

Prof. Dr. Jessica Schmidt, LL.M.

Cross-border mobility of companies in the EU: status quo and reform proposals

European Law Institute (ELI) - SIG on Business and Financial Law

Inaugural Workshop

Vienna, 23 June 2017



Outline

1. The *status quo*
2. Cross-border mergers
3. Cross-border divisions
4. Cross-border transfers of seat (conversions)
5. Legislative implementation of the reform proposals

1. The *status quo*

Type of company	cross-border mergers	cross-border divisions	cross-border transfers of seat (conversions)
limited liability companies	Cross-border Mergers Directive (CBMD)/ Company Law Directive (CLD)	freedom of establishment, Articles 49, 54 TFEU (<i>argumentum e Sevic, Cartesio, VALE</i>)	freedom of establishment, Articles 49, 54 TFEU (<i>Cartesio, VALE</i>)
UCITS	UCITS Directive		
other legal entities within the meaning of Article 54 TFEU	freedom of establishment, Articles 49, 54 TFEU (<i>Sevic</i>)		
SE/SCE	formation of an SE/SCE: SE/SCE-Regulation	-	Art. 8 SE-Regulation/ Art. 7 SCE-Regulation

and: no harmonisation of international company law
→ incorporation theory vs. real seat theory

2. Cross-border mergers

2.1. Achievements of the CBMD / title II chapter II CLD

- harmonised legal framework provides legal security and reduces transaction costs
- increasing number of cross-border mergers

But: problems and difficulties remain

2.2. Recommendations for a revision of the CBMD / title II chapter II CLD

- extension of the scope to all legal entities within the meaning of Art. 54 TFEU
- further harmonisation of the rules on creditor protection (*ex post* protection system)
- harmonisation of minority shareholder protection (exit right against adequate compensation and right to get additional compensation in case of an inadequate exchange ratio)
- certain exemptions from the requirement of a merger report

2.2. Recommendations for a revision (continued)

- harmonisation of the rules on the accounting date and on valuation
- standard forms for the relevant documentation and communication and in particular also the pre-merger certificate;
in addition, possibly also a single language requirement
- due to the political sensitivity of the issue of employee protection, this area should be omitted from any short-term revision
(and reserved for a general review of the employee protection regimes in the various EU legal acts).

3. Cross-border divisions

3.1. The need for an EU legal framework

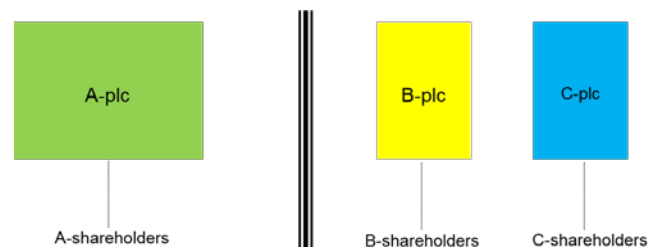
- enable legal entities to effectively exercise their ‘freedom to divide’
- sound economic reasons: cross-border divisions are an attractive tool for cross-border reorganisations
- crucial advantage of divisions:
(partial) universal transfer of all assets and liabilities *uno acto*
- risks for stakeholders can be tackled by implementing an appropriate legal framework

3.2. Key features of an EU directive on cross-border divisions

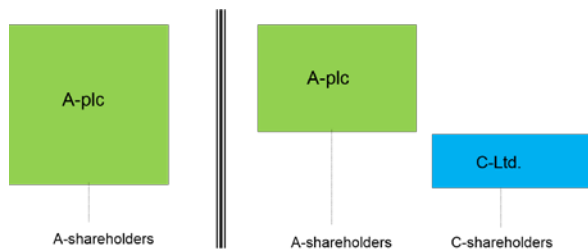
- general principle:
correspondence with rules on cross-border mergers
- scope: all legal entities within the meaning of Art. 54 TFEU

types of divisions
covered

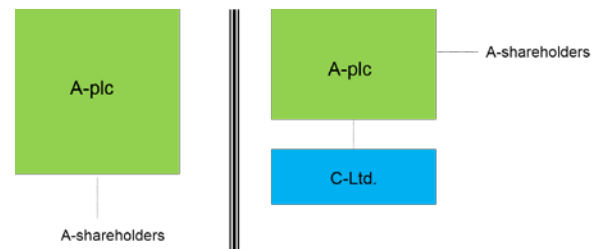
split-up



spin-off



hive-down



4. Cross-border transfers of seat (conversions)

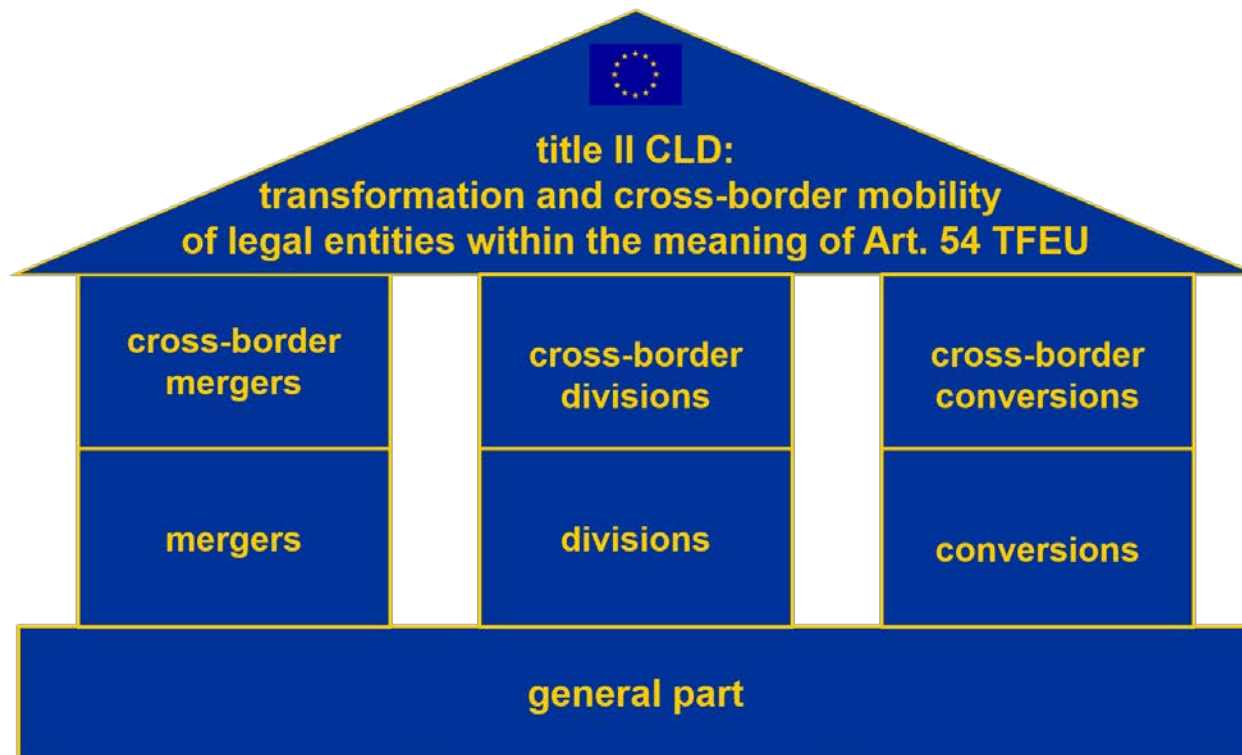
4.1. The need for an EU legal framework

- enable legal entities to effectively exercise their ‘freedom to convert’
- economic argument: cross-border conversions are an attractive tool for cross-border reorganisations
- other options currently available to ‘move’ the registered office to another Member State (re-incorporation, CBMD/CLD, SE/SCE) are in fact not really equivalent alternatives
- EU legislative framework imperative to create a level playing field and to establish clear and harmonised standards with respect to the protection of minority shareholders, creditors and employees

4.2. Key features of an EU directive on cross-border transfers of seat (conversions)

- identity-preserving conversion
- scope: all legal entities within the meaning of Art. 54 TFEU
- ‘transfer of seat’ = transfer of the registered office
- no requirement to transfer also the head office
- conversion procedure based on ‘European model for structural changes’ (like in the CBMD/CLD)
- protection rules of creditors, minority shareholders and employees
- tax neutrality

5. Legislative implementation of the reform proposals



and: harmonisation of the rules on the law applicable to companies
in a new **Rome-Regulation** on the basis of the **incorporation theory**