

THE EXIT RIGHTS OF SHAREHOLDERS IN CORPORATE CROSS-BORDER MERGER IN THE SINGLE MARKET UNDER GERMAN, IRISH AND BELGIAN COMPANY LAW

Nadiia Startsun

E-mail: nstartsun@gmail.com

Mykolas Romeris University, Law School

Scientific tutor: Prof. Dr. Lina Mikaloniene

E-mail: lina.mikaloniene@mruni.eu

Mykolas Romeris University, Law School

DOI: 10.13165/MMS-25-03-01-25

Abstract: This article is concerned with the exit rights of a shareholder in corporate cross-border mergers in the European Union single market under the law of three selected jurisdictions: Germany, Ireland and Belgium¹. It focuses on the conditions of exercising the exit rights against cash compensation, the peculiarities of each jurisdiction's approach and the valuation rules used to arrive at cash compensation. The research is primarily based on a comparative analysis to assess the transposition of Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132 with regards to cross-border conversions, mergers and divisions as a step to harmonisation of the cross-border merger process. The research showed that while transposition greatly facilitated the cross-border merger process within the single market and created a common framework, there was room for improvement in terms of procedural aspects of the exercise of exit rights, as well as to the claim of additional

¹ This article is based on a defended Master's thesis (in terms of data collection and analysis of German, Irish and Belgian legislation); the comparative analysis and conclusions that follow from it are new.

cash compensation, the methods used in its calculation and its payment.

Keywords: exit rights, withdrawal rights, cash compensation, shareholder rights, cross-border merger, dissenting shareholder, implementation of a Directive.

Introduction

European legislators are building bridges between Member States to create a comprehensive and reliable framework for cross-border corporate mergers within the European Union (EU) single market. One of the goals of this framework – harmonised protection of shareholders’ rights in cross-border transactions – will ensure that shareholders have legal instruments they can deploy against potential violations or risks arising during a cross-border merger. For some time, such protections were not unified among Member States, which created an obstacle to cross-border mergers and led to complexity and legal uncertainty². The adoption of Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132 (hereinafter referred to as the Directive) marked a huge advance in resolving this matter. One of the instruments available to shareholders since the Directive was adopted is the right of dissenting shareholders to withdraw from a company against cash compensation. Being one of the main achievements of the Directive, as it was claimed in the doctrine – exit rights – constitute a protecting tool against the change of applicable law, that poses on shareholders a thread of dealing with completely different legal jurisdictions.

The Directive provides for common standards, not directly applicable rules; therefore, it must be transposed into the company law of Member States. Article

2 Recital 17 of the Preamble of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, EUR-lex, accessed 10 February 2025, <https://eur-lex.europa.eu/eli/dir/2019/2121/oj>

288 of the TFEU stipulates that ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’³. While being the common legal basis for business activity across the EU, the Directive contains minimum harmonisation rules, which means that each Member State, while transposing the Directive into its national company law, can provide increased protection for shareholders. Additionally, the provisions of national legislation, e.g. procedural law, are sufficient to facilitate and support the execution of the Directive.

This article focuses on Germany, Ireland and Belgium. These three jurisdictions represent developed and influential economies in the EEA. Germany was not only a source of inspiration (and given German provisions on exit rights, a basis) for European legislators when drafting the Directive, but has always been one of the most attractive Member States to do business, including for the UK’s companies. After Brexit, the closest jurisdiction to the UK – Ireland – may play the role of an intermediate between Europe and the UK, hence the importance of including this Member State in this analysis. Furthermore, all of the documentation in Ireland is conducted in English, which facilitates the process of cross-border mergers. Belgium, a multilingual Member State (including francophone), has an innovative approach to the protection of shareholders in cross-border mergers and may play a role as a hub for companies wishing to expand into a French-speaking region, while at the same time having a close relationship with Germany. Moreover, the Belgian legislator opted to offer exit rights to a wider range of shareholders than was envisaged in the Directive, which makes it an appropriate choice for this analysis. Overall, each of the selected jurisdictions has meticulously transposed the Directive, which makes them interesting and appropriate examples for this analysis. Lastly, the harmonisation envisaged by

3 Article 288 of the TFEU, UR-lex, accessed 10 February 2025, <https://eur-lex.europa.eu/legal-content/EN/TX-T/?uri=celex%3A12012E%2FTXT>.

the Directive highlights the fact that mergers across borders of any jurisdiction within the single market should be as convenient as domestic ones. The question of whether the harmonisation process has been successful, and what further steps European legislators must take to enhance it, can only be answered by way of a comparative analysis.

The purpose of this article was to determine whether, under the regulatory framework of exit rights in corporate cross-border mergers of the three selected jurisdictions, there are gaps that warrant further harmonisation. To answer this, the following objectives were developed: to assess the regulatory framework of the three selected jurisdictions and the Directive regarding exit rights in corporate cross-border mergers and to identify any potential gaps; and to assess the need for further harmonisation and to determine specific areas this should address. Through a comparative analysis of different Member States' approaches, this study aimed to provide practical insights that could enhance future regulatory improvements. The object of this article is exit rights in corporate cross-border mergers in the legislation of the selected jurisdictions. The initial methods used in this article were data collection and data analysis methods, to examine, analyse and study legal acts and doctrines, in particular the legislation of Germany, Ireland and Belgium⁴. Second, a comparative method was used to provide a comparison between approaches among different Member States towards the mentioned issues. Lastly, a logical approach was used to structure the research into a convenient and readable form. The relevance of this article is evident, as the transposition of the Directive's provisions was only recently completed, in 2023. Therefore, there is scope for a comprehensive assessment and analysis. In light of this, the findings will be relevant and useful for providing additional insights into the problematic aspects of exit rights for dissenting shareholders in corporate

4 This article is based on the defended Master's Thesis, providing a more focused analysis of exit rights in corporate cross-border mergers as a tool for protecting shareholders' rights.

cross-border mergers in the single market.

Various literature covers exit rights in corporate cross-border mergers^{5,6,7,8,9,10,11,12,13,14,15,16}. This article will be of practical use to legal scholars and practitioners who specialise in shareholders' rights protection in corporate cross-border mergers, as it analyses the provisions on exit rights they use in their professional activity. It will also be useful for legislators, as it provides a comparative overview of the implementation results, with recommendations on what could be improved in the current legislation. Lastly, it will be useful to law students and independent researchers who are interested in the protection of shareholders' rights via exit

-
- 5 Jessica Schmidt, "Cross-Border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package", *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019).
 - 6 European Commission: Directorate General for the Internal Market and Services, Bech Bruun., and Lexidale, *Study on the Application of the Cross-Border Mergers Directive*, (Luxembourg: Publications Office, 2013). <https://data.europa.eu/doi/10.2780/96404>.
 - 7 Lina Mikalonienė and Nikolay Kolev, "The Statutory Exit Right of a Minority Shareholder in a Private Limited Company under Lithuanian and Bulgarian Company Law", *International Comparative Jurisprudence* 10, no. 1 (2024), <https://heinonline.org/HOL/Page?handle=hein.journals/icjuris10&collection=journals&id=144&startid=144&end=158>.
 - 8 Paula del Val Talens, *Freedom of Establishment and Cross-Border Mobility for Companies in the EU* (Madrid: LA LEY Soluciones Legales, S.A., 2024).
 - 9 Hamed Alavi and Tatsiana Khamichonak, "To Be or Not to Be; the EU Cross-Border Mergers Framework and Harmonization of Dissenting Shareholder's Rights", *Hungarian Journal of Legal Studies* 58, no. 3 (2017), <https://heinonline.org/HOL/P?h=hein.journals/ajur58&i=310>.
 - 10 Thomas Papadopoulos, "Protection of Shareholders in Cross-Border Mergers: The New Harmonized Rules", *European Company and Financial Law Review* 18, no. 6 (2022), <https://doi.org/10.1515/ecfr-2021-0038>.
 - 11 Christoph Teichmann, "The Company Law Package - Content and State of Play", *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019), <https://heinonline.org/HOL/P?h=hein.journals/ecomflr16&i=3>.
 - 12 Martin Winner, "Protection of Creditors and Minority Shareholders in Cross-Border Transactions", *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019), <https://heinonline.org/HOL/P?h=hein.journals/ecomflr16&i=44>.
 - 13 Vanessa Knapp, "Cross border mobility: what do we need in practice?", *ERA Forum* 19, (2018), <https://doi.org/10.1007/s12027-018-0495-6>.
 - 14 Gokce Kurtulan, "Minority Shareholder Protection in Cross-Border Mergers: A Must for or an Impediment to the European Single Market?", *European Business Organization Law Review* 18, no. 1 (2017), <https://heinonline.org/HOL/P?h=hein.journals/eunbuioiz18&i=101>.
 - 15 Marco Ventruzzo, "Cross-Border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights Under Italian Law", *Penn State Legal Studies Research, Bocconi Legal Studies Research Paper No. 16*, *European Company and Financial Law Review (ECFR)*, 2007, <https://ssrn.com/abstract=960579>.
 - 16 Lorenzo Benedetti, "The Protection of Shareholders in Cross-Border Conversions, Mergers, and Divisions", *Orizzonti del Diritto Commerciale: Rivista on Line Dell'Associazione Italiana dei Professori Universitari di Diritto Commerciale*, no. 3 (2023), <https://heinonline.org/HOL/P?h=hein.journals/oidldoco2023&i=1015>.

rights transposed by selected Member States.

1. Exit rights in corporate cross-border mergers in selected jurisdictions

Exit rights in corporate cross-border mergers are introduced in Article 126a paragraph 1 and constitute one of the major achievements of Directive 2019/2121 amending Directive 2017/1132 with regards to cross-border conversions, mergers and divisions, or, as it is known, the Mobility Directive¹⁷. It provides dissenting shareholders with the possibility to dispose of their shares against adequate cash compensation, which complements the right of exit¹⁸. Exit rights serve as a safeguard against undesirable changes in applicable laws. The Directive envisaged that the right to dispose of one's shares shall be granted to all members of merging companies if they voted against the approval of a cross-border merger, and provided that as a result of the merger the law that applies to them will change, i.e. the company resulting from the merger will be governed by the law of a Member State other than the law of their respecting company¹⁹. As previously mentioned, the Directive's provisions must be transposed into each Member State's national company law. The implementation process is affected by (and depends on) a Member State's national law traditions and practices and its political environment; therefore, it differs in each Member State.

1.1. Germany

The first jurisdiction analysed in this article is Germany. It should be noted that even before the implementation of the Directive, Germany had extensive procedures and rules protecting shareholder rights in mergers. Among others,

17 Papadopoulos, *supra note*, 10: 1.

18 Benedetti, *supra note*, 16: 1007.

19 "Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification)," EUR-lex, Article 126a, accessed on 10 February 2025, <http://data.europa.eu/eli/dir/2017/1132/oj>.

they covered exit rights and the procedure for their execution, as well as the right to review cash compensation with respect to exit rights. Moreover, under German law, the provisions on exit rights may apply to cross-border merging companies if their national law does not establish a compensation procedure. Hence, the German company law mechanisms protecting shareholders are considered to be comprehensive²⁰.

As mentioned, in Germany, exit rights were not a novelty but a standard established over time. The German Transformation Act already contained exhaustive regulation prior to the implementation of Directive 2017/1132. As an example, section 29 of the German Transformation Act provided that if, by way of merger, the legal form of an entity is about to change, the acquiring legal entity shall offer to each dissenting shareholder to acquire their shares or memberships in return for appropriate cash compensation. By this, the German legislator grants exit rights to shareholders who are faced with an undesired change in the company's legal form, as in the case of a domestic merger, the applicable law for a company does not change.

Under the German Transformation Act, exit rights are granted to shareholders of each transferring company if they will not be governed by German law as a result of a cross-border merger and have objected to the merger resolution. Firstly, according to this provision, the exit right is given to the shareholders of 'each transferring company', already putting as a fact that the applicable law does not change for the acquiring company. Hence, under *UmwG*, shareholders of the acquiring company are not granted exit rights, even if they are formally eligible under other conditions. As has been noted by German scholars, even though the applicable law does not change for the acquiring company, the membership rights of the company are still affected as a result of a cross-border merger²¹. Others

20 Schmidt, *supra note*, 5: 253.

21 *Ibid.*, 255-256.

believe that providing exit rights to both transferring and acquiring companies would be excessive²² and could create additional cash outflow, thus supporting the approach of the German legislator.

Furthermore, the German Transformation Act, in accordance with the Directive provisions, requires that a shareholder objects to a company's decision to conduct a cross-border merger in order to be eligible to obtain cash compensation. Shareholders have one month following a general meeting to declare their desire to exit the company²³. Reasonable concerns have been put forward about the non-binding nature of the declaration to exit the company²⁴. At the point when the declaration is made, it is still not clear if the cross-border merger will be effectuated, so in the case of a merging company stepping back, a shareholder may find themselves in an unfavourable position. In the case of Germany, where the declaration of withdrawal requires notarisation in the case of GmbH²⁵, this may cause additional uncertainty. So, from this point of view, the declaration of exit shall generally be non-binding, but will play a prerequisite role instead; first, providing a company with information as to the potential liquidity outflow, and second, entitling a shareholder to exit a company further²⁶.

The right to withdraw from a company is closely connected to the cash compensation that shareholders are to obtain. In the case of Germany, the cash

22 Paul L. Davies, et al., "The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment", *European Company and Financial Law Review Forthcoming*, *Oxford Legal Studies Research Paper* No. 25/2018, (2018): 12, <https://ssrn.com/abstract=3257846>.

23 Sec.313 paragraph (2) of German Transformation Act (*UmwG*). „Umwandlungsgesetz“, Bundesministerium der Justiz Bundesamt für Justiz, accessed 10 February 2025, https://www.gesetze-im-internet.de/umw_g_1995/index.html.

24 Leonard Hübnerand and Victor Habrich, "The new regime for cross-border mergers under Directive (EU) 2019/2121", in *Freedom of Establishment and Cross-Border Mobility for Companies in the EU* Paula del Val Talens (Madrid: LA LEY Soluciones Legales, S.A., 2024), 210.

25 Section 15 paragraph (4) of German Act on Limited Liability Companies (*GmbHG*). „Act on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG)“, Bundesministerium der Justiz Bundesamt für Justiz, accessed 14 February 2025, https://www.gesetze-im-internet.de/englisch_gmbhg/.

26 Hübnerand and Habrich, *supra note*, 24: 210-211.

consideration stipulated for dissenting shareholders has a suspensive effect on the entry into force of the cross-border merger²⁷. This means that cash compensation becomes effective only after a cross-border merger becomes legally effective and shall be paid within two weeks of the cross-border merger taking effect²⁸. Such an approach is justified by the fact that the entry into force may be postponed by factors both related (e.g. liquidity risks) and non-related (e.g. delays with preparation of documents) to the cash consideration. If one considers other time frame requirements set out by the German Transformation Act, it is evident that another two shareholder's rights can be used only after the cross-border merger has taken effect – the right to claim additional cash compensation and the right to dispute the share exchange ratio and claim a cash payment – both three months after the effective date of the cross-border merger²⁹. The suspensive effect is logically correlated with the provision that additional compensation can be claimed only after the cross-border merger has taken effect, as from this moment the amount of the cash consideration itself becomes effective.

Furthermore, the Directive itself does not require any form of acceptance of cash compensation. As far as details of the offer of cash compensation shall be included as part of a common draft of terms of cross-border merger, shareholders vote for it as a whole, with the further possibility of claiming additional cash compensation³⁰. The German legislator instead distinguishes 'notification on the acceptance of cash compensation' and the acceptance of the latter. While as a general rule shareholders have one month following a general meeting to declare

27 Section 313 paragraph (1) of German Transformation Act (*UmwG*) *op.cit.*, (fn. 23).

28 Sec. 313 paragraph (5) of German Transformation Act (*UmwG*) *op.cit.*, (fn. 23).

29 Sec. 34 of German Transformation Act (*UmwG*); Sec. 4(1) of German Act on Appraisal Proceedings (*SpruchG*) – with regard to a claim of additional cash compensation and (Sec. 15 of German Transformation Act (*UmwG*); Sec. 4(1) of German Act on Appraisal Proceedings (*SpruchG*) with regard to dispute the share exchange ratio and claim a cash payment. „Act on Appraisal Proceedings”, *Spruchverfahrensgesetz – SpruchG*, Bundesministerium der Justiz Bundesamt für Justiz, accessed 14 February 2025, https://www.gesetze-im-internet.de/spruchg/_1.html.

30 Article 122 para. (1)(m) of the Directive 2017/1132 as amended by Directive 2019/2121.

exit³¹, a special procedure applies to German LLCs – *GmbH* – where such acceptance requires notarial certification³². As a consequence, Germany implemented the requirement to notify a decision to dispose of shares according to para.2 art. 126a of the Directive, but provided two months for acceptances that require notarisation³³. Such an approach is called a ‘split-up solution’ in the doctrine³⁴ and allows one to consider both the requirements established in the Directive and the specific characteristics of national company law, particularly the law on LLCs. Lastly, in terms of claims for additional compensation, German law recognises the *erga omnes* effect of the court decision, which grants additional cash compensation to every shareholder even if they were not an applicant to the court³⁵.

1.2. Ireland

For Ireland, exit rights in corporate cross-border mergers were a novel feature. The Directive provisions were implemented into Statutory Instrument No. 233/2023 - European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023³⁶ (hereinafter referred to as Regulation 233/2023). According to Irish legislation, exit rights are granted to shareholders of ‘an Irish merging company’, without specifying further whether it is a transferor company or a successor company. In the Interpretations to Part 3 of Regulation 233/2023 under

31 Sec.313 paragraph (2) of German Transformation Act (*UmwG*).

32 Section 15 Paragraph 4 of German Act on Limited Liability Companies (*GmbHG*). „Act on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG)”, Bundesministerium der Justiz Bundesamt für Justiz, accessed 14 February 2025, https://www.gesetze-im-internet.de/englisch_gmbhg/.

33 Section 313 Para. 3 Sentence 1 of German Transformation Act (*UmwG*).

34 Jessica Schmidt, “Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung der Umwandlungsrichtlinie (BT-Drs. 20/3822)”, Öffentliche Anhörung des Rechtsausschusses des Deutschen Bundestages am 7. November 2022: 7, accessed 14 February 2025, https://www.bundestag.de/resource/blob/918824/f5b77a7694b171ce615c4e-ba9a499d3b/Stellungnahme_Schmidt.pdf.

35 Section 13 of German Act on Appraisal Proceedings (*SpruchG*).

36 “S.I. No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023”, “*Iris Oifigiúil*” of 26th May, 2023, Irish Statute Book, accessed on 14 February 2025, <https://www.irishstatutebook.ie/eli/2023/si/233/made/en/print>.

the merging company, it is understood to refer to both a transferor and successor company (for a merger by acquisition or by absorption) and a transferor company (for a merger by formation of a new company). While the formulation concerning the creation of a new company is evident from the nature of the merger, the formulation concerning mergers by acquisition/absorption implies an Irish merging company as the transferor company or as the successor company. From this, it follows that exit rights in a corporate cross-border merger are applicable both to inbound and outbound mergers.

Furthermore, dissenting shareholders, (or minority shareholders³⁷, as is the term used by the Irish legislator) may, not later than 30 days after the general meeting, decide to dispose of their shares. To do so, they must request this from the company in writing or by electronic means to acquire their shares for the cash compensation specified in the common draft terms. The cash compensation shall be paid within two months of the cross-border merger taking effect³⁸. The complementary right to exit rights – the right to claim additional cash compensation – can be executed 30 days after the general meeting on which the special resolution to adopt common draft terms of the corporate cross-border merger was passed. In this case, shareholders can apply to the Irish High Court³⁹, which is the competent authority under Irish law to hear cases to provide additional cash for compensation in cases when a shareholder exercises their exit rights⁴⁰. It is important to note that, at the moment, one month after a general meeting, it may still be unclear whether the cross-border merger will be executed at all. Regarding claims submitted to the Irish High Court, such litigation may cause problems and additional workload for the court in cases where a company does not proceed

37 Regulation 37 paragraph (11) of the Regulation 233/2023, *supra note*, 36.

38 *Ibid.*, paragraph (3).

39 Regulation 2(1) of the Regulation 233/2023, *supra n.* 41, determine that “Court” means the High Court.

40 “New Regulations on Cross Border Conversions, Mergers and Divisions”, Mason Hayes & Curran, accessed on 15 February 2025, <https://www.mhc.ie/latest/insights/new-regulations-on-cross-border-conversions-mergers-and-divisions>.

with a merger. In such cases, 30 days after the general meeting may be an inappropriate period when it comes to the claim of additional compensation, and it is recommended that shareholders should not initiate proceedings until it is clear that the cross-border merger will actually take place⁴¹.

The Irish legislator stipulates that the Court's final decision granting additional cash compensation has *erga omnes* effect⁴², i.e. is valid for all dissenting shareholders of the merging company, despite the fact that the shareholders concerned might not have applied to the Court. Moreover, it is allowable for the Court to provide different levels of additional cash compensation for different classes of shareholders, 'referred to in subparagraph (a)'. In this case, there are two classes of shareholders: 1) those who decided to exit the company and 2) those who did not claim additional compensation. It follows from the nature of *erga omnes* obligation that the Court's decision applies to every shareholder who exercises their exit rights. Moreover, it is evident that different shareholders will get different levels of payment, based on the number of shares they hold or different classes of shares (e.g. preferential shares). However, the principle used to arrive at the compensation will be the same for every shareholder. The open question remains as to what the legislator meant by different levels of compensation: was it an attempt to distinguish active and passive shareholders by allowing the initiators of the proceedings to obtain more compensation, or was it a way to stress possible different amounts of compensation within the universal application of the Court's decision.

Furthermore, the Irish legislator provides a two-month period after a cross-border merger takes effect for cash compensation to be paid, which is considered

41 Leonard Hübnerand and Victor Habrich, "The new regime for cross-border mergers under Directive (EU) 2019/2121", in *Freedom of Establishment and Cross-Border Mobility for Companies in the EU* Paula del Val Talens (Madrid: LA LEY Soluciones Legales, S.A., 2024), 212.

42 Regulation 37 paragraph 5(a) of the Regulation 233/2023.

a relatively long period and is the maximum time allowed by the Directive⁴³. Before the Directive's implementation, the Department of Enterprise, Trade and Employment of Ireland held public consultations, asking respondents for their opinions on the articles that Member States can make decisions about⁴⁴. Among others, they were asked whether Ireland should open the remedy of exit rights to more categories of shareholders than stipulated by the Directive. A submission prepared by the Company Law Review Group⁴⁵ recommended not to avail of this option and not to extend the cash consideration for members other than dissenting members.

1.3. Belgium

Belgian shareholders dissenting against a cross-border merger did not benefit from the possibility to exit the company against cash compensation prior to the implementation of the Directive. The right to exit for shareholders was known in a context outside of merger procedures, without entering into a conflict with a company, by being excluded from a company by its resolution⁴⁶ or expelled by a judicial decision⁴⁷. The introduction of exit rights in this Member State is an example of how it provided a major improvement in the shareholder rights protection framework in corporate cross-border mergers. As a consequence, the exit rights and their execution in Belgium have their own peculiarities.

43 Article 126a, para. 3 of the Directive 2017/1132 as amended by Directive 2019/2121.

44 "Public Consultation on the Transposition of Directive (EU) 2019/2121 of the European Parliament and Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. Company Law", Department of Business, Enterprise and Innovation, accessed 15 February 2025, pp. 29-30, <https://enterprise.gov.ie/en/consultations/consultations-files/public-consultation-transposition-directive-eu-2019-2121.pdf>.

45 "Consultation on Directive (EU) 2019/2121 of 27 November 2019 (the Cross-Border Conversions and Divisions Directive) Review Group Submission on Member State Options", prepared by Company Law Review Group, 13 October 2020, Department of Enterprise, Trade and Employment accessed 15 February 2025, pp. 7-8, <https://enterprise.gov.ie/en/consultations/consultations-files/clrg-submission-eu-directive-2019-2121-consultation.pdf>.

46 Christoph Van Der Elst, "21st Century Company Law in Belgium", *European Company Law Journal* 17, no. 2 (2020): 26, <https://kluwerlawonline.com/journalarticle/European+Company+Law/17.2/EUCL2020006>.

47 Dirk Van Gerven and Maxime Berlingin, "Arbitration and Company Law in Belgium", *European Company Law* 12, no. 3 (2015): 134, <https://kluwerlawonline.com/journalarticle/European+Company+Law/12.3/EUCL2015020>.

As is known, only those shareholders who vote against the approval of a cross-border merger have the right to dispose of their shares against cash compensation. While the Directive itself leaves it to the discretion of Member States to cover more categories of shareholders (by stating ‘[...] at least the members of the merging companies who voted against [...]’), Member States are reluctant to use this possibility. Among those other categories may be shareholders who simply do not have voting rights, who took part in a general meeting and abstained from voting, or who were absent and did not participate in a general meeting⁴⁸. All of them are equally affected by the repercussions of a cross-border merger, and at least those who were not passive (i.e. shareholders who do not have voting rights) should have access to such remedy, as the right to exit.

Belgian legislator made a step into resolving this matter, by granting those shareholders who hold shares without voting rights one vote per share each for the purpose of voting on the approval of a cross-border merger⁴⁹. Hence, they are eligible to exercise their exit rights because they are able to vote against the approval. Now, those shareholders who did not vote made it at their will, and not by formally lacking the possibility to vote. All of the remaining shareholders (dissenting or otherwise) who did not vote against it either agree with the cross-border merger or are perceived as being passive. The point of view exists that exit rights themselves touch upon the important question of whether withdrawal from a company constitutes a breach of the principle *pacta sunt servanda*⁵⁰, and, therefore, whether it can be justified in the case of active shareholders. In any

48 Papadopoulos, *supra note*, 10: 7.

49 Article 12:116 paragraph 1 (2b, second subparagraph) of BCCA with regard to Article 5:47 paragraph 1 (3), 7:57 paragraph 1 (3) of BCCA. “Code des sociétés et des associations”, Service Public Federal Justice, accessed 15 February 2025, https://www.ejustice.just.fgov.be/cgi_loi/article.pl?language=fr&lg_txt=f&type=&sort=&numac_search=&cn_search=2019032309&caller=SUM&&view_numac=2019032309dx2019032309f#list-link-1.

50 “Exit rights of minority shareholders in a private limited company (IVOR nr. 72) 2010/4.6”, InView.nl, accessed 10 February 2025, https://www.inview.nl/document/idce7705c783fe16cacb55c813a765b544/exit-rights-of-minority-shareholders-in-a-private-limited-company-instituut-voor-ondernemingsrecht-nr-72-4-6-conclusion?ctx=WKNL_CSL_1466&tab=tekst.

case, granting passive shareholders exit rights is not welcomed as it encourages 'free-riding' or disinterested behaviour among shareholders⁵¹.

The execution of exit rights can be divided into three parts: notification to the company before a general meeting of a shareholder's intent to exit, voting against approval of a cross-border merger and, finally, re-confirming one's intention during a general meeting⁵². The dissenting shareholder must declare their desire to exit at the latest prior to the vote at a general meeting and re-confirm this by voting during the general meeting⁵³. At the same time, the Belgian Code on Companies and Associations (BCCA) does not provide a specific time frame within which dissenting shareholders must notify the company. Concerning voting, taking into consideration the fact that every shareholder is granted one vote per share during cross-border merger approval, the ones who did not vote or abstained are justifiably behind the scope of the exit right remedy under BCCA. Lastly, a merging company can estimate the potential amount of payment after every notification on exit and decide not to proceed with a cross-border merger if it poses a significant threat to its financial sanity. Hence, if at a general meeting the merging company decides to proceed with a corporate cross-border merger, dissenting shareholders must re-approve their decision to exit the company.

Additional cash compensation, which goes hand in hand with exit rights, can be demanded 30 days after a general meeting via a claim to the President of the Enterprise Court and shall be paid no longer than two months after a cross-border merger takes effect⁵⁴. From the wording of the BCCA, it follows that both transferring and acquiring companies may be in charge of the payment of cash compensation within two months ('cash compensation may also be made by the acquiring company'). Lastly, the cash compensation for shareholders is to be paid

51 Winner, *supra note*, 12: 66.

52 Article 12:116/1 paragraph 1 of BCCA (*op.cit.* fn. 56).

53 Article 12:116/1 paragraph 1 (3) of BCCA.

54 Article 12:116/1 paragraph 1 (3) and paragraph 2 of BCCA.

only after the company has satisfied all claims of creditors⁵⁵. This puts shareholders into the position of being the company's creditors, which may serve as an argument discouraging them from involving the withdrawal from the merging company. Moreover, it is worth noting that the Belgian legislator has not adopted the opportunity in the Directive that provides the court decision as to the additional cash compensation *erga omnes* effect. It is possible that the Belgian legislator tried to somehow discourage shareholders from leaving a company. This may lead to a number of individual lawsuits, which can burden shareholders, overload the judiciary and, ultimately, result in court decisions with different approaches to compensation. Still, Belgium does not imply the possibility to resolve the aforementioned difficulty by implying *erga omnes* obligation.

2. Results of the comparative analysis of selected jurisdictions

Comparative analysis of exit rights in the context of corporate cross-border mergers includes the content of these rights and their exercise, as well as complementary cash compensation and its aspects (such as assessment of adequacy and valuation rules). In light of the recent transposition of the Directive provisions that ensure minimum harmonisation of the requirements for exit rights, a comparative assessment is an important tool enabling us to understand to what extent those requirements are harmonised in the selected Member States.

As is evident from the research, each selected jurisdiction provided the possibility of exit rights in outbound cross-border mergers for dissenting shareholders who voted against a cross-border merger, while Belgium also covered non-voting shareholders who hold profit shares by granting them one vote per share⁵⁶. Germany and Ireland provide a period of one month after a general meeting to

55 Article 12:116/1 paragraph 1 (3) of BCCA.

56 Article 12:116 paragraph 1 (2b, second subparagraph) of BCCA with regard to Article 5:47 paragraph 1 (3) and 7:57 paragraph 1 (3) of BCCA.

declare exit⁵⁷, while in Belgium the intention of members to exercise their right to dispose of their shares must be set forth at a general meeting at the latest⁵⁸. At the same time, the declaration of a desire to exit is relatively complicated in Germany (for LLCs) and Belgium (where optional provisions on pre-notification were adopted), which creates procedural obstacles.

In each of the selected Member States, complementary cash compensation must be paid after a cross-border merger takes effect, but within different periods: two months in Ireland and Belgium⁵⁹ and two weeks in Germany⁶⁰. Additional cash compensation can be claimed one month after a general meeting in Ireland and Belgium⁶¹, while under German law, a claim can be set within the three months after a cross-border merger takes effect⁶². While the Directive does not provide any guidelines on this matter, the approaches of Member States differ, with the approach of Germany (i.e. to open access to claim additional cash compensation after a cross-border merger has taken effect) appearing to be the most suitable, as cash consideration itself becomes effective only after a cross-border merger takes effect, which makes it illogical in some situations to claim an additional amount before a cross-border merger has been finalised.

Lastly, the cash compensation is to be paid by acquiring (or newly created) a company in Germany⁶³, as well as by a successor company in Ireland⁶⁴. Conversely, Belgian law allows that both transferring and acquiring companies may be in charge of the payment of cash compensation⁶⁵. In both Germany and Belgium,

57 Section 313(2) of German Transformation Act (*UmwG*) and Regulation 37 (1) of Regulation 233/2023.

58 Article 12:116/1 para.1 (3) of BCCA.

59 Regulation 37 (3) of Regulation 233/2023 and Article 12:116/1 para.1 (3) of BCCA.

60 Section 313(5) of German Transformation Act (*UmwG*).

61 Regulation 37 (4) of Regulation 233/2023 and Article 12:116/1 para.1 (6) of BCCA.

62 Section 34 of German Transformation Act (*UmwG*); Section 4(1) of German Act on Appraisal Proceedings (*SpruchG*).

63 Section 5 (5) of German Act on Appraisal Proceedings (*SpruchG*).

64 Regulation 46 (1)(e) of the Regulation 233/2023.

65 Article 12:116/1 para.1 (7) of BCCA.

shareholders are treated as creditors for the purpose of obtaining cash compensation dissenting shareholders in UmwG⁶⁶ and BCCA⁶⁷, and enter into suspensive relations with a company⁶⁸. The requirements for the period regarding the declaration of a desire to exit and execution of cash compensation are summarised in Table 1.

Table 1. Requirements for the period regarding the declaration of a desire to exit and execution of cash compensation

	Germany	Ireland	Belgium
To declare exit	One month after a general meeting ⁶⁹ (Sec.313(2) UmwG ⁷⁰)	Thirty days after a general meeting (Regulation 37 (1) of Regulation 233/2023 ⁷¹)	At the latest, prior to a vote at a general meeting and reconfirmed by voting during a general meeting (Article 12:116/1 para.1 (3) of BCCA ⁷²)
To accept cash compensation	Two months after a general meeting (Sec.313(3) UmwG)	n/a	n/a
The cash compensation is to be paid	Two weeks after a cross-border merger takes effect ⁷³ (Sec. 313(5) UmwG)	Two months after a cross-border merger takes effect (Regulation 37 (3) of Regulation 233/2023)	Two months after a cross-border merger takes effect (Article 12:116/1 para.1 (3) of BCC)
To claim additional cash compensation	Three months after a cross-border merger takes effect (Sec. 34 UmwG; Sec. 4(1) SpruchG ⁷⁴)	Thirty days after a general meeting (Regulation 37 (4) of Regulation 233/2023)	One month after a general meeting (Article 12:116/1para.1 (6) of BCCA)

66 Section 313 para. (5) sentence 2 of the German Transformation Act (*UmwG*).

67 Article 12:116/1 para.1 (3) of BCCA.

68 Such relations in German law are called “*vorleistungspflichtig*”.

69 GM – General Meeting on which the common draft-terms of cross-border merger were approved by the mean of voting.

70 UmwG – German Transformation Act (*Umwandlungsgesetz*).

71 Regulation 233/2023 - Statutory Instrument No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023.

72 BCCA – Belgian Code on Companies and Associations.

73 CBM – corporate cross-border merger in the single market.

74 SpruchG – German Act on Appraisal Proceedings (*Spruchverfahrensgesetz*).

Conclusions

In Germany, Ireland and Belgium, exit rights were transposed into national company law as part of the Directive 2019/2121 amending the Directive 2017/1132 transpositional process. Following this transposition, each of the Member States analysed now provides exit rights in corporate cross-border mergers against cash compensation. It is evident from the comparative analysis that despite the common legislative foundation laid out in the Directive, each jurisdiction has developed its own approach when it comes to procedural (e.g. time frames to declare exit, within which cash compensation is to be paid and within which additional compensation can be claimed) and substantive rules (e.g. different approaches to the *erga omnes* effect of the court decision in terms of additional cash compensation, and requirements on declaration of exit and acceptance of cash compensation). While such a situation reflects the legal traditions and corporate governance framework of the Member States analysed, it impedes both harmonisation and the protection of shareholder interests via the right to exit against cash compensation in corporate cross-border mergers. However, there is room for improvement, specifically when it comes to a common approach to the declaration of a desire to exit and the claim for additional cash compensation.

To ensure better protection of shareholders in corporate cross-border mergers by the right to exit the company against cash compensation, it is recommended to cover additional categories of shareholders if they will be subject to a change in the applicable law as a result of a cross-border merger (i.e. non-voting shareholders) in Germany and Ireland. To unify the level of protection, it is recommended that Belgium provides all dissenting shareholders, who proceed with a claim for additional cash compensation with the *erga omnes* effect on the court decision. In Belgium and Ireland, it is also recommended, where possible, to postpone the moment when cash compensation becomes conditional and hence can be

disputed until the moment a cross-border merger takes effect, to prevent shareholders from being put in an unfavourable position. Nevertheless, in further adjustment processes via the harmonisation of exit rights in corporate cross-border mergers, it is important to maintain a balance between protecting shareholder rights through the right to exit merging companies and avoiding the creation of additional obstacles in the execution of cross-border mergers.

AKCININKO IŠĖJIMO TEISĖ ĮMONIŲ TARPVALSTYBINIO SUSIJUNGIMO BENDROJOJE RINKOJE ATVEJU PAGAL VOKIETIJOS, AIRIJOS IR BELGIJOS BENDROVIŲ TEISĘ

Nadiia Startsun

Mykolo Romerio Universitetas, Lietuva

Santrauka. Šis straipsnis skirtas akcininko pasitraukimo teisei vykstant tarpvalstybiniam įmonių susijungimui bendrojoje rinkoje pagal trijų pasirinktų jurisdikcijų – Vokietijos, Airijos ir Belgijos – teisę⁷⁵. Straipsnyje nagrinėjamos pasitraukimo teisės įgyvendinimo sąlygos, kai ši teisė realizuojama už piniginę kompensaciją, kiekvienos jurisdikcijos požiūrio ypatumai bei taisyklės, taikomos kompensacijos dydžiui nustatyti. Tyrimas pagrįstas lyginamąja analize, siekiant įvertinti 2019 m. lapkričio 27 d. Europos Parlamento ir Tarybos direktyvos 2019/2121, kuria iš dalies keičiama Direktyva 2017/1132 dėl tarpvalstybinių pertvarkymų, susijungimų ir padalijimų, perkėlimą kaip tarpvalstybinio susijungimo proceso harmonizavimo žingsnį. Tyrimas parodė, kad nors direktyvos perkėlimas reikšmingai palengvino tarpvalstybinių susijungimų procesą bendrojoje rinkoje ir sukūrė bendrą teisinį pagrindą, vis dar išlieka tobulintinų aspektų, susijusių su pasitraukimo teisės įgyvendinimo procedūriniais klausimais, papildomos piniginės kompensacijos reikalavimo ir išmokėjimu galimybėmis.

Reikšminiai žodžiai: išėjimo teisė, pasitraukimo teisė, piniginė kompensacija, akcininko teisės, tarpvalstybinis susijungimas, nesutinkantis akcininkas, direktyvos įgyvendinimas.

⁷⁵ Šis straipsnis parašytas magistrinio pagrindu (duomenų rinkimo ir Vokietijos, Airijos bei Belgijos teisės aktų analizės aspektais); lyginamoji analizė ir iš jos formuluojamos išvados yra nauji.