Ranking the Rules Applicable to Cross-Border Mergers

GERCO C. VAN ECK, CIVIL-LAW NOTARY AT LOYENS AND LOEFF N.V., ROTTERDAM, THE NETHERLANDS AND
ERWIN R. ROELOFS, PHD RESEARCHER, UTRECHT UNIVERSITY, THE NETHERLANDS*

1. INTRODUCTION

On 15th December 2005, the Tenth directive[1] on cross-border mergers (CBM) entered into force and effect.[2] Since the implementation of the Tenth directive in the national laws of the Member States of the European Union (EU), a clear statutory framework for cross-border legal mergers of limited liability companies exists, which underlies the laws of different Member States of the EU,[3] in addition to the legal framework for CBM whereby a European company (Societas Europaea, SE) or a European cooperative society (Societas Cooperativa Europaea, SCE) is formed in accordance with the SE Regulation[4] and the SCE Regulation,[5] respectively. The underlying principle of the Tenth directive is a cumulative application of the laws that are applicable to merging companies – including provisions on national mergers – when implementing a CBM (see *inter alia*, Article 4, paragraph 1, sub-paragraph b, and paragraph 2 and consideration no. 3 Tenth directive). A cumulative application of the laws that are applicable to merging entities in the case of a CBM is also the guiding principle of the SE Regulation and the SCE Regulation.

When implementing a cross-border legal merger, specific problems may arise in legal practice due to the principle of the cumulative application of the national merger laws and procedures governing the parties to the CBM.[6] Such problems may specifically arise when the relevant laws and procedures are not directed at one – or more – of the parties to the CBM but are applicable to the merging companies in general. For example, this problem arises when the law applicable to one of the companies involved in a CBM provides for a simplified procedure for the merger of so-called sister companies – that is, companies of which the shares are held by the same shareholder – and the law applicable to the other merging company does not provide for such a simplified procedure. In this case, the question arises whether all formalities for a 'normal merger' have to be fulfilled, or only the formalities for the simplified procedure, which, for example, result in less strict rules on the report of the management board on the merger proposal and the exchange of shares. Another example is the report of an independent expert, which is a part of the required procedure for the entering into force of a merger. The report of the independent expert is in principle based on Article 10 of the Third directive.[7] Some Member States, such as the Netherlands,[8] introduced the requirement of a statement of an independent expert that the acquiring company meets the minimum capital requirements as a part of the report of the independent expert on the merger, whereas the statement concerning the minimum capital requirement is not based on the Third directive but on the Second directive.[9] In this case, the question arises whether the report of the independent expert on a CBM also has to contain a statement that the minimum capital requirements have been met, if the law applicable to the acquiring company does not provide for such statement as a part of the merger report.[10]

For the abovementioned problems, it may well be the case that such laws and procedures did not take any cross-border aspects

* E-mail: gerco.van.eck@loyensloeff.com and e.r.roelofs@hetnet.nl.

1 Directive 2005/56/EC of 26 Oct. 2005 on cross-border mergers of limited liability companies (OJ L 310 of 25 Nov. 2005, 1), as amended by Directive 2009/109/EC of the European Parliament and of the Council of 16 Sep. 2009, OJ L 259 of 2 Oct. 2009, 14.

2 Article 20 Directive 2005/56/EC.

3 For a general overview of cross-border mergers, see D.F.M.M. Zaman, 'Cross-Border Mergers in Europe', *European Journal of Law Reform* (2006): 123–136.

4 Council Regulation (EC) No. 2157/2001 of 8 Oct. 2001 on the Statute for a European Company (SE), OJ L 294, 10 Nov. 2001, 1–21.

5 Council Regulation (EC) No. 1435/2003 of 22 Jul. 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18 Aug. 2003, 1–24.

6 This publication in principle does not deal with EEIGs.

7 Third Council Directive 78/855/EEC of 9 Oct. 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, OJ L 295, 20 Oct. 1978, 36–43.

8 See Art. 2:328 Dutch Civil Code.

9 Second Council Directive 77/91/EEC of 13 Dec. 1976 on the coordination of safeguards, which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ L 026, 31 Jan. 1977, 1–13.

10 See more about this subject: G.C. van Eck & E.R. Roelofs, 'De rol van de accountant bij grensoverschrijdende fusie', *Vennootschap & Onderneming* (2010): 61–67.

van Eck, Gerco C. & Erwin R. Roelofs. 'Ranking the Rules Applicable to Cross-Border Mergers'. *European Company Law* 8, no. 1 (2011): 17–22.
© 2011 Kluwer Law International BV, The Netherlands

into consideration. There may be various reasons for this. On the one hand, it could be possible that at the time when the national laws and procedures entered into force, it was not yet possible to take any such cross-border aspects into consideration, because of a lack of a cross-border variant of legal mergers. On the other hand, it could be possible that the practical consequences of a (full) cumulative application and the practical complications of this cumulative application of the laws applicable to the merging companies were not properly foreseen.

In this contribution, we will try to define certain 'ranking rules', which can indicate the ranking of national laws based on different directives. We will not pay attention to 'conflict rules', which are rules of international private law and which indicate which law of which Member State is applicable to the procedure for a CBM or a part thereof. In section 2 of this contribution, we will highlight the guiding principles of the Tenth directive. We will set out the cumulative application of the laws that are applicable to merging companies on the basis of the Tenth directive in section 3. In the following section, section 4, a comparison will be made with the ranking of the rules pursuant to the SE Regulation, the SCE Regulation, and the SPE Regulation. In this section, we will also examine the scope of the applicable national law pursuant to the Third directive. In section 5, we will compare a CBM by which an SE, SCE, or SPE will be formed with a 'normal' CBM. Freedom of establishment has a limitative effect on the application of the national law of a Member State to the merging company that is governed by the law of another Member State. This subject will be examined in section 6. In section 7, we will pay attention to the ranking of the rules that are applicable to a CBM. Finally, we will present our conclusions in section 8.

2. THE TENTH DIRECTIVE: GUIDING PRINCIPLES

As set out in the introduction, the guiding principle for a CBM on the basis of the Tenth directive is the cumulative application of the laws that are applicable to merging companies.[11] Such a cumulative application should not lead, however, to – full and unconditional – application of the national law (the company law statute) governing one party to the other party to the CBM, which is itself governed by the national law (the company law statute) of another Member State. For example, although the cumulative application of laws that are applicable to merging companies forms the basis of a CBM between a French company and a German company, the provisions of German law do not have to be applied fully and unconditionally to the French company and vice versa. Because the cumulative application of laws that are applicable to merging companies is not absolute and unconditional, when applying this principle, a distinction should be made between certain parts of the merger procedure.[12] Such a distinction can be done in different manners as explained below. One could argue that when applying the relevant national company law statutes of the parties to a CBM, a distinctive approach should be followed, the so-called distinctive cumulative application.

3. THE 'DISTINCTIVE CUMULATIVE APPROACH': RANKING PURSUANT TO THE TENTH DIRECTIVE

A basis for a distinctive cumulative application can be found in Article 4 paragraph 1 subparagraph b Tenth directive. This article provides that a company, which is a party to a CBM, must comply with the provisions and formalities of the relevant national law that is applicable to it.[13] In addition, Article 4 paragraph 2 Tenth directive stipulates that such provisions and formalities are especially those that deal with (1) the decision-making process relating to the merger and taking into account the cross-border nature of the CBM and (2) the protection of (a) creditors of the merging companies, (b) bondholders, and (c) the holders of securities or shares, as well as (d) employees as regards rights other than those governed by Article 16 Tenth directive. As a consequence of the wording of Article 4, paragraph 2 Tenth directive, the *distinctive element* is those laws (company law statutes) that deal with any of the areas of law referred to in paragraph 2 of Article 4 Tenth directive, namely:

(1) the decision-making process within the framework of the CBM;
(2) the protection of the interests of creditors;
(3) the protection of the interests of shareholders (including bondholders and holders of securities); and
(4) the protection of the interests of employees (jointly the 'Specific Areas of Law').

With respect to each party to the CBM, the relevant national law applicable to the company must be complied with for each Specific Area of Law. However, national law may not introduce restrictions on the freedom of establishment or on the freedom of movement of capital unless these are justified in the light of the case law of the European Court of Justice (ECJ)

11 The cumulative application of the laws applicable to the merging companies is also the basis for the merger whereby an SE or an SCE will be formed, see Art. 18 SE Regulation and Art. 20 SCE Regulation.

12 See *inter alia*, G. Beitzke, 'Internationalrechtliches zur Gesellschaftsfusion', in *Probleme des europäischen Rechts, Festschrift für Walter Hallstein zu seinem 65*, ed. E. von Caemmerer, H.-J. Schlochauer, & E. Steindorff (Geburtstag, Frankfurt am Main, Germany: Vittorio Klostermann, 1966), 14–35; G. van Solinge, 'Grensoverschrijdende juridische fusie', PhD Thesis Vrije Universiteit Amsterdam, The Netherlands, Deventer (The Netherlands: Kluwer 1994), 162–170; and E.R. Roelofs, 'Grensoverschrijdende juridische splitsing op basis van de vrijheid van vestiging', *Weekblad voor Privaatrecht, Notariaat en Registratie* 6793 (2009): 272–281.

13 See also on the same subject but before the publication of the final version of the Tenth directive: G. van Solinge, 'Grensoverschrijdende juridische fusie', PhD Thesis Vrije Universiteit Amsterdam, The Netherlands, Deventer (The Netherlands: Kluwer 1994), 38.

(see consideration 3 Tenth directive).[14] As to other laws not dealing with any of the abovementioned areas, no such distinction can be made and, as a result thereof, complete certainty does not exist as to the full cumulative application of such laws.

In the next section, we will try to define, also taking into consideration the application of laws on a CBM by which an SE, SCE, or SPE will be formed, certain 'ranking rules' that can be used when – for example – (1) the relevant national laws governing the parties to the CBM conflict with each other, because one applicable national law provides for stricter or less strict rules than the other applicable national law, or (2) the relevant national laws – that is, both – do not deal with a certain subject matter.

4. CUMULATIVE APPLICATION WITH RESPECT TO A CBM BY WHICH A SUPRANATIONAL LEGAL FORM (SE, SCE, AND SPE) WILL BE FORMED

4.1. Ranking Pursuant to the SE Regulation

The cumulative application of the national laws of the Member States that are applicable to merging (public limited) companies is also the basis of a CBM by which an SE will be formed. With this type of CBM, comparable problems as with a 'normal' CBM can arise due to the cumulative application of the national merger laws. The SE Regulation has a stratified structure (see *inter alia*, Articles 9, 10, and 18 SE Regulation). Article 9 paragraph 1 subparagraph c, ii SE Regulation assumes that the national law of the Member State in which the SE has its registered office only has a supplementary effect. Such laws will only be applicable to the extent that certain subject matters are not dealt with by the SE Regulation, by the provisions of the Articles of Association of the SE – where this is expressly authorized by the SE Regulation – or by the provisions of laws adopted by Member States in order to implement Community measures relating specifically to SEs. Further, Article 18 SE Regulation provides that, for CBMs whereby an SE will be formed, with respect to subject matters that are not or are only partially provided for in the SE Regulation, each company involved in the formation of an SE by a merger shall be governed by the provisions of the law of the Member State to which it is subject and this will apply to mergers between public limited liability companies in accordance with the Third directive.

As a consequence of these provisions of the SE Regulation, the legal provisions have to be applied in the following sequence – 'Ranking' – to a CBM by which an SE will be formed:

1. the provisions of the SE Regulation, which can be subdivided into:
   - 1.1. the rules provided by the SE Regulation itself;
   - 1.2. the provisions of the Articles of Association of the SE, where this is expressly authorised by the SE Regulation;
   - 1.3. the rules of the national laws of the Member States which have been adopted so as to carry out the SE Regulation (the provisions of the laws of the Member States relating specifically to SEs);
   - 1.4. the rules of the national laws of the Member States directly implementing the SE directive;
   - 1.5. the rules of the national laws of the Member States indirectly implementing the SE directive (i.e., rules that are inserted in the national laws of the Member States on a voluntary basis);
2. rules of the national laws of the Member States, directly based on the Tenth directive (i.e., rules that have been inserted in the national laws of the Member States on a mandatory basis);
3. rules of the national laws of the Member States, indirectly based on the Tenth directive (i.e. rules that have been inserted in the national laws of the Member States on a voluntary basis);
4. rules of the national laws of the Member States, directly based on the Third directive;
5. rules of the national laws of the Member States, indirectly based on the Third directive; and
6. rules of the national laws of the Member States, directly or indirectly based on other directives, such as the Second directive.

4.2. Ranking Pursuant to the SCE Regulation

The SCE Regulation also has a stratified structure. This stratified structure follows from Article 8 SCE Regulation, which is the equivalent of Article 9 SE Regulation, and, in particular, of Article 20 SCE Regulation for CBM whereby an SCE will be formed (see Article 2 paragraph 1 and Article 19 SCE Regulation). Article 20 SCE Regulation refers to 'the provisions of the law of the Member State to which it is subject that apply to *mergers of cooperatives* and, failing that, the provisions applicable to *internal mergers* of *public limited-liability companies* under the law of that State'. Here, the stratified structure contains not only references to the national laws of the Member States but also references to the national laws of the Member States that are applicable to other legal forms than cooperatives, namely public limited liability companies. We note that Article 20 SCE Regulation does not literally refer to the Third directive on legal mergers, as is the case in Article 18 SE Regulation. The Third directive is the harmonizing instrument for mergers of public limited liability companies. The scope of the Third directive is limited to public limited liability companies (see Article 1 Third directive), and this directive is not directly applicable to cooperatives. The national provisions on mergers between cooperatives may not necessarily resemble

14 See also D. van Gerven et al., *Cross-Border Mergers in Europe* (Cambridge, United Kingdom: Cambridge University Press 2010), 10.

the relevant provisions in other Member States. However, several Member States, like the Netherlands, apply national merger rules based on the Third directive, also for mergers between cooperatives. In our opinion, the lack of any reference to the Third directive in Article 20 SCE Regulation is not based on the European legislator changing its mind in relation to the ranking of the rules that are applicable to CBMs whereby an SCE will be formed.

4.3. Ranking Pursuant to the SPE Regulation

On 25 June 2008, the Council of the EU submitted a proposal for a Council Regulation on the Statute for a European private company (Societas Privata Europaea, SPE).[15] Although the SPE Regulation has not yet entered into force, the SPE could be a private limited liability company on a European supranational level in the future. The proposed SPE Regulation as it stands also has a stratified structure: according to Article 4 of the proposal for the SPE Regulation (hereinafter 'SPE Regulation'), an SPE shall be governed by the SPE Regulation and also, as regards certain matters, by its Articles of Association. Where a matter is not covered by the SPE Regulation, or the Articles of Association, an SPE shall be governed by the law, including the provisions implementing Community law, which applies to private limited liability companies in the Member State in which the SPE has its registered office. In the SPE Regulation, this is also referred to as the 'applicable national law'. National and CBM are methods for the formation of an SPE (Article 5 paragraph 1 subparagraph c SPE Regulation). Also existing SPEs can take part in (cross-border) mergers (Article 39 SPE Regulation). The SPE Regulation contains no special provisions on (cross-border) mergers for SPEs. For that reason, the applicable national law within the meaning of Article 4 of the SPE Regulation applies to CBMs.[16] The provisions of the laws of the Member States implementing Community law are also applicable, but no certainty exists as to whether these provisions implementing Community law also contain provisions of national law, inserted in the national law of a Member State when implementing directives into national legislation.

4.4. Scope of the Applicable National Law Pursuant to the Third Directive

With regard to the stratified structure of the SE Regulation, certain authors have raised the question[17] whether the rules, which have not been incorporated according to the Third directive but by the Member States themselves in the relevant national laws when implementing the Third directive, also have a supplementary effect on a CBM whereby an SE will be formed. A distinction can be made between a *broad* and a *strict interpretation* of Article 18 SE Regulation. Pursuant to a *broad interpretation*, all rules of the national laws of the Member States that are applicable to the merging companies have to be applied, irrespective of whether or not these rules have their basis directly in the Third directive. A *broad interpretation* would result in several different – and even contradictory – national rules from different legal systems becoming applicable to one and the same CBM. The latter would especially apply to rules of the national law that are applicable to one of the merging companies, which are addressed to all parties to the CBM. With respect to national mergers, these rules would not conflict with each other, because all merging companies would be subject to the law of the same Member State. With respect to CBMs, this could, however, be the case. A *strict interpretation* would lead to the conclusion that Article 18 SE Regulation is specifically designed for mergers and provides for an arrangement that deviates from the system of Article 9 SE Regulation. Under a *strict interpretation*, only provisions that are directly based on the Third directive have to be applied.

Some authors (Lutter, Hommelhoff, underlined by Hügel and Schäfer)[18] tend to follow a strict interpretation of Article 18 SE Regulation. Lutter and Hommelhoff assume that (freely translated):

> the reference to national merger laws only takes effect subject to the condition that the provisions of these merger laws are in line with the Third directive. Other provisions of the national merger laws, which are indirectly based on the Third directive, are not applicable via article 18 SE Regulation.

Although Lutter and Hommelhoff tend to follow a strict interpretation of Article 18 SE Regulation, they have another view with respect to 'Sachrecht' – that is, property law. They argue that (briefly summarized) if German law is applicable to one or more of the merging companies, German property law applies. The consequence thereof is that not only the provisions that are a result of the implementation of the Third directive will apply but also other provisions, in this case the provisions of property law. Another author (De Kluiver) tends to follow a more subtle and less strict interpretation of Articles 9 and 18 SE Regulation:

> I am of the opinion that in case of a CBM also the provisions of national law must be applied, which are not directly based upon the Third directive, but do protect the position of (minority) shareholders and creditors (i.e. the Specific Areas of Law in our view), of course only to the extent that they do not conflict with the SE Regulation and do not lead to cross border controversies.

15 Proposal for a Council Regulation on the Statute for a European private company, Brussels, COM (2008) 396/3, 2008/0130 (CNS). For a critical analysis, see D.F.M.M. Zaman et al., *The European Private Company (SPE), A Critical Analysis of the EU Draft Statute* (Antwerp/Oxford/Portland: Intersentia 2009).

16 See D.F.M.M. Zaman & E.R. Roelofs, 'Restructuring, Dissolution and Nullity', in *The European Private Company (SPE), A Critical Analysis of the EU Draft Statute*, ed. D.F.M.M. Zaman et al. (Antwerp/Oxford/Portland: Intersentia 2009), 208.

17 H.J. de Kluiver et al., *De Europese vennootschap (SE), Preadvies van de Vereeniging 'Handelsrecht' 2004* (Deventer, The Netherlands: Kluwer. 2004), 47–49.

18 M. Lutter & P. Hommelhoff, *SE Kommentar, SE-VO, SEAG, SEBG, Steuerrecht* (Cologne, Germany: Dr Otto Schmidt Verlag 2008), 215/216.

In his view, this should not necessarily lead to the conclusion that the relevant merger rules of the Member State of the *acquiring company* as well as the relevant merger rules of the Member State of the *company ceasing to exist* should have to be applied as a whole, as Article 18 SE Regulation stipulates that 'each company involved in the formation of an SE by merger shall be governed by the rules of the Member State to which it is subject'. The latter part of this article is more or less similar to Article 4 paragraph 1 subparagraph b Tenth directive.

Although the rules for a 'normal' CBM on the basis of the Tenth directive differ from the rules for a CBM by which an SE will be formed on the basis of the SE Regulation, the latter rules as well as the views thereon can also be relevant for the interpretation of the first set of rules for a normal CBM. Note that through Article 10 SE Regulation (which stipulates that an SE must be treated as a national limited liability company), the Tenth directive also applies, albeit indirectly, to a CBM by which an SE will be formed. Also with respect to a 'normal' CBM on the basis of the Tenth directive, the view could be taken that the provisions of national law that are not directly based upon the Third directive must be applied, if they are rules on Specific Areas of Law and protect the position of (minority) shareholders and creditors (and employees) and to the extent that (1) they do not conflict with the Third directive or the Tenth directive and (2) do not lead to cross-border controversies.

5. COMPARING A 'NORMAL' CBM WITH A SE-CBM, SCE-CBM, OR SPE-CBM

To avoid any misunderstanding, we note that when comparing a 'normal' CBM with a CBM by which an SE, SCE, or SPE will be formed, it should be taken into consideration that:

(1) a European regulation has 'direct effect' in the national sphere of the law of the Member States (Article 288, third sentence Treaty on the Functioning of the European Union (TFEU));
(2) a European directive must first be implemented into the national laws of the Member States to become effective in the national sphere of the law of the Member States (Article 288, fourth sentence TFEU); and
(3) an SE is a supranational legal form with the SE Regulation as its legal basis and is supplemented by the national laws of the Member State of the official seat (or registered office) of the SE.

Articles 9 and 18 SE Regulation and Articles 8 and 20 SCE Regulation can thus be applied directly – and the same is applicable to Articles 5 and 39 SPE Regulation – while Article 4 Tenth directive can only be applied indirectly – mainly to interpret a national rule that has been implemented in accordance with the Tenth directive and is not entirely clear, the so-called interpretation in conformity with European directives.[19] Article 4 Tenth directive itself is not entirely clear: it is uncertain whether all applicable provisions on mergers in the national law of the Member State should be applied, or only the provisions that are a direct result of the implementation of the Third directive into national laws. In our view, it is an obvious step to interpret Article 4 Tenth directive within the meaning of other legislation at the Community level, such as the SE Regulation, the SCE Regulation, and the SPE Regulation.

6. LIMITATION OF THE APPLICABLE NATIONAL LAW BY THE FREEDOM OF ESTABLISHMENT AND ECJ CASE LAW

As already mentioned in section 3 of this contribution, the national law of a Member State may not introduce restrictions on the freedom of establishment or on the freedom of movement of capital (Articles 43 and 48 TEC (Articles 49 and 54 TFEU)) unless these are justified in the light of case law of the ECJ (see consideration 3 Tenth directive). This rule was laid down in *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* case in 1988[20] and has been confirmed in the *Cartesio Oktató és Szolgáltató* case by the ECJ in its judgment of 16 December 2008.[21] As a consequence of these decisions by the ECJ, a Member State may not apply coercive ('mandatory and restrictive') provisions of its own law to companies governed by the law of another Member State. With regard to the cumulative application of provisions of the national laws of the Member States to CBMs, the foregoing means that the cumulative application of the national laws of the Member States that are applicable to merging companies is limited and may not result in the application of coercive provisions of the law of one Member State to the merging company that is subject to the law of another Member State.

7. RANKING THE RULES THAT ARE APPLICABLE TO A CBM

Taking all of the abovementioned considerations into account, the following 'rules' have to be taken into consideration in a 'normal' CBM:

(1) all rules concerning CBMs are based on directives, namely the Third and the Tenth directives, which do not have direct effect (Article 288 fourth sentence TFEU);

19 See also E.R. Roelofs, 'Shelf-SEs and Employee Participation', ECL 3 (2010), 120–127.

20 ECJ 27 Sep. 1988, *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, reference for a preliminary ruling: High Court of Justice, Queen's Bench Division – United Kingdom, Case 81/87, European Court reports 1988, p. 05483, consideration 20.

21 ECJ 16 Dec. 2008, Case C-210/06, *Cartesio Oktató és Szolgáltató*, European Court reports 2008, p. I-09641, consideration 104, 105.

(2) therefore, all rules concerning CBMs are laid down in provisions of the national laws of the Member States;
(3) the provisions of the national law of a Member State that implement the Tenth directive have, as a *Lex Specialis*, priority over the provisions of the national laws of the Member States that implement the Third directive as a *Lex Generalis*.

When applying these rules and taking all of this into careful consideration, we feel that the relevant laws that are applicable to a 'normal' CBM could be ranked and interpreted as follows:

(1) The provisions of the national law of a Member State that are inserted in this law on a mandatory basis have priority over the provisions of the national law of a Member State that are inserted in this law on a voluntary basis. These provisions, which are a direct result of the implementation of the Tenth directive, must be applied, because of the mandatory character of the rules of the Tenth directive.
   (a) When such laws conflict with each other, the direction and scope of the relevant rules will be decisive. A rule that is specifically directed towards one merging company has priority above a rule that is directed towards all merging companies.
   (b) When said national laws are unclear, they must be interpreted in conformity with the Tenth directive and must applied in that sense. For that purpose, greater value may be attached to national laws that are implemented on a mandatory basis pursuant to the Tenth directive than to laws that are implemented on a voluntary basis by the implementation of the Tenth directive into the national laws of the Member States.
(2) The provisions of the national law of a Member State that are inserted in this law on a voluntary basis when implementing the Third directive only have a supplementary effect. These provisions may only be applied to the extent that they do not lead to cross-border controversies. Furthermore, the principles of priority and interpretation as set out in (1) subparagraphs (a) and (b) above must be applied *mutatis mutandis*.
(3) The rules as mentioned under (2) and the rules that are inserted in the national law of a Member State, whether or not these rules have been inserted to implement a directive other than the Third or the Tenth directive, such as the Second directive, may only be applied if they do not conflict with the Tenth directive or the Third directive and do not lead to cross-border controversies. Furthermore, the principles of priority and interpretation as set out in (1) subparagraphs (a) and (b) above must be applied *mutandis*.
(4) The cumulative application of the provisions of national laws of the Member States may not result in the application of contradictory provisions of the law of one Member State to the merging company, which is not subject to the law of that Member State, but to the law of another Member State.
(5) Finally, other national laws must be applied to the extent that they (a) protect the interests of (minority) shareholders, creditors, and employees; (b) do not conflict with the Tenth directive, the Third directive, and other directives in general, such as the Second directive; and (c) do not lead to cross-border controversies.

8. CONCLUSION

In this contribution, we have put the problem of 'ranking' the rules of the national laws of the Member States that are applicable to merging companies by a CBM under the spotlight. The provisions of the national laws of the Member States on CBMs are 'harmonized' by the Tenth directive. As the harmonizing effect of the Tenth directive is not comprehensive, the provisions of the laws of the Member States implementing the Third directive – concerning national mergers – are also applicable. The question thereby arises whether all provisions of the national laws of the Member States on national mergers have to be applied as a whole – including provisions that are not directly based on the Third directive – or only those provisions that are a direct result of the Third directive. This problem not only arises in a 'normal' CBM but also in a CBM whereby an SE, SCE, or an SPE will be formed. The wording of the Tenth directive, the SE Regulation, the SCE Regulation, and the SPE Regulation differ, but all have the same purport. When it comes to ranking the rules that are applicable to CBMs, we feel that rules that are not directly based on the Third directive but have been inserted into the law of a Member State on a voluntary basis or are the own creation of the legislator of that Member State or are based on other directives, such as the Second directive, also have to be applied to the extent that they do not conflict with the Tenth directive or the Third directive and do not lead to cross-border controversies.