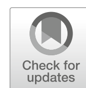
Cross-Border Mergers and Cross-Border Takeovers Compared



Matteo Gargantini

1 Cross-Border Reorganizations and the EU Internal Market

While grounded on comparable regulatory aims, the EU legal frameworks for cross-border mergers (Directive (EU) 2017/1132) and, respectively, for cross-border takeovers (Directive 2004/25/EC) display remarkable differences. This chapter compares these legal tools with a view to analysing how they deal with common issues underlying mergers and acquisitions (M&A). Section 1 provides a general introduction to the economics of M&A transactions (Sect. 1.1) and explains how this is relevant for the integration of the EU internal market (Sect. 1.2). Section 2 compares the two legal regimes in the light of the agency problems of M&A transactions (Sect. 2.1) and highlights the different legal strategies adopted to manage those problems within the board of directors (Sect. 2.2), among shareholders (Sect. 2.3) and trough exit rights (Sect. 2.4). Section 3 concludes.

The following analysis concentrates on listed companies, as these fall within the scope of the takeover bid directive (Article 1 Directive 2004/25/EC). In this chapter, a cross-border merger is understood as a merger between companies having their registered office in different EU member states (Article 118 Directive (EU) 2017/1132). The definition is more complex for cross-border takeovers, because the relevant transnational element may refer, under Directive 2004/25/EC, to different connecting factors depending on the matter. For instance, a takeover where an offeror domiciled in country A launches a bid on a company having its registered office in country B, while having its shares admitted to trading on a regulated market in country A, will be a cross-border takeover for some aspects (e.g. defensive measures) but not for others (e.g. disclosure duties: Article 4 Directive 2004/25/EC). For

M. Gargantini (✉)
University of Utrecht, Utrecht, The Netherlands
e-mail: m.gargantini@uu.nl

© Springer Nature Switzerland AG 2019

T. Papadopoulos (ed.), *Cross-Border Mergers*, Studies in European Economic Law and Regulation 17, https://doi.org/10.1007/978-3-030-22753-1_7

both mergers and takeovers, investors' domiciles may also play a role, for instance when the duty is triggered to publish a prospectus or an equivalent document. In the remainder of this chapter, the relevant connecting factors will be clarified whenever necessary.

1.1 Cross-Border Mergers and Takeovers as Reorganization Tools

This section provides a very synthetic—and necessarily incomplete—overview of the determinants of M&A corporate reorganizations, and on the different ways mergers and takeovers reflect them. The analysis relies on some basic elements of the new institutional economics approach to explain (part of) the reasons why firms may need to expand their boundaries through mergers or acquisitions (Williamson 2000). More legally-oriented readers can, therefore, proceed directly to Sect. 1.2 without losing the chapter's train of thought.

From an economic perspective, the optimal size of firms depends on several variables. Chief among them is the cost of centrally managing the factors of productions in a hierarchical context, on the one hand, relative to the cost of procuring those inputs on the market through free negotiations with independent third parties, on the other hand (Coase 1937).

The variables that determine the optimal boundaries of firms are subject to frequent changes. Technological innovations and evolving market conditions may reduce transaction costs and make independent bargaining progressively more efficient than centralized coordination of production within a single firm. Take web-based innovations as an example. Facilitated contacts among a multitude of users of the same platform greatly reduce the costs of searching for new suppliers every time the need arises to look for a specific service or good. Vice-versa, other developments can ease hierarchical management by reducing the risk that firm growth leads, in large and complex firms, to excessive bureaucratisation (Penrose 1959). For instance, technological progress in information technology facilitates the management of large systems, either vertically or through flat organizational structures.

By the same token, changing market conditions may make the aggregation of inputs within the same firm relatively more (or less) efficient over time. As the economic theory demonstrates, one reason why this happens is that relation-specific investments are prone to hold-up problems. These problems arise when contractual incompleteness gives one of the parties to a contract increased bargaining power in unforeseen circumstances and prevents her from credibly commit to not strategically exploiting such power to the other party's detriment (Williamson 1975). This situation may, in fact, induce the weak party to underinvest, which results in a loss of welfare. In this context, centralized governance may avoid strategic behaviours that incomplete contracts inevitably facilitate (Grossman and Hart 1986; Hart and

Moore 1990). As market conditions vary, the relative convenience of centralised governance over market-based transactions may equally change. These and many other variables, therefore, contribute to defining variable equilibria of business organizations. Combinations of previously independent firms may become desirable when the opportunity to develop synergies arises, and when integration exploits those benefits better than mere contractual coordination.

From a purely economic perspective, the boundaries of the firm include all the inputs falling under the control of the entrepreneur (Grossman and Hart 1986, p. 692), irrespective of the legal tool enabling such control. From a legal point of view, however, different forms of organization can lead to this result. In the simplest legal form, a single company manages all the factors of production, so that one legal entity has the ownership right on those factors—or, in any event, the right to use those factors to run the business. When the firm takes the form of a group, those rights belong instead to different companies, so that a single entrepreneurial activity corresponds to multiple legal entities. Within groups, different companies rely on various governance mechanisms to ensure that their respective activities contribute to the common firm in a coordinated manner. The most common governance tool[1] to ensure this coordination is the control of the general meeting, as this typically ensures the possibility of appointing the majority of the board of directors, thus securing control of the actual management of the company.[2]

There are, therefore, two primary forms of external growth. The first one is the transfer *en bloc* of the assets and sources of funding (liabilities) of a target company to an acquiring company. The second form is the creation (or enlargement) of a corporate group when an acquiring company gains control of a target company.[3] These two alternative effects are the distinguishing features, respectively, of mergers and takeovers (Arts 88, 89, 90 and 119(2) Directive (EU) 2017/1132, for national

[1] Other tools include contractual agreements whereby a company commits to complying with the instructions it receives from another member of the group ("contract of domination"), when allowed under the applicable company law.

[2] Coordinated management of different companies within the same group triggers the duty to prepare consolidated accounts, so that the financial statements reflect the economic integration of those companies. Under Art. 22 Directive 2013/34/EU (Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings), a company has to prepare consolidated accounts when it either has a majority of the shareholder voting rights in another undertaking, or it has in any event, as a shareholder, the right to appoint or remove a majority of the board members of another undertaking (a subsidiary undertaking), or it has the right to exercise a dominant influence over another undertaking of which it is a shareholder. By the same token, under IFRS 10 (§ B15; B35), applicable within the EU as per Regulation (EU) No 1254/2012, control arises when a company has control over another company when it has the power to direct its relevant activities. This power is conferred, among other things, by voting rights in the investee company conferring the power to appoint or remove the majority of the board members.

[3] As takeovers are a very flexible tool, they have historically fostered both the enlargement of firm conglomerates and their dismantling (Johnston 2009, pp. 49–50). While the first function is somewhat intuitive, the second also relies on the acquisition of control, which in this case moves the company from a larger to a smaller group, such as one comprising only the transferred company and a special purpose acquisition vehicle.

and cross-border mergers respectively; Art. 2(1)(a) Directive 2004/25/EC).[4] This essential difference brings about the factual consequence that, while shareholders of the target company may, in principle and with some exceptions, retain their quality if they reject the offer to tender their shares (even when the bid is successful in light of its acceptance rate), this is not possible for mergers.

While these effects are the *essentialia* of takeovers and mergers, other differences are recurrent. Takeovers inevitably maintain the bidder and the target companies as separate entities, thus creating (or enlarging) a corporate group. Mergers normally entail the dissolution without liquidation of the transferring company. However, national laws may also allow the transferring companies to survive the merger—and the ensuing transfer of all assets and liabilities, as well (Art. 117 Directive (EU) 2017/1132).[5]

Takeovers and mergers display further differences in terms of consideration paid (or offered) to the target company's shareholders. When the business combination takes the form of a takeover, the target shareholders tendering their shares may receive either consideration in cash or, in an exchange offer, shares of another company (often the bidder), or a combination of the two.

In a merger by acquisition,[6] instead, all the shareholders of the transferring company have their previously held shares replaced with shares of the surviving company, in an amount defined by the exchange ratio. At the same time, shareholders of the surviving company are diluted of a corresponding measure. However, shareholders of the transferring company may also receive a cash payment, which member states have to allow at least up to 10% of the value of the surviving (or emerging) company's shares issued in exchange (Arts 89 and 90 Directive (EU) 2017/1132).[7]

Just like the need to wind up the transferring company, limits to consideration in cash are mere *naturalia* of mergers. When member states allow cash payment in mergers to exceed the 10% threshold, the distance between takeovers and mergers may narrow down. In theory, nothing prevents member states from allowing full cash consideration (Grundmann 2012, p. 675; Bech-Bruun and Lexidale 2013, p. 110; differently Ventoruzzo 2010, p. 877), thus enabling fully-fledged cash-out

[4]Of course, reorganization is not the only reason why companies merge on a cross-border basis. Merging with a vehicle such as a shell company established in another country is a common way to change the law applicable to the transferring company (for the EU context see, e.g., Johnston 2009, pp. 198 ff). Takeovers are not a substitute for mergers in this respect.

[5]This peculiar scheme does not expressly fall into the scope of application of cross-border mergers (Arts 119(2) and 120 Directive (EU) 2017/1132) and will not, therefore, be further analysed here.

[6]In case the merger leads to the creation of a new company, all the pre-existing companies are to be regarded as transferring companies in this respect.

[7]No consideration is due, of course, when a subsidiary merges into the controlling company that holds its entire capital (Article 119(2)(c) Directive (EU) 2017/1132).

mergers.[8] In this case, the transfer of all assets and liabilities *en bloc* will remain the distinguishing feature of mergers vis-à-vis takeovers.

Whether consideration in mergers can also take the form of shares issued by a company other than the surviving company remains unclear. If so, a company A might for instance set up a fully-controlled subsidiary, and then have this subsidiary merged—in the role of the acquiring company—with another company B whose shareholders would receive shares of company A. In this example, a merger might lead to an outcome comparable to that of an exchange offer carried out under takeover law,[9] but the applicable rules—including those on shareholder decision-making—would remain those of mergers. At the national level, similar transactions are sometimes available under local instruments such as the UK schemes of arrangements. Some authors deem these "reverse triangular mergers" feasible under EU law as well (Armour and Ringe 2011, p. 162), but some doubts remain because the scope of application of national and cross-border mergers would seem to include only consideration consisting in shares of the acquiring company (Articles 89(1) and 119 (2)(a) Directive (EU) 2017/1132).

In a cross-border context, the typical difference between mergers and takeovers—namely the dissolution[10] of the target company versus the lack thereof, respectively—plays a special role because the companies involved in the business combination are subject to different laws. Consequently, takeovers and mergers offer, in a transnational scenario, alternative techniques firms may resort to when coping with different company laws. Cross-border mergers give the opportunity of levelling out the rules applicable to the firms involved by leaving just one company in place. To the contrary, takeovers do not affect those rules, as they let the involved companies survive.

Whether one or the other technique is preferable depends, inevitably, on the circumstances. Using a pyramidal structure to facilitate control may make takeover acquisitions cheaper but, in the absence of a harmonised EU law for corporate groups, maintaining different companies may have remarkable costs. Corporate group laws will normally set an array of measures aimed to protect minority shareholders and other constituencies.[11] While those measures can reduce the cost of raising capital by fostering investor protection, they inevitably complicate decision-making processes. Furthermore, unclear rules on corporate groups, for

[8]This is confirmed by Art. 116 Directive (EU) 2017/1132, which extends some of the provisions on "standard" mergers under Article 88 to mergers where "the laws of a Member State permit a cash payment to exceed 10 %".

[9]Another way to achieve a similar result is by having company A issuing new shares for consideration in kind of company B shares by this latter's shareholders (Articles 48 ff Directive (EU) 2017/1132).

[10]EU provisions on cross-border mergers do not cover the transfer of assets and liabilities without dissolution of the transferring companies: see fn 5 above.

[11]For this reason, the law on corporate groups can be a partial substitute for the mandatory bid rule (Grundmann 2012, pp. 721–722).

instance as regards the (foreign) controlling entity's ability to address binding instructions to its (local) subsidiary, may create legal uncertainty.

However, the ability of cross-border mergers alone to make the regulatory framework more homogeneous within the company may be limited. Take labour law as an example. Directive 2001/23/EC curbs the surviving company's ability to amend contracts entered into by the transferring company and its workers, and a merger shall not in itself constitute grounds for the termination of such contracts (Article 4). Consequently, cross-border mergers do not automatically lead to the creation of a homogeneous business organization, at least as far as employees are concerned (Kraakman et al. 2017, p. 194). More in general, keeping in place different companies under common control may reduce transaction costs of business combinations at least in the short run, because suddenly subjecting a potentially significant part of the newly-formed firm to new company law rules may be incompatible with an efficient transition and may, therefore, reduce the net value of synergies.[12]

This shows how takeovers can be not only a substitute for but also a complement to mergers. The combination of these techniques may in fact ease external growth because mergers may sometimes be feasible only when a takeover precedes them. Full integration of different companies through a merger may require some previous adjustments with a view to coordinating the productive factors of the firms involved. Takeovers may help make the organizations of the firms involved (including the terms and conditions of employment) gradually more homogeneous. Mergers' ability to simplify the corporate group structure by replacing previously separate entities with one resulting company (Grundmann 2012, p. 669) may bring further benefits at a later stage. As mergers require cooperation between the boards of the companies involved, takeovers may be a prerequisite to successfully performing a merger whenever the target company's directors oppose the business combination.[13]

While in these cases takeovers facilitate mergers, in other circumstances mergers may, reciprocally, facilitate takeovers. As this chapter will show more in detail,[14] bidders may increase pressure to tender among shareholders by declaring in the offer document that their plans for the offeree company include a merger with the offeror (Art. 6(3)(i) Directive 2004/25/EC). The remainder of the chapter will further analyse this relationship of both competition and cooperation that characterises the two reorganization tools.

[12] Taxation of unrealised capital gains is not anymore a concern for cross-border mergers, instead, after the entry into force of Directive 2009/133/EC (tax merger directive): Bech-Bruun and Lexidale (2013), p. 80.

[13] See infra Sect. 2.2 for further analysis.

[14] See infra Sect. 2.3.2 for further analysis.

1.2 Firm Reorganizations in the EU Treaties from a Company Law Perspective

As a matter of principle, facilitating the aggregation of enterprises on a cross-border basis may allow firms to better exploit economies of scope and scale through external growth, if only because the broader the market where firms may seek for aggregations, the larger the number of potential combinations. It is also widely understood that cross-border combinations may lead to the creation of European groups of a size comparable to that of their global competitors. Therefore, the European Treaties have been considering cross-border reorganizations as a crucial element for the creation of an internal market from the very outset.

At the same time, reorganizations have always been a particularly sensitive issue, because they normally bring along fundamental changes for shareholders, creditors and employees alike. Those changes easily involve large numbers of stakeholders, considering the typical scale of cross-border reorganizations, and may, therefore, become intractable from a political perspective. The crucial role of cross-border reorganizations has led to the inclusion of cross-border mergers in the European Treaties since the early stages of the European integration, mergers being back then the typical reorganization form (Grundmann 2012, p. 717). Mergers were part of the regulatory tools aimed at creating a European integrated market already in the Treaty establishing the European Economic Community signed in Rome in 1957 (Art. 220, third hyphen). The high sensitivity of mergers as firm reorganization devices, however, suggested referring the definition of specific harmonisation rules to ad hoc international conventions falling outside the scope of the Treaty.

The new Treaty establishing the European Community continued to refer to an international convention the definition of rules aimed at securing the "possibility of mergers between companies or firms governed by the laws of different countries" (Art. 293). However, considering how delicate the issues was, it comes as no surprise that member states never adopted the draft Convention on the International Merger of 1972.

Nevertheless, the European institutions took on the project for the creation of a European framework for—initially national, and then—international mergers. This became possible because the competence of the European law-makers under the Treaty included the adoption of directives aimed to attain freedom of establishment, including by "coordinating ... the safeguards which, for the protection of the interests of members and others, are required by Member States of companies ... with a view to making such safeguards equivalent throughout" the EU (Art. 44 (1) and (2)(g), now Art. 50(2)(g) Treaty on the Functioning of the European Union). This provision eventually became the legal basis underpinning Directive 2005/56/ EC on cross-border mergers of limited liability companies (Santa Maria 2009, pp. 8 and 61–62).

The ECJ played a decisive role in unlocking the stalemate originated by member states' reluctance to define a common set of rules on cross-border reorganizations (Armour and Ringe 2011). By leveraging on the direct applicability of the Treaties'

provisions, including those concerning the freedom of establishment (ECJ *Reyners*), the ECJ stated that the Treaties' referral to international conventions did not create a reserve of legislative competence vested in the member states (ECJ *Überseering*, §§ 54 and 60). Consequently, even in the absence of the international convention envisioned in the treaties, firms having their seats in a European country enjoy protection of their freedom of establishment when deciding to move their main seat to another European country. This also entails, in the Court's view, the right of a surviving (or an emerging) company to maintain (or obtain) registration in a member state's companies register subsequent to a merger with a transferring company having its registered office in another EU member state (ECJ *SEVIC*).

SEVIC banned restrictions by the country of origin of the surviving company, but did not openly address restrictions applied by the country of origin of the transferring company. This was due to the facts of the dispute, which arose because the country of destination—i.e. the country of origin of the surviving company, Germany in that case—refused registration of the merger in its companies register. The parties reported no similar resistance by the country where the transferring company was registered (Luxembourg). Hence, the case only concerned inbound, as opposed to outbound, restrictions to companies' freedom. However, this limitation had no substantial impact on the full recognition of cross-border mergers. First, *SEVIC* was immediately regarded as the expression of a general principle mandating recognition in both the acquirer's and the acquiree's legal system of cross-border mergers carried out in conformity with the rules applicable to purely national mergers (Santa Maria 2009, p. 61). Second, and most importantly, Directive 2005/56/EC was adopted on 26 October 2005, while the ECJ rendered the *SEVIC* decision on 13 December 2005.

Although *SEVIC* could obviously have no relevant impact on the legislative process that led to the adoption of Directive 2005/56/EC, the ECJ activism in enforcing companies' freedom of primary and secondary establishment[15] prompted a more energetic reaction by the Commission and the Council. From a political perspective, it became clear that member states could not simply freeze legal reforms on cross-border reorganizations. Rather, the ECJ case law had given member states a choice between losing the control on the process that was fostering those reorganizations, on the one hand, and contributing to shaping it on the basis of the power conferred on (the Commission and) the Council under Art. 44(2)(g) of the Treaty establishing the European Community, on the other hand.

Article 44(2)(g), together with the general statement under Article 44(1) setting the purpose to attain freedom of establishment, was also the basis for Directive 2004/25/EC on takeover bids (Santa Maria 2009, p. 126). More in general, takeovers also fall into the scope of application of the freedom of establishment, which protects them according to the scholarly interpretation of the ECJ case law (on *SEVIC* see Siems 2007, pp. 315–316).

[15] See ECJ, *Centros* and ECJ, *Inspire Art* for secondary establishment; ECJ *Überseering* for primary establishment.

Against this backdrop, the adoption of the takeover bid directive fostered the integration of the market for corporate control through increased—albeit limited—harmonization. First, it defined a closed number of options on some key issues such as pre- and post-bid defensive measures, thus reducing the information costs firms have to incur when ascertaining the rules applicable to their targets (Art. 12).[16] Second, it set some common set of rules for minority protection, although the ability of some of those measures—and especially of the mandatory bid rule—to deliver the desired outcomes in terms of homogeneity and investor protection is questionable (Enriques 2004). Third, it introduced a passport system that limits, while not entirely ruling out, the host member states' ability to require additional information (Art. 6), with a view to reducing the costs of cross-border takeovers. Fourth, specific conflict-of-law provisions that define the applicable law and allocate supervisory powers among the relevant authorities further reduce legal uncertainty for cross-border acquisitions of control (Art. 4). All these factors limit the space left to member states for restricting the exercise of fundamental freedoms on the grounds of public policy, public security or public health (Article 52 TFEU).

2 Mergers and Takeovers: Comparing the Legal Regimes

2.1 Agency Problems in Mergers and Takeovers

As in many other major corporate events, agency problems can be very acute in the context of mergers and takeovers, too. In the simplest scenario, conflicts of interest may involve shareholders taken as a whole, on the one side, and directors, on the other side. The interests of the two groups may diverge, for instance, because of the managerial incentive to oppose welfare-improving reorganizations that would jeopardise their positions. Governance devices aimed at reducing such conflicts of interest may deliver suboptimal results, if only because they might on their turn be prone to other agency problems or, sometimes, to legal restrictions. For instance, the grant of golden parachutes and similar incentive-based compensation mechanisms may divert value from the company and may be subject, in some jurisdictions, to strict scrutiny or even to outright bans (Kraakman et al. 2017, pp. 67–68 and 221). Severance agreements may also incentivise managers to enter inefficient control transactions or, vice-versa, may turn out to be a defensive measure when their size is significant (Ventoruzzo et al. 2015, p. 524).

Just like national reorganizations, cross-border mergers and cross-border takeovers are subject to the symmetric risks that conflicted managers may favour

[16]This is also the rationale underlying listed companies' disclosure duties under Art. 10 directive 2004/25/EU, which mandates publication of information that may be relevant to potential bidders (such as the ownership structure, the governance rules concerning board members' appointment, and the restrictions on voting rights).

inefficient transactions, for instance because they indulge in empire building, or vice-versa hinder welfare-increasing reorganizations, for the fear to lose their job (for mergers, see Kraakman et al. 2017, pp. 185–186). When reorganizations occur on a cross-border basis, however, these agency problems become particularly problematic for several reasons. For instance, mergers lead to the change of the applicable company law for the shareholders of the transferring company, which can jeopardise the safeguards minorities relied upon when they decided to invest in the first place (Kurtulan 2017).

Despite the stability of the applicable company law, cross-border takeovers also raise specific problems, if compared to their national equivalents. Controlling entities from different countries often display equally different entrepreneurial styles, depending on the institutional context of their country of origin (Johnston 2009, pp. 143–144). This easily emphasises the agency problems that any takeover involves. Experience shows that concerns voiced on takeovers from various stakeholders are normally louder when the bidder comes from abroad. For employees, this may reflect the fear that a radically new group governance lead in the long run to job losses or to a deterioration of the working conditions. Absent the typical restraints that media and authorities exert—often informally, through their soft power—on local managers, corporate restructurings may indeed be more radical when the new controlling entity is domiciled in another country. This different context further polarises the agency problems highlighted above.

On the one hand, cross-border takeovers may improve the targets' profitability more than purely national transactions. On the other hand, and for the same reasons, cross-border takeovers may also exacerbate the risk that changes of control waste firm-specific investments by managers (Coffee 1988, p. 447) and employees alike. As these human capital investments often rely on implicit contracts, they are particularly at risk in case of change of control (Enriques 2011, p. 625). At least from a theoretical point of view, one would expect that no rational bidder—not even when driven by the intention to loot its new subsidiary—would squander the value of firm-specific investments within the target (Gilson 1992, p. 74). However, the problem remains that controlling entities coming from another managerial tradition may be unable to identify firm-specific investments based on implicit contracts entered in an unfamiliar foreign context, not to mention that they might even actively seek to appropriate part of the inherent value of those investments (Johnston 2009, pp. 53–54).

For all the reasons mentioned above, cross-border reorganisations—whether through mergers or takeovers—display specific features if compared with their national equivalents. Other differences distinguish, of course, cross-border mergers, on the one hand, from cross-border takeovers, on the other hand. The main dissimilarity lies with the fact that, when the acquiring and the target companies are not in a relationship of control, takeovers are easier to pursue than mergers because, with the clarifications provided below, they do not require cooperation from the target board of directors. On the flipside of the coin, transferring companies may more easily freeze restructurings when these take the form of a merger.

Taken in isolation and, most importantly, all other conditions being equal, mergers therefore require previous agreements among a larger group of stakeholders, which has an obvious impact on their feasibility. In light of the agency problems highlighted in this section, mergers thus have in principle a better ability to protect production teams from external threats, but they are also more prone to agency problems when the incumbents' resistance to the reorganization is due to mere managerial entrenchment. The situation is symmetric, of course, for takeovers. Because of their ability to reduce frictions in control acquisitions, takeovers may facilitate welfare-enhancing aggregations but, at the same time, they carry the risk of making inefficient control changes possible.

Of course, many caveats apply to the previous analysis, for the simple reason that the effects of rules on reorganizations are highly sensitive to the legal and factual context. For reasons of space, only a few examples will be mentioned below, including in particular the role of different ownership patterns. However, not only do cross-border mergers and cross-border takeovers look differently in different legal and market contexts, but even within the same scenario the regulation of such transactions can lead, in practice, to divergent results. These results are often impossible to anticipate without considering the idiosyncratic features of each transactions and of the parties involved (for this reason, some scholars submit that each company should enjoy broad discretion in the definition of its own takeover regime: Enriques and Gatti 2015).

As the previous analysis demonstrates, neither the capacity to block nor the ability to foster reorganizations has a bijective correspondence with shareholder protection. The ability to prevent (or to facilitate) a reorganization may, in fact, hinder (or ease) welfare-increasing as well as value-decreasing transactions. The crucial element in this respect is the allocation of the power to decide whether to pursue a reorganization, together with the relative efficiency of the governance devices regulating such power (which include the remedies available for breaching the rules governing such devices).

The following sections will address these aspects from the point of view of the board involvement (Sect. 2.2), of the applicable rules on collective decision-making (Sect. 2.3), and of the exit strategies concerning shareholders (Sect. 2.4). Each section also includes some remarks on the techniques national rule-makers may resort to, as a consequence of minimum or incomplete harmonisation, with a view to modifying the equilibria between managers and shareholders, and among shareholder themselves. For limitation of space, the analysis does not include other corporate constituencies such as employees (other than directors) and creditors.

2.2 Board Involvement

Under EU law, cross-border mergers typically require the cooperation of the target's board of directors. Unless otherwise provided, transnational mergers are subject, as for their procedural steps, to the national rules implementing the EU provisions on

national mergers (Article 121(1)(b) Directive (EU) 2017/1132). These provisions also address the decision-making process (Art. 121(2)) and, therefore, the preparation of the draft terms of the mergers together with the written report explaining those draft terms and setting out their legal and economic grounds. The responsibility to draft these documents lies with the management or administrative organ of the merging companies (Articles 91 and 95). Articles 122 and 124 follow suit and entrust the preparation of the draft terms of cross-border mergers and the written report upon the management or administrative bodies.

One may wonder whether shareholders might directly submit merger proposals on the basis of their right to put items on the agenda of the general meeting, if accompanied by a justification or a draft resolution (Article 6(1)(a) Directive 2007/36/EC; similar doubts have historically affected the US system as well: Manne 1965, p. 117). However, the contents of the draft merger terms would seem to require, in the vast majority of the cases, direct access to updated accounting data (Articles 91 and 122 Directive (EU) 2017/1132).[17] Moreover, the merger process may include the preparation of an interim accounting statement that dates back 3 months at most (Article 97(1)(c)) and that has to take into account any interim depreciation and provisions as well as the material changes in actual values not shown in the books (Article 97(2)). In general, scholars assume that board cooperation is an essential element in the merger process (Papadopoulos 2010, p. 5; Grundmann 2012, p. 718; with regard to the schemes of arrangement that in the UK work as a substitute for mergers Kershaw 2016, §§ 2.33 and 2.39–41). Consequently, the shareholders' role against managers opposing a business combination is normally believed to consist, rather than in pushing forward a merger proposal, in removing the reluctant directors and replacing them with others ready to undertake the project.[18]

Therefore, the necessity to have the board approval for the merger project to go through gives directors a frustrating measure that is more powerful than any other available in the context of a takeover, even in the absence of a passivity rule. In practice, however, mergers may become easier when the project includes some benefits for the incumbent management. These benefits may, for instance, take the form of new positions in the acquiring or resulting company, or even of more straightforward side payments to the directors of the transferring company. These and other perquisites have traditionally accompanied mergers (Manne 1965, p. 118), and their ability to skew managerial willingness to enter a merger process is still well-known, so much so that they require specific disclosure in the draft terms of the cross-border merger (Article 122(h) Directive (EU) 2017/1132). It is therefore up to

[17]For instance, calculating a meaningful share exchange ratio—which also requires detailed explanation in the merger report (Arts 95 and 124 Directive (EU) 2017/1132)—might prove impossible, in practice, without accessing (partially) undisclosed accounting data and inside information. For this reason, the judicially-appointed experts charged with the responsibility of drafting an opinion on the merger conditions' fairness under Articles 96 and 125 are entitled to obtain all the relevant information from the merging companies.

[18]This might occur through a general meeting vote, possibly anticipated by a takeover when the majority of shareholders would not be in favour of the transaction.

the shareholders to assess whether such benefits lead to a detrimental conflict of interest that justifies rejection of the merger proposal or whether the merger would still increase shareholder value even if managers have a stake in it.

Takeovers' success requires no active managerial cooperation, instead. The role of the target's board of directors in cross-border mergers, on the one hand, and in cross-border takeovers, on the other hand, looks therefore very different on paper. One may wonder whether the same holds true in practice, however. This question seems to be justified for at least two reasons. The first reason is that, while side payments may streamline mergers, defensive measures may facilitate directors' entrenchment against hostile bids, too, so that the distance between the two forms of reorganization might narrow down in practice. The second reason lies in the ownership structure of the target company, because what works for dispersed shareholdings may not work, or may reach opposite effects, for concentrated ownership. Let us consider defensive measures first.

If managers can resort to frustrating devices, they can also credibly threaten to prevent hostile takeovers, as well as mergers. Take for instance post-bid defensive measures.[19] Increasing company's capital to make the acquisition more expensive or launching a share buy-back to reduce the number of outstanding shares available for tender may easily jeopardise a bid's success (Clerc et al. 2012, p. 169). This shows how defensive measures may facilitate directors' entrenchment, thus reducing *ex-ante* the disciplining effect of takeovers and preventing *ex-post* shareholders' ability to tender their shares at convenient prices. However, those measures can also protect shareholders from the adverse consequences of collective action problems arising from pressure to tender (see also Sect. 2.3).

Even if no active cooperation is needed from the board, the ability of (actual or potential) bidders to challenge managerial opposition to a takeover will depend on the array of defences the board may resort to. Any comparison in this respect cannot disregard national rules, both because the takeover bid directive leaves broad margins to national law-makers in the definition of the regulatory framework for frustrating measures, and because the very availability of those measures largely depends on the company law applicable to the target entity. Paradoxically, while measures aimed, at least in theory (Recital 1 and Article 1 Directive 2004/25/EU), to foster harmonisation in takeover law fall short of delivering a homogeneous regulatory framework, national company law rules often display broad similarities on the board's role.

As for takeover law, suffice it to recall that Directive 2004/25/EU defines a set of common rules that constrain certain defensive measures (Articles 9 and 11 Directive 2004/25/EC). Post-bid defences, for instance,[20] are subject to a board neutrality rule, which subordinates to the prior authorisation of the general meeting any action taken

[19]For the sake of simplicity, pre-bid measures are not considered in detail here.

[20]Pre-bid defensive measures are subject to a breakthrough rule, which neutralises, pending an offer and during the first meeting after the offer period, multiple voting rights as well as restrictions to voting rights and share transfers (Art. 11 Directive 2004/25/EC).

by the board—"other than seeking alternative bids"—which may frustrate the bid or prevent the bidder from acquiring control of the target company (Article 9(2) Directive 2004/25/EC). However, the same Directive also gives member states the option not to apply those limitations—without prejudice to the companies' freedom to adopt them voluntarily (Article 12(1)–(2)).[21] The leeway member states have in designing national laws becomes even broader for cross-border takeovers, because the Directive also gives member states the option to exempt companies from applying the limitations to defensive measures when the bidder, or its controlling entity, would not reciprocally apply them if it were the target of a takeover (Article 12(3) Directive 2004/25/EC).

As a consequence of these provisions, even within each member state, the applicable rules may vary from cross-border takeover to cross-border takeover, depending on the targets' and the bidders' choices. First, targets may decide to adopt anti-frustration rules (opt-in) when their national law does not mandate them. Second, they may be subject to those limitations or not, depending on their bidder's regime, when they can reciprocate this latter's defensive rules. As a result, the regime of the defensive measures in the EU is rather patchy, because of the different choices member states took on the optional regimes and the reciprocity rule (European Commission 2012, p. 3).

This lack of homogeneity among member states, and among companies within each member state, would seem to make any overarching comparison between the regimes of cross-border mergers and cross-border takeovers extremely difficult. However, while inevitably remaining sensitive to the specific circumstances, variations of legal and bylaws provisions on cross-border takeover may not be as broad as it might seem at first sight. As mentioned, different rules on board neutrality do not in fact necessarily lead to an equally different managerial discretion. Passivity rules may be trivial if company law provisions already restrict managerial access to frustrating measures, including by requiring shareholder approval (Kershaw 2007). This is the case at least in some major EU jurisdictions (Gerner-Beuerle et al. 2011), so that, absent shareholder consent, boards of target companies will often have a passive role in cross-border takeovers regardless of the national choices on board neutrality and reciprocity towards foreign bidders.

Rules affecting, directly or indirectly, the role of the board in cross-border mergers are not totally immune to national discretion, either. Examples we have already mentioned are the different treatment of side payments and, possibly, variable shareholder influence on the board (Sect. 2.1). However, harmonisation is higher than in takeover law, and it ensures the board has a decisive role in determining the outcome of a merger.

There is, at any rate, another more obvious reason why board involvement in mergers does not necessarily represent an obstacle to reorganizations. This reason

[21]The rule applies by default from the time the board of the target company receives the information that the bid was launched, but member states may mandate an early application (for instance from the moment when the board is aware a bid is imminent).

depends, as mentioned in Sect. 2.1, on the ownership pattern of the target company. When the company is under the control of a shareholder (or of a coalition of shareholders), the most relevant agency problems concern the relationship between the controlling shareholder(s) and the managers, on the one hand, and minorities, on the other. In the case of a merger, shareholders of the transferring company that are not large enough to block the reorganization may see their shares replaced with those of the acquiring or the emerging company (and occasionally with cash) at an unfavourable exchange ratio, just like minorities of the surviving company may, symmetrically, be excessively diluted. In this context, receiving board approval is not a matter of concern for the incumbent shareholder(s), and minority protection measures rely on different techniques, including supermajority approvals at the general meetings or independent assessment of the exchange ratio.

Concentrated ownership may make the role of the board much less relevant in takeovers, too. When a shareholder has the absolute majority of voting rights, hostile takeovers are impossible from the outset. When the shareholder has de facto control, corporate control is contestable, but board decisions to adopt frustrating measures will practically depend on the controlling shareholder's choice, because this will have the ability to remove directors otherwise. Just like in mergers, minority protection relies therefore on other tools, which we will analyse in the next sections.

2.3 Shareholder Information and Approval

This section briefly analyses shareholder involvement in cross-border mergers and cross-border takeovers. Both these forms of reorganization rely on shareholder approval to go through, so that the agency problems they have to cope with are sometimes similar. The legal techniques of the two regimes are often quite different, however. For the sake of exposition, Sect. 2.3.1 analyses how Directive (EU) 2017/1132 and Directive 2004/25/EC cope with information asymmetries with a view to putting shareholders in a condition to make informed decisions. Section 2.3.2 addresses issues involving the dynamics of collective decision-making in the two restructuring models.

2.3.1 Information Regimes for Cross-Border Mergers and Cross-Border Takeovers

Both cross-border mergers and cross-border takeovers rely on shareholder approval as a key decision-making mechanism. A genuine consent of shareholders requires these have sufficient information at their disposal to be aware of the consequences of their decisions. The two regimes, therefore, mandate the dissemination of documents aimed at informing the shareholders called to vote on the merger or to accept (or reject) the offer. A combination of conflict-of-law rules and partial harmonisation

of procedural and substantive rules reduces the costs and the legal uncertainties of mergers and takeovers involving entities located in different member states, thus facilitating cross-border reorganisations. The two regimes also resort to a third-party assessment by persons not involved in the transactions, but they do so with different intensity. Let us see these rules more in detail.

Cross-border mergers require the preparation (Article 122 Directive (EU) 2017/1132) and the publication via companies register (Article 123[22]), at least one month in advance of the general meeting convened to vote on the reorganization, of the common draft terms. These are drawn up by each of the merging companies with identical contents.[23] An explanatory report prepared by the board accompanies the draft terms. It explains and justifies the legal and economic aspects of the cross-border merger and the implications thereof (Article 124).

Cross-border mergers therefore rely on the publication of the same merger document by each of the companies involved. Because each country has its own draft merger terms published under the local rules, there is no need to set up a procedure that ensures (mutual) recognition of merger documents. However, financial supervisors also play a role when the cross-border merger requires a prospectus, or when an exemption for the publication of a prospectus requires their intervention. When the value of the new shares issued by the surviving company and the number of the transferring company's shareholders exceeds the applicable thresholds,[24] a prospectus is in principle required. The same applies for listed companies—which are the only ones analysed here—when the new shares are admitted to trading on a regulated market and exceed the materiality threshold referred to the same class of shares already listed.[25] Here, the transaction will enjoy the prospectus passport regime, so that approval is required only by the authority where the surviving company has its registered office (Article 17 Directive 2003/71/EC; Article 24 Regulation (EU) 2017/1129).[26] The host competent authorities may require a translation only for the prospectus summary (Article 19 Directive 2003/71/EC; Article 27 Regulation (EU) 2017/1129).

[22]Shareholders have the right to inspect the draft merger terms and their accompanying documents (Art. 97 Directive (EU) 2017/1132).

[23]EU law defines a minimum content for the draft terms of cross-border mergers, so that the boards involved are free to add further information jointly. Simplifications are allowed for companies that publish the drafts on their website.

[24]Namely 150 shareholders, other than qualified investors, and an amount defined at national level between 100,000 and 5,000,000 € (Articles 1(2)(h) and 3(2)(e) Directive 2003/71/EC), soon to become 1,000,000 and 8,000,000 respectively (Articles 1(3) and 3(2)(b) Regulation (EU) 2017/1129).

[25]Namely 20% under the new regime (Article 1(5)(a) Regulation (EU) 2017/1129).

[26]This authority will be competent because the prospectus regime for shares hinges upon the issuer registered office as a connecting factor: Art. 2(1)(m) Directive 2003/71/EC; Art. 2(m) Regulation (EU) 2017/1129.

For both public offers and admissions to trading on a regulated market, if the financial supervisor deems the merger document equivalent to a prospectus,[27] the company is not required to publish a fully-fledged prospectus. No passport system applies in this context, so that the competent authority in each member states where the exemption is to be used assesses the equivalence of the document (ESMA 2017, Q30, also encouraging cooperation among the competent authorities when carrying out the assessment). In the future, however, the procedure for cross-border mergers will enjoy a smoother regime in this respect, as the new EU prospectus regulation does not require a preliminary vetting for this exemption to apply (Article 1(4)(g) and 1(5)(f) Regulation (EU) 2017/1129).[28]

Takeovers also require the preparation of an information document (the offer document), whose minimum contents are defined at EU level (Article 6(2) and (3) Directive 2004/25/EU). The EU regime does not mandate administrative vetting in this case, but for cross-border takeovers approval by the competent authority grants a form of softened mutual recognition. In particular, once approval is given, the document is recognised in any other European country,[29] but the host country authorities retain remarkable powers. First, they may require a translation of the entire offering document in a local language. Second, they may ask the offeror to provide additional information on locally-relevant items, such as the formalities for the acceptance of the bid and the payment of consideration, or the applicable tax arrangements.[30]

As mentioned, both (cross-border) mergers and (cross-border) takeovers also rely on some forms of third-party evaluation of the transaction.[31] This is especially the case for mergers, which require an independent assessment of the transaction terms and conditions (and in any case of the fairness and reasonableness of the exchange

[27]Equivalence does not require that all the information mandated under the applicable prospectus schemes be given (see already CESR 2003).

[28]Other powers will remain, however, such as the power to "require issuers, offerors or persons asking for admission to trading on a regulated market . . . to provide information and documents" (Art. 32(1)(b)).

[29]While the wording of Art. 6(2), par. 2, only refers to recognition by member states (other than the state of first listing) where the company has its shared admitted to trading, the same rule applies *a fortiori* to all the other EU countries (Von Lackum et al. 2008, p. 113).

[30]It is debated whether the competent authorities of member states other than those where shares are admitted to trading on a regulated market have the power to request additional information: see Von Lackum et al. (2008), p. 113, for the negative; Article 38-II Consob Reg. No 11971/99 (Italy) for the positive.

[31]Both regimes also provide shareholders with information concerning the implications of the reorganization for other stakeholders. The management report on cross-border mergers analyses the implications of the cross-border merger for members, creditors and employees (Art. 124(1) Directive (EU) 2017/1132). As for takeovers, the opinion released by the board of directors also addresses the effects of the bid on employment. Furthermore, where the board of the offeree company receives "a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document" (Art. 9(5) Directive 2004/25/EU).

ratio). The assessment is carried out by an expert appointed, or at least approved, by the judicial or administrative authority (Articles 96 and 125 Directive (EU) 2017/1132).[32] For takeovers, the board as a whole performs a similar function, as it has to release its opinion on the bid and its reasons. The opinion has to address, among other things, the board's views on the "effects of implementation of the bid on all the company's interests" (Article 9(4) Directive 2004/25/EC).

The independent assessment of cross-border mergers is by definition non-conflicted.[33] This may not be the case for the board opinion on takeovers, instead, not only because directors may be biased against the change of control as the previous analysis shows, but also because they may be related to the offeror (up to the extreme case of a management buyout). For these reasons, some jurisdictions require a separate opinion from the independent directors when the bidder is a controlling shareholder (or a controlling coalition of shareholders) or a director.[34]

2.3.2 Collective Decision-Making

Despite their similarities, mergers and takeovers display remarkable differences as regards their collective decision-making procedures.

Merger conditions are in principle[35] subject to approval by the general meeting of shareholders both within the target and the acquiring company (Article 126 Directive (EU) 2017/1132). Each of the general meetings involved will be subject to its own company law (Article 121(1)(b)). Such law will determine the applicable quorum, in compliance with the minimum supermajority requirements set forth at European level.[36] In particular, general meeting resolution shall have approval, for each class of shares, of a majority of at least two thirds of the votes represented at the meeting or, as an alternative, of the simple majority of the votes represented as long as at least half of the subscribed capital is represented (Article 93 Directive (EU) 2017/1132; differently Kraakman et al. 2017, p. 184).

Takeovers are different in both respects. First, they require approval by the shareholders of the target company alone. To be sure, company law applicable to the bidding company (Article 4 Directive 2004/25/EC) may mandate general

---

[32]Exemptions are allowed in some circumstances, but companies taking advantage of them face higher litigation risk (Art. 114(1) Directive (EU) 2017/1132).

[33]Judicial appointment or approval should reduce the risk that evaluations be biased in favour of the incumbents (on the risk of abusive recourse to independent opinion see Macey 2013).

[34]See e.g. Italy (Article 39-II Consob Reg. No 11971/99).

[35]Some deviations apply for the general meeting of the acquiring company when shareholders have enhanced rights of inspection of the documents relevant to the merger, provided that a qualified minority has the right to request that the general meeting be convened (Arts. 94, 111 and 113 Directive (EU) 2017/1132).

[36]Most major EU jurisdictions have set more demanding requirements than the EU minimum thresholds: Kraakman et al. (2017), p. 184.

meeting approval in case the takeover leads to a relevant substantial change,[37] but this remains an exception. Second, the approval does not take the form of a general meeting decision, as the bid addresses each shareholder individually. This has relevant consequences on the agency problems takeovers entail, which we will now briefly address.

Pressure to Tender

Takeovers do not require by default an acceptance rate as high as the supermajority quorums under the merger regulation. A takeover aimed at obtaining control of a company may succeed even if the shares tendered, together with those the bidder already owns, are sufficient to reach a simple majority at the general meeting of shareholder. Of course, this will depend on the preferences of each offeror, who may decide to make the bid conditional upon acceptance by a larger number of shareholders.

The takeover acceptance system determines well-known collective action problems that may lead to suboptimal outcomes in the reallocation of control. On the one hand, the offeree shareholders may be willing to tender at a price lower than the estimated value of the shares with no change of control, simply because they may fear that if the takeover succeeded they would be locked into a less valuable company[38] (pressure to tender: see Bebchuk 1985, pp. 1720–1723). An easy way to increase the pressure to tender to the point that acceptance becomes a dominant strategy is to make the bid conditional upon acceptance of a number of shareholders sufficient to ensure control of the (annual or even extraordinary) general meeting. On the other hand, the symmetrical situation may arise. If shareholders believe the control change will increase the company's value and that the offer price does not fully reflect such expected value, they might refrain from tendering (free riding).

Coordination problems arise because the typical takeover bid does not offer shareholders a way to manifest their preference other than by tendering their shares. This decision-making mechanism does not distinguish between tendering shares because of the fear to lose value in case the bid is successful from tendering shares because the price is deemed fair. Absent a mechanism for shareholders to coordinate their actions, telling spontaneous acceptances from coerced ones is often impossible in practice.

There are of course various techniques to reduce, if not to eliminate, the pressure to tender. However, those measures are subject to limited harmonisation. Defensive measures regulated under Article 9 Directive 2004/25/EC are one of these

[37] See e.g. Article 2361 Italian Civil Code, which prevents acquisition of shareholdings when their nature and size result in a substantial modification of the company's object as specified in the articles of association. These may, therefore, need to be amended for the offer to go through.

[38] A potential decrease in the company's value may come from the new managers' inability to run the business properly (including by extracting higher private benefits of control) or from increased concentration of ownership that makes the company less contestable (Psaroudakis 2010, p. 552).

mechanisms, as directors may hinder the success of the takeover if shareholders give their approval (see Sect. 2.2). To the contrary, non-harmonised measures may substantially vary from country to country. Some of them, such as extended or two-tiered acceptance periods when the bidder reaches certain critical ownership thresholds, involve enhanced exit rights and will be considered in Sect. 2.4.

Another way to incentivise non-coercive offers is to grant their arrangers an exemption from the mandatory bid rule in case they trespass the relevant threshold (as determined under Article 5(3) Directive 2004/25/EC). Just like the measures directly aiming at reducing the pressure to tender, exceptions from the mandatory bid rule are not fully harmonised (Article 4(5) Directive 2004/25/EC enables national deviations, provided that the general principles of Article 3 are complied with). The only harmonised general exemption is granted when the bidder gains control following a voluntary bid to all shareholders for all the shares they hold (Article 5(2)). Offers including all the outstanding shares are less coercive than partial bids because they reduce the risk that existing shareholders end up holding minority stakes in a company controlled by a new dominant shareholder. However, these offers are far from eliminating the pressure to tender, because they do not remove the risk that shareholders be worse-off if they do not tender (Bebchuk 1987, pp. 925 ff.). For this reason, some member states provide for exemptions when bids are structured in a way that enables shareholders to express their views on the offer independently of their decision to tender (Bebchuk 1985, p. 1748). In Italy, for instance, no mandatory bid rule applies when the control threshold is crossed, essentially, in the context of an offer concerning at least 60% of the shares as long as the tender is approved by a majority of independent shareholders through a separate vote (Article 107 Italian Consolidated Law on Finance).

For all these measures aiming to reduce the pressure to tender, national law[39] will, therefore, be crucial in determining the bidder's ability to coerce shareholders and, symmetrically, the level of investor protection. Cross-border takeovers do not, therefore, enjoy harmonisation in this respect, so that investor protection is uneven across the EU and prospective bidders will need to ascertain the applicable rules on a case by case basis.

For cross-border mergers, the voting mechanism cleanses shareholder approval from any form of pressure to tender, instead. Shareholders deeming the exchange ratio insufficient can just vote against the proposal with no fear that this may lead to a suboptimal result. However, bidders may instrumentally use mergers to increase the pressure to tender in the context of takeovers. Offerors can—and often do—launch takeover bids that envision subsequent mergers in case those takeovers are successful, and anticipate that the exchange ratio in those mergers might be lower than the

[39]In cross-border tender offers, the applicable rules will be those of the member state where the target company has its registered office (Article 4(2)(e) Directive 2004/25/EC). This connecting factor becomes relevant when the company has its shares listed in a regulated market located in member states other than that where the company has its registered office (Article 4(2)(b)).

price initially offered for the tender offers.[40] The effect is magnified when the target company has its shares traded on a regulated market (or a multilateral trading facility providing liquidity) while the prospective acquiring company does not.

A merger looming after the expiration of the acceptance period of the offer may worsen the pressure to tender because, if the bidder gains control of the target, minorities may not be able to prevent the general meeting from approving the merger. Even if the bidder does not reach the minimum threshold needed to squeeze-out minorities under national takeover law (see Sect. 2.4 below), she might in fact still be able to control the extraordinary general meeting. The super-majority required for merger approval under EU law is lower than the squeeze-out threshold (Papadopoulos 2010, p. 10), and shareholder apathy in general meetings broadens the difference in practice. As a consequence, envisioning a merger helps set up coercive offers. This may on its turn contribute to making the market for corporate control either less or more efficient depending on the prevailing effect out of two alternative ones: the combination may in fact worsen the pressure to tender for those disliking the bidder, but it can also reduce free-riding problems in the opposite scenario.

Once again, telling which effect dominates may prove impossible unless shareholders can express their preference independently of their decision to tender. For this reason, for instance, under the Delaware law[41] two-step freeze-outs or second-stage mergers face default restrictions that may be waived—unless the company bylaws provide otherwise and if other applicable conditions are met—if a supermajority of disinterested shareholders votes in favour at the general meeting (Gilson and Gordon 2003).[42]

[40]Takeovers and mergers may interact in a somewhat symmetrical way, too, when mergers lead to a control change that triggers the mandatory bid rule under (national laws implementing) Article 5 Directive 2004/25/EU: see Sect. 2.4 below.

[41]See Delaware Code Ann. tit. 8, § 203 (setting a default rule preventing business combination with any interested stockholder for a period of 3 years following the time that such stockholder became an interested stockholder, unless some conditions are met including approval by the board of directors and authorization at an annual or special meeting of stockholders by the affirmative vote of at least 66 2/3 per cent of the outstanding voting stock which is not owned by the interested stockholder).

[42]Other protective mechanisms rely more on the scope of application of the entire fairness review by the court. Shareholder approval is an element taken into account when relaxing the standard, but such approval is disentangled from pure tendering only in some circumstances (e.g. for long-form mergers not preceded by a takeover—so-called "one-step freeze-out") but not in others (e.g. for short-form mergers preceded by a takeover—so-called "two-step freeze-out"). For a detailed review see Ventoruzzo (2010).

Free Riding

Moving now to the opposite problem of free-riding, a relatively common way to reduce this potential market failure consists in granting shareholders the opportunity to have a stake in the increased post-bid returns. Helpful tools in this respect are exchange offers where shares of the bidding company are offered in consideration for the shares of the target.

From the point of view of the target shareholders, mergers partially replicate the dynamics of exchange offers.[43] In particular, shareholders of the transferring company receive shares of the acquiring company as a replacement for the shares they held. Cross-border mergers are not particularly prone to intense free-riding by shareholders fearing not to partake in the future benefits of the new management. However, they are not immune to other, more extreme, free-riding issues under the form of a hold-up by shareholders that want to extract rents from their ability to block the transactions.

Historically, mergers often required unanimous shareholder consent, but the requirement was subsequently lowered down to a qualified majority in most jurisdictions so as to prevent reluctant residual shareholders from vetoing transactions. As Article 93 Directive (EU) 2017/1132 establishes minimum supermajority requirements only for national mergers, member states may theoretically set higher approval thresholds for cross-bored mergers and leverage on free-riding dynamics to make those business combinations more difficult. However, scholars believe that anti-discrimination principles prevent this kind of differentiation (Grundmann 2012, p. 706), so that the majority requirement adopted under Article 93 for purely national mergers might represent not only a floor, but also a cap for the majority required to approve cross-border mergers under Article 126 Directive (EU) 2017/1132.

2.4 Voluntary and Forced Exit

One last feature this chapter focuses on is shareholder exit. (Cross-border) mergers and (cross-border) takeovers rely to different extents on exit with a view to striking a delicate balance in protecting investors. The previous analysis of collective action problems provides a good explanation of the reasons why EU—and to a greater extent national—law makes recourse to voluntary or forced exit of reluctant minorities. Let us first consider mandatory exit, and squeeze-out in particular.

Squeeze-outs may be efficient because they reduce the risk of retaliation by holdouts and limit free-riding problems, thus facilitating business combinations (Johnston 2009, p. 48). Too permissive a regime for freeze-outs would however deprive

[43]This analogy also justifies an equivalent tax treatment when such reorganizations are performed on a cross-border basis (Arts 2(1)(e) and 8 Directive 2009/133/EC).

minorities of adequate protection of their ownership rights. This would result in both a limitation of a fundamental right[44] and in reduced *ex-ante* incentives to invest.

For mergers, the voting mechanism based on supermajority approval, as opposed to unanimity, reduces hold-up problems and forces reluctant minorities to have their shares replaced or diluted at the outcome of the reorganization. Therefore, the need for a specific squeeze-out rule is not as pressing as in other contexts, because mergers enable controlling shareholders to freeze-outs minorities for shares.

The law of some member states goes even further and enables shareholders controlling all but a fraction of the company's capital to cash-out residual minorities with no previous tender offer, a result that would be more difficult to obtain through more traditional techniques such as increasing the exchange ratio within a merger or performing a reverse stock split. An oft-mentioned example is a German rule that allows to cash out minorities below 5% on the basis of a general meeting decision and at a price determined by a court-appointed expert (§ 327a–f AktG: Ventoruzzo 2010, pp. 901–902; Kraakman et al. 2017, pp. 190–191 and 230). These national provisions also enable member states to deviate from the rules applicable to cross-border mergers where the acquiring company holds 90% or more of the shares of the transferring company (Article 114(2) Directive (EU) 2017/1132).

The takeover bid directive sets forth the most effective EU-wide cash-out rule, namely the right to squeeze-out minorities. The directive grants this right to the offeror that has secured at least 90% of the voting capital and of the votes, following a bid made to all the holders of the offeree company's securities for all of their securities. The relevant threshold may refer to either the offeree's shareholding in absolute terms or to the number of shares tendered in the context of the offer, at the choice of the member state. More precisely, the squeeze-out right applies either where the offeror holds securities representing at least 90% of the voting capital and 90% of the voting rights (member states may raise the percentage to 95%) or where, following acceptance of the bid, the offeror has acquired 90% of the voting capital and 90% of the voting rights comprised in the bid (Article 15 Directive 2004/25/EC). Being based on the acceptance rate, this last parameter defines in any case what constitutes the "fair price" for a squeeze-out following a voluntary offer, while consideration offered in a mandatory bid shall always be presumed to be fair. In other circumstances, the determination of the fair price relies on national rules and supervisory practices.

Once the offeror has crossed the 90% threshold, there are therefore two ways to freeze minorities out under EU law. The first one is through a (cross-border) merger enjoying a simplified procedure (Article 132(2) Directive (EU) 2017/1132), and the second one is by enforcing the squeeze-out right under takeover law. However, the entity of the simplifications for cross-border mergers depends on national choices,

[44]The case law of the European Court of Human Rights admits restrictions to ownership rights concerning company shares due to squeeze-out procedures when the applicable law ensures fair compensation (ECtHR, *Offerhaus and Offerhaus v. the Netherlands*, App. No 35730/97, 16 January 2001; European Commission of Human Rights, *Bramelid and Malmström v. Sweden*, App. No 8588/79 and 8589/79, 12 December 1983).

and the determination of the squeeze-out price under Directive 2004/25/EU is harmonised only in some circumstances. Therefore, guessing in abstract terms which alternative leads to the best outcome in terms of investor protection, or is more convenient in fostering cross-border reorganizations, is a difficult exercise. In general, scholars highlight that mergers normally have higher procedural costs, but often ensure lower returns for minority shareholders (Papadopoulos 2007, p. 530).

National rules can offer further tools to reach a substantial squeeze-out. For instance, UK company law enables legal devices (falling into the broad category of the schemes of arrangement[45]) whereby shareholders of the target company have their shares replaced with those of the acquiring company (Davies 2008, pp. 977–978). This outcome closely mirrors that of an exchange offer, with the crucial difference that the general meeting, as opposed to shareholders individually, has the competence to decide on the scheme. Consequently, these forms of reorganization can squeeze-out minorities in the target even when less than 90% of the addressee shareholders accept, through their vote, the scheme (normally, 75% is the applicable threshold; Kershaw 2016, §§ 2.35 and 2.55; courts have sometimes been reluctant to uphold schemes not approved by the majority of the non-affiliated minority, however: Ventoruzzo 2010, p. 901). Reverse triangular mergers, which some authors deem subject to the EU framework on cross-border mergers, may lead to a comparable outcome.[46]

Voluntary exit raises issues that are symmetrical to those of mandatory exit. In general, allowing disagreeing minorities to leave the company once a major control change has occurred has the potential benefit of curbing the incumbents' incentives to exploit collective decision-making rules to the detriment of outside investors. *Ex-ante*, this enhanced protection incentivises investments by providing a—sometimes limited—safeguard against major adverse control changes.

While this first rationale of voluntary exit extends to both mergers and takeovers, a second explanation refers to collective action problems that affect takeovers to a much larger extent. In particular, voluntary exit may reduce the pressure to tender, because investors may follow a wait-and-see strategy in the first place, while being allowed to quit when the outcome of the takeover becomes clear. As the decision to leave the company may be postponed, shareholders are not forced to facilitate undesired control changes.

Of course, each of these effects has a flipside. Providing dissenting shareholder with a put option may become as expensive as to prevent the feasibility of value-increasing transactions, and extending the offering period may increase free-riding problems. The EU law on cross-border mergers therefore does not afford dissenting shareholders appraisal rights (Grundmann 2012, p. 685), but it leaves member states the option to do so (under the general provision that national law can adopt rules designed to ensure appropriate protection for minority members who have opposed the cross-border merger: Article 121(2) Directive (EU) 2017/1132). Many EU

[45] See Sect. 1.1 above.

[46] See Sect. 1.1 above.

countries do not, therefore, rely on appraisal rights, although some major jurisdictions—including Germany, France, and Italy—grant them at least for some mergers (Kraakman et al. 2017, pp. 186–187).[47]

At the EU level, an exit option that enables minorities to cash their investment out only exists in the context of takeovers. When a control change occurs, or a previously widely-held company becomes a controlled entity,[48] the mandatory bid rule grants shareholders the possibility of tendering their shares at a price that is in principle able to capture at least part of the expected future returns of the new controlling shareholder—whether these will come from efficiency gains or increased private benefits of control (Article 5 Directive 2004/24/EC).

As the mandatory bid rule often leads to very expensive offers, takeovers and mergers may have a different appeal depending on their capacity to escape that duty, thereby avoiding the need to pay an exit to dissenting shareholders. EU law directly grants an exemption from the mandatory bid rule when the control threshold is crossed following a voluntary bid to all the holders of securities for all their holdings (Article 5(2) Directive 2004/25/EC). Other exemptions are possible under national laws, however (Article 4(5) Directive 2004/25/EC), and these normally concern mergers as well (European Commission 2012, pp. 6–7; Ventoruzzo et al. 2015, p. 532). The contents of such exemptions for mergers and other reorganizations are not harmonised across the EU,[49] so that their capacity to make those transactions more attractive than a voluntary bid on all the outstanding capital varies from country to country. More importantly, this leaves cross-border reorganizations subject to regulatory arbitrage, as the involved companies may structure their reorganization by trying to take advantage of more lenient regimes.[50]

Besides mandating a bid for control changes, EU takeover law grants minorities the right to sell-out their shares to the offeror who has acquired at least 90% of the

[47]Differential treatment of cross-border, as opposed to local, mergers may be justified because of the change in the applicable company law (Kurtulan 2017).

[48]The EU law leaves the definition of the control threshold to member states' discretion. Most EU jurisdictions set it at 30% (European Commission 2012, p. 5).

[49]For instance, in Italy, shareholders crossing the control threshold through mergers are not under an obligation to launch a mandatory bid provided that the merger is approved by a majority of the disinterested shareholders of the target (Art. 49(1)(g) Consob Reg. No 11971 of 1999), while contributions in kind are exempted only when the capital increase would restore the company's compromised financial conditions (Art. 49(1)(b)). In France, the AMF may grant a waiver from the mandatory bid rule for both mergers and contributions in kind subject to shareholder approval (Art. 234-9 AMF General Regulation).

[50]Take for instance company A controlling the listed company B in country X, and company C controlling the listed company D in country Y. Imagine company B and company D want to combine their businesses. Country X exempts contributions in kind, while country Y does not (see fn 49 for a practical example). Assuming that the contribution to B or D of shares giving control over D or B respectively would cross the mandatory bid threshold in both companies, A and C will have an incentive to organize the transaction so that C contributes to B its controlling stake in D. In this case, the only duty will be for B to launch a bid on D. If A contributed to D its controlling stake in B, then A would be forced to launch a bid on D, and D would have to do the same on B, thus making the whole transaction more expensive.

voting shares (Article 16 Directive 2004/25/EC).[51] This enables small residual minorities to leave the company at a fair price when their ability to prevent potentially abusive behaviour by the controlling shareholder is impaired. On top of the EU rule on sell-out, many member states also mandate an extension of the acceptance period (or a reopening of the offer) when the offeror reaches some thresholds that ensure tighter control—such as the absolute majority of voting rights or a majority sufficient to pass charter amendments[52]—or when the offer is no longer subject to conditions based on minimum acceptance rates[53] (either because those conditions are met or because the offer is declared unconditional as to acceptances).[54]

3 Conclusions

This chapter has compared the EU legal regimes for cross-border mergers and cross-border takeovers from a functional point of view. Both legal frameworks deal with similar agency problems concerning the need to ensure investor protection from value-decreasing reorganizations and, at the same time, to facilitate efficient financial transactions.

Unfortunately, the two regulatory objectives easily lead to an obvious trade-off. Particularly protective measures may prevent the expropriation of minorities, but they may also discourage potentially efficient reorganizations by making those transactions too expensive. Too lax a regime may instead avoid the risk that hold-outs block transactions that would have benefited all the remaining shareholders, but may also allow cash-outs to the detriment of minority shareholders. This scenario reflects the typical double-edged nature of many protective measures, a problem that cross-border takeovers and cross-border mergers address with different techniques.

For instance, the mandatory bid rule may discourage value-decreasing control changes by reducing, potentially down to zero, the incentives to take over companies with a view to extracting private benefits of control. However, it can also make efficient control changes more expensive, because it forces the bidder to share the expected benefits of her superior managerial ability with the tendering shareholders. For this reason, the mandatory bid rule is also considered a defensive measure under certain circumstances (Ventoruzzo 2008). By the same token, restriction to freeze-outs, while protecting minority shareholders from potential expropriations, can also shield shareholders holding de facto control from hostile acquisitions (Ventoruzzo

[51]The threshold is defined by reference to the squeeze-out rule.

[52]These thresholds are normally lower than those applicable to squeeze-out rights, and are therefore particularly protective for minority shareholders (Kraakman et al. 2017, p. 230).

[53]Conditional offers are particularly prone to pressure to tender: see text following fn 38 above.

[54]Similar rules exist for instance, sometimes with additional qualifications, in Germany, UK, France, Italy and Austria (Grundmann 2012, p. 737; Kraakman et al. 2017, p. 230).

2010, pp. 910–911). A similar reasoning applies to (cross-border) mergers as well, as the divergent national approaches to appraisal rights demonstrate.

All in all, neither the capacity to block nor the ability to foster reorganizations has a bijective correspondence with shareholder protection. The crucial element is, in all circumstances, the allocation of the power to decide whether to pursue that reorganization, together with the relative efficiency of the governance devices regulating such power.

References

Armour J, Ringe W-G (2011) European Company Law 1999–2010: renaissance and crisis. Common Mark Law Rev 48:125–174

Bebchuk L (1985) Toward undistorted choice and equal treatment in corporate takeovers. Harv Law Rev 98:1695–1808

Bebchuk L (1987) The pressure to tender: an analysis and a proposed remedy. Del J Corp Law 12:911–949

Bech-Bruun and Lexidale (2013) Study on the application of the cross-border mergers directive. Brussels

CESR (2003) Summary of the answers to the questionnaire on the way Member States interpret the notion of equivalence in the context described in Article 4(3) of the Prospectus Directive (CESR/03-495)

Clerc C et al (2012) A legal and economic assessment of European takeover regulation. CEPS, Brussels

Coase RH (1937) The nature of the firm. Economica 4:386–405

Coffee J (1988) The uncertain case for takeover reform: an essay on stockholders, stakeholders and bust-ups. Wis Law Rev: 435–465

Davies P (2008) Gower and Davies' principles of modern company law. Sweet & Maxwell, London

ECJ, Case C-167/01, *Inspire Art*, 30 September 2003, ECLI:EU:C:2003:512

ECJ, Case C-2/74, *Reyners*, 21 June 1974, ECLI:EU:C:1974:68

ECJ, Case C-208/00, *Überseering*., 5 November 2002, ECLI:EU:C:2002:632

ECJ, Case C-212/97, *Centros*, 9 March 1999, ECLI:EU:C:1999:126

ECJ, Case C-411/03, *SEVIC*, 13 December 2005, ECLI:EU:C:2005:762

Enriques L (2004) The mandatory bid rule in the takeover directive: harmonization without foundation. Eur Company Financ Law Rev 1:440–457

Enriques L (2011) European takeover law: the case for a neutral approach. Eur Bus Law Rev 22:623–639

Enriques L, Gatti M (2015) Creeping acquisitions in Europe: enabling companies to be better safe than sorry. J Corp Law Stud 15:55–101

ESMA, Questions and answers. Prospectuses. 27th updated version – October 2017 (ESMA-31-62-780)

European Commission (2012) Report on the Application of Directive 2004/25/EC on takeover bids (COM(2012) 347 final)

Gerner-Beuerle C, Kershaw D, Solinas M (2011) Is the board neutrality rule trivial? Amnesia about corporate law in European takeover regulation. Eur Bus Law Rev 22:559–622

Gilson R (1992) The political ecology of takeovers: thoughts on harmonizing the European corporate governance environment. Fordham Law Rev 61:161–192

Gilson R, Gordon J (2003) Controlling controlling shareholders. Univ Pa Law Rev 152:785–843

Grossman S, Hart O (1986) The costs and benefits of ownership: a theory of vertical and lateral integration. J Polit Econ 94:691–719

Grundmann S (2012) European company law. Intersentia, Cambridge
Hart O, Moore J (1990) Property rights and the nature of the firm. J Polit Econ 98:1119–1158
Johnston A (2009) EC regulation of corporate governance. CUP, Cambridge
Kershaw D (2007) The illusion of importance: reconsidering the UK's takeover defence prohibition. Int Comp Law Q 56:267–307
Kershaw D (2016) Principles of takeover regulation. OUP, Oxford
Kraakman R et al (2017) The anatomy of corporate law. OUP, Oxford
Kurtulan G (2017) Minority shareholder protection in cross-border mergers: a must for or an impediment to the European single market? Eur Bus Organ Law Rev 18:101–121
Macey J (2013) The regulator effect in financial regulation. Cornell Law Rev 98:591–636
Manne H (1965) Mergers and the market for corporate control. J Polit Econ 73:110–120
Papadopoulos T (2007) The mandatory provisions of the EU takeover bid directive and their deficiencies. Law Financ Mark Rev 1:525–533
Papadopoulos T (2010) The relationship between takeover bids and mergers: implications for the internal market of the European Union. Int Comp Corp Law J 7:1–19
Penrose E (1959) The theory of the growth of the firm. Wiley, New York
Psaroudakis G (2010) The mandatory bid and company law in Europe. Eur Company Financ Law Rev 7:550–584
Santa Maria A (2009) European economic law. Wolters Kluwer, Alphen aan den Rijn
Siems M (2007) SEVIC: beyond cross-border mergers. Eur Bus Organ Law Rev 8:307–316
Ventoruzzo M (2008) Takeover regulation as a Wolf in a Sheep's Clothing: taking U.K. rules to continental Europe. Univ Pa J Bus Employ Law 11:135–173
Ventoruzzo M (2010) Freeze-outs: transcontinental analysis and reform proposals. Virginia J Int Law 50:841–917
Ventoruzzo M et al (2015) Comparative corporate law. West Academic, Saint Paul
Von Lackum J et al (2008) The offering of shares in a cross-border takeover. Eur Company Financ Law Rev 5:101–114
Williamson O (1975) Markets and hierarchies: analysis and antitrust implications. The Free Press, New York
Williamson O (2000) The new institutional economics: taking stock, looking ahead. J Econ Lit 38:595–613

Matteo Gargantini is Assistant Professor of European Economic Law at the University of Utrecht. Previously, Matteo worked at Consob, the Italian Securities and Exchange Commission, and at the Max Planck Institute Luxembourg for Procedural Law (as a Senior Research Fellow). He also worked in the Capital Markets and Listed Companies Unit of Assonime, the Association of the Italian joint-stock companies. Matteo holds a PhD in Law and Economics (Banking and Financial Markets Law) from the University of Siena, and in 2012 he received the Italian National Academic Qualification as Associate Professor (Law and Economics and Financial Markets Law). His main fields of research are capital markets, banking, and company law.