

Cross-border mergers and divisions

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Consultation by the European Commission, DG MARKT

INTRODUCTION

Preliminary Remark

The purpose of this questionnaire is to collect information, which would help the Directorate General for Internal Market and Services to assess the functioning of the existing EU legal framework for cross-border operations of companies and any potential need for changes in the current rules. The questions focus on the improvement of the existing framework for cross-border mergers and a possible framework for cross-border divisions of companies. The questions do not reflect any official position of the European Commission and in no way prejudice its future decisions, if any, on the improvement of the framework for cross-border operations of companies.

The [Action Plan on Company Law and Corporate Governance](#) stressed that [Directive 2005/56/EC](#) (CBMD - Cross-Border Merger Directive) was a big step forward for cross-border mobility of companies in the EU and, at the same time, acknowledged that it might need to be adjusted to meet the changing needs of the single market. The [study on the application of this directive](#) identified a number of problems/difficulties related to its implementation and functioning in practice. For instance, the study identified procedural rules as being a source of uncertainty and complexity, in particular, rules on creditors' protection, minority shareholders' protection and the valuation of assets.

As regards divisions, the relevant rules have been harmonised at national level for a number of years by [Directive 82/891/EEC](#). However, to date, there is no EU level framework for cross-border divisions and companies wishing to undertake a cross-border division have to perform several operations, such as a national division and a cross-border merger or the creation of a subsidiary and a subsequent transfer of assets.

Therefore, the 2012 Action Plan mentioned that the Commission would consider an initiative to provide a framework for cross-border divisions, possibly through an amendment of the cross-border mergers Directive, as the latter would be well known to stakeholders and would provide a tested framework for cross-border restructurings.

The outcome of the [2012 consultation on the future of European company law](#) showed that the majority of stakeholders would be interested in further harmonisation in the field of cross-border mergers and divisions.

The purpose of the current consultation is to gather more in-depth information on the following issues:

a) existing barriers in cross-border operations

- b) what changes stakeholders believe are needed to the existing legal framework, and
- c) costs that could be saved thanks to action at EU level.

The responses will be taken into account in assessing the need for EU action in this field.

Responses to this consultation should be concise, focused specifically on the questions raised and sent no later than 01/12/2014. The answers to the questionnaire should be given on-line and, if there is a need for attachments, the file should be uploaded at the end of the questionnaire in Section IV. If you have any specific questions on the consultation or would like to provide feedback, please send those to markt-f2@ec.europa.eu.

The Commission would like to thank all interested parties for taking part in this consultation and reserves the right to contact respondents if further information or clarifications are necessary.

See [specific privacy statement](#).

I. Information

1. Country of respondent

- a) EU country
- b) Non EU country

Please specify your country:

2. Please provide your name and address:

3. Please indicate if you are responding on behalf of:

- a) Public authority (including government)
- b) University/Research Institute/Think Tank or similar
- c) Lawyer/notary
- d) Business Federation/ Business Organisation/Chamber of Commerce, Consumer association, other federation, association or organisation
- e) Trade Union/Employee Body or similar
- f) Company
- g) Individual
- h) Other

Is your organisation registered in the Transparency Register? (If your organisation is not registered, we invite you to [register here](#), although it is not compulsory to be registered to reply to the consultation)

- Yes
- No
- I do not know

If so, please indicate your Register ID number:

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II. Cross-border mergers

The Cross-Border Merger Directive (CBMD) contains a harmonised framework of rules for mergers between companies from different Member States.

In the 2012 consultation the majority of stakeholders expressed the view that the existing EU rules for cross-border mergers should be adjusted to meet the changing needs of the single market.

Furthermore, the [study on the application of the CBMD from 2013](#) put forward a number of concrete suggestions to improve the existing legal framework. The questions below build on the above-mentioned research and concern concrete actions that could be taken at EU level.

1. Should the CBMD apply to cross-border mergers of companies that have not been formed in the EU/EEA but have converted into an EU/EEA form?

- a) Yes
- b) No
- c) I do not know

2. Should cross-border mergers be possible between different company types in general, e.g. a merger between a private limited liability company and a public limited liability company?

- a) Yes
- b) No
- c) I do not know

3. Should the rights of creditors in case of a cross-border merger be harmonised?

- a) Yes
- b) No
- c) I do not know

3.1. What approach should this harmonisation take?

- a) Full harmonisation of rights of creditors in all Member States
- b) Two option approach - Member States could implement one of the two sets of rights for creditors provided for by EU law
- c) Open-menu approach - Member States could, but would not be obliged to, avail themselves of one of the two proposed sets of rights for creditors provided for by EU law
- d) I do not know

3.2. The creditors should have the right to: **[multiple choice question]**

- a) Block the merger
- b) Request a company to provide a guarantee or security to the creditor
- c) Ask the court to require that a company provides a guarantee or security
- d) Other rights (please specify)
- e) I do not know

4. Should the requirements companies are subject to, when the creditors' protection period is running, be harmonised?

- a) Yes
- b) No
- c) I do not know

4.1. Which requirements for companies should be harmonised ? Those regarding : **[multiple choice question]**

- a) Creditors' meetings
- b) Guarantees/securities
- c) Separate management of assets and liabilities
- d) Other (please specify)
- e) I do not know

5. Should the date determining the beginning of the period throughout which the creditors of the merging companies are protected be harmonised?

- a) Yes
- b) No
- c) I do not know

5.1. The starting date should be:

- a) before a cross-border merger takes effect ("ex ante")
- b) after a cross-border merger takes effect ("ex post")
- c) Other (please specify)
- d) I do not know

6. Should the rights of minority shareholders in case of a cross-border merger be harmonised?

- a) Yes
- b) No
- c) I do not know

6.1. What approach should this harmonisation take ?

- a) Full harmonisation of rights of minority shareholders in all Member States
- b) Two option approach - Member States could only implement one of the two sets of rights for minority shareholders provided for by EU law
- c) Open-menu approach - Member States could, but would not be obliged to, avail themselves of one of the two proposed sets of rights for minority shareholders provided for by EU law
- d) I do not know

6.2. The minority shareholders should have the right to : **[multiple choice question]**

- a) Block the merger
- b) Right of investigation
- c) Request compensation
- d) Other rights (please specify)
- e) I do not know

7. Should the date determining the beginning of the period throughout which the minority shareholders of the merging companies could exercise their rights be harmonised?

- a) Yes
- b) No
- c) I do not know

7.1. What should be the "event" triggering the starting date ? **[multiple choice question]**

- a) General meeting
- b) If there is no general meeting, the publication of the common draft terms of cross-border merger in the register or on a company's web-site
- c) If there is no general meeting, the application to the relevant authorities for the pre-merger certificate
- d) If there is no general meeting, the registration of the merger in the business register
- e) Other (please specify)
- f) I do not know

8. Should the length of the period throughout which the minority shareholders of the merging companies can exercise their rights be harmonised ?

- a) Yes
- b) No
- c) I do not know

8.1. How long should this period of protection be?

- a) One month
- b) Two months
- c) Longer than two months (please specify)
- d) I do not know

9. When a cross-border merger involves the issuance of new shares, the valuation of assets and liabilities may be necessary. Among Member States two different types of valuation methods are used: the fair value method and the book value method. Since the two methods may result in different valuations, should common rules be set across all Member States?

- a) Yes
- b) No
- c) I do not know

9.1. Which method should be chosen?

- a) Company should be able to choose between fair or book value
- b) Common standard of book value should be imposed
- c) Common standard of fair value should be imposed
- d) Other
- e) I do not know

10. Should the date from which the transactions of cross-border merging companies are treated, for accounting purposes, as being those of the company resulting from the cross-border merger, be harmonised?

- a) Yes
- b) No
- c) I do not know

10.1. What kind of date should be considered?

- a) The effective legal date ("registration date") of the merger, i.e. the date when the merger is entered into the business register
- b) The accounting date ("decisive date") of the merger which is to be specified by the common draft terms of cross-border merger, i.e. the date from which the acquired company's transactions are treated as being those of the acquiring company for accounting purposes
- c) Another date (please specify)
- d) I do not know

11. If, under certain circumstances, no general meeting is necessary should the date for the publication of the common draft terms of cross-border merger be harmonised?

- a) Yes
- b) No
- c) I do not know

12. Should, in certain cases, a harmonised "fast track" cross-border merger procedure be introduced?

- a) Yes
- b) No
- c) I do not know

12.1. In what circumstances should such a procedure be available? **[multiple choice question]**

- a) When a company has no employees
- b) When all shareholders agree
- c) When 90% of shareholders agree
- d) When there would be no impact on creditors
- e) Other (please specify)
- f) I do not know

13. Should each of the respective national authorities involved in the cross-border merger only check compliance with the requirements imposed by its own Member State?

- a) Yes
- b) No
- c) I do not know

14. Should the rules currently in force under the CBMD on the employee participation be modified?

- a) Yes
- b) No
- c) I do not know

III. Cross-border divisions

Divisions at national level are currently harmonised by [Directive 82/891/EEC](#), but EU company law has no rules on cross-border divisions. The 2012 consultation on the future of EU company law showed that there is a need for a clear European legal framework specifying the conditions under which cross-border divisions could be made.

1. Why would a company want to carry out a cross-border division? **[multiple choice question]**

- a) Realise new Internal Market opportunities
- b) Change/simplify its organisational structure
- c) Adapt to changing market conditions
- d) Other (please specify)
- e) I do not know

2. How could harmonisation at the EU level of legal requirements concerning cross-border divisions help enterprises and facilitate the increase of cross-border activities of companies within the EU? **[multiple choice question]**

- a) Reduction of regulatory costs (fees)
- b) Reduction of the costs directly related with the cross-border division (e.g. cost of translation, advice, etc)
- c) Reduction of the operating costs of the company or group of companies
- d) Other (please specify)
- e) I do not know

3. What, if any, are the obstacles to the execution of cross-border divisions when compared to national divisions ? **[multiple choice question]**

- a) Costs of a cross-border division effected via a national division and then a cross-border merger
- b) Difficulty of financing cross-border divisions
- c) Legal uncertainty because of a lack of European rules
- d) Duration and complexity of the current procedures necessary to execute a cross-border division
- e) Tax issues
- f) Any other obstacles than mentioned above? (please specify)
- g) I do not know

3.1. Please identify which costs you consider as major. **[multiple choice question]**

- a) Translations
- b) Registration requirements/fees
- c) Costs of different rules on the valuation of assets when doing a cross-border division
- d) Costs of advice related to a cross-border division
- e) Costs related to the preparation of reports to shareholders and other stakeholders (creditors, employees)
- f) Operational costs for preparing and conducting general meetings.
- g) Any other costs
- h) I do not know

3.1.3. Please give an estimate of these costs. **[multiple choice question]**

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.4. Please give an estimate of costs for legal advisors. **[multiple choice question]**

- a) Amount in Euro (please specify)
- b) % of the total cost of a division (please specify)
- c) I do not know

3.1.5. Please give an estimate of costs for notaries. **[multiple choice question]**

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.1.6. Please give an estimate of costs for accountants. **[multiple choice question]**

- a) Amount in Euro (please insert)
- b) % of the total cost of a division (please insert)
- c) I do not know

3.2. How much could be saved by a company if, instead of a national division and a cross-border merger, a direct cross-border division would be available?

- a) Please insert amount in Euro
- b) Please insert % of the total cost of division
- c) I do not know

4. What are the main issues related to cross-border divisions that should be regulated at EU level ? **[multiple choice question]**

- a) Creditors' issues
- b) Minority shareholders' issues
- c) Stakeholders' issues
- d) Procedural issues
- e) Accounting issues
- f) Employee participation
- g) Other (please specify)
- h) I do not know

5. Should harmonised rules on cross-border divisions be integrated in the framework established in the Directive on cross-border mergers?

- a) I agree (please specify the reasons)
- b) I disagree (please specify the reasons)
- c) I do not know

Please specify the reasons:

In light of the new European Commission's objective to establish a Single Capital Markets Union, we believe it is of considerable importance to establish a fully integrated European harmonised framework on cross-border mergers and divisions

IV. General comments

If you would like to provide general comments on the questionnaire or raise specific points not covered in the questionnaire, please upload your contribution here.

Contact

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