



CROSS-BORDER MERGERS AND DIVISIONS

ICAEW welcomes the opportunity to comment on the *Cross-border mergers and divisions* published by the European Commission, DG MARKT on 8 September 2014 a copy of which is available from this [link](#).

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This response of 1 December 2014 reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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MAJOR POINTS

Consultation Process

1. The Commission requires responses to this consultation to be made on-line and in a multiple choice format. In many cases the choice of possible answers is insufficient to reflect our views. We have copied our answers to the questions in Parts II and III below and supplemented in this document where necessary. This document therefore constitutes our 'General Comments' under Part IV of the consultation. The questions in Part I of the consultation are not repeated here as the relevant information is, in substance, contained in our introductory comments.
2. The consultation method is 'unfriendly' for users; it would be easier if space were allowed under each question for comment and if the questionnaire could be provided in Word (or equivalent) format.
3. As a general comment, EU intervention is necessary for cross border mergers or divisions to take place throughout the EU but much of the process for mergers or divisions can be left to national laws and does not require harmonisation.

RESPONSES TO SPECIFIC QUESTIONS

II. Cross-border mergers

Q1. Should the CBMD apply to cross-border mergers of companies that have not been formed in the EU/EEA but have converted into an EU/EEA form?

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

Q2. Should cross-border mergers be possible between different company types in general, e.g. a merger between a private limited liability company and a public limited liability company?

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

4. Any regime for merger between different types of company should protect rights of creditors of each type of company. For instance, where re-registration of one form as another is permissible under local law, equivalent protections should apply.

Q3. Should the rights of creditors in case of a cross-border merger be harmonised?

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

5. It is not necessary to harmonise creditor rights; their interests can be protected as a matter of national law by rights to challenge a merger in the same way as any non-cross-border restructuring of a company.

Q4. Should the requirements companies are subject to, when the creditors' protection period is running, be harmonised?

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

Q5. Should the date determining the beginning of the period throughout which the creditors of the merging companies are protected be harmonised?

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

6. It would be helpful for timeframes to be harmonised, but the starting date should always be before the merger has taken effect. Similarly, the end date should be before the merger has taken effect.

Q5.1. The starting date should be:

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

Q6. Should the rights of minority shareholders in case of a cross-border merger be harmonised?

- ☐ a) Yes
- ☒ b) No

☐ **c) I do not know**

7. It is not necessary to harmonise these rights as the minority shareholders of each company have the protections accorded to them under their respective national laws for any other corporate reconstruction.

Q7. Should the date determining the beginning of the period throughout which the minority shareholders of the merging companies could exercise their rights be harmonised?

☒ **a) Yes**

☐ **b) No**

☐ **c) I do not know**

Q7.1. What should be the "event" triggering the starting date ? [multiple choice question]

☐ **a) General meeting**

☐ **b) If there is no general meeting, the publication of the common draft terms of cross-border merger in the register or on a company's web-site**

☐ **c) If there is no general meeting, the application to the relevant authorities for the pre-merger certificate**

☐ **d) If there is no general meeting, the registration of the merger in the business register**

☒ **e) Other (please specify)**

☐ **f) I do not know**

Please specify :

8. The triggering event should be the publication of draft terms in all cases, whether or not there is a general meeting. Publication should be in advance of any general meeting or other specific events noted above.

Q8. Should the length of the period throughout which the minority shareholders of the merging companies can exercise their rights be harmonised?

☒ **a) Yes**

☐ **b) No**

☐ **c) I do not know**

Q8.1. How long should this period of protection be?

☐ **a) One month**

- ☒ **b) Two months**
- ☐ **c) Longer than two months (please specify)**
- ☐ **d) I do not know**

9. The key point is that the protection period should not extend beyond the time for shareholder approval of the merger. As noted, we think that two months from the start date is appropriate.

Q9. When a cross-border merger involves the issuance of new shares, the valuation of assets and liabilities may be necessary. Among Member States two different types of valuation methods are used: the fair value method and the book value method. Since the two methods may result in different valuations, should common rules be set across all Member States?

- ☐ **a) Yes**
- ☒ **b) No**
- ☐ **c) I do not know**

Q10. Should the date from which the transactions of cross-border merging companies are treated, for accounting purposes, as being those of the company resulting from the cross-border merger, be harmonised?

- ☐ **a) Yes**
- ☐ **b) No**
- ☒ **c) I do not know**

10. It should not be necessary to harmonise the dates as the two companies will become one on the same date and the accounting implications could be assessed by the relevant accountants. However, we are aware of cases where merging companies would have found a harmonised approach helpful so that further consideration of this issue would be merited.

Q11. If, under certain circumstances, no general meeting is necessary should the date for the publication of the common draft terms of cross-border merger be harmonised?

- ☒ **a) Yes**
- ☐ **b) No**
- ☐ **c) I do not know**

Q11.1. What should be the "event" by reference to which the publication date of the draft terms of the cross-border merger is determined?

- ☐ **a) Submission of the documents to the national authority responsible for scrutinising the legality of the cross-border merger**
- ☐ **b) Submission of the documents to the business register**

- ☐ c) Disclosure of the merger in the business register
- ☒ d) Other (please specify)
- ☐ e) I do not know

Please specify :

11. Once the proposed merger has been made public (or is required to be made public under applicable law or regulation).

Q12. Should, in certain cases, a harmonised "fast track" cross-border merger procedure be introduced?

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

Q13. Should each of the respective national authorities involved in the cross-border merger only check compliance with the requirements imposed by its own Member State?

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

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

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

III. Cross-border divisions

Q1. Why would a company want to carry out a cross-border division? [multiple choice question]

- ☐ a) Realise new Internal Market opportunities
- ☐ b) Change/simplify its organisational structure
- ☐ c) Adapt to changing market conditions

☒ **d) Other (please specify)**

☐ **e) I do not know**

Please specify:

12. Some member states already permit cross-border divisions. It is a convenient tool if a company wishes, for instance, to sell part, but not all, of its business.

Q2. How could harmonisation at the EU level of legal requirements concerning cross-border divisions help enterprises and facilitate the increase of cross-border activities of companies within the EU? [multiple choice question]

☐ **a) Reduction of regulatory costs (fees)**

☐ **b) Reduction of the costs directly related with the cross-border division (e.g. cost of translation, advice, etc)**

☐ **c) Reduction of the operating costs of the company or group of companies**

☒ **d) Other (please specify)**

☐ **e) I do not know**

Please specify:

13. The contribution of this harmonisation initiative to reduction of obstacles to cross-border activities is likely to be limited in the context of obstacles generally (such as divergent employment and taxation laws and different languages and cultures). Where companies do wish to divide on a cross-border basis, they can usually do so, despite lack of harmonisation, for instance through creating a new company and transferring the relevant assets (and, in effect, liabilities) to that company and then merging the new company with another (if that is what is desired).

14. However, if division can be implemented in a simpler way than by incorporating a new company and business transfer, that would be beneficial.

Q3. What, if any, are the obstacles to the execution of cross-border divisions when compared to national divisions? [multiple choice question]

☐ **a) Costs of a cross-border division effected via a national division and then a cross-border merger**

☐ **b) Difficulty of financing cross-border divisions**

☐ **c) Legal uncertainty because of a lack of European rules**

☐ **d) Duration and complexity of the current procedures necessary to execute a cross-border division**

☐ **e) Tax issues**

- ☒ **f) Any other obstacles than mentioned above? (please specify)**
- ☐ **g) I do not know**

Please specify:

- 15.** The key obstacle is that the laws of both countries of the companies involved would need to facilitate the division, which would require EU action of the kind under consideration to be the case in all member states. The costs of effecting a division under alternative approaches (eg as outlined in (a) above) arise out of this underlying issue.

Q4. What are the main issues related to cross-border divisions that should be regulated at EU level? [multiple choice question]

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

- 16.** Our earlier answers address a number of the issues that should (or should not) be addressed at EU level. However, in general, we think that harmonisation should be limited so far as possible to meet the objective and we consider this to be harmonisation of procedural issues, whilst retaining creditor (and shareholder) rights under national law of applicable to the dividing entity. Post-division, the employee, accounting and other laws of the member state of each entity will apply. These do not need to be harmonised as the dividing entity and its stakeholders will be able to take them into account in determining whether or not to proceed.

Q5. Should harmonised rules on cross-border divisions be integrated in the framework established in the Directive on cross-border mergers?

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

- 17.** We do not think that it matters much where the relevant rules are contained. It is for the member states to implement the rules and to determine how to do so in the most practicable way having regard to the way in which their laws are made.