

Cross-border mergers and minority protection An open-ended harmonization

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I. Introduction

1. Minority protection is an important issue in company law, but at the same time a very difficult one. The decision by majority-rule being one of the cornerstones of an efficient functioning of a company, the parties concerned (such as the legislator, the majority and the minority shareholders, and the courts) have to strike a subtle balance between the legitimate interests of the majority shareholder(s) and those of the minority shareholder(s). Ideally, corporate law should allow the two (or more) groups involved to find, through appropriate decision making processes, a reasonable compromise between all interests at stake.

Those preventive mechanisms, however, may not always function properly, in which case the balance between the interests at stake risks being disturbed. While such rupture of the balance may still be reasonably easy to identify in case of an outright abuse of majority rights, one should bear in mind that such cases are – or at least should remain – the exception. Apart from such exceptional cases, majority and minority views on the best interests of the company may differ on fairly objective grounds, and it may not always be easy to determine which side the law should choose, and how the imbalance may best be remedied. Moreover, the legitimate interests of third parties also come into play: while annulment of a corporate act may be the best remedy for the shareholders, *bona fide* third parties may be unreasonably harmed by such annulment: a monetary compensation is then often viewed as second best.

Moreover, there is no such a thing as ‘the’ minority shareholder, apart from the numeric characteristic that it owns less than 50% + 1 of the voting rights within a company. A retail shareholder holding 15 shares in a listed company can hardly be compared with a third generation minority shareholder in a family owned SME holding 30% of the shares, to give only one example.

In short, almost nothing is as complicated – and consequently as challenging – as minority protection in corporate law.

This contribution specifically analyses the minority protection rules provided for by Directive 2005/56/EC of 26 October 2005 on cross-border mergers of companies with share capital (the ‘Cross-border Merger Directive’). As the reader will notice, all elements relating to the subtle balance between majority, minority and third party interests, briefly touched upon above, are present in different hues.

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II. Minority protection before the Cross-border Merger Directive

2. The Cross-border Merger Directive is largely inspired by its predecessor, the Third Council Directive 78/855/2 of 9 October 1978 concerning mergers of public limited liability companies (the ‘Third Directive’). One can, without the slightest hesitation, call the Third Directive one of the biggest successes in European harmonization of company law: it develops a comprehensive, workable and logical concept for merger operations, and by doing so indeed managed to harmonize this concept throughout Europe – a few exceptions (such as the UK, where the friendly takeover through a scheme of arrangement is preferred over the legal merger) not to be mentioned. One can fairly state that the Third Directive has been an indispensable tool for making the Tenth Directive possible; in the long run cross-border mergers may become more important than national mergers.

The development and acceptance of this common concept made it possible for the European legislator to also use it in cross-border restructurings: both the SE Regulation (see below, under 4) and the Cross-border Merger Directive (see below, under 6) have basically limited themselves to prescribing a distributive application¹ of the national merger laws involved in order to realize a cross-border merger.

Article 2 of the Third Directive explicitly confirms that it only applies to companies ‘governed by their national laws’ merging by acquisition or by formation. Cross-border mergers are thus not covered by it, as was confirmed in the *Daily Mail* case.²

The Third Directive however does not provide for any specific minority protection rules, with one minor and unimportant exception (Article 28). In the case that a parent company acquires by merger one or more of its subsidiaries, of which it holds over 90% of the shares (the so-called simplified merger), the merger procedure can even be further simplified if the minority shareholders of the company being acquired (the subsidiary) are entitled to have their shares acquired by the acquiring company (the parent). The minority protection device is thus very clearly defined: a sell out right for cash, reserved to the shareholders of the company or companies being acquired.

3. At first glance it may be surprising that the Third Directive hardly pays any attention to minority protection. Since the mechanisms of the SE Regulation and the Cross-border Directive are both modelled after the Third Directive, and both contain minority protection devices, one would expect the model to have them too.

In the three cases, the decision to merge is indeed, in principle, taken by a majority decision of the general meeting of all merging companies (see Articles 7 and 23 of the Third Directive; Article 23 of the SE Regulation and Article 9 of the Cross-border Merger Directive). The outvoted minority has no other option but to become a shareholder in the acquiring company.

The difference in approach between the Third Directive on the one hand and the SE Regulation and the Cross-border Merger Directive on the other hand may very well be nothing more than a ‘sign of the times’: minority protection was simply much less of an issue in 1978.

4. However, times change. When, on 8 October 2001 Regulation (EC) 2157/2001 on the Statute for a European Company (the ‘SE Regulation’) was adopted, minority protection was

1 See already G. Beitzke, ‘Les conflits de lois en matière de fusion de société (droit communautaire et droit international privé)’, 1967 *Rev.Crit.D.I.P.* 1.

2 ECJ 27 September 1988, Case C-81/87.

considered, though only leading to the inclusion of a ‘framework-principle’. Pursuant to Article 24.2, treating the formation of a SE by merger, Member States may, for the merging companies governed by their law, adopt ‘provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger’. If the law of a member state to which a merging company is subject provides for a procedure to *compensate* minority shareholders that does not prevent the merger registration, then the shareholders of the other merging companies situated in member states that do not provide for such compensation, must, when approving the draft terms of the merger, explicitly accept such procedure to apply. In that case ‘*the decision in the procedure shall be binding on the acquiring company and all of its shareholders*’ (Article 25.3, our italics).

The protective device is very broadly defined. It is clear however that the European legislator had two things in mind: (i) it thought of monetary compensation, (ii) for the dissenting shareholders of the companies being acquired.

5. Takeover bid law is quite another matter. Other than in the case of a merger scenario, a takeover bid offer is addressed by an external party to each shareholder of a listed company individually. It is up to each such shareholder of the target company to decide whether or not to accept the bid. The general meeting will only intervene if it must decide upon the reaction of the target company on the bid, in the case of a possibly hostile bid. On the bidder’s side, no structural intervention of its general meeting has been provided for, though in practice it may intervene, *e.g.* in case the bid requires a change in the corporate purpose of the bidder, or, much more frequently, in the case of an exchange bid, for approving the issue of the shares offered as remuneration under the bid.

Only when the bidder has reached the threshold for a squeeze out (see Article 15 of Directive 2004/25/EC of 21 April 2004 on takeover bids (the ‘Takeover Bid Directive’)) does it obtain a right to buy the shares of the remaining shareholders. In that case the minority shareholders also have the mirroring right to be bought out (see Article 16 of the Takeover Bid Directive).

The minority shareholder seems very well off enjoying this important freedom, but does take a risk when it does not sell: it may stay behind in a company with an new majority shareholder drastically changing the policy, and with a share that, in an narrow market with hardly any free float left, is very difficult to sell, except to the majority shareholder.

But Takeover bid-legislation is also, in itself, minority protection. According to Article 5 of the Takeover Bid Directive, confirmed in Consideration (9) of the Preamble, the mandatory bid following the crossing of a certain threshold of voting securities – to be determined by each of the Member States³ – through an acquisition of voting securities is a form of minority protection: minority shareholders must be allowed to sell their shares to the third party who, by crossing the threshold, has acquired control⁴ over the company.

3 But set around 30% in a large majority of the Member States: see the Commission Report on the implementation of the Directive on Takeover Bids, 21 February 2007, SEC(2007) 268 (http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf).

4 The word ‘control’ (in French ‘*contrôle*’; in German ‘*Kontroll*’; in Dutch ‘*zeggenschap*’, which is a better term) may lead to confusion. The only relevant criterion is the fixed percentage set by the Member States, and not the technical notion of ‘control’, *e.g.* for consolidation purposes.

III. Minority protection under the Cross-border Merger Directive

6. The Cross-border Merger Directive has largely copied the SE Regulation as far as minority protection is concerned, and thus also provides for a few – rather broadly formulated – principles.

Article 4.2 reads as follows: ‘a member state *may*, in the case of companies participating in a cross-border merger, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger.’

According to Article 6.2.c, the publication of draft merger terms in the national gazette of each member state must include an indication of the arrangements for the exercise of the rights of minority members of the merging companies, as well as the address at which complete information on these arrangements may be obtained, free of charge. Article 10.3 provides that if the law of a member state, to which a merging company is subject, provides for a procedure to compensate minority members without preventing the merger registration, such minority protection procedure shall only apply if the other merging companies situated in other Member States, not having such procedures, have explicitly approved it when approving the draft terms of the merger. More specifically, the general meeting of the other merging companies must approve that the protected members of the merging company may initiate court proceedings before the competent jurisdiction. The outcome of these proceedings will be binding upon the surviving company and all of its members (shareholders).

In short, there are two options: minority protection cannot interfere with the merger, but in such a case, all shareholders meetings must approve that the minorities can obtain relief in their own member state at the expense of the surviving company; or alternatively the merger can only be effectuated if all minorities have been compensated.

Minority protection is optional, not compulsory. Furthermore, the Cross-border Merger Directive does not indicate (i) who qualifies as a minority shareholder; (ii) in which company (the surviving entity or the disappearing entities) the minority deserves protection or (iii) what the nature of the protection could be.

The Cross-border Merger Directive thus allows Member States to provide for arrangements protecting shareholders specifically in the case of a cross-border merger, even when they do not do so in case of a national merger. This is worthwhile noting: it seems to indicate that going cross-border with a restructuring is going just one step further than a purely ‘internal’ restructuring (see however below, under 15 for that argument). However, Member States should keep in mind the third consideration of the Preamble to the Cross-border Merger Directive: no restrictions on the freedom of establishment or of capital are allowed, save where they can be justified in accordance with the case-law of the ECJ and in particular by requirements of the general interest, and even then they should be necessary for, and proportionate to, the attainment of such overriding requirements.

7. For the sake of completeness, it is worth noting that following the consultation which the European Commission conducted with regard to the proposed – but recently abandoned – directive on the cross-border transfer of seat (April 2004), over 80% of the respondents (fully) agreed that there is a need for minority protection; over 18% (fully) disagreed.

Article 8.5 of the SE Regulation does provide for the possibility of minority protection in the case of a transfer of seat of an SE: Member States may adopt provisions designed to ensure appropriate protection for minority shareholders who oppose the transfer. Logically, the same rule should be included in a directive covering the cross-border transfer of the corporate seat.

IV. Transposition of the Cross-border Merger Directive in some Member States

8. Although the Cross-border Merger Directive had to be transposed in national law by 15 December 2007 (see Article 19), not all Member States have already enacted the required legislation.

Below we briefly describe the approach towards minority protection in a selection of countries that have already implemented corresponding legislation (or are in the process of doing so). This analysis will demonstrate that the least that can be said is that the approaches are fairly different.

9. The German Bundestag implemented the Cross-border Merger Directive on 19 April 2007 by adopting a modification to the ‘*Umwandlungsgesetz*’ (UmwGE), including a minority protection system, as it had already done when implementing the SE-Regulation.⁵

The German cross-border minority protection system is largely inspired by the pre-existing system for minority protection in the case of a merger, but is nevertheless also influenced by a cross-border element. It is organized as a three step system:

- (i) As is the case for a national merger, each single shareholder has the right to challenge the merger at the pre-merger stage and so prevent the merger from taking place; it will then be up to the court to decide whether the merger procedure can be continued.
- (ii) The minority shareholder can also submit the exchange ratio to the court in order to achieve an improvement thereof. This is only possible if the German company is the disappearing entity, if the law of the other Member States governing the other companies involved provides for a similar procedure, or if all the other merging companies have agreed that this procedure would apply. The merger itself can take place; if later on the court awards an additional cash payment by way of compensation for the deficient exchange ratio, all shareholders of the German company should benefit from this, even those who voted in favour of the merger. There is no limit as to the height of the amount to be paid out to the German shareholders.
- (iii) Finally, a dissenting minority shareholder has a right to withdraw, as he would also have in case of a national merger, provided that there is reciprocity or pre-merger approval. German law qualifies such withdrawal as an acquisition by the company of its own shares.

Italian law seems to be rather well developed on the issue, even before the first European texts were adopted,⁶ apparently because the notion of withdrawal rights for minority shareholders in case of major changes possibly impacting on their rights – e.g. in the case of a transfer of the company’s seat abroad – has, for a while, already been a well developed instrument.⁷ This legal framework does not, as such, cover the cross-border merger, but the changes that a cross-border merger brings along can generally be qualified under at least one, if not several, of the proper causes for exercising a withdrawal right.⁸ The debate is highly focused on the change of applica-

5 See, for an analysis of the draft law, D. Haritz & B. Von Wolff, ‘Internationalisierung des deutschen Umwandlungsrechts – Zum Entwurf eines Zweites Gesetzes zur Änderung des Umwandlungsgesetzes’, 2006 *GmbHHR* 7, pp. 340-345; E. Gepken-Jäger, ‘Wetsvoorstel betreffende grensoverschrijdende fusies van kapitaalvennootschappen’, 2007 *Ondernemingsrecht*, p. 301, no. 3.

6 See M. Ventrizzo, ‘Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law’, 2007 *European Company and Financial Law Review* 1, pp. 47-75.

7 For an inventory of such changes see Ventrizzo, *supra* note 6, p. 62.

8 *Ibid.*, p. 69.

ble law inherent in cross-border transactions. While current Italian law does not seem to accept that a cross-border transfer of seat of an Italian company under all circumstances leads to a change of corporate law but can result in a winding up of the company under Italian law,⁹ it does, surprisingly so, accept that an outbound cross-border merger does result in the submission of the absorbed Italian company to the national law of the absorbing company¹⁰. Already in 2003, a law that entered into force in 2004 introduced a withdrawal right for minority shareholders, at a fair value. The shares offered for sale under such withdrawal rights are first to be offered to existing shareholders or even third parties; any remaining shares are either to be acquired by the company itself or annulled under a capital decrease mechanism.

The Dutch draft law¹¹ proposes to introduce a withdrawal right, but only if the cross-border merger implying a Dutch public or private limited liability company results in the shareholders of such Dutch company becoming shareholders in a company that is situated in another member state (the so called outbound merger). Apparently the Dutch legislator is mainly concerned that the minority shareholder will thus be confronted with different (albeit not necessarily less) minority protection, thus making the valuation of its shares and the assessment of the exchange ratio more difficult. Moreover, both pre-merger and post-merger challenges of a merger would, according to the Dutch legislator, be more difficult in a cross-border situation. At the same time, and surprisingly, the Netherlands has not made use of the possibility offered by the SE-Regulation (see above, under 4) to introduce minority protection in a quasi-identical situation.

10. As far as we could gather, neither France¹² nor the UK are planning to introduce any specific minority protection provisions for cross-border mergers.

In Belgium, no official draft law exists yet, but based upon the information available, it does not seem to be the intention of the Belgian legislator to provide for any specific minority protection provisions in cases of cross-border mergers. Under Belgian law, such minority protection is likewise not offered in the case of a national merger, with one exception of limited importance in practice: the statutory right of partners in a cooperative company to be bought out by the company pending the merger approval and provided the merger is approved.¹³ Belgium has also not provided for any minority protection in the case of a formation of an SE by merger.

IV. Minority protection: the formats

11. Minority protection can theoretically take various forms and degrees. One can consider, in increasing order of implication: (i) their right to be informed; (ii) their right to be consulted; (iii) their right to challenge majority decisions; and (iv) specific minority rights such as monetary compensation rights, withdrawal rights or appraisal rights. As indicated, only the fourth category can be qualified as rights that are specifically granted to minority shareholders because of their status as minority shareholders.

As far as information rights are concerned, all shareholders are treated equally, and will receive substantial information on the proposed merger, in essence in the same manner as is the

⁹ *Ibid.*, p. 56.

¹⁰ *Ibid.*, p. 57.

¹¹ *Kamerstuk* (Parliamentary Paper), 30 929, 15 January 2007. See on the draft law Gepken-Jager, *supra* note 5, pp. 298-304; and specifically on the withdrawal rights of minority shareholders under Dutch law: A. Leijten, 'Het uittreedrecht voor aandeelhouders volgens het wetsvoorstel grensoverschrijdende fusies (30 929)', 2007 *Ondernemingsrecht*, pp. 305-311.

¹² See M. Loy, 'Les fusions transfrontalières: entre présent et avenir', *S.J. (Droit et Affaires)*, no. 31-34 (1987), August 2007, pp. 25-29.

¹³ See Arts. 698, §2 and 711, §2 of the Belgian Company Code.

case for a national merger.¹⁴ In essence, shareholders can rely on the common draft merger terms, jointly established by the management or administrative organ of all merging companies (see Article 5 of the Cross-border Merger Directive), the report of the management or administrative organ, drawn up for each merging company separately (see Article 7 of the Cross-border Merger Directive), and on the independent expert report. Such independent expert report can be drawn up by an expert appointed by each of the merging companies separately, or, provided he is appointed by a judicial or an administrative authority, jointly for all merging companies (see Article 8 of the Cross-border merger Directive).

At the level of consultation, a merger is one of the most democratic restructuring processes: its approval requires a positive vote of the general meetings of all of the merging companies involved. In a cross-border merger, the attendance and approval quorums are determined by the national law of each of the merging companies¹⁵ (see Articles 9 and 4.1 (b) of the Cross-border Merger Directive; so there is no supermajority for cross-border mergers). However, such majority decision also binds the minority shareholders: even if they have voted against the merger, they will have to accept the consequences of the merger. In this respect a merger differs from a takeover bid, where each shareholder can decide whether or not to accept the offer of the bidder and tender its shares in the bid.¹⁶ And that is exactly where the fourth category of minority rights may come into play (see below, under 12).

The fact that a merger necessarily implies a majority decision of the general meeting also minimizes the risk that majority and minority shareholders (specifically of the company being acquired) would be treated differently. Everything happens at the same moment and under identical conditions. Nevertheless, majority shareholders could still obtain certain advantages, but they would then have to be hidden and indirect.¹⁷

A minority shareholder also has certain rights to contest the merger conditions and/or the majority decision to merge. It can do so pre-merger, usually in summary proceedings, if it still wants to attempt to change the exchange ratio and/or the proposed articles of association of the surviving company. Again, these rights are not specifically reserved for such a shareholder, but majority shareholders have other channels available for doing so: they will be better informed and represented during the merger negotiations. Therefore, they will seldom have to turn to the courts in order to preserve their rights, while minority shareholders often have no other option.

A minority shareholder having opposed the merger but finding itself confronted with a positive majority decision may also challenge the merger afterwards. National law will determine under which conditions a shareholder that has respectively voted against, abstained from voting or even abstained from presence or representation at the general meeting is still allowed to challenge the merger (see also below, under 13). National law will also determine on which formal or substantive grounds nullification can be obtained. However, the Third Directive has

14 See, in this regard, already the 4th Consideration in the Preamble to the Third Directive: 'Whereas [...] it is particularly important that the shareholders of merging companies be kept adequately informed in as objective a manner as possible and that their rights be suitably protected'.

15 Art. 7.1 of the Third Directive requires 'a majority of not less than two thirds of the votes attaching either to the shares or to the subscribed capital represented'. However, 'when at least half of the subscribed capital is represented', Member States legislation 'may [...] provide that a simple majority of [such] votes is sufficient'. 'Moreover, where appropriate, the rules governing alterations to the memorandum and articles of associations shall apply'. When there is more than one class of shares, the vote in each class will have to meet these requirements (Art. 7.2). Art. 8 provides for the circumstances under which shareholders' approval is not required, and is – if implemented in national law – also applicable in case of a cross-border merger (see Art. 7.3 of the Cross-border Merger Directive): basically, no shareholders' approval is required if there is proper access to information and at most 5% of the shareholders have the right to nevertheless convene a meeting.

16 At the risk however that (i) it stays behind as an absolute minority in a company with a very limited free float or that is even delisted, and with an entirely different dividend policy, and (ii) having to sell in any event under a squeeze out, when the threshold is reached (see Art. 15 of the Takeover Bid Directive).

17 Such as, e.g., well remunerated directors' mandates, or business arrangements in other companies belonging to these majority shareholders.

already, for the sake of legal certainty (see the ninth consideration of the Preamble) limited the grounds for nullification of a merger, and provides for a very short prescription period of six months (see Article 22).¹⁸

The Cross-border Merger Directive, following the example of the SE Regulation (see Article 30), further narrows down the possibilities to obtain the nullification of a cross-border merger: Article 17 states that a cross-border merger, once it has taken effect in accordance with Article 12,¹⁹ can no longer be declared null and void (see also consideration (8) of the Preamble). The fact that the possibilities for post-merger opposition of a cross-border merger are thus more limited than for a national merger, is therefore to be considered as an explicit choice of the European legislator. It does not prevent minority shareholders from obtaining the nullification until such entry into effect (which may indeed take a while), nor for testing other remedies.

In both cases (i.e. national and cross-border mergers), shareholders of the surviving entity, as well as shareholders of the disappearing entity, may have a legitimate interest in such pre- or post-merger challenging of the transaction.

12. If, in the end, the merger stands, the only satisfactory relief that can be offered to minority shareholders that opposed the merger is either the right to compensation for the damages, incurred or the right to sell their (undesired) shares and obtain a fair or at least reasonable price for them. To put it simply, specific minority rights will inevitably take the form of monetary compensation in one way or another.

Such compensation taking the form to sell can only come from two parties: either the surviving company, or from a third party, such as a majority shareholder of the surviving entity.

In the case of a monetary compensation for damages, the burden of proof that they have suffered damage, what the cause of such damage was (and consequently who should pay the compensation) and how such damage should be evaluated, lays with the minority shareholders.

If the major rationale behind the minorities' protection is their basic right not to accept a cross-border merger because of the resulting change of applicable law (see below, under 15), even if, for all other matters, the merger has taken place in respect of all their legal and economic rights, the most efficient relief that can be offered to them consists of the minorities' right to sell their shares. In such a case, how should the shares to be sold be valued? With (as a basis) the same valuation methods as those used in the merger? Yes, as a rule of thumb, but probably not necessarily: in cases where the minority shareholders dissent precisely because they do not agree with (and have, as the case may be, unsuccessfully attempted to challenge) the valuation methods applied or the resulting exchange ratio, buying them out at such valuation may not satisfy them.²⁰

And is the valuation an exact shift copy of the parameters used for determining the exchange ratio? Ventrizzo dissents: if one rejects the merger one should not profit from it

18 Basically, the following rules apply:

- the nullity must be ordered by a court;
- the nullity can only be based on the following grounds: (a) absence of judicial or administrative preventive legality supervision; (b) the merger has not been drawn up and certified in the proper form; (c) the decision of the general meeting is void or voidable under national law.

Of course, the last category being an open-ended one, it considerably enlarges the possible grounds for nullification.

19 The entry into effect of a cross-border merger is to be determined by the law governing the surviving company. It can not be set earlier than the moment in time where the authority designated by the member state of the surviving company to scrutinise the legality of the completion of the cross-border merger, has, on the basis of certificates received from the other merging companies confirming that they have for their part complied with the applicable procedure.

20 Compare with Art. 11.5 of the Takeover Bid Directive, where equitable compensation is put forward for loss of rights following the break through rule but where it is explicitly left to the member states to determine the terms thereof. Since the Cross-border Merger Directive is completely silent, even on the nature of the protection to be offered to the minority shareholders, it does not give any indication in this regard.

either. Therefore he pleads for a neutralization of the positive effects of the merger on the value of the shares.²¹ The Dutch draft favours an agreement between the company and the dissenting shareholder, but failing such agreement, the value to be taken into account is the value of the shares in the disappearing entity the moment the draft merger terms are filed.²² That also seems to indicate that an increase in the value based on the merger synergies should not be taken into account.

If the surviving company has to acquire the shares, how should it impute such acquisition? Is it to be considered as an acquisition by the surviving company of its own shares, and must it thus follow the applicable rules, meaning also that there may be limits to the possibility to offer relief to the minority shareholders (depending on the maximum percentage of own shares that can be acquired according to national law and/or the available distributable profits)?²³ Can the surviving entity take it one step further and (partially) impute the shares on its capital? And how is this to be treated for tax purposes? What about the 10%-limit on cash payments laid down in Articles 3.1 and 4.1 of the Third Directive: is the compensation paid to minority shareholders to be taken into account for determining this limit? Probably not, because it is not a payment to shareholders in exchange for the contribution of all assets and liabilities of the disappearing entity, but this is an issue that should be clarified.²⁴

The fact that other shareholders would have to buy out the dissenting minority seems much less evident, unless they would volunteer for it.

Again, there are enough open questions, and therefore the need for the national legislators to carefully consider them.

V. Who are the minority shareholders to be protected?

13. Another question entirely left open by the European legislator, is who are to be considered as minority shareholders worthy of protection in the framework of a cross-border merger. The question is not trivial, especially when it comes to determining the specific minority rights: there can be an important difference between paying compensation to 25% of the shareholders or to 50% of the shareholders.²⁵ In this respect, one should keep in mind the minimum merger approval criteria imposed under the Third Directive (see footnote 15): generally, a majority of 2/3 of the votes suffices, and, if national law requires an attendance quorum of 50%, a simple majority of 50% plus one vote will do. Theoretically, the dissenting minority can thus be as large as 50% minus one vote, in each of the companies participating in the merger.

It goes without further saying that shareholders that have voted in approval of the merger, should not be allowed to either challenge it afterwards, nor to obtain specific compensation, unless their vote was obtained on the basis of false, incorrect or incomplete information.

Likewise, it is also clear that shareholders that have rejected the merger by voting against it at the general meeting should qualify as minority shareholders who have opposed the merger.

One must also consider those shareholders that have not approved nor opposed the merger: these are the shareholders that were either not present or were present but abstained from voting. Absent shareholders may count for the attendance quorum but not for the majority. One possible

21 Ventoruzzo, *supra* note 6, pp. 70-71.

22 Gepken-Jager, *supra* note 5, p. 300.

23 See also Directive 2006/68/EC amending Council Directive 77/91/EC as regards the formation of public limited liability companies and the maintenance and alteration of their capital, allowing member states to mitigate these rules.

24 See also Gepken-Jager, *supra* note 5, p. 300.

25 See Leijten, *supra* note 11, pp. 310-311.

approach could be to consider that they should not be taken further into account: the attendance quorum aims at guaranteeing the presence of a representative number of votes before the voting can even take place. Once that quorum is reached, the absent shareholders should play no further role. Another approach could be to accept the qualification of the dissenting minority to each shareholder that would be in a position, under national law, to challenge the merger by introducing a court claim in nullification of the merger. Should abstaining shareholders qualify as minority shareholders opposing the merger? If under national law a vote that is not expressed – an abstention – counts as a negative vote, one would be tempted to answer this question in the affirmative; if on the other hand the vote of an abstaining shareholder is neutral, one may consider that such a shareholder is not an opposing minority. Article 4.2 of the Cross-border Merger Directive states that the protection should only be available to minority shareholders having opposed the merger, but whether that means that absent shareholders by definition should not obtain relief, is another matter.²⁶

The doubt expressed leads to one certainty: the national legislator opting for minority protection would do well to clarify this.

Likewise, the national legislator should take the precaution to explicitly determine whether only the minority shareholders of the companies being merged, or the minority shareholders of all companies involved in the merger deserve protection, including the minority shareholders of the surviving entity. Indeed, while it seems obvious, at first glance, that only the dissenting shareholders of the disappearing entities deserve protection, this becomes less evident when one looks with more detail into the possible *rationales* for minority protection in the case of a cross-border merger.

VI. Why do minority shareholders deserve protection in a cross-border merger?

14. Once more, the European legislator is completely silent with regard to the reasons that could underlie the choice of any national legislator to provide for minority protection. As we have pointed out under 2-3 above, the European legislator has only introduced the possibility of minority protection for cross-border mergers, and not for national mergers. Does one have to derive from this difference in approach that minority protection is necessarily related to the fact that there is a change in applicable corporate law? That is not the case, as we will see below.

a. Change of corporate nationality (and ensuing shareholder's rights)

15. National legislators may be concerned about the fact that shareholders that until now were subject to their own national law as shareholders of a company governed by such law, will, following the merger, become shareholders of a company governed by the national law of another member state. This concern can only arise in cross-border mergers, and may therefore explain the different approach taken by, on the one hand, the Third Directive and, on the other hand, the SE-Regulation and the Cross-border Merger Directive. Also, this concern only relates to the shareholders of the company (or companies) that will disappear following the merger, *i.e.*, the companies being acquired in the case of a merger by acquisition and the companies ceasing to exist in the case of a (more rare) merger by formation of a new company.

Such concern may be understandable, but is not really convincing when one takes a closer look. If the facts are analysed, what is the difference between, *e.g.* a German *Aktiengesellschaft*

²⁶ Yes, according to Leijten, *supra* note 11, p. 309.

and a Dutch *naamloze vennootschap*? And would a shareholder switching *e.g.* from a French *société anonyme* to a French *société à responsabilité limitée* in a national merger be subject to less drastic changes than a shareholder who switches from the same French *société anonyme* to a Belgian *société anonyme/naamloze vennootschap*, just because they are both companies governed by French law? It seems that if the European legislator itself admits that 40 years of European harmonization in company law has not led to at least sufficiently comparable corporate forms to induce a minimum of confidence for their ‘users’ throughout Europe,²⁷ it may be a better idea to continue to work on that harmonization.²⁸

The consideration that minority withdrawal or appraisal rights contribute ‘to define the legal attractiveness of a given jurisdiction, because they influence the degree of freedom granted to controlling shareholders and managers that want to change the applicable company law, and the level of protection of investors’²⁹ goes in the same direction, and in fact confirms that harmonization has not advanced sufficiently in this area. The same commentator also points at the flipside of the coin: ‘minority protection may adversely affect the development of a free market for companies in Europe, granting a sort of veto power to minorities that oppose the merger’.³⁰

An identical concern is also present in case of an exchange takeover bid each time the bidder is governed by the law of another member state than the target. While it is most certainly correct that in a takeover bid – other than in a merger scenario – the individual shareholder has the choice between accepting shares of the bidder and thus exposing himself to a foreign law, the exercise of such choice does not remain without consequences (see above, under 5), and in any case, the first aim of an exchange bid is that it succeeds. Nevertheless, the European legislator has not at all been specifically concerned about the change of corporate form in this hypothesis. In the eyes of the European legislator, the fact that in a merger the minority has to abide by the majority decision seems to be a sufficient reason to provide for the (possibility of) minority protection in that specific case.

Whether the draft Directive on the transfer of corporate seat – raising exactly the same issue – will cover it (see above, under 7), seems to have lost its pertinence, at least for the time being.

At a time when the European legislator, being aware of the ever increasing ability of investors to participate across borders in (listed) companies, takes initiatives to facilitate and encourage the cross-border exercise of shareholders rights,³¹ it seems to be a somewhat narrow vision to focus on the change of the applicable law (and not on a change of the distinguishing characteristics of the corporate format of the surviving company) as a reason to provide for minority protection. This vision seems to be based on the presumption that shareholders are – generally speaking – more familiar with the national law of the company in which they are holding their shares than with the law of other Member States, and are better placed to enforce their rights under such national law. This may, in itself, be an accurate presumption, but only to the extent that shareholders are ‘of the same nationality’ as the company. And that is, in real life, less and less the case, which also, over the years, will make the presumption less evident.

27 See in that respect the definition of limited liability company in Art. 2 of the Cross-border Merger Directive. On the issue of European harmonization see K. Geens, ‘De nieuwe harmonisatiedynamiek van het vennootschapsrecht: een “eerste klas” begrafenis van het Europees vennootschapsrecht na 50 jaar?’, *T.R.V.* 2006, 75-89.

28 Including in the field of corporate taxation, often a determining factor in corporate restructurings and in the selection of a location for the seat of a company.

29 Ventoruzzo, *supra* note 6, p. 75, see also p. 50, where the author states that minority protection may become a central issue in corporate arbitrage among different systems of corporate law.

30 *Ibid.*

31 See Directive 2007/36/EC of 11 July on the exercise of certain rights of shareholders of listed companies.

16. It is true that concerns may also relate to the merger procedure: the Dutch legislator, for example, apparently was concerned that when the merger leads to the absorption of a Dutch company by a foreign company, the shareholders of the Dutch company would not dispose of the same possibilities to challenge the merger pending the merger decision making process.³²

Again, this is in itself a valid concern. But once more this concern is based on the presumption that a shareholder implicated in a cross-border merger is less protected than in a purely national merger, because of the mere fact that the operation takes place across borders.

17. Minority shareholders may also disagree with the merger terms being proposed: they may reject the valuation of one or more of the merging entities and the exchange ratio resulting from them. Alternatively, they may disagree with certain amendments to the articles of association of the surviving company that result from the merger. Once more, this is in itself a valid concern. But the issue presents itself in an identical manner in a national merger. And so, here too, the question in fact comes down to the question raised above: is it correct that it is more difficult to defend shareholders' rights in a cross-border merger than in a national merger merely because of the cross-border character?

18. Finally, one may, following the Italian approach (see above, under 9), consider cross-border mergers as one among many other circumstances where there is so much impact on the rights of minority shareholders, that they should have a right of sell-out. This approach is to a certain extent comparable with the approach taken in the Takeover Bid Directive. Once more, there is no reason to treat national mergers and cross-border mergers differently in this respect.

19. From the above it is also clear that the reflex to link minority protection to the disappearing company (and thus limiting minority protection to outbound mergers and not inbound mergers), is only warranted when considering some of the possible justifications of such protection. The change of applicable law indeed only affects the shareholders of the disappearing company (see above, under 15).

However, to the extent that the criticism concerning the merger procedure is based on valuation issues or future shareholders' rights (see above, under 16 and 17), or on the right to be 'bought out' in case of a change of control (see above, under 18), there is no reason to be less concerned about the shareholders of the disappearing company than those of the surviving company.

VII. A few preliminary conclusions

20. Where does the overview above bring us?

It is evident that, while in general the Cross-border Merger Directive, that can build further on the harmonizing effect of the Third Directive, should result in a fairly harmonized legal landscape for cross-border mergers, it has at the same time allowed the Member States to develop a rather nationalistic reflex.³³ It seems indeed that, in the mind of the European legislator, minority protection must in the very first place be offered to the shareholders of the companies

³² See Gepken-Jager, *supra* note 5, p. 299, no. 2.

³³ See also Gepken-Jager, *supra* note 5, p. 298, no. 1, who points out that the proposal of the Dutch legislature to provide for (non-mandatory) minority protection in case of an outbound merger is the traditional exemption confirming the rule, namely that the Dutch legislature did not wish to be stricter than required by the European legislature.

that will disappear in the merger, because they will, by becoming shareholders in the surviving entity following the merger, undergo a change in applicable corporate law.

It is true that consideration (3) of the Preamble limits this possibility by reminding the Member States that no restrictions on the freedom of establishment or on the free movement of capital will be tolerated if they cannot be justified in accordance with the case law of the European court of justice, and, in particular, by requirements of the general interest and if they are not necessary for, and proportionate to, the attainment of such overriding requirements. But the impact thereof on minority protection, as it is explicitly allowed by the Cross-border Merger Directive, seems at first glance limited.

On the other hand, the European legislator has clearly not considered minority protection to be so important that it has obliged the Member States to introduce it: it has only allowed them to do so. The overview above (see under 9 and 10) teaches us that the message has been understood in a very diverse way by some of the Member States.

Harmonization in cross-border mergers will not extend to minority protection.

21. While it seems that the change of applicable corporate law has been the major rationale underlying the European legislator's decision to allow minority protection, the Cross-border Merger Directive is completely silent on such or any another rationale, as well as on the nature and the scope of the protection that may be offered, its beneficiaries and its possible impact on the capital of the merging entity.

It remains somewhat of a mystery as to why the European legislator, while confirming on the one hand that a cross-border merger should be subject to the same rules as national mergers, has on the other hand created one possible and very vague exception to that rule, the impact of which could possibly be important.

As is now a standard provision in each directive, Article 17 of the Cross-border Merger Directive calls for a review five years from 15 December 2007. This may very well be an opportunity for the European Commission to redo its homework for this specific aspect of the Directive. It may be a good idea to start the evaluation by finding out how many cases of minority protection in the context of cross-border merger were inspired by the change of applicable law, and how many were inspired by the assertion that the valuations and/or the exchange ratio for the shares would not be satisfactory to such minorities.