Cross-border mergers have become an integral part of corporate restructurings within the EU internal market. Groups have been taking advantage of the harmonized rules to move or consolidate operations, ownership of assets and liabilities across the member states – for instance, many corporations used cross-border mergers to reorganise their structures as a result of Brexit. However, the level of harmonization of cross-border reorganizations was limited, covering only mergers of limited liability companies, while other forms were absent. New legislation, discussed in more detail in this article, expands the rules for cross-border reorganizations by introducing comprehensive procedures also for cross-border conversions and divisions and revising rules on cross-border mergers of LLCs. It aims at making the process simpler, faster and cheaper, while, at the same time, ensuring increased protection of shareholders, employees and creditors and
allowing national authorities to block cross-border reorganizations set up for fraudulent or abusive purposes, such as circumvention of social security payments or tax obligations.

An underlying legislation in this area is the Directive No. 2017/1132 relating to certain aspects of company law. Experts have often pointed out the inadequacy of current legislation. The lack of a harmonised legal framework leads to many practical issues and to a large extent fails to provide effective protection of vulnerable stakeholders. To address these concerns, the European Union has adopted a new Directive 2019/2121, amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions. As the transposition deadline of 31 January 2023 approaches, we believe it is the right time to remind ourselves of some of the main changes introduced by this new legislation.

Firstly, the Directive lays down comprehensive rules for cross-border conversions and divisions of LLCs involving formation of new companies (transfer of assets and liabilities to one or more existing companies is still carved-out from the harmonised framework). Cross-border divisions will also contain a new category that is currently not recognized by Czech law. By way of division, a company will be able to transfer part of its assets and liabilities to one or more recipient companies, in exchange for shares in the recipient companies. This “division by separation”, in which shares in the recipient company will be issued to the divided company, instead of shareholders of the divided company, will thus provide an alternative to the establishment of a subsidiary by provision of non-monetary contributions by a holding company.

The Directive also specifies and expands information obligations towards shareholders and employees. The scope of information in the report of the management body explaining and justifying the legal and economic aspects of the proposed cross-border reorganization and its implications for employees is provided in much larger detail. Employees (or their representatives) will then be able to comment on the relevant parts of the report by submitting their opinions. For shareholders, the report should include protection tools available to them, in particular information on their right to withdraw from the company. In order to speed up the process of reorganization, shareholders can waive their right to this report. Further information rights are also provided to creditors. Member States will also have to ensure that creditors who are not satisfied with the protection provided by the company in the common draft terms (and where they have not been able to find a satisfactory solution with the company) will be able to apply to the appropriate authority for protective measures.

In order to successfully close a cross-border reorganization, it will be necessary to obtain a pre-conversion, pre-merger or pre-division certificate from the competent authorities of the Member States attesting compliance with all relevant conditions and the proper completion of all procedures and formalities in the Member State of the participating company. Member States must ensure that companies will be able to apply for the certificate online.

In addition, in the process of a cross-border reorganization companies will have to publish a notice in a register informing shareholders, creditors and employees (or their representatives) on their right to comment on the proposed reorganization. The
comments submitted, together with the common draft terms, report of the management body and information on the approval of the common draft terms by the supreme body of the company will be attached to the application for the certificate described in the section above.

According to the European Commission, new legislation and harmonization should speed up the process of cross-border reorganizations, which can take around 3-6 months depending on the circumstances of the case, and make it cheaper. The estimated savings are between EUR 12,000 and 19,000 per single cross-border reorganization.

The Directive was adopted on 27 November 2019 and is effective as of 1 January 2020. As mentioned above, the deadline for transposition of the Directive into national laws is 31 January 2023. As of the date of publication of this article, no amendments to the relevant laws, in particular Act No.125/2008 Coll., on transformations of companies and cooperatives, which would implement the Directive, have been submitted to the legislative procedure in the Czech Chambers of Deputies.

Simona Zajickova also contributed to this article.

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