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Cross-border Mergers:

prospects and limits

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INTRODUCTION

The paper is aimed at addressing the complex operations of cross-border merger across the European Union, as regulated by the recent Directive (EU) 2019/2121 and - in Italy - by the Legislative Decree n. 19/2023.

The analysis starts providing a framework on how the European Community rules on cross-border transactions and their transposition in Italy have evolved over the years, starting from the Directive 2005/56/EC, implemented in Italy by D. Lgs. n. 108/2008, to the Directive (EU) 2017/1132 (without any changes in Italy compared to what dictated by D. Lgs. n. 108/2008) and the last, newest Directive (EU) 2019/2121, implemented in Italy by D. Lgs. n. 19 of 2nd March 2023 (which then went to replace and repeal the previous D. Lgs. n. 108/2008), pointing out the main differential elements and features: the European Directives are discussed and examined in depth within Chapter 1, while their transposition in Italy is dealt with inside the Chapter 2, with an examination comparing the various specific Articles of the two Legislative Decrees, together with the Articles of the Italian Civil Code, concerning mergers. The paper, therefore, points out the path that has been followed during this legislative evolution process, highlighting the objectives that drove this change: making cross-border extraordinary operations easier and more practicable, harmonising European Community rules and regulations as far as possible, filling the concept and the right of freedom of establishment with content, better protect the rights of a number of persons involved and affected by these cross-border operations, such as shareholders, creditors and workers in "transferred" or merged companies.

Following this introduction of the legal framework, the paper will then proceed with both a transversal and a sectoral analysis of the matter, with the aim of pointing out and display the major prospects as well as the limits of this kind of complicated and delicate operations. In the first section of Chapter 3, the

analysis will be transversal in nature, analysing the strength and weaknesses present in the application of the recent Directive (i.e. D. (EU) 2019/2121). The last two sections will, instead, be absolutely sectoral in nature, specifically concerning the need for a new and different EU regulatory intervention on cross-border mergers within the banking sector (discussing the "not perfectly" harmonized EU regulation) and the possible impact of the tax variable on cross-border mergers operations, since it is deemed to be not marginal to ultimately wonder how tax legislation relates to this type of operations, when considering the concrete terms of applicability and full usability of the legislation on cross-border mergers.

CHAPTER 1

Evolution of the European Legislation on Company law:

the specific case of cross-border mergers

1.1 The evolution of the economic framework

In the last decades, the economic system has been going through an impressive process of transformation, due to the unfolding of the globalization of markets and production systems on one side, and the progressively increasing technological development on the other, leading to the so-called digital revolution. Two complex, disruptive and interrelated phenomena - from which changes and innovations resulted - advancing relentlessly, fostering a redefinition of all sectors of the economy.

The effect of this evolution is found in the free movement of people, goods and ideas in a potentially universal and technologically interconnected space, having a huge impact on the functioning of both simple and complex organizations and all the stakeholders involved. Increased competitiveness, competition, supply chain effectiveness and dynamism on a global scale led to novel business models and strategic decision making, granted by the possibility to undertake and implement growth in a transnational dimension - favoured also by a greater elasticity in terms of corporate governance, pursued by the companies.

In the light of this revolution, cross-border operations – "*by which a diverse series of reorganization tools for entities, and reshaping of the original investment for shareholders, is meant, starting with mergers, demergers and transformations*"[1] - assume considerable importance in the life cycle of companies.

[1] Ferrari, P. (2023, May). *Operazioni straordinarie cross-border e tutela collettiva dei lavoratori*. Giappichelli.

In this new context of market integration combined with the increasing diffusion of advanced technologies, in fact, the centrality assumed by the companies operating - or who intend to operate - in different States (thus becoming increasingly important centres of power and protagonists of the global economy) can easily be understood. Moreover, in recent experience, also due to a series of economic crises that have strongly affected the economy of European countries, there has been a significant increase in the number of this type of operations - both at domestic as well as cross-border level – gaining relevance and increasing importance in the redefinition of business systems. The redistribution of capital through cross-border operations appears, in fact, to be of the most significant phenomena of the recent decades, both globally as well as at European level. These operations represent an important aspect of globalisation, influencing the competitiveness of entire States (or regions), redistributing world economic forces.

In order to implement development processes in this continuously evolving economic scenario - that has now gone beyond the limits of national borders, crossing different territorial and regulatory boundaries - companies need to understand how to respond to changes, occurring both internally as well as in the external context, through a reformulation of their strategies, aimed at reaching new economic-financial equilibrium conditions.

It is, therefore, undoubtedly evident that the implementation of these complex cross-border operations needs to be framed within a regulatory system containing rules and procedures "*aimed at controlling market power and preventing anti-competitive behaviour*"[2], to achieve the objectives pursued, granting protection to the various actors involved in the process while also seeking to balance the various interests.

[2] Stefko, R., Heckova, J., Gavurova, B., Valentiny, T., Chapcakova, A., & Kascakova, D. R. (2022). An analysis of the impact of economic context of selected determinants of cross-border mergers and acquisitions in the EU. *Ekonomska Istraživanja/Ekonomska IstražIvanja*, *35*(1), 6385–6402. https://doi.org/10.1080/1331677x.2022.2048200

For this reason, the attention paid by national and supranational legislators to these kinds of transactions, in both domestic and cross-border dimensions, has continuously increased; these institutions have now reached a high degree of elaboration and a considerable high level of regulatory and operational complexity[3].

[3] Ferrari, P. (2023, May). *Operazioni straordinarie cross-border e tutela collettiva dei lavoratori*. Giappichelli.

1.2 Existing differences between Member States' Legislations

Since ever, there have been and are many similarities between the laws of the European States, but at the same time also many significant differences, in terms of company law. It can be pointed out that - in order to better adapt them to the realities and to the economic and social needs present on the national territory - each State has created its own legal forms. Especially in recent decades, in the light of the increasing propension for foreign trade fostered by the emergence of the phenomenon of globalization, each Member State has used it as a tool to attract foreign investment in their territory to promote growth. In fact, the possibility to choose the applicable legislation and the place in which to register the company, *"generates a competition regime between Member States which are driven to 'lighten' the burdens on companies"*[4], in order to attract them on its territory.

The progressive fall of many cultural, linguistic, trade and currency barriers has gradually opened the way to a greater comparison between the rules applied in each different legal system, therefore directing national legislators to seek increasingly attractive and evolved organizational forms for both national operators as well as those from other countries

This kind of organizational development has found fertile ground in the European Union legal order, aiming to broaden the scope of cooperation between Member States in terms of the creation of the "*internal market*"[5]. In fact, it is evident that the differences in regulations and the consequent lack of links between legal systems has always been a critical factor in overcoming barriers between Member States, even if, on the other hand, the existence of these differences can also be considered a positive factor, since the risk of companies

[4] Borelli, S. (2020, June 12). Company package e diritto del lavoro. *Diritti Lavori Mercati*. https://www.ddllmm.eu/wp-content/uploads/2022/02/DLM-2_2020.pdf

[5] Internal market's aim is to have an area without internal frontiers or regulatory obstacles in which the free movement of goods, persons, services and capital is ensured in accordance with the articles of the Treaties | EUR-Lex https://eurlex.europa.eu/EN/legalcontent/glossary/internalmarket.html#:~:text=The%20internal%20market%20refers%20to,the%20articles%20of%20the%20Treaties.

migrating towards States granting the most suitable conditions for the production of profit, has given impetus to reforms aimed at accepting the same or other similarly efficient solutions in some legislations that, otherwise, would have not admitted them.

The comprehensive picture emerging over the last decades is *"evolutionary and of perpetual tension between the protection of national interests and the growth of the market itself, because of the risks and, at the same time, the opportunities that the opening of channels of communication with other systems may entail"*[6], and this is clearly the reason why the common institutions and legislators have progressively worked over the years to achieve a higher level, if not of uniformity, at least of harmonisation of national company rules.

[6] Boggio, L. (2022). *Mobilità transfrontaliera delle società e continuità soggettiva nell'Unione europea*. Giappichelli.

1.3 The Directive 2005/56/EC

Different national legislations regarding cross-border mergers were creating a huge obstacle to the completion of these transactions while lacking, at the same time, adequate and sufficient regulations for the protection of all the interest involved. The main obstacles arose from national rules either prohibiting or not even existing for this type of transactions, leading to the inadmissibility or impossibility of them. These kinds of problems of insufficient regulation were present nearly everywhere, even in Member States that - like Italy, for example - allowed cross-border merger and the transfer of headquarters abroad, although under the condition of compliance with the laws of all the States concerned in the operation (Article 25, paragraph 3, l. 218/1995)[7].

Either the impossibility or difficulty of complying with poorly or even not compatible provisions between different national legislations (i.e. some kind of action/behaviour to be complied with in one of the Member States, was not complying with the rules of another) or because of the inadequacy of the usual rules of protection applicable to domestic mergers (particularly those affecting minority shareholders, employees and creditors) were the main factors generating frictions in the process of completion of cross-border mergers.

The *"need for cooperation and consolidation"*[8] to overcome both legislative and administrative difficulties with regards to cross-border mergers, appeared to be evident as well as necessary.

The Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (also referred to as *X Company Directive*) has been a measure adopted following

[7] Rescio, G. (2007). *Gli Studi del CNN - Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla Direttiva 2005/56/CE in materia di fusione transfrontaliera - Casi e materiali di diritto comunitario di interesse notarile: le società - Fondazione Italiana del Notariato*. https://elibrary.fondazionenotariato.it/approfondimento.asp?app=21/studiCNN/2007_1_A_Rescio&mn=3&tipo=3&qn=6

[8] Recital (1) - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

urgent requests to the European institutions by economic operators in the various Member States, wishing to exercise the freedom of establishment enshrined in the Treaties, also by the means of cross-border merger operations. The articles of the Treaty referred to are 49 TFEU (ex 43 TEC) and 56 TFEU (ex 48 TEC): the former refers to the *freedom of establishment* promoting the free movement of individuals and businesses within the European Union, aiming at an integrated internal market that fosters economic growth removing national barriers to trade and entrepreneurial activity[9]; the latter refers to the *freedom to provide services* promoting a single market for services within the European Union, ensuring fair competition between economic operators from different Member States together with the free movement of services, fostering the development of innovation and economic growth[10].

As pointed out by G. Rescio, the possibility to remove the existing barriers to cross-border mergers makes the full implementation of the principles of freedom of establishment (set out in Articles 43 and 48 TEC)[11] possible, in fact, through the process of merger, the enterprises are able to carry out their transfer within the EU - without previously being subject to complications, additional costs and long delays associated with the liquidation of the companies and their reconstitution in another State - without interruption in the exercise of the activity, respecting the continuity of the company.

It's deemed important - at this point - to underline the fact that, as regards the "*cross-border*" mergers (referred to in the Directive), the scope of application is limited to the intra-Community transactions, therefore, to be distinguished from the cross-border mergers in the broad sense (i.e. extra-Community) that

[9] Article 49 TFEU | EUR-Lex
https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX%3A12008E049
[10] Article 56 TFEU | EUR-Lex
https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX%3A12008E056
[11] Rescio, G. (2007). *Gli Studi del CNN - Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla Direttiva 2005/56/CE in materia di fusione transfrontaliera - Casi e materiali di diritto comunitario di interesse notarile: le società - Fondazione Italiana del Notariato*.
https://elibrary.fondazionenotariato.it/approfondimento.asp?app=21/studiCNN/2007_1_A_Rescio&mn=3&tipo=3&qn=6

take place between one or more companies governed by the law of a single Member State and one or more companies established outside the European Union's territory[12].

The X Company Directive - which set as its objectives the facilitation of cooperation and consolidation between companies with share capital subject to different *lex societatis*[13], removing regulatory obstacles to cross-border merger other than those concerning internal merger *("allow the cross-border merger (…) if the national law of the relevant Member States permits mergers between such types of company"*[14]) - was structured around some key principles, that will be pointed out hereafter:

- Neither the provisions nor the formalities of single Member States *"should introduce restrictions on freedom of establishment or on the free movement of capital"*[15]; the restrictions imposed are justified only, as an exception, by requirements of general interest (on the basis of the criteria of necessity and proportionality);
- The identification of a minimum common content of the draft terms of merger - in order to overcome the differences in terms of content requirements of different legislations - and its publication. For protection purposes (to members and third parties), the administrative bodies of the participating companies draw up the common draft terms (that must specify all the elements referred to in the Article 5 of the Directive) and publish it at least one month before the general meeting, in the respective national Register of Companies;

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[12] Matera, P. (2015). *Le fusioni transfrontaliere intracomunitarie*. www.comparazionedirittocivile.it. https://www.comparazionedirittocivile.it/data/uploads/colonna%20sinistra/8.%20impresa%20societ%C3%A0%20e%20mercati%20finanziari/matera_frontiere2015.pdf

[13] Recital (1) - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

[14] Recital (2) - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

[15] Recital (3) - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

- The national regulation of the expert report on the draft terms, leaving room to Member State for the decision regarding the fact that "*such experts may be natural persons or legal persons*"[16];
- A distinction - regarding the control of compliance with the law of all the procedural segments of the cross-border merger - between the initial internal decision-making processes of the companies involved and the implementation of the merger[17]: the control over the former is left to the national authority responsible for the individual companies concerned (culminated, if positive, with the issue of the pre-merger certificates for each of the companies involved) while as regards the latter, control pertains to the national competent authority in relation to the acquiring or resulting company: the pre-merger certificates of all the companies participating will be subject to final control of this authority that will – in case of positive outcome of the control – deem the cross-border merger to be suitable to produce the *consequences of the cross-border merger*[18].

The Directive 2005/56/EC, furthermore, proves to be a more inclusive Directive, including in its scope companies with share capital "*established in accordance with the law of a Member State and having its registered office, central administration or principal place of business in the Community*"[19], that need to present the following characteristics: the presence of share capital, the attribution of legal personality with autonomous assets, the principle of liability for social debts limited to property, be subject to the forms of protection of

[16] Art. 8, paragraph 1 - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

[17] Rescio, G. (2007). *Gli Studi del CNN - Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla Direttiva 2005/56/CE in materia di fusione transfrontaliera - Casi e materiali di diritto comunitario di interesse notarile: le società - Fondazione Italiana del Notariato*. https://elibrary.fondazionenotariato.it/approfondimento.asp?app=21/studiCNN/2007_1_A_Rescio&mn=3&tipo=3&qn=6

[18] Art. 14, paragraphs 1 and 2 - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

[19] Art. 1 - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

members and third parties provided for by the First Directive[20]. Although the Directive does not directly exclude cooperatives, it leaves the discretion to the Member States to decide whether or not it applies to them. Companies "*the object of which is the collective investment of capital provided by the public*"[21] are, instead, excluded.

Another important element to underline is the fact that - as stated in Article 3 ("*Further provisions concerning the scope*") - the Directive applies also to cross-border mergers in which the law of one Member State applying to one of the companies involved allows "*the cash payment referred to in points (a) and (b) of Article 2(2) to exceed 10 % of the nominal value (…) of the securities or shares representing the capital of the company resulting*"[22]. The result is that companies - of which the domestic law impedes to merge with other domestic companies with cash payments greater than 10% - are still able to merge with Community companies whose national law allows them to go over the 10%. In this way, the Community legislature, emphasizing its support for concentration, rewards in a certain way the national legal system which most facilitates mergers within the Community, forcing the "more restrictive" to adapt to the "more liberal" one, immediately in the mergers that affect both and prospectively in a general way[23].

The X Directive, however, seemed to provide very little uniform regulation - referring to a large extent to the legislation of the single Member States - since it

[20] Rescio, G. (2007). *Gli Studi del CNN - Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla Direttiva 2005/56/CE in materia di fusione transfrontaliera - Casi e materiali di diritto comunitario di interesse notarile: le società - Fondazione Italiana del Notariato*. https://elibrary.fondazionenotariato.it/approfondimento.asp?app=21/studiCNN/2007_1_A_Rescio&mn=3&tipo=3&qn=6

[21] Art. 3, paragraph 3 - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

[22] Art. 3, paragraph 1 - Directive 2005/56/CE | *Directive (EU) 2005/56/EC of the European Parliament and of the Council of 26 October 2005*. (2005, November 25). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0056

[23] Rescio, G. (2007). *Gli Studi del CNN - Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla Direttiva 2005/56/CE in materia di fusione transfrontaliera - Casi e materiali di diritto comunitario di interesse notarile: le società - Fondazione Italiana del Notariato*. https://elibrary.fondazionenotariato.it/approfondimento.asp?app=21/studiCNN/2007_1_A_Rescio&mn=3&tipo=3&qn=6

simply traced a "regulatory perimeter" aimed primarily at allowing mergers between companies of different Member States and giving them legal certainty, in order to avoid companies to incur into complex transaction processes that could have often been in violation of mandatory rules of one or more of the relevant jurisdictions involved[24]. One of the most prominent criticalities regarded the complete lack of detailed rules for the adequate protection of both the creditors and dissenting members categories. Moreover, with respect to the field of responsibility of experts and companies' directors during the whole process, additional difficulties emerged, in fact, the Directive outlined only the main functions attributed to them, referring instead to the domestic discipline for what regarded liability hypothesis of these subjects, therefore generating frictions in terms of uniformity between different Member States.

To conclude, it can be stated that even though the Directive 2005/56/EC has contributed to the idea of enhancement of company mobility across the European Union, it has not really been capable to lay down a clear, comprehensive and self-reliant set of standards and regulations on the cross-border merger procedure, limiting itself to a simple specification of the two main phases of the process.

[24] Matera, P. (2015). *Le fusioni transfrontaliere intracomunitarie*. www.comparazionedirittocivile.it. https://www.comparazionedirittocivile.it/data/uploads/colonna%20sinistra/8.%20impresa%20societ%C3%A0%20e%20mercati%20finanziari/matera_frontiere2015.pdf

1.4 The Directive (EU) 2017/1132

The continuously increasing frequency and development of trade relations between States EU Member States brought about the need for a greater harmonization of cross-border merger regulations. Therefore, on the 20th of July 2017, The Directive (EU) 2017/1132 entered into force, repealing the X Company Directive.

Its aim was to harmonise national legislation on different aspects of company law, providing more guarantees for members and third parties trying to ensure uniformity in terms of safeguards across all Member States. The elements covered by the Directive regarded: the coordination of guarantees required for the formation of public limited liability companies *"in order to ensure minimum equivalent protection for both shareholders and creditors"*[25]; the safeguarding and modification of share capital since *"Union provisions are necessary for maintaining the capital, which constitutes the creditors' security"*[26]; the coordination of guarantees with regard to publicity: *"disclosure requirements for the protection of the interests of members and third parties"*[27] should also include cross-border mergers in order to keep third parties adequately informed"; the disclosure of branches since *"the lack of coordination, in particular concerning disclosure, gives rise to some disparities, in the protection of shareholders and third parties, between companies which operate in other Member States"*[28]. Most importantly (for the purpose of this analysis) it covered – within Chapter II - the "Cross-border mergers of companies with limited liability".

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[25] Recital (3) - *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017*. (2022, August 12). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:02017L1132-20220812

[26] Recital (40) - *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017*. (2022, August 12). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:02017L1132-20220812

[27] Recital (50) - *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017*. (2022, August 12). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:02017L1132-20220812

[28] Recital (15) - *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017*. (2022, August 12). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:02017L1132-20220812

As regards the latter, The Directive (UE) 2017/1132 reaffirmed the principles and objectives common to the previously repealed one (i.e. Directive 2005/56/CE), with the intent to ease intra-EU mergers between corporations, underlining the fact that – in the case in which this Directive did not provide otherwise - any company (and third-party) involved in these kinds of operations *"shall remain subject to the provisions and formalities of national law which would apply in the event of a national merger"*[29].

This Directive – setting out in full the provisions laid down by the European legislator in 2005 (with the X Directive), starting with the joint cross-border merger project, its publication, the report of the administrative body and of the independent experts, the approval by the general meeting of the project, the preliminary merger certificate and the control of the legality of the transaction – however, neglected the bigger problems existing in terms of disharmony between substantive national rules (especially in the case of protections to be granted to creditors and minority shareholders), and the lack of *"fast track"*[30] simplified procedures that could be granted to less "complex" mergers, hindering therefore the efficient exercise of the *right of establishment*, by generating frictions across the different legislations.

[29] Recital (56) - *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017*. (2022, August 12). https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:02017L1132-20220812

[30] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

1.5 Company Law Package: the proposal

Although the provisions contained within the Directive (EU) 2017/1132 constituted a *"milestone towards a better functioning"*[31] of the internal market for companies across the European Union and their exercise of the freedom of establishment, as time passed by, from the assessment of these provisions – however – the European parliament understood the necessity *"to revise it in order to improve its functioning"*[32], modifying and updating them. In addition, the need to provide for new appropriate provisions regarding cross-border divisions and conversions emerged too.

On the 25th April 2018, in the light of these considerations, the European Commission presented the *Company law package*, which consisted in two proposals for directives amending Directive (EU) 2017/1132:

I. *Directive (EU) 2019/1151* ("*Digital tools Directive*") amending the Corporate Law Framework Directive 2017/1132 regarding the use of digital tools and processes in corporate law.

II. *Directive (EU) 2019/2121* amending the same directive (EU) 2017/1132 as regards cross-border mobility, more specifically referred to cross-border conversions, cross-border mergers and cross-border divisions[33].

The Digital tools Directive (EU) 2019/1151 proposal required Member States to ensure a procedure for the online registration of limited liability companies or their branches. Since the increasing use of digital tools by enterprises while carrying out their business and to interact with the public authorities, the proposal for this new provision arose - because of the significant differences

[31] *Relazione sulla proposta di direttiva del Parlamento europeo che modifica la direttiva (UE) 2017/1132*. (2019). Europarl.europa.eu. https://www.europarl.europa.eu/doceo/document/A-8-2019-0002_IT.pdf

[32] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[33] Borelli, S. (2020, June 12). Company package e diritto del lavoro. *Diritti Lavori Mercati*. https://www.ddllmm.eu/wp-content/uploads/2022/02/DLM-2_2020.pdf

existing between different Member States regarding the availability of online tools of the enterprises in their contacts with public authorities - with the aim to achieve a better, deeper, fairer Digital Single Market[34], promoting *"digital solutions for formalities throughout a company's lifecycle"*[35] and underlining the extreme importance of the interconnection of all the business Registers, to reduce both the costs and the administrative burdens associated with the various processes.

As regards cross-border mergers, conversions and divisions (the one on which the paper is more focused), the content of the proposal contained in the Company law package started by emphasizing the fundamental role of enterprises in the promotion of national economic growth, also by attracting foreign investments in the European Union and creating jobs, increasing the overall social welfare.

In order to succeed in their activities, companies need to operate in a context of legal and administrative conditions conducive to growth, and at the same time, also able to grant the possibility to face social and economic challenges of the globalized world, while, most importantly, always ensure adequate protection of all the stakeholders entailed such as workers, creditors and minority members[36]. Corporate restructurings – such as cross-border conversions,

[34] The Digital Single Market aims to create the right environment for digital networks and services providing high-speed, secure and trustworthy infrastructures and services supported by the right regulatory conditions. - *Digital economy and society in the EU - What is the digital single market about?* – Moving From 28 National Digital Markets to a Single One. https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html#:~:text=An%20environment%20where%20digital%20networks,by%20the%20right%20regulatory%20conditions.

[35] *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/resource.html?uri=cellar:063411b2-4935-11e8-be1d-01aa75ed71a1.0001.02/DOC_1&format=PDF

[36] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

divisions and mergers - *"are part of companies' life-cycle"*[37] as they clearly represent a way for enterprises to adapt to the everchanging economic environment, pursuing growth across existing and potential new markets, as well as to achieve greater operating efficiency and cost reductions. The objective of the Commission - with this proposal – was, therefore, represented by the aim to create a *"comprehensive set of measures for fair, enabling and modern company law rules in the European Union"*[38] since these kinds of restructuring operations would be facilitated and fostered by a harmonised European legal environment, creating trust in the *Single Market*, that provides the adequate safeguards against abuse.

The key principle of freedom of establishment legitimizing cross-border mobility company was recalled and underlined as fundamental for the development of the internal market, allowing companies – around 24 million, at that time, of which nearly 80% were Ltd.s (i.e. Limited liability companies), mostly all SMEs (i.e. Small-Medium Enterprises)[39] - to operate across different Member States "*on a stable basis*"[40]. The proposal, interestingly, highlighted, however, the fact that this kind of right still *"remains difficult"*[41] to be exercised, finding the reasons in the still not sufficiently adapted and harmonized

[37] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[38] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[39] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[40] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[41] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

company law regarding cross-border mobility intra-UE, not offering a predictable and perfectly clear legal framework in which to operate.

The Commission, subsequently, pointed out the main obstacles identified in the formulation of the previous Directive (i.e. (EU) 2017/1132), primarily "*the lack of harmonisation of substantive rules, in particular for the protection of creditors and minority shareholders*"[42], since the current rules on cross-border mergers set minimum standards ("*mainly procedural rules*"[43]) of protection, leaving the substantive protection of the interest of these two categories, to the different legislations of each Member State. For instance, the previous Directive laid down that creditors should have been protected by national law rules, without giving any additional specifications and, similarly, it laid down rules regarding shareholders in general, but left the further protection of minority shareholders again to the legislations of the single different Member States, *de facto* creating disharmony across different regulations. The non-existence of a "fast track" for simplified restructuring procedures was also noted, as well as the lack of a sufficient integration of digital tools and processes (subject matter of the Directive (EU) *2019/1151)*. Furthermore, the low level of information concerning the specific details and the consequences of the cross-border mergers provided to employees (granting them low levels of protection) had also been noted.

The Article 50 TFEU – legal basis for the European Union to act in the company law area[44] – is the real basis on which this proposal stood, in order to ensure the right of freedom of establishment and provide for coordinated measures of safeguard for all the stakeholders entailed.

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[42] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[43] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[44] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

Since the clear impossibility of single Member States to act individually to overcome the problems arising because of the *"divergent, conflicting or overlapping national rules"*[45] regarding these complex cross-border operations, the principle of *subsidiarity* recognised the clear added value of addressing these issues at European level - instead of through individual national regimes' actions or provisions - by the means of harmonised and coordinated solutions granting legal certainty and, therefore, a greater effectiveness of the stakeholders' protection provisions. Concerning the principle of *proportionality*, instead, it was noted that the positive consequences of the measures adopted could, in a certain way, outweigh possible negative effects and that, most importantly, the proposed actions would not exceed what is necessary to achieve the objectives set[46].

The proposal – introducing improvements in the procedures of cross-border mergers and new provisions regarding cross-border conversions and divisions – found one of its innovative elements in the *"ex-post evaluation of the existing Cross Border Mergers Directive"*[47] carried out by an external agent for the Commission and two public consultations (2015 and 2017)[48] as to gather feedbacks of all the stakeholders entailed, regarding the functioning of cross-border operations. Moreover, in 2012, the Commission was able to carry out a public consultation regarding the key interests of stakeholders (such as public authorities, business federations, trade unions, investors, consultants, and

[45] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[46] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[47] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[48] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

more) referred to company law, to better understand which could have been the future priorities to focus on. This consultation - gathering in total 496 responses[49] - highlighted the need to focus on an improvement in terms of the easiness of mobility intra-UE, the enhancements of safeguards for creditors, shareholders and employees and the facilitation of company creations.

To conclude, it can be pointed out that the objective of the Company law package proposal was double: on the one side, the will to provide for "*specific and comprehensive procedures for cross-border conversions, divisions and mergers*"[50] for the purpose of enhancing cross-border mobility within the European Union while, on the other hand, to grant to companies' stakeholders clear and right protections with the purpose of safeguarding the integrity and fairness of the Single Market. "*Such action forms part of creating a deeper and fairer Single Market, which is one of the priorities of the current Commission.*"[51]

[49] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[50] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

[51] *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*. (2018, April 25). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241

1.6 The Directive (EU) 2019/2121

The adoption of the Company Law Package by the European Parliament has been one of the most significant reforms in the field of harmonisation of the European Union company law. As mentioned in the previous section, part of the package included the proposal for the Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019, which entered into force on the 1st of January 2020, but became effective only after being transposed into the national legislations of the Member States (in Italy with the D. Lgs. 19/2023 of the 2nd March 2023). This Directive, however, should not be understood as a separate regulation[52], but as an amendment and an extension of the previous Directive (i.e. (EU) 2017/1132) with regard to cross-border mergers, moreover introducing - for the first time – specific provisions for harmonized regimes concerning cross-border conversions and cross-border divisions (that were previously lacking, harming therefore the adequate safeguards to be granted to employees, creditors and minority members, that were instead forced to rely on the single different Member States' legislations for the protection of their interests).

The aim of this Directive, is therefore to lay down the "*foundations to overcome the uncertainty and fragmentation of the rules on* [all of the] *extraordinary cross-border operations*"[53] which, in the past, have sometimes been a constraint on the optimal completion of these transactions; or have simply been causes of excessive costs and timing, actually hindering the freedom of establishment guaranteed at European level by the Treaty (i.e. TFEU).

The Directive starts by recalling the fact that the Article 49 of TFEU grants the right of establishment to a company which is established in accordance with the legislation of a Member State, making it possible for it to convert itself into a

[52] Boggio, L. (2022). *Mobilità transfrontaliera delle società e continuità soggettiva nell'Unione europea*. Giappichelli.
[53] Esposito, L. (2023). Le concentrazioni tra istituti di credito nei periodi di crisi economico-finanziarie: esempi del passato e previsioni future. *Il Diritto Dell'economia*, 81–114. https://www.ildirittodelleconomia.it/wp-content/uploads/2023/06/03Esposito.pdf

firm which will be subject to the law of another Member State *"provided that the conditions laid down by the legislation of that other Member State are satisfied and (…) that the test adopted by the latter Member State to determine the connection of a company or firm with its national legal order is satisfied"*[54], stressing the fact that, in the absence of harmonisation, in terms of importance, the connecting factors as central office, central administration and principal place of business are at an equal level[55]. The Directive in question aims to balance the Union interest for new economic opportunities, enhanced productivity and competition - resulting in overall economic growth - with other important interest such as European integration and social protection referred to in Articles 3 TFEU and 9 TFEU, together with the promotion of the social dialogue referred to in Articles 150 TFEU and 151 TFEU[56], clearly without compromising the adequate protection of fundamental rights of all the stakeholders entailed.

In order to support the creation of a single market facilitating the intra-EU mobility, characterized by a uniform legal framework, the Directive (EU) 2019/2121 underlines some important key points in its "Recitals" that will be pointed out hereafter.

The complexity of these intra-EU operations requires an appropriate *"scrutiny of the legality of cross-border operations before they take effect"*[57] – also to allow competent authorities to decide on the approval in a fair manner, having of all the relevant elements available - since, if the checks were carried out after the effectiveness of the merger, there would be a situation of legal uncertainty. Moreover, the Directive introduces a limit to the issuance of the preliminary

[54] Recital (2) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[55] Recital (3) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[56] Esposito, L. (2023). Le concentrazioni tra istituti di credito nei periodi di crisi economico-finanziarie: esempi del passato e previsioni future. *Il Diritto Dell'economia*, 81–114. https://www.ildirittodelleconomia.it/wp-content/uploads/2023/06/03Esposito.pdf

[57] Recital (10) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

certificate of merger, in order to block cross-border mergers involving fraudulent or abusive intent. A refusal to issue such a certificate is envisaged where the competent authorities of the individual Member States consider that the cross-border merger is set up for fraudulent purposes "*leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes*"[58] (identified as "Anti-abuse control procedure").

To improve the importance given to the interests of the various stakeholders entailed in the operations, they are given the opportunity to submit "*comments with regard to the proposed operation*"[59]. It is therefore necessary that members, workers and creditors are properly informed about all the "*legal and economic aspects of the proposed cross-border operation and the implications*"[60] by the means of reports pointing out: the remedies available to them; the right of withdrawal from the company for members - with a withdrawal right - voting against the adoption of the draft of the merger ("*to exit the company and receive cash compensation for their shares*"[61], which has to be equivalent to the value of the shares held before the operation); the right to challenge the calculation of the cash settlement that the competent administrative and judicial authorities identified (in the case in which it's deemed to not be calculated according to the principles allowed[62]); the right to challenge the share-exchange ratio for members who are not able or did not exercise the right of exit.

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[58] Esposito, L. (2023). Le concentrazioni tra istituti di credito nei periodi di crisi economico-finanziarie: esempi del passato e previsioni future. *Il Diritto Dell'economia*, 81–114. https://www.ildirittodelleconomia.it/wp-content/uploads/2023/06/03Esposito.pdf

[59] Recital (12) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[60] Recital (13) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[61] Recital (18) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[62] Recital (20) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

With regard to shareholders, it is deemed important to underline the fact that - unlike the provisions regarding their protections in the previous Directive, in which *the possibility* to adopt adequate safeguards measures protecting minority members opposed to cross-border merger, was left to individual Member States' discretion - in Directive (EU) 2019/2121 each Member State is instead *required* to adopt adequate provisions for the protection of their interests (as pointed out in Article 126a "*Protection of members*").

Concerning the safeguard of the interests of the creditors, the Directive - introducing Article 126b "*Protection of creditors*" granting a minimum standard level of protection – provides that the creditors "*who has established a relationship with the company before the company had made public its intention to carry out a cross-border operation*"[63] should be able to evaluate and understand the impacts of the change of jurisdiction applicable and obtain adequate protections, in particular granting this category the right to "*file a complaint in the Member State of departure for a period of two years*"[64] following the completion of the cross-border operation, along with the possibility to obtain a declaration of solvency that has to be drawn up by the firms participating in the transaction, in which - for the resulting company – the absence of information indicating the possibility of not being able to meet their obligations is attested (the consequences in the event of incorrect declarations are left to the discretion of the legislations of the Member States).

Another element of novelty is represented by the amendment to Article 120 "*Further provisions regarding the scope*" in which the paragraph 4 is updated stating that the chapter does not apply to a company that "*(a) (…) is in liquidation and has begun to distribute assets to its members*", "*(d) (…) is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive*

[63] Recital (24) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[64] Recital (24) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

2014/59/EU.". A further paragraph (i.e. paragraph 5) is added providing that the single Member States *may decide* not to apply it to enterprises that are the subject of *"a) (…) insolvency proceedings or subject to preventive restructuring frameworks"* or *"(b) (…) liquidation proceedings other than those referred to in point (a) of paragraph 4"* or *"(c) (…) crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU"*. This amendment has been provided in order to obstacle the abuse of the process of cross-border mergers by companies seeking to avoid insolvency proceedings at the expense of their creditors.

As concerns the protection of employees' interests, finally, the Directive emphasizes that the involvement of them "*contributes to a long-term and sustainable approach being taken by companies across the internal market*"[65], reason why it is considered essential to encourage the protection of participation rights within the management body of a company by employees', represented therein by representatives of employees, who, after being informed (by the reports) upon potential substantial changes in the conditions of employment and their contracts, may initiate a "*bona fide negotiation (...) carried out in line with the procedure provided for in Directive 2001/86/EC"*[66] in order to find a solution reconciling both the company's right to carry out the cross-border operation as well as the employees' rights of participation.

Having a look on the whole process of evolution of the case law of the European Court of Justice, it appears that - already long before Directive (EU) 2019/2121, as highlighted in the previous sections - Union company law was letting very little discretion to its Member States to restrict freedom of establishment, both in the process of the setting-up of a company (or of branches), as well as in the transfers from one State to another.

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[65] Recital (30) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[66] Recital (32) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

While the Treaty on the Functioning of the European Union itself, in principle, relies on single Member States, when recognizing enterprises as "*companies incorporated in accordance with the law of a Member State*"[67], at the same time, it appears evident that those companies are – before being subject to the law of each Member State - governed by the European company law, "directing" and influencing many aspects of the legislations of different Member States. In the same way, despite the fact that within the Directives analysed there are some rules that explicitly refer to the single national law, these are provided exclusively by the European Union law, thus precluding differing actions by national legislators. Therefore, when a Directive takes over to regulate a company aspect of the European Union law, it ends up "*achieving at least a "formal" rapprochement between the laws of the Member States*"[68], inserting them in the European Union legal framework. Hence, the Directives define a common European law applicable to all the enterprises independently to the different legislation in accordance to which they were established, without any regards to the "*differences resulting from the exercise of options granted to national legislators*"[69], concerning European Union law.

Even though the principle of *maximum harmonization* has not yet been reached in the general principle of companies[70] and greater convergence between different legal systems of the Member States has still to be pursued, the presence of a dense network of European company rules, together with a nucleus of common principles of law has to be noted. In fact, even though it cannot be said that Directive (EU) 2019/2121 does represent the "point of arrival" for the evolution in terms of European company law, it can be stated, however, that this Directive brings an improvement in the delineation of an

[67] Article 54 TFEU | EUR-Lex - https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A12016E054
[68] Boggio, L. (2022). *Mobilità transfrontaliera delle società e continuità soggettiva nell'Unione europea*. Giappichelli.
[69] Boggio, L. (2022). *Mobilità transfrontaliera delle società e continuità soggettiva nell'Unione europea*. Giappichelli.
[70] Boggio, L. (2022). *Mobilità transfrontaliera delle società e continuità soggettiva nell'Unione europea*. Giappichelli.

European context that aims to protect the right of freedom of establishment, defining a legal framework that provides for a path which entails both deliberation and publicity, as well as prohibitions and guarantees[71] for all the stakeholders involved in cross-border operations. Hence it possible to state that - in continuity with the reform process which started with the enactment of Directive (EU) 2017/1132 - by the means of this new Directive, the European legislator has "*placed the basis for the standardisation of European company law*"[72], with the intent to provide greater legislative harmonization for both companies and corporate groups during the process of cross-border operations within the European Union.

[71] Boggio, L. (2022). *Mobilità transfrontaliera delle società e continuità soggettiva nell'Unione europea*. Giappichelli.
[72] Esposito, L. (2023). Le concentrazioni tra istituti di credito nei periodi di crisi economico-finanziarie: esempi del passato e previsioni future. *Il Diritto Dell'economia*, 81–114. https://www.ildirittodelleconomia.it/wp-content/uploads/2023/06/03Esposito.pdf

CHAPTER 2

Legislative Decrees transposing European Directives in Italy: *steps to reach the consequences of a cross-border merger*

2.1 Table of connections between Legislative Decrees and the relative articles of the Italian Civil Code

In the light of what has been pointed out within the previous sections, the second chapter will be devoted - more specifically - to the regulation of cross-border mergers as transposed by the Legislative Decrees in Italy.

The analysis that will be carried on subsequently, is introduced - here beneath - by the means of a synthetic table of connection and comparison between the articles of D. Lgs. n. 108/2008 (transposing Directive 2005/56/EC), the related articles of D. Lgs. n. 19/2023 (transposing Directive (EU) 2019/2121) and finally the articles that the Italian Civil Code dedicates to the national merger (from Art. 2501 onwards), in order to ensure the reader an overview with a clear display of the links between them.

EVOLUTION OF THE RULES GOVERNING CROSS-BORDER MERGERS: TABLE CONNECTING ARTICLES OF D. LGS. N. 108/2008 AND D. LGS. N. 19/2023 WITH RESPECT TO THE ARTICLES OF C. C. ON CROSS-BORDER MERGERS		
D. Lgs. n. 108/2008 (Transposing Directive 2005/56/EC)	D. Lgs. n. 19/2023 (Transposing Directive (EU) 2019/2121)	Civil Code (Main reference: title V, chapter X, section II, book V)
Article 1: Definitions	Art. 1 (Common Definitions) + Art. 17 (Definitions)	Art. 2501 (Forms of merger)
Article 2: Scope	Art. 2 (Scope) + Art. 18 (Applicable norms to mergers)	Art. 2501 (Forms of merger) + Art. 2501 *bis* (Merger Leveraged Buy-Out)

Article 3: Conditions relative to cross-border mergers	Art. 3 (Conditions relative to cross-border operations (intra-EU and extra-EU))	
Article 4: Applicable regime	Art. 4 (Applicable norms)	
Article 5: Withdrawal	Art. 25 (Withdrawal) + Art. 26 (Dispute of the share-exchange ratio) + Art. 27 (Common provisions on disputes relative withdrawal and share-exchange ratio)	Art. 2502 (Decision on the merger) + Art. 2473 (Withdrawal of Ltd. member) + Art. 2437 (Withdrawal right in S.p.A.)
Article 6: Draft terms of the cross-border merger	Art. 19 (Draft terms of the merger)	Art. 2501 *ter* (Draft terms of the merger)
Article 7: Publication in the Official Journal	Art. 20 (Disclosure)	Art. 2501 *ter* (Draft terms of the merger)
Article 8: Report of the Administrative Body	Art. 21 (Report of the Administrative Body) + Art. 23 (Terms and filing of documents)	Art. 2501 *quinquies* (Report of the Administrative Body) + Art. 2501 *septies* (filing of documents) + Art. 2501 *quater* (balance sheet and financial situation)
Article 9: Independent expert Report	Art. 22 (Independent expert Report) + Art. 23 (Terms and filing of documents)	Art. 2501 *sexies* (Independent expert report) + Art. 2501 *septies* (Filing of documents)
Article 10: Decision on the ross-border merger	Art. 24 (Decision)	Art. 2502 (Decision on the merger)
Article 11: Pre-merger certificate of cross-border merger	Art. 5 (Competent Authority) + Art. 28 (Opposition of creditors) + Art. 29 (Pre-merger certificate) + Art. 30 (Pre-merger certificate in case of public debts and subsidies) + Art. 31 (Procedures for the formation and regulation of guarantees for public debts and subsidies)	Art. 2502 *bis* (Filing of the merger decision) + Art. 2503 (Opposition of creditors) + Art. 2503 *bis* (Obligations)
Article 12: Merger deed	Art. 32 (Cross-border merger deed)	Art. 2504 (Merger deed)
Article 13: Scrutiny of the legality of the cross-border merger	Art. 33 (Scrutiny of the legality of the cross-border merger) + Art. 5 (Competent authority)	
Article 14: Disclosure	Art. 34 (Merger deed)	Art. 2504 (Merger deed)
Article 15: Date on which the cross-border merger takes effect	Art. 35 (Date on which the cross-border merger takes effect)	Art. 2504 *bis* (Consequences of a merger)
Article 16: Consequences of a cross-border merger	Art. 36 (Consequences of a cross-border merger)	Art. 2504 *bis* (Consequences of a merger)
Article 17: Invalidity of a cross-border merger	Art. 37 (Invalidity of a cross-border merger)	Art. 2504 *quater* (Invalidity of a merger)

Article 18: Simplified formalities	Art. 38 (Simplified formalities)	Art. 2505 (Incorporation of fully owned companies) + Art. 2505 *bis* (Incorporation of 90% owned companies)
Article 19: Employees' participation	Art. 39 (Employees' participation) + Art. 40 (information and consultation of employees)	
Article 20: Transitional provisions	Art. 56 (Transitional and final provisions)	

For the sake of greater clarity, the chapter will be structured predominantly on the analysis of how Legislative Decree n. 19/2023 has transposed Directive (EU) 2019/2121, particularly as regards the various steps to reach the consequences of a merger; within this investigation, the differential elements with respect to the Legislative Decree n. 108/2008 that transposed the X directive, will be reported and highlighted.

Before proceeding, recalling the definition of Merger – as given by Directive (EU) 2017/1132 (and therefore Directive (EU) 2019/2121) – is deemed important, since the definition provided by the D. Lgs. provides only a brief general explanation referring to Article 2501 of the Civil Code. Hence, the merger is defined as an operation in which one or more companies (or two or more companies), "*on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company*" (or to a new company they form), the acquiring company (or the new company), "*in exchange for the issue to their members of securities or shares representing the capital of that other company*" (or of that new company) "*and, if applicable, a cash payment not exceeding 10% of the nominal value (…)*"[73].

[73] Art. 119 – Directive (EU) 2017/1132 | *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017*. (2022, August 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02017L1132-20220812

The case of a "merger by absorption", refers instead to an enterprise transferring all its assets and liabilities to the holding company of all its securities or shares representing its capital. This particular type of merger will, however, be further investigated within the next chapter[74], during the analysis performed regarding the prospects and limits of European cross-border merger operations.

[74] Chapter 3, Section 3.4 *"The possible impact of the tax variable on cross-border mergers operations"*

2.2 Novelty elements in the Legislative Decree n. 19/2023

The Legislative Decree n. 19 of the 2nd of March 2023 - consisting in 57 Articles – has led to a radical revision of the provisions for both cross-border (intra-EU) and international operations (extra-EU) procedures, repealing (updating and refining) the previous legislation of D. Lgs. n. 108 of the 30th of May 2008. While the previous Decree (as provided for in the X Directive) focused exclusively on cross-border mergers of companies with share capital, the new Decree extends its scope to include not only mergers, but also notions regarding cross-border conversions and divisions, introducing new homogeneous regulations in the Italian legal system - aligned with the new European standards - also favouring economic integration and growth, facilitating and improving the possibility of mobility for enterprises between different Member States, without renouncing to ensure adequate levels of protection for all the entailed stakeholders.

The objective of this extension by the European legislator concerning the regulated matter, on the one hand, allows to repeal the Legislative Decree n. 108/2008 and, on the other, is implemented through "*a subjective extension of the application of the rules on such extraordinary transactions well beyond the scope of companies with share capital*"[75]; in particular, it refers to the extension of the European Union legal framework application also on mergers, conversions or divisions in which participate or result:

- companies other than companies with share capital[76], provided the fact they are registered in the appropriate Business Register, with the exception of cooperatives with prevailing mutual purpose;
- companies not having their registered office, central administration or principal place of business in the territory of the European Union but

[75] *Consiglio Nazionale Forense - Schema Decreto legislativo recante attuazione della Direttiva (UE) 2019/2121*. (2023, January 10). documenti.camera.it. https://documenti.camera.it/leg19/documentiAcquisiti/COM02/Audizioni/leg19.com02.Audizioni.Memoria.PUBBLICO.ideGes.7164.13-06-2023-09-58-02.pdf

[76] The definition of companies with share capital is provided within Article 1 of D. Lgs. 19/2023

being subject to the law of a Member State which has extended its harmonisation to such entities;

- companies not included in the above assumptions and companies that are governed by the law of a non-EU State (in accordance with Article 25, paragraph 3 of Law n. 218 of 31st of May 1995, which provides that mergers of entities established in different states "*shall be effective only if implemented in accordance with the laws of those concerned States*"[77].
- entities which, in a form other than that of a company, carry out business activities and are, in turn, registered in the Business Register (in accordance with Article 25, paragraph 3 of Law 218 of 31 May 1995).

The new Legislative Decree, instead, does not apply to variable capital investment companies (i.e. "*SICAVs*"), to entities subject to crisis resolution instruments or crisis prevention measures[78]. However, it is still applicable in the case of cross-border operations concerning companies against which insolvency or crisis regulation proceedings are opened[79], where the applicable legislation (on business crises) allows this type of transactions without providing specific regulations.

Cross-border merger procedures involving an Italian company are governed by the detailed provisions of the Italian Civil Code, namely Book V, Title V, Chapter X, Section II[80]. These rules have to be interpreted taking into account the modifications and integrations introduced by the recent Legislative Decree n. 19/2023. From this point of view, the cross-border merger process is in line with the effects of an internal merger. The company which emerges from this kind of cross-border operation (or the company which is incorporating) assumes all the rights and obligations of the participating companies, ensuring

[77] *L. 31 maggio 1995, n. 218 -. Riforma del sistema italiano di diritto internazionale privato*. (1995). www.esteri.it. https://www.esteri.it/mae/doc/L218_1995.pdf
[78] Art. 2, paragraph 2 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[79] Art. 2, paragraph 3 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[80] Art. 18, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

the seamless continuation of all their existing relationships, including legal and procedural matters[81].

The Legislative Decree n. 19/2023, within Article 18, paragraph 2, reaffirms the previous legislation (i.e. the one contained in the D. Lgs. n. 108/2008) establishing the supremacy of the legislation applicable to the acquiring company in the event of legislative discrepancies relating to the actions to be taken after the issuance of the pre-merger certificate, in the event of a conflict between the law of the acquiring company and that of the acquired company.

With regard to mergers following a leveraged buy-out, Article 18, paragraph 3, of the Legislative Decree n. 19/2023 contains the previous rule (i.e. the one present in D. Lgs. n. 108/2008) according to which Article 2501-bis of the Italian Civil Code is not applicable in the case in which the company (*target*) (i.e. the company whose acquisition is financed through indebtedness) acquired is not Italian and does not participate to the merger as an Italian enterprise. If, instead, the target company is Italian, Article 2501-bis of the Italian Civil Code applies, irrespective of whether it is the incorporated company or the acquiring company (as in the case of a *reverse merger*)[82].

A relevant novelty provided for in the new Legislative Decree is what is stated within Article 5 regarding the role of the *"Notary as a public official"*[83]. Who is identified as the competent authority to carry out the necessary checks required for the issue of the pre-merger certificate, with which the notary certifies that the cross-border operation is taking place in accordance with the law.

In the specific case of the cross-border merger, the notary must verify that all the companies have approved identical common draft terms of merger, and that the pre-merger certificates for each of the companies involved in the cross-

[81] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.
[82] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.
[83] Art. 5, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

border transaction have been received correctly. The notary must also verify that the arrangements for employee participation have been laid down, if at least one of the companies involved in the merger applies a system of employee participation or has had (during the six months preceding the publication of the draft terms of the merger) *"an average number of workers equal to four fifths of the minimum required for the activation of employee participation, according to the legislation of the Member State from which it is regulated"*[84]. Compared to Legislative Decree n. 108/2008, moreover, always in favour of greater protection of workers' rights, the new Legislative Decree provides for a more detailed report by the administrative body, which has to contain - in addition - justifications regarding the legal and economic aspects of the cross-border transaction, as well as a clear explanation of the implications that the operation will have for the employees and the future activity of the company.

A further addition - related to the role of the notary - present in the new Legislative Decree is the one concerning the "*crime of false or omitted statements for the issue of the preliminary certificate*" contained in Article 54 which provides for a penalty characterized by the imprisonment from six months to three years[85] for "*anyone, in order to make the conditions for the issuance of the pre-merger certificate appear fulfilled*"[86] by issuing or certifying false documents (both if only in part or in full).

Given the introduction of the crime dealt with inside Article 54, Article 55 provides for its inclusion "i*n the list of corporate crimes provided for by Article 25-ter, paragraph 1, of Legislative Decree n. 321/2001, establishing for companies a financial penalty of 150 to 300 shares*"[87].

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[84] Art. 39, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[85] Art. 54, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[86] Art. 54, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[87] *Trasformazioni, fusioni e scissioni transfrontaliere: atto del governo 11*. (2023, January). https://documenti.camera.it/Leg19/Dossier/Pdf/FI0012.Pdf

The Legislative Decree n. 19/2023 also introduces specific regulation aimed at contrasting possible abuses performed by Italian companies involved in cross-border operations that have incurred debts with the Italian Treasury or other public institutions. Articles 30 and 31 - relating to this subject - provide that when the cross-border transaction results in a company subject to the law of another State, "*the Italian company participating in the transaction, with the request of the pre-merger certificate, is required to prove, by means of the relevant certificates, that it has no debts towards public administrations or bodies or that it has satisfied them*"[88] or however guaranteed it at a 115% of the outstanding debt[89]. In the specific case of mergers, when the company resulting from the operation is an enterprise subject to the legislation of another State, the common draft terms of cross-border merger must clarify whether, in the previous five years, the Italian company received public aid for its production activities, specifying the amount and the entities that provided the aid[90]. Any processes of revocation or cancellation of the above mentioned benefits already underway should also be mentioned. In the absence of these requirements, the notary is prevented from issuing the pre-merger certificate, thus preventing the finalization of the merger.

In conclusion, another novelty present in the Legislative Decree 19/2023 is the one regarding Article 38 "*simplified formalities*", setting out simplified procedures in the cases of merger by absorption in which:

(i) the operation is carried out by a company owning all the shares or other securities conferring voting rights to the shareholders of the company being acquired;

[88] Art. 30, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[89] Art. 31, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[90] Art. 19, paragraph 2 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

(ii) a single person holds directly or indirectly (by the means of one or more companies participating in the merger) all the shares of the acquiring company and those incorporated;

(iii) the same persons hold shares in the same proportion in each of the merging companies;

(iv) the operation is carried out by a company that holds at least 90% but not all of the shares or other securities that have voting rights in the shareholders' meeting of the acquired company[91].

In the above mentioned cases, simplified procedures apply – clearly with differences in terms of requirements, depending on the different cases – in order to not require some regular steps that are usually mandatory during "normal" cross-border operations procedures (for instance point (b) and (m) of the draft terms of merger[92], and/or the management body's report for members, and/or the experts' report, and/or the approval by the management body of the incorporated company) with the aim to fasten the whole process of completion, avoiding excessive costs and waste of time.

[91] Article 38 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[92] [Specifying] *"b) any special modality regarding the right to share in profits; m) m) data on the cash settlement offered to members in the case of withdrawal, in accordance with Article 25 and the indication of the digital domicile where the company receives any communications of withdrawal"* - Article 19, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

2.3 Steps to reach the consequences: a comparison

Following the recent analysis of some of the main divergences and similarities between the Legislative Decrees of 2008 and 2023, this section will be focused on the analysis of the various procedural steps to be carried out in order to reach the finalization of a cross-border merger, firstly at a general level, then - in the following sub-sections - more specifically, highlighting the differences between the two Decrees as regards the specific individual steps.

The cross-border merger procedure - as outlined by Legislative Decree n. 19/2023 - follows a well-defined path, which can be substantially divided into three main phases. The initial - preparatory - phase is the one in which the members of all the companies involved have to agree to undertake this operation. This moment is dedicated to the collection, preparation and realization of all the necessary documents that will allow members to make an informed and conscious decision. It also serves to provide - in order to protect their interests and rights - all the necessary information to the creditors of the companies and their employees involved.

Once this phase is completed, "*the shareholders' decision on the approval of the joint cross-border merger project shall then be adopted*"[93]. Once approved, the competent authority - designated by each of the countries involved in the cross-border merger operation (in Italy it's the Notary, as pointed out by Article 5 of D. Lgs. 19/2023[94]) - after carrying out the necessary checks of legality and compliance with law, issues a 'pre-merger certificate' attesting the correctness and legality of all acts and formalities carried out in preparation for the merger, in such a way as to ensure that any step required by the law has been diligently observed for the purpose of completing the transaction.

[93] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

[94] As pointed out in the Directive (EU) 2019/2121, each Member States has the right to designate its competent authority. In Italy, Legislative Decree n. 19/2023 identifies this figure in the Notary.

The last step of the process concerns the signature of the public deed of merger, followed by the issuance of a 'final certificate', by the competent authority of the country of destination (having first received and then verified all the pre-merger certificates obtained by the companies taking part in the cross-border transaction), where the law governs the incorporating company. This final certificate, which confirms the legality check completed, gives full effect to the merger operation giving rise to the "*consequences of a cross-border merger*"[95].

The pre-merger certificate is, therefore, essential to certify and confirm that the merger operation complies with the laws of the different States involved, through a verification conducted by the legally designated authorities. This document guarantees that all the pre-merger procedures have followed the regulations in force in a scrupulous manner, attesting the legitimacy of the transaction until that moment.

Subsequently, the final certificate (issued by the competent authority of the State of destination) presupposes the legal validity of the actions that have been carried out in the States of the incorporated companies, in the country that regulates the acquiring company. By issuing this certificate, the integration of the assets of the incorporated company into the legal framework of the acquiring company becomes concrete.

This step is crucial to ensure that the final stages of the transaction also comply with the applicable rules, thus establishing the legal completion of the merger.

The process therefore follows a principle defined as "*distributive criterion*"[96]: initially the laws of the State of the incorporated companies apply until the

[95] "*a) all the assets and liabilities of the company being acquired, including all contracts, credits, rights and obligations, shall be transferred to the acquiring company; (b) the members of the company being acquired shall become members of the acquiring company, unless they have disposed of their shares as referred to in Article 126a (1); (c) the company being acquired shall cease to exist.*" – Article 131, paragraph 1 of *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[96] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

issue of the preliminary certificate; subsequently, we move to the application of the laws of the State of the acquiring company, in order to facilitate the legal transition and the effective integration of the corporate entities involved.

Throughout the whole process, it is crucial (as highlighted in Chapter 1 among the reasons that led the European Legislator to the issue of the new Directive (EU) 2019/2121[97]) to pay particular attention and to ensure adequate safeguards to all parties involved "*to allow all stakeholders' legitimate interests to be taken into account in the procedure governing a cross-border operation*"[98]. It is essential that the shareholders of the companies involved are protected in order to avoid an undesirable erosion of their capital shares. This includes, for example, protection against involuntarily becoming a member of a company operating under a new different legal system, thus avoiding any unwanted legal or administrative issue.

As regards creditors, it is crucial to safeguard their interests in order to ensure that the transaction does not compromise their credit rights, also making them "*able to take into account the potential impact of the change of jurisdiction and applicable law as a result of the cross-border operation*"[99]. The protection should also be extended to maintain the financial soundness of the companies involved, so that the obligations towards creditors remain safe and not unfairly diminished.

Moreover, it is vital to consider the employment of workers, making sure that the cross-border operation does not undermine their work situation or governance rights. This means ensuring that there is no deterioration in terms of employment or working conditions that may result from company restructuring.

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[97] Chapter 1, paragraph 1.6 *"The Directive (EU) 2019/2121"*
[98] Recital (12) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121
[99] Recital (20) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

Finally, it is important that the State and the general government do not suffer negative consequences as a result of the transaction. Particular attention should be given to safeguarding tax interests and the risk of relocation of productive activities that have received public support (especially if located[100]) in the years preceding the cross-border merger.

It appears clear that the protection of the interests of all the stakeholders involved in cross-border operations, plays a fundamental role in maintaining a balance between the needs of business growth and development and the social and economic responsibilities towards its creditors, its employees and the State.

2.3.1 Common draft terms of a cross-border merger

Article 122 of Directive (EU) 2019/2121 - entitled *"Common draft terms of cross-border merger"* - and Article 19 of D. Lgs n. 19/2023 - entitled *"Draft terms of merger"* - illustrate the content of the plan.

The common draft terms of cross-border merger - containing the information specified in Article 2501-ter, paragraph 1, of the Italian Civil Code in addition to those contained in article 19 of the Legislative Decree - must be drawn up by each of the companies involved in the operation and approved by the respective management bodies. In addition to the provisions contained in the previous Decree (i.e. n. 108/2008) information regarding the liquidation offered to shareholders who choose to withdraw (not applicable in the case of mergers

[100] Article 1, paragraph 3, t) *"Localised Public benefit: any public support measure intended for a productive investment in a specific part of the territory of the State or relating to an establishment, headquarters, branch, office or autonomous department, located in the territory of the State, which is found in the availability of the Italian company participating in the (...) merger (...), which has benefited from it, or of parent companies, controlled companies or linked to the participant company, pursuant to Article 2359 of the Civil Code" - DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

with "*simplified formalities*"[101]) is included. It is also necessary to specify the digital address through which the company manages communications related to the withdrawal. The document should also outline the guarantees or commitments proposed to creditors, as well as propose an "*indicative time table for the operation*"[102], which is not binding but serves only as a guideline.

Moreover, if the merger should result in a new entity which will not be subject to Italian law, it is essential - as reported in the previous section[103] - that the plan indicates whether the Italian company incorporated has benefited from public benefits[104] or of localised incentives in the last five years, including their amount and the granting institutions. In addition, it is also necessary to indicate any procedures for the revocation or revocation of these benefits initiated or completed during the aforementioned period, detailing the sums to be repaid, including the recovery of guarantees and the application of any sanctions.

2.3.2 The Report of the administrative body to members and employees and the external experts' Report

Article 124 of Directive (EU) 2017/1132, previously entitled "*Report of the management or administrative body*", has been renewed by Directive (EU) 2019/2121. The new Article 124, now referred to as the "*Report of the administrative or management body to members and employees*", reveals through its title the increasing importance of this document in the context of the protection

[101] Article 38, paragraphs 1,2,3,4 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[102] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

[103] Section 2.2 *"Novelty elements in the Legislative Decree n. 19/2023"*

[104] Article 1, paragraph 3, s) *"public benefit: any public support measure for the development of productive activities, referred to as public finance or European funds, granted in one of the forms provided for in Article 7 of the Legislative Decree of 31 March 1998, n. 123, and subject to mandatory entry in the State aid register or other register required by law" - DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

of the rights of members as well as the ones of workers. This regulatory change underlines the expansion of the role of the report - that can be appreciated also in the Article 21 of the new D. Lgs. n. 2019/2023 amending the one of the previous Legislative Decree n. 108/2008 - highlighting its goal of improving transparency and support for both members and employees within the company structures.

Article 21, in fact, provides that the administrative body draws up a report for members and employees. This document must state and justify the legal and economic aspects of the cross-border merger, as well as describe the consequences and implications of the cross-border operation for the workers and the future prospects of the company. The legislation allows this report to be dispensed in the case in which all the members - namely the holders of voting rights in the assembly and the holders of voting financial instruments - unanimously decide to go on without it. This option represents a significant innovation compared to the past, in fact Article 8 of the old Legislative Decree n. 108/2008, which implemented the now repealed Directive 2005/56/EC, provided that the report of the administrative body should follow the provisions of Article 2501-quinquies of the Civil Code: however, as highlighted by the Notary Council of Milan[105] it was not really possible to renounce to this report since the only aspect on which the members could unanimously agree was the waiver of the notice period of thirty days before the meeting deliberating on the draft merger. The reason for this restriction laid in the fundamental role of the report, in carrying out an informative task - crucial to the general interest - in explaining the implications of the transaction for shareholders, employees and creditors.

However, this "opt-out possibility" - in the new legislation - does not automatically extend to the report for workers, except in the specific case where the only employees of the company involved in the merger and its subsidiaries

[105] Fusione transfrontaliera: relazione dell'organo gestorio. (2009). *Consiglio Notarile Di Milano*, Massima n. 113-27 gennaio 2009. https://www.consiglionotarilemilano.it/wp-content/uploads/2021/02/Massima-113.pdf

are the members of the administrative body, thus making the report optional. "*If* [therefore] *a waiver were not allowed, the execution time of most operations (…) would suffer*"[106] especially in those companies that employ a very limited number of workers, (who may - in some cases - agree to give up the report).

The administrative body's report may be drawn up either in the form of a single document or as two distinct documents for members and employees respectively. The document intended for members details and justifies the common draft terms of cross-border merger both legally and economically, stating the liquidation value of the shares or units in the event of withdrawal, the exchange ratio and the criteria that have been adopted to establish it: members who did not participate in the common draft terms decision and are in some way affected by the exchange ratio, "*have the right to receive (...) from the company resulting in the merger, a compensation equal to the difference between the value that the participation would have had on the basis of a fairly determined exchange ratio*"[107] and the one fixed in the common draft terms of cross-border merger. Moreover, the report must report the possible difficulties encountered in the evaluation, also to clarify the rights and protections available to members (such as the right of withdrawal and the possibility of contesting the exchange ratio).

The document aimed at workers, on the other hand, explains the legal and economic effects of the operation in question on the employment relations, highlighting any significant change in working conditions or the location of production activities. In addition, it also illustrates the planned measures to protect employment and explain the consequences of the transaction on any subsidiary. In the case in which workers express an opinion regarding the report, the management body *"shall refer to the shareholders' meeting"*[108]. Moreover, if this opinion is received *"at least five days before the meeting, it shall be*

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[106] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.
[107] Article 26, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[108] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

attached to the administrative body's report [and] *filed with the company's registered office"*[109].

Regardless of the role of the Italian company as an incorporating or incorporated company - as regards the adequacy of the exchange ratio - the current legislation[110] requires the drawing up of an adequacy report by a statutory auditor or an audit firm (one for each of the companies entailed in the cross-border operation). This document is further regulated by article 2501-*sexies* "*The experts' Report*", of the Italian Civil Code. The appointment of the expert has to be made by the Italian court *"competent according to the registered office of the Italian company involved in the operation"*[111], if the acquiring company is a public limited company, be it Italian or foreign. Otherwise, the responsibility for the appointment lies in the Italian company itself. It is also possible that the merging companies may require a joint expert, which is a decision for the competent court under the law applicable to one of the companies involved.

The expert report assesses not only the adequacy of the exchange ratio but also that of the liquidation value expected for shareholders exercising the right of withdrawal, as defined in the draft terms of cross-border merger. It is necessary to specify the methods that have been used to calculate the liquidation value, the results obtained with these methods - in addition to any difficulties encountered during the calculations - and provide an assessment of the adequacy of the methods used and the relative importance of each in determining the final value. To prepare the report, the expert has the right to access all relevant information and documents of the company and to conduct the necessary verifications to complete its assessment. "*If the members and holders*

[109] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.
[110] Article 22 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[111] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

of other financial instruments that grant the right to vote, of each of the participating companies, unanimously waive it"[112] the report in question is not required.

2.3.3 Disclosure

It is deemed relevant to note that Legislative Decree n. 19/2023 has introduced significant changes – in terms of disclosure - compared to the previous legislation (i.e. D. Lgs. 108/2008), eliminating the need to publish an "extract" of the common draft terms of cross-border merger in the Official Gazette. In fact, Article 20 states that the draft merger has now to be necessarily filed - for the purposes of registration in the Companies Register - at least thirty days before the date of the general meeting convened to approve it. Alternatively, the common draft terms and the relevant notice (dealt with hereafter) may be published on the company's website for the period preceding the meeting and, if the project is approved, until the merger is completed[113].

A notice must be published in the Companies Register for members, creditors and workers' representatives, or directly to the workers (in the case in which representatives are absent) - precisely, respecting the same time-limit mentioned above - informing on the possibility and the modalities of submitting observations on common draft terms, up to five days before the relevant meeting[114].

If the common draft terms of cross-border merger are published on the company's website, it is still necessary to file an "information note"[115] in the

[112] Article2501-*sexies* C.C. | *Codice civile italiano* (2024). Gruppo 24Ore. (17th Edition).
[113] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.
[114] As pointed out previously, in this case, the administrative body shall these observations refer to the shareholders' meeting.
[115] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

Companies Register, at least thirty days before the meeting scheduled for the approval of the project. This information note has to include details regarding each company involved in the merger such as the type, the name and the registered office; the Business Register in which all the companies participating in the transaction are registered together with the relevant registration numbers; how creditors, employees and members will be able to exercise their rights. In addition, it has to indicate the website where the common draft terms of cross-border merger, the notice and other detailed information are freely accessible. Also through the BRIS[116], all these documents are made publicly available.

Furthermore, Article 23 sets out new provisions regarding the availability of the necessary documentation. Specifically, as regards the administrative body's Report regulated by Article 21 of the Legislative Decree n. 19/2023, it now has to be accessible to members both in paper form at the company's Registered Office as well as in an electronic format, at least forty-five days before the meeting for the approval of the common draft terms of the cross-border merger (unlike the previous Legislative Decree n. 108/2008 that required the term to consist in only thirty days[117]). The same report must also be sent to the workers' representatives or - in their absence - directly to the workers themselves, within the same period. In parallel, the common draft terms must be made available in the same way as the directors' Report.

The second paragraph of the Article points out that the experts' Report "*and other acts provided for in Article 2501-septies of the Civil Code*"[118], must be made available to members. These documents can be consulted at the head office or in

[116] Interconnection of EU Business Registers, providing information on companies registered in any EU country - *European Justice*. (n.d.). https://e-justice.europa.eu/. Retrieved May 9, 2024, from https://e-justice.europa.eu/content_business_registers_at_european_level-105-en.do#:~:text=Interconnection%20of%20EU%20Business%20Registers,-From%20June%202017&text=This%20means%3A,cross%2Dborder%20mergers%20of%20companies.

[117] Article 8, paragraph 2 - *Decreto Legislativo n. 108/2008*. (2008, June 17). Gazzetta Ufficiale. https://www.gazzettaufficiale.it/eli/id/2008/06/17/008G0130/sg

[118] Article 23, paragraph 2 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

electronic format, during the thirty days preceding the meeting called for the approval of the common draft terms of cross-border merger.

2.3.4 Approval of the common draft terms of cross-border merger

Having reviewed the reports - previously analysed - provided for by Articles 21 and 22 of Legislative Decree n. 19/2023, each general meeting of the companies participating in the cross-border operation has to take a decision on the approval of the common draft terms, as well as assessing any possible amendment to the memorandum and articles of association. In accordance with the fourth paragraph of Article 126 "*Approval by the General Meeting*" updated with Directive (EU) 2019/2121 (transposed by the new Legislative Decree), Member States must specify the cases in which the approval of a cross-border merger decided by the general meeting cannot be challenged. These include inadequate determination of the share-exchange ratio, an unsatisfactory assessment of cash netting or situations where information relating to the exchange ratio or to cash netting does not comply with legal requirements[119].

The common draft terms of cross-border merger need to be approved by the general meeting of the Italian company involved - in the case in which it's a limited liability company - or directly from the shareholders of a partnership "*in a non-party manner, unless the social pacts require it*"[120] even though it then has to be formalized by a public deed or with authenticated signatures.

A decision to approve the draft terms of cross-border merger may be taken either before or after ninety days from the date of filing the common draft terms

[119] Article 126, paragraph 4 - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

[120] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

in the Companies Register [121] or the informative note - necessary in the case the common drat terms are published on the company's website - as indicated in the first paragraph of Article 28[122]. The crucial element is that the pre-merger certificate - as specified in Article 29 - must certify that the resolution approving the common draft terms has been registered in the Companies Register and that the period necessary for any kind of objections raised by creditors has elapsed.

In the case of a "simplified" merger procedure (as outlined within Article 38 of D. Lgs. n.19/2023) the common draft terms of cross-border merger can be ratified directly by the Italian incorporated company's administrative body, without the need to rely on the shareholders' meeting. Moreover, the articles of association of the Italian company that incorporates can establish that the approval of the common draft terms - that will need, however, to be necessarily formalized by a public deed - is carried out by its administrative body. However, in the event that the shareholders of the acquiring company - representing at least five percent of the entire share capital - within eight days of its filing in the Companies Register or its publication on the company's website, require it, it is possible that such a decision on the approval of the common draft terms is, instead, taken by the general meeting[123].

Article 24 states that "*the provisions of law required for the amendment of the Articles of Association*"[124] shall determine the necessary proportion of share capital for the validity of the constitution of the General Meeting convened to approve the

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[121] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

[122] The pre-merger certificate can be issued *"before the ninety-day period if it results that there is the consent of the creditors of the company prior to the registration of the draft terms of merger or the payment of the creditors who have not given their consent or the deposit of the corresponding sums with a bank (…), for all the merging companies, by a single audit firm which ensures, under its own responsibility under the same Article 2501-sexies, sixth paragraph, that the assets and financial position of the merging companies, also taking into account the change in applicable law, render unnecessary any safeguards to protect those creditors."* As pointed out in Article 28, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[123] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

[124] Article 24, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

common draft terms of cross-border merger. As regards the *quorum* needed to decide upon the common draft terms, the rules require that the latter has to be approved in specific ways depending on the legal form of the company involved in the transaction.

In the case of limited liability companies, it is necessary that the common draft terms obtain the favourable vote of two thirds of the capital represented at the shareholders' meeting, which must at the same time constitute a representative majority of at least half of the share capital. This implies therefore the necessity of the "*vote of 50.01 percent of the share capital, which must be "matched" to the constitutive quorum equal to half of the share capital: Art. 2479bis, paragraph 3, C.C.*"[125]. With regard to companies limited by shares, however, the approval of the common draft terms requires only the approval of two thirds of the capital present at the shareholders' meeting.

As regards the banking sector, mergers involving regulated entities are prohibited from registering common draft terms in the relevant Companies Register until the supervisory authority[126] grants them the relative authorisation as the *"Banca d'Italia's authorisation takes place at a stage prior to the initiation of the civil proceedings; thus, avoiding any market disturbance that may occur in the time interval between the public announcement of the transaction and the decision on the authorisation"*[127]. This topic will, however, be discussed within the next Chapter[128].

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[125] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

[126] "Sancito, ad esempio, dagli artt. 57, comma 2, del TUB e 201, comma 1, del CAP rispettivamente per banche e imprese di assicurazione" - *Appunti sui profili regolamentari delle operazioni societarie transfrontaliere*. (2023, October 3). www.dirittobancario.it. https://www.dirittobancario.it/art/appunti-sui-profili-regolamentari-delle-operazioni-societarie-transfrontaliere/

[127] *Appunti sui profili regolamentari delle operazioni societarie transfrontaliere*. (2023, October 3). www.dirittobancario.it. https://www.dirittobancario.it/art/appunti-sui-profili-regolamentari-delle-operazioni-societarie-transfrontaliere/

[128] Section 3.3.2 *"The relationship between cross-border bank mergers and Legislative Decree n. 19/2023"* of Chapter 3

2.3.5 Withdrawal

Any member of an Italian company who does not agree with the proposal to approve the draft terms of cross-border merger, who has abstained or is not present at the meeting, has the right of withdrawal according to Article 25 of Legislative Decree n. 19/2023[129]. Within the new legislation, the protection of minority shareholders who do not approve the merger (compared to the previous rules provided for by Legislative Decree n. 108/2008) has been examined in depth recognising the right of withdrawal as one of the main possible safeguards offered. Above all, this right of withdrawal is also essential to curb the influence of majority shareholders.

The right of withdrawal is conferred to the member in different circumstances. In particular, the shareholder has the right to withdraw always in the event that the Italian company is incorporated into a foreign company (a measure taken in order to protect Italian members who become part of a foreign company – therefore being subject to a different legislation - following a cross-border merger). In addition, the right of withdrawal is also provided for when the Italian law or the statute of the company so establishes[130], in the event that the acquiring company is an Italian company.

With regard to the exercise of this right, members who have participated in the meeting have to exercise their right of withdrawal within fifteen days of the registration of the resolution approving the common draft terms of cross-border merger in the Business Register, and in any case not later than thirty days after the adoption of the resolution. Similarly, members who did not attend the meeting have fifteen days - from the date of registration of the approval resolution in the Register of Companies - to exercise their right of withdrawal.

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[129] Further regulated by Article 2473 C.C. | *Codice civile italiano* (2024). Gruppo 24Ore. (17th Edition).

[130] *"A merger as a reason for withdrawal is provided for in Art. 2473, paragraph. 1 of the Italian Civil Code (on the subject of withdrawal from a company limited by quotas* [S.r.l.]*, but not in Art. 2437 of the Italian Civil Code (on withdrawal from a company limited by shares* [S.p.A.]*)"* - Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

The notification of withdrawal has to be sent by registered letter or by a document with electronic signature, addressed to the digital domicile of the company. This notification must include the identification of the member who intends to withdraw and his address for communications relating to the procedure, as well as the number and type of shares on which he exercises the right of withdrawal[131]. Moreover - in order not to incur decadence - any dispute concerning the liquidation value previously specified in the common draft terms of cross-border merger must be included.

The process of shares liquidation of the withdrawing member includes the option for other members to buy the shareholding of the outgoing member and - possibly - the sale of these to third parties, based on the value established previously in the common draft terms of cross-border merger.

In the specific case of companies limited by shares, the option must be registered in the Companies Register within fifteen days from the end of the period defined for the declaration of withdrawal. Moreover, within sixty days from the effectiveness of the merger, the liquidation of the shares of the withdrawing member must be completed. It's deemed important to highlight the fact that even creditors have the right to object to the merger (as discussed in the next sections) and that the acquiring company must meet the minimum capital requirements required by law.

Italian legislation regulates the withdrawal procedure and is also competent for any disputes relating to the withdrawal of a shareholder of an Italian company (i.e. regarding the share-exchange ratio), even after the execution of a cross-border merger.[132]

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[131] Article 2437-*bis* C.C. | *Codice civile italiano* (2024). Gruppo 24Ore. (17th Edition).

[132] *"The rights referred to in Articles 25 and 26 shall be governed by the law of the State in which the merging company is governed and any disputes relating thereto, (…) shall be assigned exclusively to the jurisdiction of that State, even after the cross-border merger has taken effect."* - Article 27, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

In the event that any dispute arises regarding the value of the share-exchange ratio due to the withdrawing member, its value will be determined through a sworn report of an expert, appointed – precisely - by the Italian Court, who will also settle the legal fees and determine his compensation. The request for the appointment of the expert must be submitted within thirty days of the registration of the merger resolution in the Business Register. The expert has a time limit of sixty days to complete his work, which can, however, be extended by another sixty days in the presence of "serious reasons".

If the liquidation value calculated by the expert is higher than what specified the common draft terms of cross-border merger - within sixty days of the presentation of the expert report - the difference shall be paid in the court's registry

The member exercising the right of withdrawal shall retain his position as a member until the merger becomes effective, unless his shares have been liquidated in advance.

As regards the banking sector - specifically the terms for the opposition of creditors - "*Art. 57 paragraph 3 of the TUB reduces the ordinary term ex art. 2503 c.c. from 60 to 15 days (starting from the registration in the register of companies of the Shareholders' Meeting resolution approving the merger)*"[133] in order to accelerate the closure of proceedings. Again, this topic will be discussed more in depth within the next Chapter[134].

[133] *Appunti sui profili regolamentari delle operazioni societarie transfrontaliere*. (2023, October 3). www.dirittobancario.it. https://www.dirittobancario.it/art/appunti-sui-profili-regolamentari-delle-operazioni-societarie-transfrontaliere/

[134] Section 3.3.2 *"The relationship between cross-border bank mergers and Legislative Decree n. 19/2023"* of Chapter 3

2.3.6 The pre-merger certificate and the objection by creditors

Once the general meeting of the Italian company has approved the common draft terms of cross-border merger, the company – as pointed out specifically within Article 29 of the D. Lgs. n. 19/2023 - has to request to the notary the release of the pre-merger certificate. This step is necessary in order to proceed with the signing of the merger deed and the following issue of the final certificate. The content of the request in question is a novelty compared to the previous legislation (i.e. that of D. Lgs. n. 108/2008[135]) which was rather limited and focused mainly on what elements should be certified by the notary and the deadline for sending the certificate and the common draft terms to the competent authority for the verification of the legality of the transaction. The pre-merger certificate assumes, therefore, greater importance - in the new legislation - since it also establishes the responsibility of the legality control between the different entities involved, both in the state of origin and in the destination state. In addition, it is essential that the final verification process by the appointed body in the country of destination is as simple as possible, given the need to deal and to comply with different national legislations.

The request for the issue of the pre-merger certificate has to include: the approved common draft terms of cross-border merger; the decision of approval of the common draft terms taken by members; the reports of directors and independent experts, together with any comment or observation made by members, employees and creditors regarding the common draft terms. It should also include a replacement declaration confirming the start of the required negotiation procedures "*where at least one of the merging companies applies a system of employee participation*"[136]; up-to-date certifications on public debts (existing or non-existent) of the Italian company involved in the operation, or their regulation, in the event that "*the cross-border merger results in*

[135] Article 11 - *Decreto Legislativo n. 108/2008*. (2008, June 17). Gazzetta Ufficiale. https://www.gazzettaufficiale.it/eli/id/2008/06/17/008G0130/sg

[136] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

a company subject to the law of another state"[137], in addition to the consent of processing such data by the Italian company.

The request must also confirm that there have been no changes to the information - contained in the common draft terms of cross-border merger - relating to the conditions of public debts (localized and not) previously declared (also providing evidence of guarantees or payments made); include details of any parent, subsidiary or affiliated company[138]. This documentation can be sent to the notary's digital address with a digital signature. In the case in which the notary has doubts about the real identity of the applicant or his ability to represent the company, he is entitled to request the physical presence of the parties.

The notary - after a careful analysis of all the documentation in his possession - proceeds with a series of crucial checks. First, it checks that the resolution approving the common draft terms of cross-border merger has been formally registered in the Register of Companies. Next, he checks that the deadlines for creditors' opposition have passed, making sure there are no legal obstacles that could slow down or prevent the smooth running of the process. In addition, it examines whether the company has complied with all regulatory obligations - as specified by Article 30 of D. Lgs. n. 19/2023 - concerning public debts and public benefits received by the Italian company.

The notary also ensures that there are no conditions that could hinder the implementation of the operation[139]. This includes verifying that there are no

[137] Article 30, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[138] As provided for in Article 2359 "*Subsidiaries and associated companies*" C.C. | *Codice civile italiano* (2024). Gruppo 24Ore. (17th Edition).
[139] As provided for in Article 29, paragraph 3: "*f) the absence, on the basis of the information and documents received or acquired, of conditions preventing the implementation of the cross-border merger relating to the applicant company*" - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

fraudulent intentions or abuses in the merger process[140], thus confirming that the transaction was conducted in good faith and with legitimacy.

The pre-merger certificate has to be issued by the notary "*without delay and subject to reasons of exceptional complexity, specifically justified, not later than thirty days after receipt of the complete documentation*"[141]. Within the same period, the notary must also inform the directors of the company about any motivation or condition that prevents the issuance of such certificate, establishing a definitive deadline to correct these shortcomings, if possible. In the event that corrections are not performed, the notary may decide to refuse the issuance of the certificate, providing a written justification[142].

In the case in which the issuance of the certificate is denied, the administrative body has the opportunity - within thirty days from the reception of the notification of refusal or after the deadline for the notary to issue the certificate (in the event that it has not been issued) - to appeal to the Court. If the Court verifies that all the legal conditions have been met, it will issue the certificate with the Decree. Otherwise, if the formalities required by law have not been fulfilled or the procedures necessary for the merger have not been observed, "*the Tribunal shall proceed pursuant to paragraph 5, first sentence*" [143] of Article 29[144].

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[140] As provided for in Article 29, paragraph 3: "*g) that, on the basis of the information and documents received or acquired, the merger is not carried out for manifestly abusive or fraudulent purposes, resulting in the infringement or circumvention of an overriding rule of Union or Italian law, and that it is not aimed at the commission of crimes according to Italian law*" - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[141] Article 29, paragraph 4 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[142] Article 29, paragraph 5 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[143] Article 29, paragraph 7 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[144] "Article 29, paragraph 5: "*If the notary considers that the conditions laid down by law have not been fulfilled or that the formalities necessary for the merger have not been complied with, inform the directors of the applicant company without delay of the reasons for not issuing the certificate and set the company a time limit for remedying such deficiencies, if it considers that they can be remedied.*" - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

As regards the disclosure of the pre-merger certificate – being it released or not - the law states that the certificate has to be filed in the Companies Register by the administrative body and made accessible through the BRIS system. In addition, the administrative body has the task of registering also the refusal of an appeal submitted to the Court to obtain the preliminary certificate through judicial procedure, in the Business Register. This shows that the preliminary certificate, once issued by the Italian notary, requires an independent registration, with responsibility falling on the directors of the company rather than on the notary.

With the aim to protect and guarantee adequate safeguards to the creditors of the companies involved in a cross-border merger, Legislative Decree n. 19/2023 - within Article 28 - establishes that "*the pre-merger certificate related to cross-border merger may be issued no earlier than ninety days after the date of the filing of the common draft terms of cross-border merger (or the information note required in case of disclosure of the common draft terms on the company's website) with the Companies Register*"[145]. However, there are exceptions that allow the early release of the certificate: (i) in the case in which creditors of the Italian company - whose claims were originated before the deposit of the common draft terms - have given their consent to the transaction; (ii) where debts with creditors who have not given their consent have already been settled; (iii) where all the sums due to such creditors have been deposited in a bank. This last condition is however not necessary when a single firm of auditors confirms that the capital and financial position of all the companies involved in the transaction - also taking into account the change in the applicable law - does not require additional guarantees for the various creditors.

[145] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

During the ninety-day period[146], creditors (with claims arising prior to the filing of the common draft terms) may object to the merger if they are concerned that it may cause them *material injury*. If the Court finds these concerns to be unfounded - or if the company has provided adequate guarantees - it may decide that the merger will proceed despite the opposition of the creditors.

As regards the protection of the creditors' interests, therefore, it can be stated that the new Legislative Decree has clearly introduced novelty elements with respect to the previous Legislative Decree (i.e. n. 108/2008, which implemented the Directive 2005/56/EC, now repealed) which was not able to offer such a precise and detailed regulation on the specific protection of creditors. In fact, it merely mentioned that the pre-merger certificate had to confirm the expiry of the period necessary for creditors' opposition[147].

2.3.7 Deed of cross-border merger and issue of the "final" certificate

As provided for also in the previous Legislative Decree (i.e D. Lgs. n. 108/2008), «*the cross-border merger results from a public deed*»[148] which is stipulated according to the law of the country of destination (where the resulting company will arise). When the acquiring company is Italian and the incorporated company is located within the European Union, the Italian notary will conclude this act only after receiving - through the BRIS system - the pre-merger certificate issued by the foreign authority (relative to the incorporated company) in addition the one issued by his own (concerning the Italian company). After the

[146] "*The time limit is reduced to thirty days if the operation involves companies other than limited liability companies*" | Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.
[147] Article 11 - *Decreto Legislativo n. 108/2008*. (2008, June 17). Gazzetta Ufficiale. https://www.gazzettaufficiale.it/eli/id/2008/06/17/008G0130/sg
[148] Articcle 32, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

merger is formalised, the notary issues a "*final certificate*"[149] , which certifies the verification of legal compliance[150].

This final certificate must be issued within thirty days of the receipt of the necessary documentation, which includes - in addition to the approvals of common draft terms by the companies involved - also all the relevant pre-mergers certificates. Subsequently, the deed of merger - together with the pre-merger certificates and the final certificate – needs to be filed in the Register of Companies related to the registered office of the Italian company within thirty days of its formalization.

If, instead, the incorporated company is Italian while the acquiring one is foreign (still being subject to the legislation of another European Union Member State), the process presents some differences: as highlighted in the opening of this section, it is the competent foreign authority to draw up the cross-border merger deed - after receiving the pre-merger certificate (relating to the Italian company) from the Italian notary and having issued its own pre-merger certificate – to complete, subsequently, the disclosure formalities required by the law of the country in which the acquiring company has its registered office. This deed, together with the necessary translation and legalization[151], has to be filed with the Italian notary (together with the foreign certificate), to be then registered in the Italian Business Register within forty-five days of the issuance of the final certificate. The cancellation of the Italian company from the Italian Companies Register will, however, only take place after the notice from the

[149] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

[150] *"The notary verifies that:*
a) the companies involved in the cross-border merger have approved an identical joint project;
b) the pre-merger certificates for each of the participating companies have been received;
c) where necessary, arrangements for the participation of employees have been established in accordance with Article 39." Article 33, paragraph 2 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[151] *"In the absence of legalisation (or apostille), the document drawn up abroad is considered tamquam non esset on the point of view of the Italian legal system"* in fact *"the legalisation of documents drawn up abroad and to be enforced in the Italy [...] is an obligatory and peremptory condition for the effectiveness of such documents in Italy"* - Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

foreign Companies Register that the merger has become effective (through the BRIS system).

In the case in which the competent foreign authority does not proceed with a public deed (because the legislation of that specific member states does not require it), "*the deed of merger is drawn up by the notary*"[152]. This happens after obtaining the pre-merger certificate (relative to the foreign company) by the foreign authority through the BRIS. Once the Italian notary has stipulated the merger deed, it issues its own pre-merger certificate that will be sent to the foreign authority, allowing it to issue the final certificate[153]. The foreign authority then, upon receipt of the certificate, carries out the all the necessary formalities in accordance with the law of the country in which the acquiring company is established.

Subsequently, the final certificate of the foreign authority is sent to the Italian notary, who proceeds with its filing, together with that of the deed of merger at the Companies Register in which the Italian company is registered. Also in this case, the cancellation of the Italian company from the Italian Business Register will occur only when the Italian Register of Companies will be informed by the foreign Registry that the merger has actually entered into force.

If the Italian notary assesses that the legal conditions for the issue of the final certificate[154] have not been met, he has to immediately inform the administrative body of the Italian company, explaining the reasons that hinder the issue of the certificate, also giving the company a useful time to correct any

[152] Article 32, paragraph 3 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[153] *"If the company resulting from the merger is an Italian company, the notary must issue the pre-merger certificate prior the completion of the public deed of merger; if the company resulting from the merger is a foreign company belonging to a jurisdiction where a public deed of merger is not required, the deed of merger must be executed by the Italian notary who will issue the pre-merger certificate after the completion of the public deed of merger"* Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer.

[154] Specified in paragraph 2 of Article 33 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

irregularities (if deemed to be solvable). The company has the right to submit its comments within ten days of receipt of the communication.

"If it is not possible to remedy such deficiencies, or the company shall fail to do so within the time limit granted to it, or in the period possibly extended for serious reasons"[155] the notary must formally notify the administrative body of the refusal to issue the final certificate, justifying his decision (after considering also the comments received from the company).

Within thirty days of the notification of refusal (or expiry of the thirty-day period granted to the notary to issue the certificate), the administrative body of the company is authorized to request the issue of such a certificate by appealing to the competent Court, who - after having verified that all the legal conditions have been met and after consulting the public prosecutor - may decide to issue the final certificate *"by way of Decree"*[156]. If the court finds that the conditions have not been met, it may reject the request or - if it is deemed possible - grant the company an additional period to correct the irregularities.

2.3.8 Effectiveness (and invalidity) of the cross-border merger

As provided for by Article 35 of D. Lgs. n. 19/2023, in the case in which the company resulting from the merger is subject to Italian law, the transaction takes effect from the date of registration of the deed in the Companies Register where the company has its registered office[157]. Otherwise, if the company resulting from the cross-border operation is subject to the legislation of another

[155] Article 29, paragraph 5 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[156] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer
[157] *"A later date may be fixed in the* [case of a] *merger by incorporation"* as provided for in Article 35, paragraph 1 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it - https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

European Union Member country, this legislation will determine when the transaction will begin to produce effects.

In addition, if the merged company is Italian, the Commercial Register office of the place where it has its registered office "*informs without delay, through the BRIS, the corresponding Companies Register in which each participating company is registered (...), that the transaction has become effective*"[158] leading to the cancellation of these companies from their respective Registers. If the resulting company is from another Member State, the Companies Register in which it is registered must inform the Italian Commercial Register, also via BRIS, that the merger is effective, so that the Italian company can be deleted from the Italian Business Register.

Communication between the Business Registers of the different Member States involved (facilitated by the BRIS) is therefore essential for the precise coordination of information to ensure that the process is properly recorded, especially because of the cross-border nature of the transaction involving companies subject to different legislations. It should be noted that only after the registration of the merger deed, the cancellation of the participating companies from the Register of their home state can be realized.

"*Once the cross-border merger has taken effect, it cannot be declared null and void*"[159]. However, the right to compensation for any damage suffered by members and third parties as a result of the cross-border merger remains, as specified in the second paragraph of Article 37 of D. Lgs. n. 19/2023.

[158] Article 5, paragraph 2 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg
[159] Busani, A. (2023). *Cross-border and international mergers, divisions and conversions* (Edition II). Wolters Kluwer

2.3.9 Consequences of a cross-border merger

After the merger becomes effective, the company resulting from the cross-border operation (or the acquiring one) "*assumes all the rights and obligations of the companies involved in the merger*"[160] ensuring the continuity of all substantive and procedural relationships existing at the time before the merger. In addition, in the first balance sheet following the cross-border operation, assets and liabilities have to be recorded at book values at the date on which the merger takes effect.

[160] Article 2504-*bis* C.C. | *Codice civile italiano* (2024). Gruppo 24Ore. (17th Edition).

CHAPTER 3

Prospects and Limits of cross-border Mergers: *a transversal and sectoral analysis of the matter*

3.1 Introduction of the analysis

Having analysed all of the above – ranging from the evolution and development of the European Community legislative framework[161] regarding cross-border mergers to the contents of its transposition in Italy[162] - it is, finally, appropriate to have a look at the new regulatory framework in a "practical" perspective; not so much through the exemplifying re-proposal of the hypothetical steps and procedures of a cross-border merger, but rather through the analysis of the concrete and full usability of the new Directive.

The critical question is whether the common law system promoted by the Directive (EU) 2019/2121 for cross-border operations provides an adequate and integral response to all the potential aggregation needs present in the European Community constellation and if any deficiencies are simply linked to the natural transitory incompleteness of such a complex evolution and legislation or do not depend rather on the needs posed by the - not simple - declination of the delicate political-economic relationships and balances between the different Member States.

[161] From the Directive 2005/56/EC till the Directive (EU) 2019/2121
[162] From Legislative Decree n. 108/2008 till Legislative Decree n. 19/2023

3.2 A "still not perfectly" harmonized EU legal framework

A critical initial consideration is undoubtedly the fact that the Directive (EU) 2019/2121 - despite fostering a worthwhile transition to a more homogeneous Communitarian regulation of mergers operations – still leaves many aspects of the procedural dimension uncovered.

As highlighted for example in Italy - by Assonime - with the issuance of the last Directive, "*the crucial step of establishing a body of directly applicable uniform European law has not yet been taken. For businesses, in fact, the major problem lies in the different procedural regimes that cross-border operations may take on in various legal systems*"[163].

Moreover, traces of this issue can be found – as pointed out in the previous Chapter[164] – in the Legislative Decree n. 19/2023, for instance within Article 32 ("*Cross-border merger deed*"), which addresses the fact that sometimes the law of the destination Member States of the company resulting from the cross-border operation does not require a public deed for the transaction in question; an issue that the third paragraph of the Article specifically resolves by stating that "*when such law does not provide that the cross-border merger is to result from a public deed and in the case of an international merger, the merger deed has to be drafted by the notary*"[165].

Although it can be absolutely stated that the Directive (EU) 2019/2121 has been able to reduce uncertainties - promoting and facilitating the freedom of establishment for companies moving across the European Community - by regulating and facilitating cross-border operations, it has been unable, to some extent, to resolve some important technical issues, adding instead - in some cases - additional bureaucratic complexity.

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[163] Assonime (Italian Association of Public limited liability Companies). (2023). *Circolare 16/2023 - Le operazioni straordinarie transfrontaliere*. www.assonime.it. https://www.assonime.it/attivita-editoriale/circolari/Pagine/Circolare-16_2023.aspx

[164] Section 2.3.7 *"Deed of cross-border merger and issue of the "final" certificate"* of Chapter 2

[165] Article 32, paragraph 3 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

At least according to some doctrine, the way in which this process of harmonisation and simplification of legislation has been carried out "*could, on the other hand, have led to problems linked to the heterogeneity of the legislation of individual Member States and the identification of the applicable law, which may still prove to be an obstacle to the realisation of the mobility of companies within the common European area"*[166]. This is because, in a sense, some of these issues have only been addressed at European level for some extraordinary operations, in relatively recent times and with a technique that mainly aims to preserve the peculiarity of national legislations. It is therefore necessary to assess whether this choice is complete and adequate to achieve all the objectives set, considering the different nature of the interests at stake.

Moreover, it could be argued that because, for example, the procedure outlined in the Directive is not independent from national re-incorporation procedures, it does not completely and adequately harmonise all divergent rules and formalities.

On the contrary, as pointed out previously, it could even introduce an additional bureaucratic layer into the process. Some issues will, therefore, continue to emerge because of the - still not totally resolved - fragmentation of national procedures and "*the insufficiency of the bottom-up approach taken by the EU legislator*"[167] that is, the harmonisation of national company law at a lower level rather than of doctrines at a higher (EU) level. The new Directive adds a European layer to the different national procedures for cross-border operations, while, however, remaining dependent on national laws, to some extent, in some cases.

The lack of a uniform procedural regime is an issue, on closer inspection, that - if it appears having little impact in the case of cross-border mergers involving

[166] Ferrari, P. (2023, May). *Operazioni straordinarie cross-border e tutela collettiva dei lavoratori*. Giappichelli.
[167] Tasman, D. (2022). The EU legal framework on corporate seat transfers: lifting the roadblock to the freedom of establishment or digging bureaucratic rabbit holes? *Social Science Research Network*. https://doi.org/10.2139/ssrn.4312731

enterprises with great economic weight, moreover, already in itself structured and equipped to deal with technical issues of international scope - risks to be a non-marginal deterrent for the range of aggregations that might involve smaller companies[168] - culturally and technically linked to a more "home-grown" dimension - for which the approach to a cross-border merger might prove particularly challenging and burdensome, from multiple points of view.

In 2022, when addressing the delicate topic of the still not perfectly harmonized EU legal environment, specifically relative to cross-border divisions, Defne Tasman proposed two possible "instruments" "*to alleviate some of the burden for legal entities, although without* [completely] *solving the problem*"[169].

A "*Best Practice Guide*" is one of the suggestions proposed by Tasman, recommendable to reduce the differences still existing in national procedures and arbitrary decisions. Although this proposal has been promoted and conceived in the specific context of cross-border conversion, it is deemed that, with the necessary modifications, it can be adapted and, therefore, also used in the context of cross-border mergers, in order to clarify the process and the regulations to observe. It could be, therefore, imagined that this guide - drawn up by a group of experts - would include information on the necessary requirements explained in the Directive, perhaps with the addition, also, of specific case-by-case examples, to provide further information on how to deal with the cross-border merger regulation.

In order to facilitate the application of this Guide and the Directive by the authorities, the EU legislator could consider the creation of a special body, for instance a European Agency, which could ensure a fair and effective application of the current EU legal framework, "*promote cross-border practices and*

[168] As highlighted in the section 1.5 "*Company Law Package: the proposal*" of Chapter 1, the percentage of SMEs (Small-medium enterprises) is elevated in the European economic environment, therefore making the lack of a uniform procedural regime an important issue.
[169] Tasman, D. (2022). The EU legal framework on corporate seat transfers: lifting the roadblock to the freedom of establishment or digging bureaucratic rabbit holes? *Social Science Research Network*. https://doi.org/10.2139/ssrn.4312731

clarify the ambiguities remaining after the implementation of the Directive"[170]. Furthermore, rather than following lengthy and costly proceedings from national courts to the Court of Justice, that body could also act as an intermediary in determining whether the procedural rules laid down in the Directive have been complied with and whether the Guide has been used to carry out the assessment.

The second suggestion proposed by Tasman regards, instead, a "*Seat Transfer Matrix*"[171] which appears, clearly, to be very specific on the cross-border conversion topic. Nevertheless, the idea of how the matrix has been conceived and the information to be contained in it, could be – again - adapted to the cross-border merger situation.

One could, in fact, imagine a sort of matrix mapping the substantive and procedural rules - of each of the Member State - in order to orient companies through the formalities and processes necessary when they move from one specific State to another specific one, reducing existing uncertainties by providing a greater degree of clarity. Entities wishing to carry out a cross-border operation could thus consult all existing differences in national legislation as well as the requirements to comply with, from the matrix.

It should be noted that, however, these suggestions are obviously not capable of solving the deeper problems or to replace the existing regulations. The complete and absolute free mobility of companies in the European Union internal market is a long-term project whose success "*will depend on a future convergence of doctrines*"[172].

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[170] Tasman, D. (2022). The EU legal framework on corporate seat transfers: lifting the roadblock to the freedom of establishment or digging bureaucratic rabbit holes? *Social Science Research Network*. https://doi.org/10.2139/ssrn.4312731

[171] Tasman, D. (2022). The EU legal framework on corporate seat transfers: lifting the roadblock to the freedom of establishment or digging bureaucratic rabbit holes? *Social Science Research Network*. https://doi.org/10.2139/ssrn.4312731

[172] Tasman, D. (2022). The EU legal framework on corporate seat transfers: lifting the roadblock to the freedom of establishment or digging bureaucratic rabbit holes? *Social Science Research Network*. https://doi.org/10.2139/ssrn.4312731

It is, therefore, reasonable to expect a forthcoming, rapid completion and integration of the regulation on cross-border mergers so that - for a European Union company - the path to be followed for this type of transactions will not represent a legal-procedural challenge but rather a technicality which is easily accessible to all of those enterprises having explored and evaluated the opportunity given by the cross-border operation on a more strictly strategic, economic and operational level.

3.3 The need for a new and different EU regulatory intervention on cross-border mergers in the banking sector

If the deficiency or, at least, the need for further regulatory upgrade represented in the previous paragraph has - so to speak – transversal significance with respect to the European Union cross-border merger topic, another – relevant - one is pointed out within this section, being instead absolutely sectoral in nature, specifically concerning the banking sector.

"*Over the past decade, cross-border merger and acquisition (M&A) activity in the EU banking sector has remained far below its pre-crisis levels*"[173] despite the legislative interventions introduced in response to the crisis. Although the European Union has adopted the Single Rulebook, tried to standardized supervisory practices, established a common framework for crisis management, and founded the Banking Union, barriers and restrictions to capital movement between member countries still persist, preventing the EU from fully reaping the benefits of the single market.

"*The current regulatory framework relies on a territorial approach (…), favours pre-positioning resources with the subsidiaries and entails market fragmentation*"[174]. This situation can, in turn, undermine the comparability of financial institutions across different countries and therefore, as a consequence, diminish the propensity of banking institutions for cross-border consolidation.

Despite progress in the convergence of supervisory practices across the European Union, however, there are still inconsistencies, especially in relation to the links between prudential requirements and restrictions on distributions, as well as the need for a clearer approach to defining risk-specific requirements. In addition, the lack of uniform and fully transparent procedures in the

[173] Gardella, A., Rimarchi, M., & Stroppa, D. (2020). Potential regulatory obstacles to crossborder mergers and acquisitions in the EU banking sector. *Social Science Research Network - EBA*. https://doi.org/10.2139/ssrn.3749447

[174] Gardella, A., Rimarchi, M., & Stroppa, D. (2020). Potential regulatory obstacles to crossborder mergers and acquisitions in the EU banking sector. *Social Science Research Network - EBA*. https://doi.org/10.2139/ssrn.3749447

European Union for the prudential assessment of mergers transactions adds further complexity to the system.

These potential obstacles highlighted above, impact the ability of market operators to fully enjoy the advantages of the Single Market, furthermore influencing its effectiveness in achieving risk-sharing and enhancing financial stability.

3.3.1 European Union interest in cross-border bank mergers

The European Union has always looked with great favour onto banking aggregations, and - in particular - onto cross-border mergers, because of three main reasons that are well stated, specifically, in the ECB (European Banking Union) Annual Report on supervisory activities regarding year 2017, which - reminding that "*a healthy banking system goes together with a healthy market for bank mergers and acquisitions (M&A)*"[175] - already in its first steps of the report, motivates its favour and its general commitment to facilitate banks to undertake mergers across borders for the following motives:

1. firstly, these kinds of operations would promote a greater and stronger financial integration within the euro area (integration that the European Central Bank identifies as a crucial move necessary to reach the shared objective of a genuine, functioning European banking sector);
2. second, the aggregation process would broaden the range of sound investment possibilities and choices for savers, as well as offer more sources of funding both for companies and private citizens interested in accessing them;

[175] *ECB Annual Report on supervisory activities 2017*. (2018, March). www.bankingsupervision.europa.eu. https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf

3. third and crucially important, through cross-border mergers, *"risk-sharing would be improved, helping the European Union economy to become more stable and more efficient"*[176].

Moreover, after stating these important principles, ECB's own 2017 report immediately finds itself having to acknowledge the fact that bank mergers - both domestic and cross-border - are still not frequent or even very limited in numbers, pointing out that - after an initial increase following the introduction of the euro - bank mergers and acquisitions within the European Union have declined conspicuously. Just in 2016, in fact, they hit their lowest point since 2000[177], both in terms of the number of transactions completed as well as their total value. Moreover, such mergers tended to be domestic rather than cross-border.

The major limitation that ECB recognizes for this type of transaction is that of uncertainty about the "rules of engagement," on several fronts, with the aggravation that these uncertainties are further exacerbated and amplified by the cross-border nature of such transactions. Cross-border mergers force banks not only to cross national borders, but also to overcome cultural and linguistic differences. In addition to all of this, the lack of uniformity in the legal and regulatory rules governing supervisory controls over mergers and acquisitions in the Member Countries of the Single Supervisory Mechanism (SSM) can increase costs and act as a barrier to cross-border transactions. National merger regulations, furthermore, vary significantly across countries, adding further complications.

[176] *ECB Annual Report on supervisory activities 2017*. (2018, March). www.bankingsupervision.europa.eu. https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf

[177] *ECB Annual Report on supervisory activities 2017*. (2018, March). www.bankingsupervision.europa.eu. https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf

In principle, the separation of capital and liquidity between jurisdictions plays a key role. The cross-border intra-group requirements waiver options "*are currently being considered as part of the Capital Requirements Regulation (CRR) and the Capital Requirements Directive (CRD IV) review*"[178] and could therefore, if introduced, play a supporting role for cross-border M&A, improving the process, fostering its completion. In addition, CRD IV and CRR still contain a number of options and discretions that can be exercised differently at national level, making it therefore difficult to ensure a coherent overall level of regulatory capital in the Member States, thus harming the full comparability of the banks' financial positions.

There are, of course, other regulatory factors - having an influential role - to be considered in banks' decisions to consolidate. The additional capital requirements - for instance - that may arise from an increase in the size and complexity of a bank (precisely as a result of a cross-border transaction), "*via other systemically important institution (O-SII) buffers or even global systemically important bank (G-SIB) buffers*"[179], may be an additional deterrent. To further complicate the situation, which is already not simple, is the fact that some parts of the legislative framework (such as insolvency regulations), tax systems and other regulations (such as all the one related to consumer protection), that support the functioning of the financial systems, still remain heterogeneous within the European Union and throughout the euro area.

Within the report, however, it is stressed that *"while European banking supervision can point out these obstacles, its role in shaping the environment is limited,* [highlighting the fact that] *consolidation itself needs to be left to market forces, and*

[178] *ECB Annual Report on supervisory activities 2017*. (2018, March). www.bankingsupervision.europa.eu. https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf

[179] *ECB Annual Report on supervisory activities 2017*. (2018, March). www.bankingsupervision.europa.eu. https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf

changes to the regulatory landscape to the lawmakers."[180] The European banking supervision, however, confirms the fact that uncertainty regarding the quality of bank assets has been reduced (thanks in particular to the review of these assets undertaken in 2014, considered an important initiative towards this objective). It also put greater attention to the non-performing (NPL) credit portfolios of banks and stressed that the supervisory authorities were responsible for ensuring the effectiveness of all supervisory processes relating to and applied to merger operations: "*it is important to ensure faithful and consistent implementation of agreed reforms, (…) as well as to take further steps towards completing the banking union, most importantly the European deposit insurance scheme*"[181]. These elements therefore appear to be fundamental to mitigate uncertainty in the sector.

As can clearly be noted, for the ECB there are many reasons why cross-border bank mergers are not very successful; and these are mostly technical reasons, which few "direct" responsibilities - if not where ECB claims that when it comes to mergers, the national laws differ between them - end up attributing to what at the time was the regime carved for cross-border mergers by Directive 2005/56/EC and Directive (EU) 2017/1132, but that in good substance photographs in indirect terms the inability - until there - of the Communitarian Legislator, of common law or of other fields, to act effectively and proactively on the front of the cross-border banking aggregations.

To all of what has been pointed out above, ECB has tried to react over time with the weapons and tools available to it, for example with initiatives aimed at reducing uncertainty related to banks' assets' quality, or encouraging the transition to a more harmonised supervisory system at Community level

[180] *ECB Annual Report on supervisory activities 2017*. (2018, March). www.bankingsupervision.europa.eu. https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf

[181] *ECB Annual Report on supervisory activities 2017*. (2018, March). www.bankingsupervision.europa.eu. https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf

(transition in itself satisfactorily reached, as evidenced - at the introduction of the ECB Annual Report on Supervisory activities regarding year 2023 – by the interview in which Claudia Buch, Chair of The Supervisory Board, declares that with the introduction of the Single Supervisory Mechanism (SSM), Europe has been able to make great strides in the establishment of institutions and in the centralisation of competences at a European level). "*A decade ago, the Supervisory landscape in Europe was fragmented, in terms of both institutions and practices. Cross-border risks were often ignored, and it was impossible to benchmark banks against their peers*"[182]. At present time, Europe benefits from a strong supervisory authority that works in synergy with the various national authorities.

But the fact remains that, in 2023, not a relevant number of cross-border bank mergers took place. The last ECB 2023 report just quoted above, within paragraph 2.1.2.1[183], certifies that there has been a limited number of cross-border consolidations - as in the previous years - despite the new transformations and consolidation dynamics underway. This implies that not even Directive (EU) 2019/2121 is currently experiencing and driving a change in the pace or attitude of the banking system to cross-border mergers, although it must be taken into account that it cannot already have had its full effect on the year 2023 (to which the latest ECB supervisory report refers).

Yet the European Community need to favour and enhance them was and remains concrete, as formalized and highlighted at different levels and from different sources:

- for instance, already on November 22nd, 2017 Francois Villeroy de Galhau, at the head of the French Central Bank and a member of the Governing Council of the ECB, stated that "*healthy and sound consolidation agreements would allow banks to better diversify the risks of the entire*

[182] *ECB Annual Report on supervisory activities 2023*. (2024). www.bankingsupervision.europa.eu. https://www.bde.es/f/webbe/GAP/Secciones/SalaPrensa/ComunicadosBCE/InformacionMus/Arc/ssm.ar2023.en.pdf

[183] *ECB Annual Report on supervisory activities 2023*. (2024). www.bankingsupervision.europa.eu. https://www.bde.es/f/webbe/GAP/Secciones/SalaPrensa/ComunicadosBCE/InformacionMus/Arc/ssm.ar2023.en.pdf

Eurozone, and to channel their funding more efficiently towards productive investments"[184]; but Francois Villeroy de Galhau finds himself having to declare the same thing, after years, even today: "*We need an even greater number of cross-border bank mergers and also a deeper banking union*"[185].

- Andrea Enria, in a recent interview at the end of his mandate as President of the ECB's Banking Supervision, recalled "*the advantage of having more diversified banks between member states: so if a shock affects one state, losses in that state can be offset by profits made in another country*"[186] stressing the fact that, in terms of stability, cross-border diversification can help absorb a negative shock, thus delineating these kind of operations as a great advantage to deal with difficult economic situations. In a subsequent interview – while pointing out that the hoped-for process of cross-border consolidation of banks is not particularly followed up - he went so far as to explicitly state the following: "*the fact remains that when banks try to diversify their activities in other countries, they encounter a number of obstacles. On this, perhaps, even some legislative initiative would be appropriate*"[187]; making it evident that the ECB itself does not consider Directive (EU) 2019/2121 an appropriate and comprehensive legislative initiative, at least in terms of enhancement and facilitation of cross-border bank mergers.

It therefore appears that cross-border mergers are, indeed, needed.

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[184] FinanzaOnline, R. (2022, July 19). Bce, Villeroy: banche si preparino a fronteggiare situazioni estreme. Sì a fusioni transfrontaliere. *FinanzaOnline*. https://www.finanzaonline.com/notizie/bce-villeroy-banche-si-preparino-a-fronteggiare-situazioni-estreme-si-a-fusioni-transfrontaliere

[185] XM & Reuters. (2024, April 18). *ECB's Villeroy: Europe needs more cross-border bank mergers*. XM –. https://www.xm.com/research/markets/allNews/reuters/ecbs-villeroy-europe-needs-more-crossborder-bank-mergers-53816248

[186] *Enria (BCE): all'Europa servono più colossi alla JP Morgan*. (2023, November 29). La Stampa. https://finanza.lastampa.it/News/2023/11/29/enria-bce-alleuropa-servono-piu-colossi-alla-jp-morgan/NTNfMjAyMy0xMS0yOV9UTEI

[187] Cabrini, D. A. (2023, December 19). Andrea Enria (Vigilanza Bce): le banche sono solide. Ecco le priorità per il 2024. L'intervista esclusiva. *MF Milano Finanza*. https://www.milanofinanza.it/news/andrea-enria-vigilanza-bce-le-banche-sono-solide-ecco-le-priorita-per-il-2024-intervista-esclusiva-202312191641148752

Moreover, a Credit Institute that seeks to consolidate and strengthen itself, diversifying its territorial scope of activity outside the domestic borders, has three main ways to seek and affirm its own cross-border dimension:

a) a first way is to intervene outside the border, opening up to the cross-border market, through a real subsidiary, constituting in another determined Member State a new daughter company or acquiring an already existing company, making it become its own daughter company;
b) a second way is to intervene outside the domestic borders setting up a real branch in a given Member State; which does not constitute a new and different legal entity, representing simple branching and "direct emanation" of the parent company, still managing to have its own management and operational autonomy, as a permanent establishment constituting place of effective management;
c) a third way is naturally that of cross-border merger, generally by means of a merger by absorption (and generally after acquisition) of target companies outside the group already operating in a given Member State.

Of course, each of these possible, main solutions carries nonmarginal issues:

a) in the first case, which in itself is fairly simple to manage from an administrative and managerial point of view, however, we are faced with the underlying problem - which is well known to the banking groups which adopt this organisational configuration – of having to meet the capital and liquidity requirements in each Member State; As Marco Lamandini recently recalled "*although so much water passed under the bridge in the law and practice of the Banking Union after the European Commission's tabled amendments of November 2016 to Articles 7 and 8 CRR to make capital and liquidity waivers for EU banks' subsidiaries available (or more widely available as to liquidity waivers) also on a cross-border level (something that should appear a quite obvious course of action at least in the Euro zone after the establishment and successful deployment of the SSM and SRM) encountered*

opposition by (some) Member States and were eventually dropped"[188], and furthermore stressing the fact that also domestic waivers are a source of concerns due to flaws in the legislative framework, and that policymakers appear to regard reforms in this area as a "dead-letter".

b) in the second case, one has to manage a configuration with the boundaries that are not so immediate - from the organizational point of view - and automatically defined as in the previous case, with complications from the point of view of the connection and alignment in terms of accounting, administrative and legal aspects between the branch and parent company; but, however, not with a marginal advantage in return, over the previous case: namely the fact that operating across borders via branches avoids different capital and liquidity requirements to be respected in each Member State; Enria, in the aforementioned recent interview stresses the fact that they "*suggested that banks consider using branches more, even transforming subsidiaries into branches*"[189] in order to avoid the need to adapt to the different capital and liquidity requirements in each Member State. "*As banks become more profitable and market valuations improve, these options may become more attractive*"[190] and a greater drive for industry integration could be seen;

c) the third way - together with the procedural difficulties that will be discussed in the following section - certainly remains a legal technicality available to credit institutions looking to achieve a European dimension, but does not appear in itself to be able to overcome the series of constraints and structural problems identified by the ECB as limits to cross-border banking operations (except to the extent that - by the means

[188] Lamandini, M. (2023). *Closing speech at the EBI International Conference "Banking and Finance in Stressed Times: Climate, Resilience and Exit" Co-organized and co-hosted by the Universidad Carlos III and the Universidad Complutense of Madrid on 11 and 12 May 2023*.
[189] *Enria (BCE): all'Europa servono più colossi alla JP Morgan*. (2023, November 29). La Stampa. https://finanza.lastampa.it/News/2023/11/29/enria-bce-alleuropa-servono-piu-colossi-alla-jp-morgan/NTNfMjAyMy0xMS0yOV9UTEI
[190] *Enria (BCE): all'Europa servono più colossi alla JP Morgan*. (2023, November 29). La Stampa. https://finanza.lastampa.it/News/2023/11/29/enria-bce-alleuropa-servono-piu-colossi-alla-jp-morgan/NTNfMjAyMy0xMS0yOV9UTEI

of mergers involving the "legal" incorporation of the foreign subsidiary, as a branch, and leaving the permanent establishment and its place of operations abroad - it is able to facilitate the "transformation" from subsidiaries into branches, almost in a palliative measure, as "suggested" by Enria).

The debate remains, therefore, open on the desirability and opportunity of which obstacles to remove - and with which regulatory interventions - to pave the way, especially through cross-border mergers, towards a complete and solid European banking system, in a context in which in the recent years - in addition to the above mentioned issues - the critical attention of apical subjects, technicians and industry experts in this field has greatly focused on the additional limitation that, to this day, the system of insurance and guarantees for deposit continue to have - at the national level - for banking integrations and aggregations, which effectively constitutes for the various Member States a kind of inevitable push, or need, to keep their banking sectors isolated.

Enria, in fact, already some years ago, stated the following, on the matter: "*to complete the banking union with the European Deposit Guarantee System would be the most direct way to promote integration*"[191] because any reason to support residual regulatory provisions in European and national legislation, which confine capital and liquidity within national borders, would dissolve; however, that of the European Deposit Guarantee Scheme (EDIS) still remains nowadays an unfulfilled objective, although it is increasingly felt[192] and recently "revived" in the work of the Committee on Economic Affairs of the European Parliament[193].

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[191] Scudieri, E. (2020, November 18). Banche, Enria: "Accelerare sul sistema europeo di assicurazione depositi." *FocusRisparmio*. https://www.focusrisparmio.com/news/banche-enria-accelerare-sul-sistema-europeo-di-assicurazione-depositi

[192] Il Sole 24 Ore reports - for a hypothetical banking aggregation between Société Générale and the Spanish company Santander - that the French president Macron has shown openness to the idea of a cross-border mergers between Eurozone banks, an option repeatedly suggested by ECB Supervision but which has never been implemented until now. "*Statements, those of Macron, expressing a political will to accelerate European integration. But that, according to the financial analysts, do not yet mark the real kick-off of the game of cross bank mergers border, which can only start when the regulatory framework of the Union is completed banking, starting with the single guarantee scheme for bank deposits.*" - Graziani, A. (2024, May 14). Macron apre alle fusioni tra banche in

3.3.2 The relationship between cross-border bank mergers and Legislative Decree n. 19/2023

Being said how the Directive (EU) 2019/2121 is not able by itself - in the absence of specific, further sectoral regulatory interventions - to best assist the hoped-for European Community transition to an increased number of cross-border banking aggregations and restructurings, it should be, however, noted that in any case the Directive leaves the connection between the common law rules provided on the general level for cross-border mergers and the procedural aspects that come to attention when dealing with mergers involving banks and insurance companies, not adequately regulated.

Focusing specifically on the Italian case - which is of greatest interest here - it is, indeed, necessary to consider the fact that banks and insurance companies are entities subject to the supervisory powers of their respective, competent[194] authorities[195] and are regulated by specific sectoral regulations[196].

Europa. *Il Sole 24 ORE*. https://www.ilsole24ore.com/art/macron-apre-fusioni-banche-europa-AFnKLwzD

[193] *Torna per le banche europee l'idea dello Schema europeo di assicurazione dei depositi*. (2024, April 18). Italy. https://citywire.com/it/news/torna-per-le-banche-europee-l-idea-dello-schema-europeo-di-assicurazione-dei-depositi/a2440684

[194] *"The Bank of Italy supervises banks and non-banking intermediaries entered in specific registers. Since November 2014 this supervision has been conducted within the framework of the Single Supervisory Mechanism."* And more*: "Banking union among euro-area countries is based on the Single Supervisory Mechanism and the Single Resolution Mechanism. The Single Supervisory Mechanism (SSM) consists of the joint exercise, since November 2014, of supervisory tasks and powers vis-à-vis the banks on behalf of the European Central Bank (with the newly-created Supervisory Board) and of euro-area supervisory authorities (together with those of non-EU countries that wish to join the area). The ECB supervises the "significant" banks directly. The other banks are supervised by the national authorities following ECB guidelines and also by the ECB, based mainly on the information it receives from the national supervisory authorities; the ECB can also supervise these banks directly, if necessary."* – Banca d'Italia, (2024). *Banca d'Italia - Vigilanza sul sistema bancario e finanziario*. (C) Banca D'Italia. https://www.bancaditalia.it/compiti/vigilanza/index.html?dotcache=refresh

[195] *"The main purpose of supervision is ensuring suitable protection of insured persons and other persons entitled to insurance benefits. To this objective IVASS pursues the sound and prudent management of insurance and reinsurance undertakings as well as, together with CONSOB (the National Commission for Listed Companies and the Stock Exchange), each one in exercise of its respective competencies, their transparency and fairness to customers. Another purpose of supervision, which is subject to the previous one, is the stability of the system and of financial markets." And more: "Main supervisory functions: In accordance with articles 5 and 6 of the CAP, IVASS shall carry out functions of supervision over the insurance sector by exercising its powers of an enabling, prescriptive, investigative, protective and repressive nature, as set forth in the provisions of the Insurance Code. In the exercise of its supervisory functions IVASS shall form part of the ESFS and participate in the activities it performs, taking into account the convergence in the supervisory instruments and practices within the EU"*. – Article 3 of the

The proof, is the fact that the D. Lgs. n. 19/2023 - transposing the Directive (EU) 2019/2121 – within Article 4, takes care to clarify that "*The provisions and powers established by the consolidated banking and credit law of 1 September 1993, n. 385, the consolidated law on financial intermediation of 24 February 1998, n. 58, the legislative decree of 7 September 2005, n. 209, the law of 10 October 1990, n. 287, the decree-law of 31 May 1994, no. 332, converted with amendments by the law of 30 July 1994, n. 474, and the decree-law of 15 March 2012, n. 21, converted with amendments by the law of 11 May 2012, n. 56, remain in force.*"[197]

This provision is, therefore, understandably intended to avoid any direct interference of the general regulation of cross-border mergers with the specific regulatory framework of these sectors; Legislative Decree n. 19/2023 is intended to remain the *corpus* of the guiding principles, the normative frame of reference also for bank and insurance mergers, but it cannot overlap and affect the specific requirements that - in this type of operations - banks and insurance companies are required to meet: "*Cross-border transactions raise regulatory issues when banks, insurance companies or other supervised intermediaries are involved, given that these cases are subject to specific authorisation and, often, of ancillary scrutiny by the competent supervisory authorities as a result of the effects typically attributable to such transactions, including the impact on ownership structures, own funds, operations abroad, etc.*"[198]

The point, however, is that the national legislator – when transposing the EU Directive - has not gone so far as to provide rules or guidelines for all those cases where the specific sectoral regulatory requirements are not automatically

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Code of Private Insurance (CAP) - *IVASS - Objectives of the supervision and its main functions and activities*. (n.d.). https://www.ivass.it/normativa/focus/adempimenti-disclosure/obiettivi-vigilanza/index.html?com.dotmarketing.htmlpage.language=3

[196] Esposito, L. (2023). Le concentrazioni tra istituti di credito nei periodi di crisi economico-finanziarie: esempi del passato e previsioni future. *Il Diritto Dell'economia*, 81–114. https://www.ildirittodelleconomia.it/wp-content/uploads/2023/06/03Esposito.pdf

[197] Article 4, paragraph 6 - *DECRETO LEGISLATIVO 2 marzo 2023, n. 19*. (2023). www.gazzettaufficiale.it -https://www.gazzettaufficiale.it/eli/id/2023/03/07/23G00027/sg

[198] *Appunti sui profili regolamentari delle operazioni societarie transfrontaliere*. (2023, October 3). www.dirittobancario.it. https://www.dirittobancario.it/art/appunti-sui-profili-regolamentari-delle-operazioni-societarie-transfrontaliere/

reconciled or are in contrast with the procedural dashboard provided by the D. Lgs. n. 19/2023.

To give a significant example on the most strictly juridical level, among the various possible (and recalled by the same doctrine cited), it may be recalled that Article 57, paragraph 3, of the TUB provides for a period of 15 days for the opposition of creditors, while Article 28 of D. Lgs. n. 19/2023 - derogating from the "domestic" term of 60 days provided for in Article 2503 C.C. - for such opposition grants creditors a period of 90 days from the filing of the draft merger for registration with the competent Companies Register.

Considering the intention of Article 57 of the TUB to keep procedural deadlines short, it is therefore reasonable to assume that in the case of cross-border transactions between banks, the shortest possible deadline for creditors to object is applied (defined respectively by Article 28 of Legislative Decree n. 19/2023 - establishing a period of 90 days - and Article 57 paragraph 3 of the TUB) in such a way that the transaction can be concluded as close as possible to the time of approval by the supervisory authority.

The goal of reducing the timing of the finalization of a corporate merger, already authorised by the supervisory authority, appears to be a common practice, especially in banking mergers. Often, the corporate concentration is completed before finalizing the liquidation of the shares of the company being acquired. In this way, shares subject to withdrawal are offered as an option and pre-emption to members by the bank resulting from the operation, using shares already converted.

However, as withdrawal involves the use of the company's own funds - in order to maintain a balance between the need for adequate capital and the operational efficiency required for the transaction - a maximum limit of withdrawals is often established which, if exceeded, may affect the execution of the transaction itself.

There are, however, doubts about the automatic applicability of the right of withdrawal in cross-border mergers, as indicated by Article 25 of the D. Lgs. n. 19/2023. This is due to the fact that in the case of mergers of companies limited by shares "*Article 2437 c.c. does not properly mention the merger as the cause of withdrawal, since it is a physiologically neutral reorganization*"[199][200]. Moreover, the high harmonisation of corporate and financial regulations in the European Union reduces the likelihood that a change in the legislation, to which the entity is subject, could significantly alter the risk conditions of the equity investment, to justify a withdrawal.

Furthermore, there are also examples of a more operational nature: banks and insurance - pursuant to Article 57, paragraph 2, of the TUB and Article 201, paragraph 1, of the CAP[201] - have the prohibition to provide for the registration of the common draft terms of the cross-border merger at the competent Companies Register pursuant to Article 2501-ter, paragraph 3, C.C., until the authorization has been obtained by the supervisory authority; this is primarily in response to the need to avoid any market disturbance that may arise from the time the common draft terms are publicised to the time of actual authorisation, but it generates management problems with respect to the issue of the capital situation supporting the planned merger pursuant to Article 2501-quater, the updating and significance of which may be lacking at the time of the final "green light" given by the competent authority.

However, market practice and the need to prevent asset information from becoming obsolete - especially where there are no concrete confidentiality requirements preventing the filing of the common draft terms at the head office before the decision of the supervisory authority (for instance, in the case in

[199] *Appunti sui profili regolamentari delle operazioni societarie transfrontaliere*. (2023, October 3). www.dirittobancario.it. https://www.dirittobancario.it/art/appunti-sui-profili-regolamentari-delle-operazioni-societarie-transfrontaliere/

[200] Even though the possibility of a withdrawal will still be available in case of statutory amendments occurring due to the cross-border operation.

[201] *Appunti sui profili regolamentari delle operazioni societarie transfrontaliere*. (2023, October 3). www.dirittobancario.it. https://www.dirittobancario.it/art/appunti-sui-profili-regolamentari-delle-operazioni-societarie-transfrontaliere/

which the transaction is already public or has a limited impact on the market) - have led operators to consider an acceptable time difference of even a few months[202] from the date of filing of the common draft terms at the registered office until the date of subsequent filing in the Commercial Register, which must be mandatory after obtaining permission from the supervisory authority.

As can be deduced, therefore, the coordination between company and regulatory legislation, in the context of cross-border reorganisations, is entrusted to the interpreting analysis of the interpreter, which will have to resolve the application issues that emerge from the intersection of the different regulatory frameworks, with the related application risks that will arise.

Finally, for the sake of completeness of the analysis, it is necessary to point out that to the issues described above may overlap - in particular relevance – also with the issues related to the potential exercise by the Italian State of the so-called "Golden Powers", which are special powers to safeguard the ownership structures of companies operating in the sectors considered strategic or deemed to be of national interest; an area in which - since a few years - the banking, insurance and finance sectors, pertain too[203].

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[202] *Appunti sui profili regolamentari delle operazioni societarie transfrontaliere*. (2023, October 3). www.dirittobancario.it. https://www.dirittobancario.it/art/appunti-sui-profili-regolamentari-delle-operazioni-societarie-transfrontaliere/

[203] The author recalls that "*as a result of a normative path started with the d.l. n. 148/2017, continued with the d.l. n. 23/2020 and concluded at the moment with the d.p.c.m. n. 179/2020, the banking, insurance and financial sector entered the scope of application of the golden Powers of the Italian State. The applicability of special powers in the financial field is a novelty for the operators of the sector, able to affect both the relative business and ownership dynamics and the balance of the system. This is because, as today, the changes in the control structures of the companies in question have become subject to scrutiny not only by the competent supervisory authorities, but also by the Government, which acts according to the monitoring logic typical of the control on foreign direct investments (FDI screening)*". - Sacco Ginevri, A. (2020). Golden powers e banche nella prospettiva del diritto dell'economia. *Rivista Della Regolazione Dei Mercati - Giappichelli*.

3.4 The possible impact of the tax variable on cross-border mergers operations

When considering and analysing the concrete terms of applicability and full usability of the legislation on cross-border mergers, and any brakes or obstacles in realizing them, it is not marginal to ultimately wonder how tax legislation relates to this type of operations; not so much with the claim to analyse the overall framework of the tax discipline – which falls outside the scope of the present analysis – but with the more limited objective of understanding whether the tax element can be a factor in choices and assessments prior to a given merger.

This is, in fact, an aspect of fundamental interest in an everchanging macro-economic scenario of great instability, that corporate groups increasingly face with consolidations and corporate restructurings, in a context in which moreover - after the huge recourse to relocation processes (offshoring) that has to some extent characterized the Italian entrepreneurial choices (and other European countries) especially in the 10, 15 years around the 2000 (and above all towards countries of Eastern Europe, as well as Asian countries) - a process of progressive reshoring (at national level and not only) or even of real productive back-shoring is being registered during the last years[204][205].

There were several reasons for the offshoring (cost savings, often of the staff; rapprochement to the sources of the raw material; tax advantages; etc.), as well as there are multiple reasons for the recent back-shoring phenomenon such as the recovery of the quality (in the production process), improved ability to certify the procurement and production processes, compliance with environmental standards – also to improve the possibilities to obtaining bank

[204] Elia, S. & Politecnico di Milano. (2022). *Processi di reshoring nella manifattura italiana*. https://www.supplychainitaly.it/wp-content/uploads/2022/10/Processi-di-reshoring-nella-manifattura-italiana-Politecnico-di-Milano.pdf

[205] Franzese, G. (2021, May 12). Reshoring in manovra, tutta Europa partecipa: Francia e Italia prime nei rientri delle aziende. *Il Messaggero*. https://www.ilmessaggero.it/AMP/economia/imprese_reshoring_rientro_imprese_europa_italia_francia-5866773.html

credit - and overcoming tax risks, for example related to the discipline of transfer pricing or the variability of the framework of the countries originally chosen[206].

But it is a fact that especially the business groups and enterprises interested by this transition are themselves part of the 'user base' of the new EU regulations on cross-border operations, and it is undeniable that - among these - within business groups, the ideal operation, the one that best lends itself to reorganisations such as those mentioned, is represented by the merger by absorption, which on a technical-legal level allows the parent an easy reabsorption in its field (also with simplified procedure, in certain quantitative control percentage cases, as highlighted in the previous chapter[207]) of a subsidiary whose autonomy (legal and/or operational) is no longer considered functional.

It should also be borne in mind that, in the course of the acquisition of its own subsidiary, having its registered office and establishment in a given European Community foreign State, the incorporating company (for example an Italian company) faces the choice between two different organizational configurations, potentially being able to opt for a merger by absorption that is - so to speak - limited to the legal and subjective aspect (configuration option in which the plant of the incorporated company would remain in the State of origin as permanent establishment of the company resulting from the merger), or an incorporation that also entails the return and the displacement in Italy of the plant that was abroad before the operation.

The fact is that - whereas, on a systematic level, the principle of neutrality of cross-border mergers is generally stated, which would instinctively lead us to

[206] *In aumento le imprese manifatturiere italiane che scelgono fornitori domestici*. (2022). https://www.confindustria.it/home/centro-studi/temi-di-ricerca/scenari-geoeconomici/dettaglio/strategie-internazionali-imprese-italiane

[207] Within Chapter 2, section 2.2 *"Novelty elements in the Legislative Decree n. 19/2023"*

think of a European Community principle of neutrality having the same characteristics as the national one (Italian) - in reality, it is not:

- The three European Directives dealing with taxation applicable to cross-border mergers (from 90/434/EEC of 23.07.1990, to 2005/19/EC of 17.02.2005, until the most recent and most important 2009/133/EC of 19.10.2009) have developed to, finally, state - in the "recitals" of the last Directive cited above - the principle of the fiscal neutrality of mergers, in the light of the imperative need to eliminate the penalties that such transactions – when operating across borders - suffer from a fiscal point of view compared to what would happen in cases where the same type of transactions were occurring between enterprises of the same Member State, therefore creating "*within the Community, conditions analogous to those of an internal market*"[208], thus ensuring "*the effective functioning of such an internal market*"[209]. However, it ends up ensuring such neutrality only to mergers involving the purely "legal" incorporation of the acquirer, the one occurring without moving the plant, which in these cases stays in the original country of the acquirer in the form of "*permanent establishment*"[210] (which, from the fiscal point of view, continues therefore to remain subject to the taxing authority of that country); this view does not fully encompass the range of possible mergers and is already crystallized, albeit partially, in the "Recital" n. 6 of the last Directive cited, according to which - as it is not always the case in reality - cross-border mergers "*normally result either in the transformation of the transferring company into a*

[208] Recital (2) - *Council Directive 2009/133/EC of 19 October 2009*. (2009, October 19). eur-lex.europa.eu. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:310:0034:0046:EN:PDF#:~:text=The%20common%20tax%20system%20ought,the%20transferring%20or%20acquired%20company.

[209] Recital (2) - *Council Directive 2009/133/EC of 19 October 2009*. (2009, October 19). eur-lex.europa.eu. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:310:0034:0046:EN:PDF#:~:text=The%20common%20tax%20system%20ought,the%20transferring%20or%20acquired%20company.

[210] There is "permanent establishment" when a company operates on the territory of another State with not-episodic settlement and organization, structured with a high level of autonomy and with solid qualitative, quantitative and temporal characteristics.

permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company"[211];

- The same applies, actually, to Italy: Article 179 of the TUIR enshrines neutrality for cross-border mergers, but – again - this neutrality is in fact recorded only in the case in which the incorporated company maintains its plant in a permanent establishment in the State of origin; moreover, the current Article 166 of the TUIR provides that in case of a transfer abroad of the enterprise with a merger by absorption (without the plant remaining in the Country of origin as a permanent establishment) the same is subject to an *exit tax* on the capital gains accrued until the transfer.

All this takes place in an evolution of the Community orientation in which:

- initially the European Court of Justice held that this type of exit tax infringes the principle of freedom of establishment (e.g. Case C-9/02 Hughes de Lasteryrie du Sallant[212]);
- in an intermediate phase (see National Grind Indus BV judgment of 29 November 2011, Case C-371/10[213]) the European Court of Justice deemed the exit tax to be admissible, allowing the State "losing" the undertaking, to tax its capital gains, which would otherwise be taxed by the State of the acquirer at a potential later date (for example on the occurrence of a sale) provided that it allowed the suspension of taxation until the moment of actual and possible realisation or sale of the company;
- in a last phase, the European legislator (with the issuing of directives ATAD (Anti Tax Avoidance Directives) I and II - the n. 2016/1164 and n.

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[211] Recital (6) - *Council Directive 2009/133/EC of 19 October 2009*. (2009, October 19). eur-lex.europa.eu. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:310:0034:0046:EN:PDF#:~:text=The%20common%20tax%20system%20ought,the%20transferring%20or%20acquired%20company.

[212] *Case C-9/02 DE LASTEYRIE DU SAILLANT JUDGMENT OF THE COURT (Fifth Chamber) 11 March 2004*. (2004, March 11). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CJ0009

[213] *Case C-371/10 NATIONAL GRID INDUS JUDGMENT OF THE COURT (Grand Chamber) 29 November 2011*. (2011, November 29). eur-lex.europa.eu. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0371

2017/952[214], transposed in Italy by D. Lgs. "ATAD" n. 142/2018 - has been considered admissible tout court, after simple concession of the instalment payment option of the exit tax (what is precisely provided in Article 166 of the Italian TUIR, after the changes made by D. Lgs. 142/2018; while appearing in obvious contrast with the orientation of the European Court of Justice and with the same "Recital" n. 7[215] of the cited Directive 2009/133/CE).

As can be seen, the current European endpoint on the issue of the exit tax has a rather contradictory path, which authoritative doctrine[216] attributes to a real "*oversight*" or "*clear misunderstanding*" regarding the notion of "deferred taxation"; a notion that in fact:

- in the National Grid Indus case the Court had evidently been understood - disconnecting it temporally from the merger process - like "postponed" taxation to the moment succeeding the eventual realization of the gains, for example in force of a sale of the enterprise;
- the ATAD Directive, on the other hand, intended and envisaged "immediate" taxation, upon the merger process, diluted or dilutable over time[217].

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[214] Assoholding. (2020, July 27). *La Normativa ATAD: contrasto alle attività di erosione del mercato*. https://www.assoholding.it/la-normativa-atad-contrasto-alle-attivita-di-erosione-del-mercato/

[215] *"The system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the Member State of the transferring company at the date of their disposal."* Recital (7) - *Council Directive 2009/133/EC of 19 October 2009*. (2009, October 19). eur-lex.europa.eu. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:310:0034:0046:EN:PDF#:~:text=The%20common

[216] Melis, G. (2022). Osservazioni di un tributarista sullo schema di decreto legislativo recante attuazione della Direttiva (UE) 2019/2021 sulle operazioni societarie transfrontaliere. *Diritto E Pratica Tributaria Internazionale*, *4/2022*(Wolters Kluwer-Cedam).

[217] "*This is a solution that, in the opinion of the writer, stems from the confusion between 'deferred' taxation - which in the case of National Grid Indus concerned the actual realization of capital gains - and 'staggered' taxation, which is nothing more than an immediate taxation spread over time.*" - Melis, G. (2022). Osservazioni di un tributarista sullo schema di decreto legislativo recante attuazione della Direttiva (UE) 2019/2021 sulle operazioni societarie transfrontaliere. *Diritto E Pratica Tributaria Internazionale*, *4/2022*(Wolters Kluwer-Cedam).

Whether it is, the State can only conclude that the national merger is tax neutral for the companies involved, from the point of view of direct taxes, while the cross-border merger - in case of relocation of the plant - is tax neutral for the States but not for the transferred enterprise, which will be subject to exit tax.
The great and unresolved upstream issue is, of course, the fact that - whereas at Community level the highest indirect tax (VAT) is to some extent harmonised - the same can not be stated for direct taxes, in which the taxing authority of individual Member States remains a non-negotiable prerequisite for the Community's framework. It has been easier, instead, to harmonize VAT, since the tax conditions of which, are linked to the territorial aspect of the places where operations are carried out.

It therefore seems difficult, as of today, to harmonize direct taxes, traditionally anchored to the "fiscal residency" of the income-producing business entity (where, in substance - focusing solely on what may be of greater interest here - according to international and conventional tax rules, this residency is anchored to the place of effective management rather than the location of the registered office; in a context in which the direct taxation system generally adopted in continental European countries is that of the worldwide taxation principle, which states that all individuals residing in a given country for tax purpose are required to pay taxes on all sources of income, both those originating in the territory of the State and those originating outside the territory of the State[218].

In summary, for the European legislator, the merger is as neutral as possible, in the stated objective of encouraging mobility and the freedom of establishment of the enterprises, while at the level of direct taxation - in the absence of full Communitarian harmonisation - the merger, in order to make it tax neutral for the States involved and affected by the operation, is neutral for the companies that implement it, only in the event that there is no mobility and movement of

[218] To avoid tax overlaps, there is of course an international network of agreements between various States against double taxation of the same events, with mechanisms that effectively - for example - grant Italian taxpayers a tax credit for income events - for example, real estate - already taxed in a foreign country.

the plant (an aspect which is not immediately apparent without a minimum examination the Community's jurisprudential and regulatory development).

What has just been pointed out above, is equivalent to saying that - within the current framework that in various ways governs and regulates cross-border operations - "legal" mergers and incorporations are fiscally inconsequential, while the "physical" incorporations are fiscally significant, as they potentially affect the taxing rights of the jurisdiction of the States from which the plant departs (as for example the mergers by absorption that presuppose productive back-shoring in the country of the parent company).

Certainly, this is therefore in some logical contrast with the spirit of Directive (EU) 2019/2121, whose "Recitals" n. 35 and n. 36 - on the assumption that cross-border transactions could be used "*for abusive or fraudulent purposes, such as (…)* [avoid] *tax obligations*"[219] - close with a consideration based on to which as an "*indication of an absence of circumstances leading to abuse or fraud*"[220] the competent Authority may consider the fact that *"the cross-border operation were to result in the company having its place of effective management or place of economic activity in the Member State in which the company or companies are to be registered after the cross-border operation*"[221].

Actually, what attenuates the suspicions of illegality of the civil legislator is precisely the type of operation that the overall tax system analyses and considers with greater attention; but what is even more important here, for the purposes of this analysis, is to infer that taxation is, therefore, also an important factor to be weighed in the assessment of certain cross-border merger scenarios (apart from the more general subject, which also depends on the lack of

[219] Recital (35) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121
[220] Recital (36) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121
[221] Recital (36) - *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019*. (2019, December 12). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121

harmonisation, of differences in the quality and quantity of taxation between the various European Member States).

CONCLUSION

The comprehensive analysis carried out in the paper - which started providing a framework on how the European Community rules on cross-border transactions and their transposition in Italy have evolved over the years, pointing out the main differential elements and features – has highlighted the fundamental objectives pursued by the European legislator in order to make cross-border operations easier and more practicable, improving the functioning of the European Union Single Market, allowing greater flexibility for companies that have the intention to move across different Member States, for organizational and strategic reasons. Even though the principle of *maximum harmonization* has not yet been reached in the general principle of companies and greater convergence between different legal systems of the Member States has still to be pursued, the presence of a dense network of European company rules, together with a nucleus of common principles of law, has to be noted.

It can be stated that the Directive (EU) 2019/2121 does not represent the "point of arrival" for the evolution in terms of European company law. Hence it possible to affirm that - in continuity with the reform process which started with the enactment of Directive (EU) 2017/1132 – through this new Directive, the European legislator has been able to lay down the foundation for the standardization of European company law, with the intent to provide greater legislative harmonization for both companies and corporate groups during cross-border operations within the European Union. However, as highlighted by the both transversal and sectoral analysis carried out within Chapter 3, The Directive (EU) 2019/2121 - despite fostering a worthwhile transition to a more homogeneous Communitarian regulation of mergers operations - still leaves many aspects of the procedural dimension uncovered.

The previous legal framework - introduced by Directive 2005/56/EC - has been significantly completed and developed, but - as shown by the analysis - some of

the new rules still have gaps today. The specific provisions on cross-border merger contained in Directive (EU) 2017/1132 (repealing and consolidating Directive 2005/56/EC), which would have required amendments, have not been updated by the Directive (EU) 2019/2121, which moreover does not harmonise certain specific sectors of cross-border mergers that still need greater and deeper harmonisation.

As pointed out before, therefore, the overall assessment of Directive 2019/2121 is certainly positive, but the possibility of further improvements in future changes concretely exists.

While the first section of Chapter 3 provides a transversal comprehensive analysis, the last two sections are, instead, sectoral in nature pointing out some important limits of the Directive in two specific fields.

In the specific context of the banking institutions, the major limitation - that ECB recognizes for this type of aggregations and restructurings - is the uncertainty about the "rules of engagement," exacerbated and amplified by the cross-border nature of such transactions. Apart from the issue of overcoming cultural and linguistic differences, the lack of uniformity in the legal and regulatory provisions governing supervisory controls over mergers and acquisitions in the Member Countries of the Single Supervisory Mechanism (SSM) increases costs and act as a barrier for these kinds of transactions. Furthermore, national merger regulations vary significantly across countries, adding further complications.

As highlighted during the analysis, the ECB 2023 Report, certifies that there has been a very limited number of cross-border consolidations, during the last years, implying the fact that not even Directive (EU) 2019/2121 is currently experiencing and driving real, evident change in the pace or attitude of the banking system to cross-border mergers. As highlighted at different levels, from different authoritative sources, instead, the goal on increasing cross-border diversification is to be pursued, also in order to absorb negative shocks, and

become a great advantage to deal with difficult economic situations. Enri itself - Chair of the ECB Supervisory Board from 2019 to 2023 – pointed out, recently, the fact that banks still encounter a number of obstacles, when trying to diversify their activities and interests across borders, suggesting the need for new, more appropriate, specific regulation, making it, therefore, evident that the ECB itself has not considered the latest Directive (EU) 2019/2121 an appropriate and comprehensive legislative initiative, at least in terms of enhancement and facilitation of cross-border bank mergers. In recent years, alongside the previously mentioned issues, apical subjects, experts and industry specialists have increasingly focused on the additional limitation posed by the national systems of deposit insurance and guarantees, continuing to act as significant barriers to all types of banking restructurings and mergers, compelling various Member States to maintain a degree of isolation within their banking sectors.

The ongoing debate about which obstacles should be removed and the regulatory interventions required to facilitate, particularly through cross-border mergers, the development of a comprehensive and robust European banking system, still holds.

The last section analyses, instead, the possible impact of the tax variable on cross-border mergers operation, which is deemed to be a "not marginal" factor in choices and assessments prior to a given merger. The focal point is that while at the level of general principles it is said that cross-border mergers should be tax neutral, neither more nor less than national ones, in reality this neutrality is recorded only in the event that the incorporated company retains a permanent establishment in the state of origin.

All this takes place in an evolution of the Community orientation in which: (i) it was initially considered that this type of exit tax infringed the principle of freedom of establishment; (ii) in an intermediate phase (National Grind Indus BV judgment of 29 November 2011) the exit tax was deemed admissible, allowing the state "losing" the undertaking, to tax its capital gains, which would

otherwise be taxed by the state of the acquirer at a potential later date (for example on the occurrence of a sale) provided that it allowed the suspension of taxation until the moment of actual and possible realisation or sale of the company; (iii) in a last phase (after the enactment of the Anti Tax Avoidance Directive ATAD I and II - the n. 2016/1164 and n. 2017/9522017/952 - transposed in Italy by D. Lgs. "ATAD" n. 142/2018) has been considered admissible tout court, after simple concession of the instalment payment option of the exit tax (what is precisely provided for art. 166 of the Italian TU, after D. Lgs. 142/2018).

In other words, while in the national merger fiscal neutrality applies to the company as well as to the state, in cross-border mergers the concept of neutrality is intended for the States, to prevent some of them from benefiting in terms of taxation following business transfers (as to say that the national merger is tax neutral for the companies involved, while the cross-border merger -in case of relocation- is tax neutral for the states but not for the company transferred, subject to exit tax). While European Community company law has evolved over time, in the sense of harmonising and emphasising the concept of freedom of establishment, the European Community tax policy has not moved in parallel (perhaps it has moved in the opposite direction), limiting or affecting in some way the freedom and ease of establishment and the principles laid down in EU Directive 2019/2021, making taxation, therefore, also an important factor to be weighed in the assessment of certain cross-border merger scenarios (apart from the more general subject, which also depends on the lack of harmonisation, of differences in the quality and quantity of taxation between the various European Member States).

To conclude, it can be said that, by implementing greater harmonisation, a fully harmonised and comprehensive framework for cross-border mergers at the European Union level should be created, through the adoption of coordinated regulations covering all aspects of the complex process of cross-border mergers. It is clear that a further improvement in harmonisation would strengthen the

procedure and the success of these operations and help to ensure a greater level of legal certainty. Moreover, such process would ensure a further reduction of the various obstacles to the freedom of establishment of the enterprises, improving, therefore, the functioning of the European Union Single Market for companies. A complete harmonisation would remove the lack of familiarity with the different national rules for cross border mergers (which is creating not only legislative but also "psychological" barriers for companies interested in cross border transactions) by reducing the obstacles arising from the different national rules on cross-border mergers between Member States.

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