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by acquisition
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Abstract

The Mobility Directive has inserted a special EU legal framework for cross-border divisions into Title II Chapter IV of the Company Law Directive (CLD) – but only for cross-border divisions by formation of new companies, not for cross-border divisions by acquisition. This paper analyses the consequences of the exclusion of cross-border divisions by acquisition from the scope of the CLD, how various Member States have dealt with it when implementing the Mobility Directive and whether the scope of the CLD should be extended to cross-border divisions by acquisition de lege ferenda.

Keywords: Company Law Directive, CLD, cross-border divisions, freedom of establishment

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Cross-border divisions of limited liability companies by acquisition – or: can we do without a directive?

The Mobility Directive has inserted a special EU legal framework for cross-border divisions into Title II Chapter IV of the Company Law Directive (CLD) – but only for cross-border divisions by formation of new companies, not for cross-border divisions by acquisition. This paper analyses the consequences of the exclusion of cross-border divisions by acquisition from the scope of the CLD, how various Member States have dealt with it when implementing the Mobility Directive and whether the scope of the CLD should be extended to cross-border divisions by acquisition de lege ferenda.

1 Protection of cross-border divisions by acquisition by the freedom of establishment

In its case law, the CJEU has repeatedly dealt with the protection of cross-border operations by the freedom of establishment (Art. 49, 54 TFEU). It already held in 2005 in the *SEVIC* case that cross-border mergers fall within the scope of the freedom of establishment.¹ In its landmark decision *VALE* in 2012, the court then confirmed what it had already indicated in 2005 in the *SEVIC* case and stated *obiter* in 2008 in the *Cartesio* case²: cross-border conversions are also protected by the freedom of establishment.³ Building upon this, the court then clarified in 2017 in the *Polbud* case that this applies also to cross-border conversions by way of an isolated transfer of the registered office.⁴

Admittedly, the CJEU has not yet expressly decided that cross-border divisions are also protected by the freedom of establishment. However, already in the *SEVIC* case, the CJEU has framed the scope of the freedom of establishment in very general terms:

“Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in

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¹ CJEU, 13 December 2005, *SEVIC*, C-411/03, ECLI:EU:C:2005:762, para. 19.

² CJEU, 16 December 2008, *Cartesio*, C-210/08, ECLI:EU:C:2008:723, paras. 111-113.

³ CJEU, 12 July 2012, *VALE*, C-378/10, ECLI:EU:C:2012:440.

⁴ CJEU, 25 October 2017, *Polbud*, C-106/16, ECLI:EU:C:2017:804.

respect of which Member States are required to comply with the freedom of establishment [...].”⁵

- 3 The CJEU then referred explicitly to this paragraph when it held in the *VALE* case that cross-border conversions are protected by the freedom of establishment.⁶
- 4 Therefore, cross-border divisions, as a further type of company transformation operations, must also be protected by the freedom of establishment; this is now not only the prevailing view in academic literature⁷, but has also been acknowledged by the European legislator in recital 5 sentence 1 of the Mobility Directive⁸.

2 The exclusion of cross-border divisions by acquisition from the scope of the Company Law Directive and its consequences

- 5 The Commission’s proposal for the Mobility Directive⁹ had already provided to regulate only cross-border divisions by the formation of new companies, but not cross-border divisions by acquisition (cf. Art. 160b(3) CLD draft). The JURI committee of the European Parliament then proposed to delete the chapter on cross-border divisions altogether because it considered that given the creation of clear rules for cross-border conversions, the added value of a separate chapter for cross-border divisions was not proven.¹⁰ In the course of the further legislative procedure, the chapter on cross-border divisions was ultimately not only “rescued”, but its scope was even extended by the addition of divisions by separation as a third type of cross-border divisions. However, the EU legal framework for cross-border divisions inserted by the Mobility Directive in Title II Chapter IV of the Company Law Directive (CLD)¹¹ covers only cross-border divisions by the formation of new limited liability companies (Art. 160b(3)-(4) CLD, recital 8 sentence 1 Mobility Directive).
- 6 The European legislator justifies this restriction to cross-border divisions by formation of new limited liability companies by arguing that cross-border divisions by acquisition have been viewed as being overly complex, requiring the involvement of competent authorities from several Member States and entailing additional risks in terms of the circumvention of Union

⁵ CJEU, 13 December 2005, *SEVIC*, C-411/03, ECLI:EU:C:2005:762, para. 19.

⁶ CJEU, 12 July 2012, *VALE*, C-378/10, ECLI:EU:C:2012:440, paras. 24 ff.

⁷ *Bayer/J. Schmidt* ZHR 173 (2009) 735, 768; *Bernard*, Les enjeux des scissions transfrontalières au sein de l’Union européenne, 2022, n° 127-236; *Kalss/Klampfl* in Dausen/Ludwigs, Handbuch des EU-Wirtschaftsrechts, 60th supplement 2023, E.III. Rn. 136; *Lutter/Bayer/J. Schmidt*, EuropUR, 6th ed. 2018, 7.105; *Roelofs*, Grensoverschrijdende juridische splitsing kapitaalvennootschappen, 2014, p. 590; *J. Schmidt*, Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?, PE 559.960, p. 11; *Stelmaszczyk* in BeckOGK, 1.7.2024, UmwG § 320 margin note 9.

⁸ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, [2019] OJ L 321/1.

⁹ Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, COM(2018) 241.

¹⁰ A8-0002/2019, p. 209.

¹¹ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), [2017] OJ L 169/46; last amended by Regulation (EU) 2021/23, [2021] OJ L 22/1.

and national rules.¹² However, this is far from convincing. Cross-border divisions are by their very nature generally very complex transactions, irrespective of whether they are by acquisition or by formation of new companies.¹³ The involvement of competent authorities from several Member States is also necessary in case of cross-border divisions by formation of new companies and the European legislator does not give the slightest indication why the risks in terms of fraud and circumvention would be significantly higher in case of cross-border divisions by acquisition (or why such potentially higher risks could not be mitigated by appropriate rules).¹⁴ Quite the opposite: Abuse is actually less likely in case of cross-border divisions by acquisition because the assets and liabilities are transferred to a company that already exists.¹⁵

Yet, the exclusion of cross-border divisions by acquisition from the scope of the CLD means only that the European legislator has not established a special EU legal framework for them which would have to be implemented by the Member States in their national laws. As the CJEU has consistently emphasised in its settled case law, the existence of harmonisation rules does not constitute a precondition for the implementation of the freedom of establishment.¹⁶ Therefore – despite being excluded from the scope of application of the CLD – cross-border divisions by acquisition are (still) possible on the basis of the freedom of establishment (Art. 49, 54 TFEU) in its manifestation of the “freedom to divide”.¹⁷ Nevertheless, the lack of a special EU legal framework entails not only considerable legal uncertainty for companies and forces them to use complex and costly “detours”, it also results in a lower level of protection for (minority) shareholders, creditors and employees.¹⁸

Besides, Member States are already free *de lege lata* to go beyond what the CLD requires and provide also for cross-border divisions by acquisition in their national laws. Contrary to the opinion of some scholars¹⁹ (and apparently initially also some German courts), Title II Chapter IV CLD does not operate as a “barrier” in this respect. Just like the restriction of Title II Chapter III CLD to (national) full divisions does not prohibit the Member States from applying the rules on national divisions laid down in the directive also to partial divisions and divisions

¹² Cf. recital 8 sentence 1 Mobility Directive.

¹³ *J. Schmidt* DK 2018, 273, 275; *J. Schmidt* ECFR 2019, 222, 234 f.; *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3.

¹⁴ *J. Schmidt* DK 2018, 273, 275; *J. Schmidt* ECFR 2019, 222, 234 f.; *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3; see also *Bader/Börner* in Kindler/Lieder (eds.), *European Corporate Law*, 2021, Art. 160b CLD para. 9; *Bormann/ Stelmaszczyk* ZIP 2019, 353, 355; *Bungert* FS Krieger, 2020, 109, 111; *Stelmaszczyk* GmbHR 2020, 61, 64; *Stelmaszczyk* DK 2021, 1, 4; *Zwirlein-Forschner* ZGR-Sonderheft 26 (2023), 195, 201.

¹⁵ *Heckschen* NotBZ 2020, 241, 245; *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3.

¹⁶ Cf. CJEU, 13 December 2005, *SEVIC*, C-411/03, ECLI:EU:C:2005:762, para. 26 (with respect to cross-border mergers); CJEU, 12 July 2012, *VALE*, C-378/10, ECLI:EU:C:2012:440, para. 38 (with respect to cross-border conversions); see e.g. also already CJEU, 28 January 1992, C-204/90, *Bachmann*, ECLI:EU:C:1992:35, para. 11.

¹⁷ See Explanatory Notes to the UmRUG, BR-Drs. 371/22, 133; *Bayer/J. Schmidt* BB 2019, 1922, 1926; *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3; *Stelmaszczyk* in BeckOGK, 1.7.2024, *UmwG* § 320 para. 4.

¹⁸ *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3; see also Explanatory Notes to the UmRUG, BR-Drs. 371/22, 133; *J. Schmidt* NZG 2022, 579, 580; *Teichmann* NZG 2019, 241, 243.

¹⁹ *Kopenhagen/Wentz* WM 2023, 2113, 2114; *Mayer/Weiler* in *Münchener Handbuch des Gesellschaftsrechts*, volume 3, 6th ed. 2023, § 72 para. 787e; *Schulte* GmbHR 2020, 139, 144.

by separation²⁰, Title II Chapter IV CLD does not prohibit Member States to apply the rules on cross-border divisions by formation of new limited liability companies *mutatis mutandis* also to cross-border divisions by acquisition.

- 9 Alternatively, Member States may in their national laws also establish a legal framework for cross-border divisions by acquisition which deviates from the standards laid down in the CLD for cross-border divisions by the formation of new limited liability companies. But pursuant to the jurisprudence of the CJEU²¹ – which was developed with respect to cross-border conversions but must consequently be applied *mutatis mutandis* also to cross-border divisions – they must abide by the principle of equivalence and the principle of effectiveness. Therefore, the rules governing cross-border divisions by acquisition must not be less favourable than those governing domestic divisions by acquisition (principle of equivalence) and they must not render cross-border divisions by acquisition impossible in practice or excessively difficult (principle of effectiveness).

3 Cross-border divisions by acquisition under German law

3.1 Basic concept: partial extension of the CLD rules to cross-border divisions by acquisition

- 10 When the German legislator implemented the Mobility Directive through the UmRUG²², it fortunately decided to apply the new rules set out in Title II Chapter IV CLD for cross-border divisions by way of formation of new limited liability companies *mutatis mutandis* also to certain cross-border divisions by acquisition. The main reason was the considerable practical need for a legal framework also for cross-border divisions by acquisition.²³ A clear legal framework provides legal certainty (at least for the “German side”) and spares companies from having to use complex and costly detours.²⁴ At the same time, it ensures an appropriate level of protection for minority shareholders, creditors, and employees.²⁵
- 11 However, pursuant to § 332 sentence 1 UmwG²⁶, the UmwG covers only cross-border divisions by acquisition where all companies involved have, in the six months prior to the disclosure of the draft terms of the cross-border division, an average number of employees less than 4/5 of the applicable threshold, as laid down in the law of the Member State of the company being divided, for triggering the participation of employees (“cross-border divisions

²⁰ CJEU, 20 January 2020, *I.G.I.*, C-394/18, ECLI:EU:C:2020:56, para. 53.

²¹ CJEU, 12 July 2012, *VALE*, C-378/10, ECLI:EU:C:2012:440, paras. 48 ff.

²² Gesetz zur Umsetzung der Umwandlungsrichtlinie und zur Änderung weiterer Gesetze v. 22.2.2023, BGBl. I Nr. 51.

²³ Explanatory Notes to the UmRUG, BR-Drs. 371/22, 133; *Bayer/J. Schmidt* BB 2019, 1922, 1926; *Bormann/Stelmaszczyk* ZIP 2019, 353, 355; *Bungert* FS Krieger, 2020, 109, 111; *Bungert/Becker* DB 2019, 1609, 1617; *J. Schmidt* EuZW 2019, 801, 802; *J. Schmidt* NZG 2022, 579, 580; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 4; *Stelmaszczyk* GmbHR 2020, 61, 64; *Stelmaszczyk* DK 2021, 1, 4.

²⁴ Explanatory Notes to the UmRUG, BR-Drs. 371/22, 134; *J. Schmidt* NZG 2022, 579, 580; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 4.

²⁵ Explanatory Notes to the UmRUG, BR-Drs. 371/22, 134; *J. Schmidt* NZG 2022, 579, 580; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 4.

²⁶ Umwandlungsgesetz (UmwG) v. 28.10.1994, BGBl. I, 3210 (as amended).

by acquisition not relevant in terms of codetermination"). Thus, the rules laid down for cross-border divisions by formation of new limited liability companies in Title II Chapter IV CLD were only partially extended to cross-border divisions by acquisition. The reason was that, in the opinion of the German legislator, effective protection of employee codetermination in case of cross-border divisions by acquisition is not possible in the absence of harmonised rules.²⁷ To ensure that the level of protection of codetermination in case of cross-border divisions by acquisition is not lower than the level of protection which the 4/5-threshold laid down in Art. 160I(2) CLD ensures for cross-border divisions by formation of new limited liability companies²⁸, § 332 sentence 1 UmwG therefore limits the scope of application of the UmwG to cross-border divisions by acquisition below this threshold.²⁹

3.2 Details regarding the scope of the partial extension of the CLD rules to cross-border divisions by acquisition

3.2.1 Outbound cross-border divisions by acquisition

Pursuant to § 332 sentence 1 number 1 UmwG, outbound cross-border divisions by acquisition of limited liability companies only fall within the scope of application of the UmwG if both the company being divided and the recipient companies have, in the six months prior to the disclosure of the draft terms of the cross-border division, an average number of employees of less than 400. 12

The limit of 400 employees corresponds with the 4/5-threshold of Art. 160I(2) CLD, which has been implemented in German law in § 5 number 1 MgFSG³⁰ (this is explained by the fact that 500 employees is the threshold for codetermination pursuant to § 1 DrittelbG³¹ and 400 employees is 4/5 of this).³² Consequently, with respect to the details of the threshold, the principles applicable in case of § 5 number 1 MgFSG must apply *mutatis mutandis*.³³ 13

The fact that the limit of 400 employees applies not only to the German company being divided, but also the recipient companies (irrespective of which law they are governed by) has the paradoxical consequence that a cross-border division by acquisition does not fall within the scope of the UmwG if a recipient company has at least 400 employees even if the threshold for codetermination is considerably higher pursuant to its governing law.³⁴ It would have been much more coherent to tie the scope of application, in line with the rationale of Art. 133(2) 14

²⁷ Explanatory Notes to the UmRUG, BR-Drs. 371/22, 134.

²⁸ Explanatory Notes to the UmRUG, BR-Drs. 371/22, 134; see also *Schollmeyer NJW-Spezial* 2023, 207, 208.

²⁹ *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 5.

³⁰ Gesetz über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitendem Formwechsel und grenzüberschreitender Spaltung (MgFSG) v. 4.1.2023, BGBl. I Nr. 10.

³¹ Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat (Drittelbeteiligungsgesetz – DrittelbG) v. 18.5.2004, BGBl. I, 974 (as amended).

³² *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 5.

³³ *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 5.

³⁴ *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 10.

CLD, to 4/5 of the threshold for codetermination as laid down in the law governing the respective company involved.³⁵

3.2.2 Inbound cross-border divisions by acquisition

- 15 Pursuant to § 332 sentence 1 number 2 UmwG, inbound cross-border divisions by acquisition of limited liability companies only fall within the scope of application of the UmwG if both the company being divided and the recipient companies have, in the six months prior to the disclosure of the draft terms of the cross-border division, an average number of employees less than 4/5 of the threshold, as laid down in the law of the Member State of the company being divided. Hence, the 4/5 threshold of Art. 160I(2) CLD is also applied *mutatis mutandis*.³⁶ However, this time 4/5 of the codetermination threshold of the law of the Member State of the company being divided is decisive; this threshold applies to both the foreign company being divided and the recipient companies.³⁷
- 16 Like in the case of § 332 sentence 1 number 1 UmwG, this has the paradoxical consequence, that for all companies involved in the cross-border division only the limit of 4/5 of the codetermination threshold of the law of the Member State of the company being divided is decisive.³⁸ It would have been much more coherent to tie the scope of application, in line with the rationale of Art. 133(2) CLD, to 4/5 of the threshold for codetermination as laid down in the law governing the respective company involved.³⁹

3.2.3 The legal framework for cross-border divisions by acquisition and its specific characteristics

- 17 § 332 sentence 1 UmwG sets out the basic principle that the rules on cross-border divisions by formation of new limited liability companies laid down in §§ 320-331 UmwG (which implement Title II Chapter IV CLD) apply *mutatis mutandis* to cross-border divisions by acquisition within the scope of the UmwG.⁴⁰ So, in principle, the standards established by the CLD for cross-border divisions by formation of new limited liability companies are implemented *mutatis mutandis* also for cross-border mergers by acquisition.
- 18 However, of course, the German legislator had to cater for the specific characteristics of cross-border divisions by acquisition. Hence, § 332 sentence 2 UmwG provides that the provisions on cross-border mergers laid down in §§ 305-318 UmwG apply supplementary as regards the special circumstances related to the involvement of more than one company. The underlying rationale is that whereas in case of a cross-border division by formation of new limited liability companies initially only one company exists, in case of a cross-border division by acquisition several companies exist initially.⁴¹ The resulting regulatory gap is closed by supplementary

³⁵ J. Schmidt in Lutter, UmwG, 7th ed. 2024, § 332 para. 10.

³⁶ J. Schmidt in Lutter, UmwG, 7th ed. 2024, § 332 para. 14.

³⁷ J. Schmidt in Lutter, UmwG, 7th ed. 2024, § 332 para. 14.

³⁸ J. Schmidt in Lutter, UmwG, 7th ed. 2024, § 332 para. 14.

³⁹ J. Schmidt in Lutter, UmwG, 7th ed. 2024, § 332 para. 14.

⁴⁰ See in more detail J. Schmidt in Lutter, UmwG, 7th ed. 2024, § 332 paras. 17 ff. with further references.

⁴¹ Explanatory Notes to the UmRUG, BR-Drs. 371/22, 135.

applying the provisions on cross-border mergers laid down in §§ 305-318 UmwG – which are based on the initial existence of several companies.⁴²

The provisions on cross-border mergers apply supplementary especially in the following contexts: 19

- Pursuant to §§ 332 sentence 2, 307(1) UmwG, the companies involved in a cross-border division by acquisition shall draw up common draft terms of the cross-border division.⁴³
- With respect to the entry of a cross-border division into the register of a German recipient company, § 318(1) sentence 3 and § 318(3) number 2 UmwG apply supplementary pursuant to § 332 sentence 2 UmwG.⁴⁴
- Moreover, pursuant to § 332 sentence 2 UmwG, certain special rules for cross-border group mergers apply *mutatis mutandis* to cross-border divisions by acquisition.⁴⁵

4 A look at selected other Member States

4.1 Austria

Prior to the implementation of the Mobility Directive, Austrian law did not set out any special provisions for cross-border divisions. In the context of the implementation of the Mobility Directive through the GesMobG⁴⁶, which established a new EU-Umgründungsgesetz (EU-UmgrG)⁴⁷, the Austrian legislator laid down only rules on cross-border divisions by formation of new limited liability companies (§§ 46-67 EU-UmgrG). This is in line with the general policy of the Austrian legislator to amend Austrian law only to the extent necessary to implement the Mobility Directive.⁴⁸ 20

⁴² *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 para. 9.

⁴³ See in more detail *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 322 para. 9.

⁴⁴ See in more detail *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 331 paras. 60 ff.

⁴⁵ See in more detail *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 322 paras. 96 ff., § 323 para. 5, § 324 paras. 12, 62 ff., § 325 paras. 39 ff.; § 326 paras. 57 ff.

⁴⁶ Bundesgesetz, mit dem zur Umsetzung der Gesellschaftsrechtlichen Mobilitäts-Richtlinie 2019/2121 ein Bundesgesetz über grenzüberschreitende Umgründungen von Kapitalgesellschaften in der Europäischen Union (EU-Umgründungsgesetz - EU-UmgrG) erlassen wird und das Firmenbuchgesetz, das Rechtspflegergesetz, das Übernahmegesetz, das Aktiengesetz, das Umwandlungsgesetz, das Bankwesengesetz sowie das Gerichtsgebührengesetz geändert werden (Gesellschaftsrechtliches Mobilitätsgesetz - GesMobG), BGBl. I Nr. 78/2023.

⁴⁷ Bundesgesetz über grenzüberschreitende Umgründungen von Kapitalgesellschaften in der Europäischen Union (EU-Umgründungsgesetz - EU-UmgrG), BGBl. I Nr. 78/2023.

⁴⁸ Cf. ErIRV 2028 BlgNR XXVII. GP, S. 1.

4.2 Netherlands

- 21 In the Netherlands, the Mobility Directive was implemented by the Wet van 28 juni 2023.⁴⁹ Art. 2:334jj BW provides explicitly that the section on cross-border divisions does not apply to cross-border divisions by acquisition.

4.3 Ireland

- 22 Ireland has implemented the Mobility Directive through the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023⁵⁰. In line with Title II Chapter IV CLD, Part 4 Cross-Border Divisions applies only to cross-border divisions by formation of new limited liability companies. R. 49 defines “recipient company” as “a company newly formed in the course of a cross-border division”.

4.4 Malta

- 23 In the course of implementing the Mobility Directive, Malta also limited itself to regulating cross-border divisions by formation of new limited liability companies. R. 3 Cross-border Divisions of Limited Liability Companies Regulations 2023⁵¹ defines “recipient company” as “a company newly formed in the course of a cross-border division”.

4.5 Luxembourg

- 24 Luxembourg law expressly allowed cross-border divisions by formation of new companies as well as cross-border divisions by acquisition even before the Mobility Directive: Art. 1030-1(3) Loi du 10 août 1915, concernant les sociétés commerciales⁵² provides simply that a Luxembourg company may effect a division involving a foreign company provided that the national law governing the latter does not prevent it from doing so.⁵³
- 25 At the time of writing of this paper, Luxembourg had not yet implemented the Mobility Directive. However, the Projet de loi n° 8053 provides⁵⁴ only new rules for cross-border divisions by formation of new limited liability companies. This is in line with the draft’s general guiding theme “toute la directive, rien que la directive” (“the entire directive, nothing but the

⁴⁹ Wet van 28 juni 2023 tot wijziging van Boek 2 van het Burgerlijk Wetboek en de Wet op het notarisambt in verband met de implementatie van Richtlijn (EU) 2019/2121 van het Europees Parlement en de Raad van 27 november 2019 tot wijziging van Richtlijn (EU) 2017/1132 met betrekking tot grensoverschrijdende omzettingen, fusies en splitsingen (PbEU 2019, L 321/1) (Wet implementatie richtlijn grensoverschrijdende omzettingen, fusies en splitsingen), Staatsblad 2023, 252.

⁵⁰ S.I. No. 233/2023.

⁵¹ L.N. 26 of 2023.

⁵² Loi du 10 août 1915, concernant les sociétés commerciales.

⁵³ Cf. *Corbisier/Bernard* (2019) 16 ECL 18, 19.

⁵⁴ Projet de loi modifiant 1) La loi modifiée du 10 août 1915 sur les sociétés commerciales, 2) La loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises, aux fins de transposer la Directive (UE) 2019/2121 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne les transformations, fusions et scissions transfrontalières, n°8053, Chambre Des Députés, Session ordinaire 2021-2022.

directive”).⁵⁵ In the Luxembourg legislator’s opinion, the EU legal framework for cross-border divisions established by the Mobility Directive in Title II Chapter IV CLD is considerably less favourable for the cross-border mobility of companies than the current framework provided by Luxembourg law; therefore, it wants to maintain the traditionally liberal approach of Luxembourg law to the largest extent possible and thus does not consider it expedient to extend the scope of application of the rules laid down in Title II Chapter IV CLD also to cross-border divisions by acquisition.⁵⁶

The *Projet de loi n° 8053* therefore provides that in the future, the *Loi du 10 août 1915, 26* concernant les sociétés commerciales will regulate “scissions transfrontalières européennes” (“European cross-border divisions”) within the meaning of Title II Chapter IV CLD in newly introduced Art. 1034-1 to Art. 1034-20, and national divisions as well as other cross-border divisions (i.e. cross-border divisions by acquisition and cross-border divisions involving third country companies) in Art. 1030-1 to Art. 1033-1 (cf. Art. 1030-0).⁵⁷

4.6 France

In France, the Mobility Directive was implemented by the *Ordonnance n° 2023-393*⁵⁸. The new 27 Art. L236-46(1) C. com. defines a cross-border division as an operation by which an S.A. or S.à.r.l. with registered office in France participates in a division involving one or more companies within the meaning of Art. 160b CLD. Pursuant to Art. L236-46(2) C. com. such cross-border divisions are subject not only to the special provisions for cross-border divisions in Art. L236-46 to Art. L236-47 C. com., but also to the provision on national divisions in Art. L236-18 to Art. L236-21 and Art. L236-23 to Art. L236-26 C. com. which are not contrary to them. Thus, Art. L236-18(1) C. com., which provides that a company may, by way of a division, transfer its assets to several existing or several new companies, is also applicable.⁵⁹ Hence, French law allows both cross-border divisions by formation of new limited liability companies and cross-border divisions by acquisition.⁶⁰

4.7 Italy

In Italy, the Mobility Directive was implemented by the *Decreto Legislativo 2 marzo 2023, 28* n. 19⁶¹. With respect to the definition of the term division („scission”), Art. 41(1)(a) refers to Art. 2506 *Codice civile*⁶², which in its first paragraph mentions both the division by formation

⁵⁵ *Projet de loi n° 8053* (fn. 54), p. 5, 108.

⁵⁶ *Projet de loi n° 8053* (fn. 54), p. 108. See on this also *Conac Rev. soc.* 2023, 782, 786.

⁵⁷ *Projet de loi n° 8053* (fn. 54).

⁵⁸ *Ordonnance n° 2023-393* du 24 mai 2023 portant réforme du régime des fusions, scissions, apports partiels d’actifs et opérations transfrontalières des sociétés commerciales, *JORF n°0120* du 25 mai 2023.

⁵⁹ Art. L236-18(1) C. com.: “Une société peut, par voie de scission, transmettre son patrimoine à plusieurs sociétés existantes ou à plusieurs sociétés nouvelles.”.

⁶⁰ Cf. *Cathiard BJS* 2023, n° 9, 45, 48; *Reygrobellet Rev. soc.* 2023, 732, 735.

⁶¹ *Decreto Legislativo 2 marzo 2023, n. 19. Attuazione della direttiva (UE) 2019/2121 del Parlamento europeo e del Consiglio, del 27 novembre 2019, che modifica la direttiva (UE) 2017/1132 per quanto riguarda le trasformazioni, le fusioni e le scissioni transfrontaliere, GU n. 56 del 7-3-2023.*

⁶² *GU n. 79 del 4-4-1942* (as amended).

of new companies and the division by acquisition⁶³. Hence, Italian law also allows both cross-border divisions by formation of new companies and cross-border divisions by acquisition.⁶⁴

4.8 Spain

- 29 In Spain, the Mobility Directive was implemented by the Real Decreto-ley 5/2023⁶⁵. As regards the scope of application, the Spanish legislator follows a rather liberal approach: In addition to the section on cross-border divisions by formation of new companies (Art. 107-111), the RDL 5/2023 also includes a section on cross-border divisions by acquisition.⁶⁶ Moreover, there is a special section on extra-European divisions (Art. 121-126).⁶⁷

4.9 Belgium

- 30 Belgian law had already permitted both cross-border divisions by formation of new companies and cross-border divisions by acquisition even before the Mobility Directive (Art. 12:73, 12:90 CSA⁶⁸ in force until 15 June 2023). Against this background, the Belgian legislator, when implementing the Mobility Directive through the law of 25 May 2023⁶⁹, decided to continue to allow both cross-border divisions by formation of new companies and cross-border divisions by acquisition.⁷⁰ Art. 12:120 to Art. 12:141 CSA now contain special rules (aligned with the CLD) for cross-border divisions by formation of new companies and for cross-border divisions by acquisition; besides, the rules on national divisions apply (cf. Art. 12:120 CSA).

⁶³ Art. 2506(1) Codice civile: "Con la scissione una società assegna l'intero suo patrimonio a più società, preesistenti o di nuova costituzione, o parte del suo patrimonio, in tal caso anche ad una sola società, e le relative azioni o quote ai suoi soci."

⁶⁴ See also *Conac Rev. soc.* 2023, 782, 786; *Magliulo Revista del Notariato* 2023, 481, 604 f.

⁶⁵ Real Decreto-ley 5/2023, de 28 de junio, por el que se adoptan y prorrogan determinadas medidas de respuesta a las consecuencias económicas y sociales de la Guerra de Ucrania, de apoyo a la reconstrucción de la isla de La Palma y a otras situaciones de vulnerabilidad; de transposición de Directivas de la Unión Europea en materia de modificaciones estructurales de sociedades mercantiles y conciliación de la vida familiar y la vida profesional de los progenitores y los cuidadores; y de ejecución y cumplimiento del Derecho de la Unión Europea, BOE Núm. 154 Jueves 29 de junio de 2023 Sec. I. Pág. 90565.

⁶⁶ See on this *Virgós Soriano* in Pulgar Ezquerro/Fuentes Naharro, La nueva Ley de modificaciones estructurales, 2024, Capítula Octavo IX.

⁶⁷ See on this *Virgós Soriano* in Pulgar Ezquerro/Fuentes Naharro, La nueva Ley de modificaciones estructurales, 2024, Capítula Octavo IX.

⁶⁸ Code des sociétés et des associations, M.B. 4.4.2019.

⁶⁹ Loi modifiant le Code des sociétés et des associations, la loi du 16 juillet 2023 portant le Code de droit international privé et le Code judiciaire, notamment à la suite de la transposition de la directive (UE) 2019/2121 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne les transformations, fusions et scissions transfrontalières, M.B. 6.6.2023.

⁷⁰ Cf. Projet de loi modifiant le Code des sociétés et des associations, la loi du 16 juillet 2023 portant le Code de droit international privé et le Code judiciaire, notamment à la suite de la transposition de la directive (UE) 2019/2121 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne les transformations, fusions et scissions transfrontalières, Doc., Ch., 2022-2023, n° 3219/001, p. 5.

5 Key takeaways

Although the preceding comparative legal analysis encompasses only 10 of the 30 EU-/EEA- 31
Member States, it clearly shows that the Member States have handled the exclusion of cross-
border divisions by acquisition from the scope of the CLD very differently.

Some have limited themselves to regulating in their national law – in line with Title II 32
Chapter IV CLD – only cross-border divisions by the formation of limited liability companies.
The rationale was mainly that the respective Member State did deliberately not want to go
beyond what was strictly necessary to implement the Mobility Directive. However,
Luxembourg wants to maintain its traditionally more liberal framework for cross-border
divisions by acquisition.

On the other hand, there are many Member States which have implemented the standards 33
set out in Title II Chapter IV CLD *mutatis mutandis* also for cross-border divisions by
acquisition. Germany occupies a special position in this respect, having opted for a special
German “middle ground” by implementing the standards of Title II Chapter IV CLD *mutatis
mutandis* only for certain cross-border divisions by acquisition not relevant in terms of
codetermination.

The result is a kind of “patchwork”, which requires assessing in each individual case on which 34
basis a cross-border division by acquisition is possible:

- (a) Ideally, all Member States involved have implemented the standards of Title II Chapter IV
CLD *mutatis mutandis* also for cross-border divisions by acquisition (or did so at least
partially), so that the legal systems of all Member States involved not only expressly
provide for cross-border divisions by acquisition but are also harmonised. At least for
these cases there is now a relatively certain legal framework. Examples of such cases are
the cross-border full division of a French SA on a Spanish SA and an Italian SA or the cross-
border full division of a German AG with 200 employees on a French SA and a Spanish SA.
- (b) If, however, only one or only some of the Member States involved have implemented the
standards of Title II Chapter IV CLD (partially) *mutatis mutandis* also for cross-border
divisions by acquisition, the entire operation already stands with one foot on shaky
foundations. In such cases, at least one Member State does not provide any special legal
framework for cross-border divisions by acquisition or one which is not coordinated.
Examples of such cases are the cross-border full division of a French SA on an Irish Limited
and a Maltese Limited or the cross-border full division of a Spanish SA on an Austrian
GmbH and a Luxembourg SA.
- (c) In the worst case scenario, all Member States involved have limited themselves to
implementing into their national law rules on cross-border divisions by formation of new
limited liability companies in line with Title II Chapter IV CLD or the operation in question
is outside the scope of the relevant national rules on cross-border divisions by acquisition.
Examples are the cross-border partial division of an Irish Limited on a Maltese Limited or
the cross-border full division of a German AG with 1000 employees on an Irish Limited and
an Austrian GmbH.

In the scenarios (b) and (c), the companies involved have to set out (at least partially) on the 35
treacherous and uncertain path of a cross-border division by acquisition exclusively on the
basis of the freedom of establishment in its manifestation as a “freedom to divide”. This

entails legal uncertainty and costs and possibly the need to take “detours”.⁷¹ Moreover, the level of protection for minority shareholders, creditors, and employees is potentially lower than if the operation would be carried out in line with the standard of protection guaranteed by the CLD.⁷²

36 Hence, it is expedient to extend the scope of Title II Chapter IV CLD *de lege ferenda* also to cross-border divisions by acquisition.⁷³

6 Summary

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- (i) Cross-border divisions by formation of new companies and by acquisition are protected by the freedom of establishment (Art. 49, 54 TFEU).
- (ii) With the Mobility Directive, the European legislator has unfortunately only established a special EU legal framework for cross-border divisions by formation of new limited liability companies in Title II Chapter IV CLD.
- (iii) Member States have handled the exclusion of cross-border divisions by acquisition from the scope of the CLD very differently: Some have limited themselves to regulating in their national law – in line with Title II Chapter IV CLD – only cross-border divisions by the formation of limited liability companies; others have implemented the standards of the directive (at least partially) *mutatis mutandis* also for cross-border divisions by acquisition or have provided for a legal framework for cross-border divisions which deviates from the standards of the directive.
- (iv) The resulting “patchwork” entails legal uncertainty and costs; moreover, it does not ensure a harmonised standard of protection for minority shareholders, creditors, and employees within the EU and EEA.
- (v) Hence, the scope of Title II Chapter IV CLD should *de lege ferenda* be extended to cross-border divisions by acquisition.

⁷¹ Cf. *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3; *J. Schmidt* NZG 2022, 579, 580; *Teichmann* NZG 2019, 241, 243; see also Explanatory Notes to the UmRUG, BR-Drs. 371/22, 133.

⁷² Cf. *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3; *J. Schmidt* NZG 2022, 579, 580; *Teichmann* NZG 2019, 241, 243; see also Explanatory Notes to the UmRUG, BR-Drs. 371/22, 133.

⁷³ *Bayer/J. Schmidt* BB 2019, 1922, 1935; *Bormann/Stelmaszczyk* ZIP 2019, 353, 355; *Brandi/M. Schmidt* AG 2023, 297, 300; *Bungert/Becker* DB 2019, 1609, 1617; *Knaier* GmbH 2019, R132, R134; *J. Schmidt* in Lutter, *UmwG*, 7th ed. 2024, § 332 para. 3; *Teichmann* NZG 2019, 241, 243. Very critical as regards the restriction to cross-border divisions by formation of new limited liability companies also: *Bader/Börner* in Kindler/Lieder (eds.), *European Corporate Law*, 2021, Art. 160a CLD para. 9; *Bernard* D.A.O.R. 2018, n° 127, 5, 11; *Bormann/Stelmaszczyk* ZIP 2019, 353, 355; *Bungert* FS Krieger, 2020, 109, 111; *Bungert/Wansleben* DB 2018, 2094, 2095; *ECL* ECFR 2019, 196, 201; *Handelsrechtsausschuss des DAV* NZG 2018, 857 para. 88; *Heckschen* NotBZ 2020, 241, 245; *Lecourt* Rev. soc. 2020, 338 n° 7; *Menjucq* Rev. soc. 2019, 17, 18; *J. Schmidt* EuZW 2019, 801, 802; *J. Schmidt* (2019) 16 ECL 13, 14; *J. Schmidt* ECFR 2019, 222, 234; *J. Schmidt* NZG 2022, 579, 580; *Stelmaszczyk* GmbH 2020, 61, 64; *Stelmaszczyk* DK 2021, 1, 4; *Thomale* RdW 2020, 424, 430; *Thomale/Schmid* NotBZ 2023, 91, 94; *Wachter* GmbH-StB 2018, 317, 329.