors is mandatory in all three cross-border operations. The protection is individual, since creditor should take action in order to be protected. Some of these mechanisms are *ex ante* protection mechanisms, while others are *ex post* mechanisms of protection. All the potential risks for creditors connected to the cross-border operations are clearly considered by the EU legislator. Namely, as a result of a cross-border operation, the debtor and/or its financial situation may be changed, as well as the applicable company law. Regarding the range of protected creditors, it is not completely clear whether the rules on creditor protection cover all types of creditors. On the one hand, the protection is not limited to voluntary creditors who are not debenture holders or holders of securities other than shares while, on the other hand, it seems that the tort creditors are indirectly excluded from the system of protection. The interpretation of the provisions of the Directive, in their linguistic meaning, leads to the conclusion that the range of protected creditors may not be broadened and that additional protection mechanisms not provided for in the Directive may not be prescribed by the national legislators. Nevertheless, the explanatory memorandum of the Directive Proposal makes it clear that this was not the intention of the EU legislator. The linguistic interpretation should not prevail, i.e. the range of protected creditors may be broadened and additional safeguards may be provided.

Creditor protection mechanisms provided for in the Directive may be divided into protection mechanisms in the broader sense and the ones in the narrower sense. The former are not intended only for creditors and they serve as pre-conditions exercising of creditor rights. These are the rules on disclosure, the right to be consulted, and the issuance of the pre-operation certificate. The procedure of the cross-border operation itself comprises of the creditor protection mechanisms in the broader sense. Protection through disclosure relates only to the disclosure of the draft terms. Although the disclosure itself is not enough for the proper protection of creditors, it is the most important mechanism in the broader sense, since it is a precondition for the application of other protection mechanisms. Protection through the right to be consulted is the weakest among them. The creditors' comments may be a way to inform the company that they are not satisfied with the offered safeguards, which would leave enough time for the company to find an adequate solution that is acceptable to the creditors. The issuance of the pre-operation certificate by the competent authority is an indirect protection mechanism, which is relevant mostly for public creditors. Therefore, the main protection mechanisms are the latter – the protection mechanisms in the narrower sense – which are created exclusively for the protection of the interest of the creditors. Most of these mechanisms are general, since they are available in all three cross-border operations. However, some apply only to particular ones.

Protection in the form of applying for safeguards is provided only if certain conditions are met. Namely, claims should antedate the disclosure of the draft terms and they should not have fallen due at the time of disclosure, while their satisfaction should be at stake. Only the creditors who did not obtain an adequate safeguard from the company may be awarded this protection. Besides being not secured or being not secured enough, the satisfaction of their claims needs to be at stake, i.e. threatened or at risk by the cross-border operation. This should be credibly demonstrated by the creditors. The meaning of the words "at stake" is particularly problematic in the case of cross-border conversions and that is why it may be expected that this protection mechanism will not be very helpful, at least in such cases. Protection in the form of the issuance of the solvency declaration is the weakest mechanism of protection in the narrower sense, because it is optional, while no detailed rules regarding the liability of the administrative or management body are provided. The special rule on jurisdiction, which enables creditors to initiate the proceedings in the Member States of the company's origin, within two years of the operation taking effect, is available only in cross-border conversions. This is possible when jurisdiction is not exclusive and where the prorogation clause is not prescribed in the contract. Therefore, it is considered useful for small and non-professional creditors, who might be exposed to costs and thus be unwilling to sue in a different country. Finally, the last protection mechanism available only in cross-border divisions is subsidiary joint and several liability of other recipient companies with the company to which the liability is allocated, in the case of full divisions, and of companies being divided, in the case of partial divisions or divisions by separation. Unlike the complex rules on joint and several liability in domestic divisions, this rule is clear and should thus be welcomed.

Although there is room for improvement regarding the protection of creditors, and especially regarding the need for clarification concerning the range of protected creditors and the meaning of the words "at stake", with regard to the satisfaction of claims in cross-border conversions, it is undeniable that the adopted system of protection is well designed. To conclude, the interests of creditors are well protected in each of the cross-border operations.

REFERENCES

[1] Alexandropoulou, Antigoni, Martin Winner. 4/2021. Creditor Protection and Divisions – Did the CJEU Get it Right? *European Company and Financial Law Review* 18: 588–607.

[2] Alexandropoulou, Antigoni. 1/2021. Protection of members and creditors after the Mobility Directive: challenges in the implementation. *ERA Forum* 22: 9–20.

[3] Bech-Bruun and Lexidale. 2013. Study on the Application of the Cross-border Mergers Directive. *5–8fea-01aa75ed71a1* (last visited 26 March, 2022).

[4] Biermeyer, Thomas, 2015. Stakeholder Protection in Cross-Border Seat Transfers in the EU. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837424* (last visited 26 March, 2022).

[5] Binard, Sébastien, Laurent Schummer. 1/2019. The Case for Further Flexibility in Matters of Cross-Border Corporate Mobility. *European Company Law Journal* 16: 31–37.

[6] Bratton, William W. 1/2006. Bond Covenants and Creditor Protection: Economics and Law, Theory and Practice, Substance and Process. *European Business Organization Law Review* 7: 39–97.

[7] Davies, Paul, Susan Emmenegger, Eilís Ferran, Guido Ferrarini, Klaus J. Hopt, Niamh Moloney, Adam Opalski, Alain Pietrancosta, Markus Roth, Tolf Skog, Martin Winner, Jaap Winter, Eddy Wymeersch (European Company Law Experts – ECLE). 1–2/2019. The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment, *European Company and Financial Law Review* 16: 196–221.

[8] Enriques, Luca, Martin Gelter. 1/2006. Regulatory Competition in European Company Law and Creditor Protection. *European Business Organization Law Review* 7: 417–453.

[9] Ernst & Young. 2018. Assessment and quantification of drivers, problems and impacts related to cross-border transfers of registered offices and cross-border divisions of companies – Executive summary,

DG JUST, JUST/2015/PR/01/0003. *https://ec.europa.eu/info/sites/default/files/dg_just_transfers_divisions_executive_summary_final_en_06022018_1.pdf* (last visited 26 March, 2022).

[10] Fleischer, Holger. 7/2006. Legal Capital: A Navigation System for Corporate Law Scholarship. European Business Organization Law Review 7: 29–38.

[11] Fuentes Naharro, Mónica. 2019. Cross-Border Conversions and the Company Law Package. 13–48 in *Stakeholder Protection in Restructuring – Selected Company and Labour Law Issues*, edited by Erika Kovács and Martin Winner. Baden-Baden: Nomos.

[12] Garcimartín, Francisco, Enrique Gandía. 1–2/2019. Cross-Border Conversions in the EU: The EU Commission Proposal. *European Company and Financial Law Review* 16: 15–43.

[13] Gerner-Beuerle, Carsten, Federico M. Mucciarelli, Edmund-Philipp Schuster, Mathias M. Siems. 2016. Study on the Law Applicable to Companies. *https://www.lse.ac.uk/business/consulting/reports/study-on-the-law-applicable-to-companies* (last visited 26 March, 2022).

[14] Jevremović Petrović, Tatjana. 2020. Unapređenje pravnog okvira prekograničnih pripajanja i spajanja privrednih društava u pravu EU. 249–276 in *Izazovi u međunarodnom poslovnom pravu i pravu Evropske unije – Liber Amicorum in Honours of Radovan D. Vukadinović*, edited by Allan F. Tatham, Vitomir G. Popović, Jelena Vukadinović Marković. Banja Luka – Kragujevac: Akademija nauka u umjetnosti Republike Srpske i Udruženje za evropsko pravo.

[15] Jevremović Petrović, Tatjana. 2021. Regulisanje prekograničnih promena pravne forme privrednih društava. 53–86 in *Liber Amicorum prof. dr Mirko Vasiljević*, edited by Dušan Popović. Beograd: Univerzitet u Beogradu – Pravni fakultet.

[16] Kyriakides, Michael, Fryni Fournari. 2020. Procedural Harmonisation in Cross-Border Mergers. 209–222 in *Cross-Border Mergers – EU Perspectives and National Experiences*, edited by Thomas Papadopoulos. Cham: Springer.

[17] Merkt, Hanno. 1/2006. Creditor Protection Through Mandatory Disclosure 7: 95–122.

[18] Mucciarelli, Federico M. 2020. Cross-Border Mergers and Reincorporations in the EU: An Essay on the Uncertain Features of Companies' Mobility. 53–64 in *Cross-Border Mergers – EU Perspectives and National Experiences*, edited by Thomas Papadopoulos. Cham: Springer.

[19] Papadopoulos, Thomas. 4/2012. The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive. *European Business Law Review* 23: 517–546.

[20] Raaijmakers, Geert T.M.J., Thijs P.H. Olthoff. 1/2008. Creditor protection in cross-border mergers; unfinished business. *Utrecht Law Review*: 4, 34–39.

[21] Radović, Mirjana. 4–6/2018. Pravo poverioca da zahteva dobijanje odgovarajuće zaštite u slučaju statusne promene privrednog društva – dužnika. *Pravo i privreda* 56: 645–665.

[22] Schmidt, Jessica. 2016. Study on Cross-border mergers and divisions, transfer of seat: Is there a need to legislate? *https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU(2016)556960_EN.pdf* (last visited 26 March, 2022).

[23] Teichmann, Christoph. 2/2016. Corporate Restructuring under the EMCA. *European Company and Financial Law Review* 13: 277–300.

[24] Truli, Emmanuella. 2016. Ex-post analysis of the EU framework in the area of cross-border mergers and divisions, European Implementation Assessment – Study, EPRS – European Parliamentary Research Service. Ex-Post Impact Assessment Unit, PE 593.796. *https://www.europarl.europa.eu/RegData/etudes/STUD/2016/593796/EPRS_STU(2016)593796_EN.pdf* (last visited 26 March, 2022).

[25] Vizner, Boris. 1978. Član 186. Kad dospijeva obveza naknade. 832–834. *Komentar Zakona o obveznim (obligacionim) odnosima*. Zagreb: Riječka tiskara.

[26] Winner, Martin. 1–2/2019a. Protection of Creditors and Minority Shareholders in Cross-border Transactions. *European Company and Financial Law Review* 16: 44–73.

[27] Winner, Martin. 2019b. Creditor Protection in Mergers in Europe. 49–72 in *Stakeholder Protection in Restructuring – Selected Company and Labour Law Issues*, edited by Erika Kovács and Martin Winner. Baden-Baden: Nomos.

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