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Don't try this at home!

Luxembourg-made and Brussels-made rules on corporate mobility in Europe

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INTERNATIONAL SCIENTIFIC CONFERENCE: *EUROPEANIZATION OF NATIONAL LAW:
ACHIEVEMENTS, PROBLEMS, CHALLENGES*

Vytautas Magnus University, Law Faculty, Kaunas, October 13th, 2017



- The EU is based upon the principle of **guaranteeing** and **facilitating** the broadest possible market access....
- ... not just for goods but also for services, labour, capital and **cross-border establishment of companies** (5 fundamental freedoms – the pillars of the European Internal Market).

Article 49 TFEU (ex Article 43 TEC)

[...] restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to **set up and manage** undertakings, in particular **companies** or firms [...] under the conditions laid down for its own nationals by the law of the country where such establishment is effected [...].*



Article 54 TFEU (ex Article 48 TEC)

***Companies** or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be **treated in the same way as natural persons** who are nationals of Member States.*

- Unlike humans, who are creatures of nature, **companies are artificial beings** existing due to the law and functioning within the legal system.
- Two **connecting factors**: incorporation vs real seat
- Forms of cross-border corporate operations
 - primary establishment
 - secondary establishment
 - seat transfer
 - mergers & divisions



- **Reasons for cross-border corporate operations** – Why would companies move across-borders or involve in cross-border corporate reorganisations?
 - **business driven** choices – companies actually wanting to move physically or having business purpose to merge
 - **regulatory arbitrage** (tax or corporate) - *de facto* primary establishment or merger with a view of changing the legal regime
- **EU law impact on national company law:**
 - harmonisation of **substantive company law**?
 - EU' interference with **private international laws**?
 - EU's guarantees on **freedom of establishment** (Luxembourg)
 - EU's **facilitation of cross-border operations** (Brussels)



- **Guaranties:** **Luxembourg**-made law / CJEU-Judges as policy makers
 - **Daily Mail** (81/87): real seat transfer **UK** → NL
 - **Centros** (C-212/97): establishment UK → **DK**
 - **Überseering** (C-208/00): (real) seat transfer NL → **DE**
 - **Inspire Art** (C-167/01): establishment UK → **NL**
 - **Sevic Systems** (C-411/03): merger LU → **DE**
 - **Cartesio** (C-210/06): (real) seat transfer **HU** → IT
 - **Vale** (C-378/10): conversion & (real) seat transfer IT → **HU**
 - **Polbud** (C-106/16, pending): conversion **PL** → LU



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The impact of Centros- Überseering-Inspire Art case-law

(pseudo)foreign private limited liability company incorporations in the UK (number of companies incorporated in the UK, which had majority or all of the directors from outside the UK)

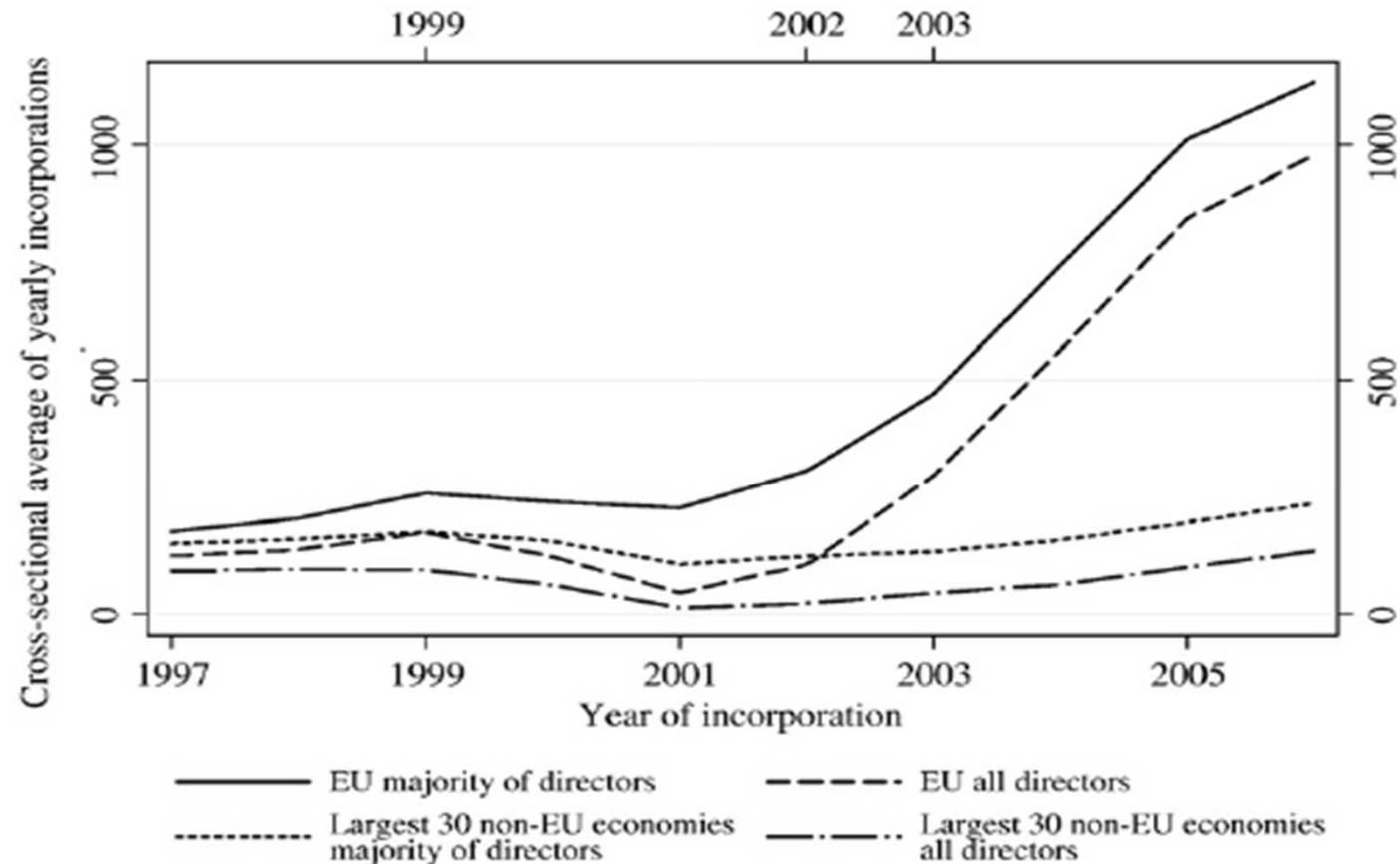
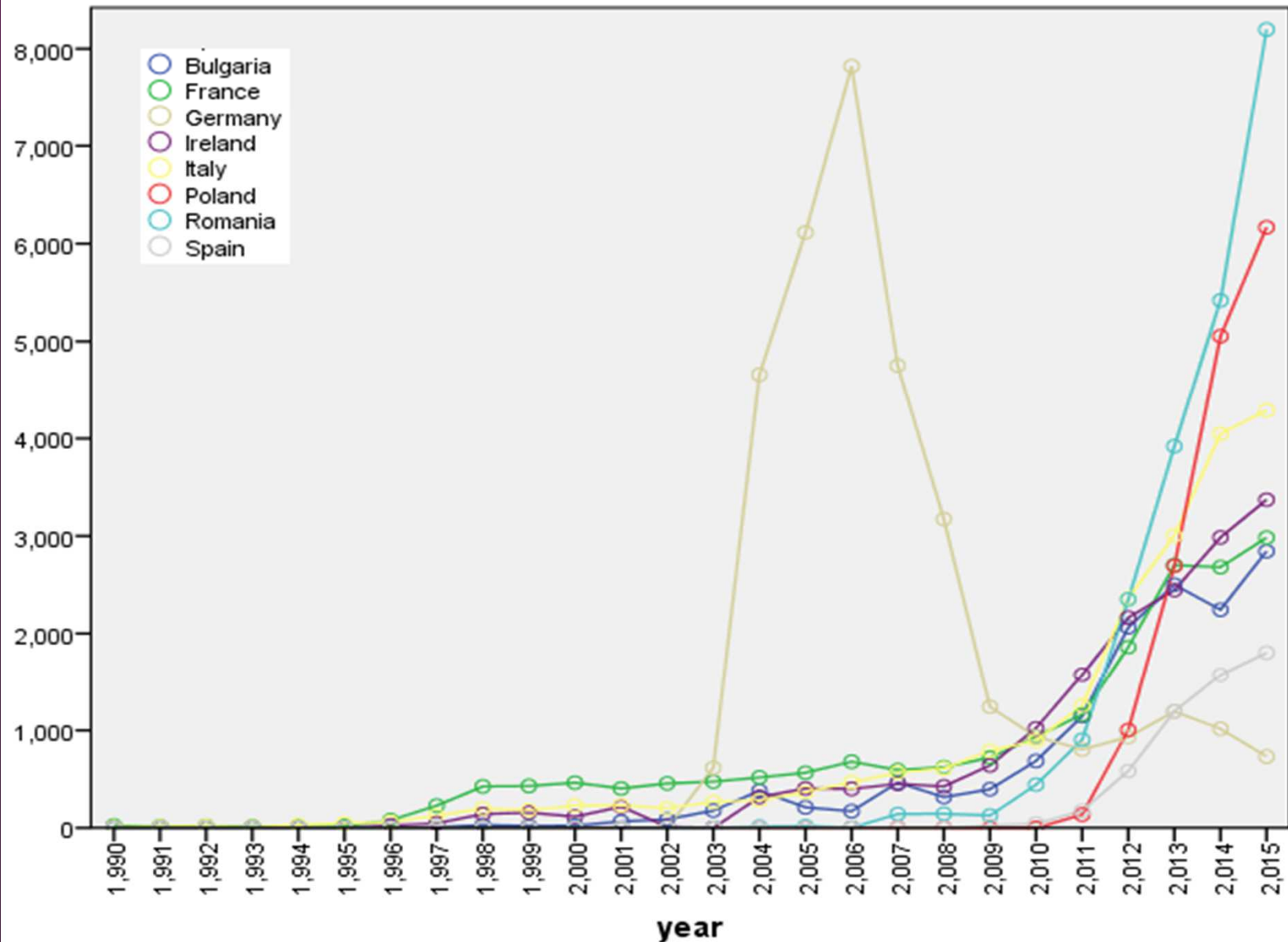


Fig. 1. Foreign private limited company incorporations in the U.K. 1997–2006.

Source: M. Becht, C. Mayer, H.F. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, Journal of Corporate Finance, Vol. 14, No. 3 (2008)



(source: Gerner-Beuerle & Mucciarelli & Schuster & Siems)



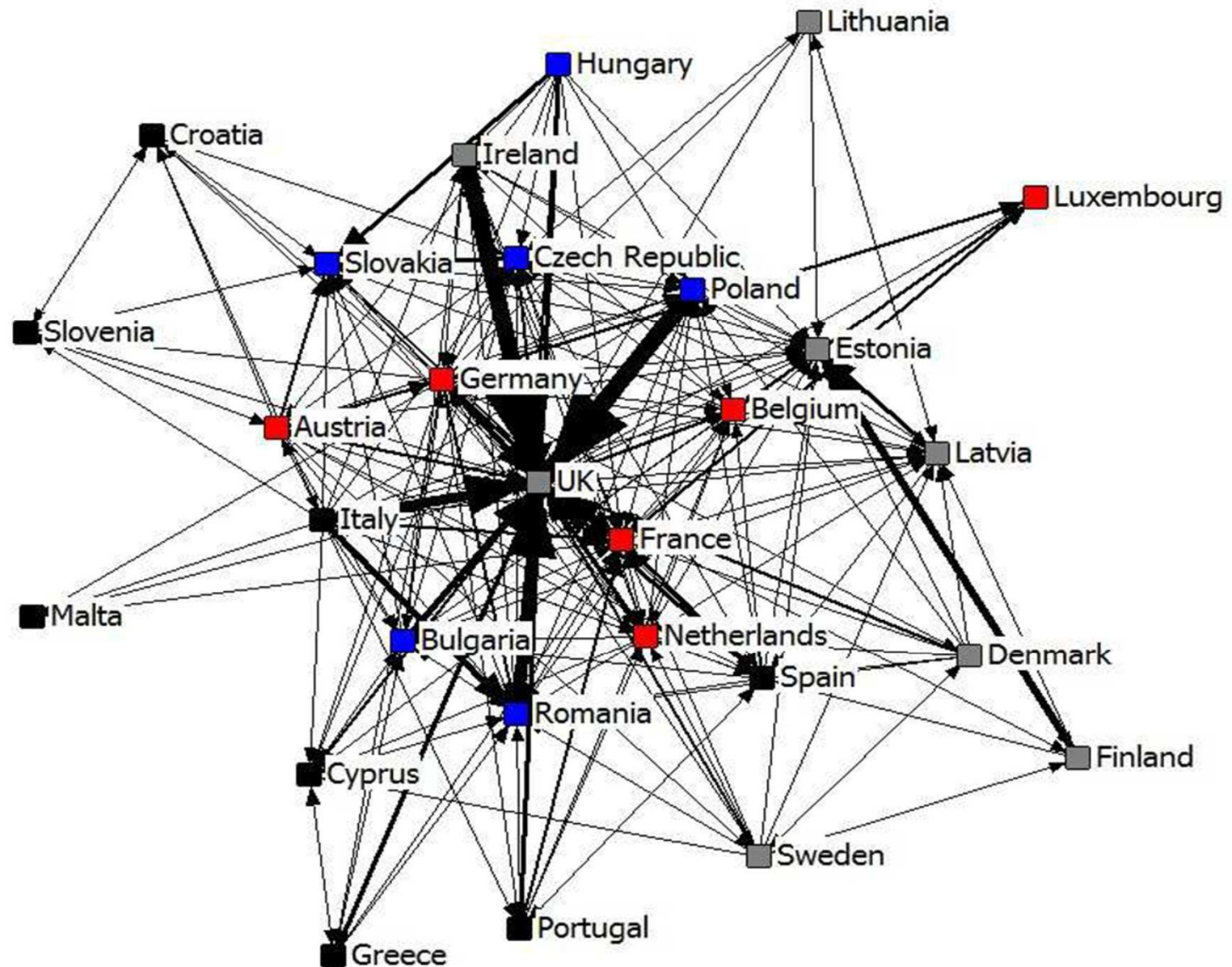


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Race for incorporations

Network of businesses incorporated in other Member States

(source: Gerner-Beuerle & Mucciarelli & Schuster & Siems)





- **Facilitation: Brussels-made law**
 - **Societas Europaea, Societas Privata Europaea** (proposal eventually abandoned)
 - **Cross-Border Mergers Directive** (2005/56/EC – 10th CLD)
 - proposal for a **Directive on the cross-border transfer of a company's registered office** (draft 14th CLD)
 - **2017 corporate mobility package** (work in progress):
mergers (CBMD), divisions (CBDD), conversions (CBCD)



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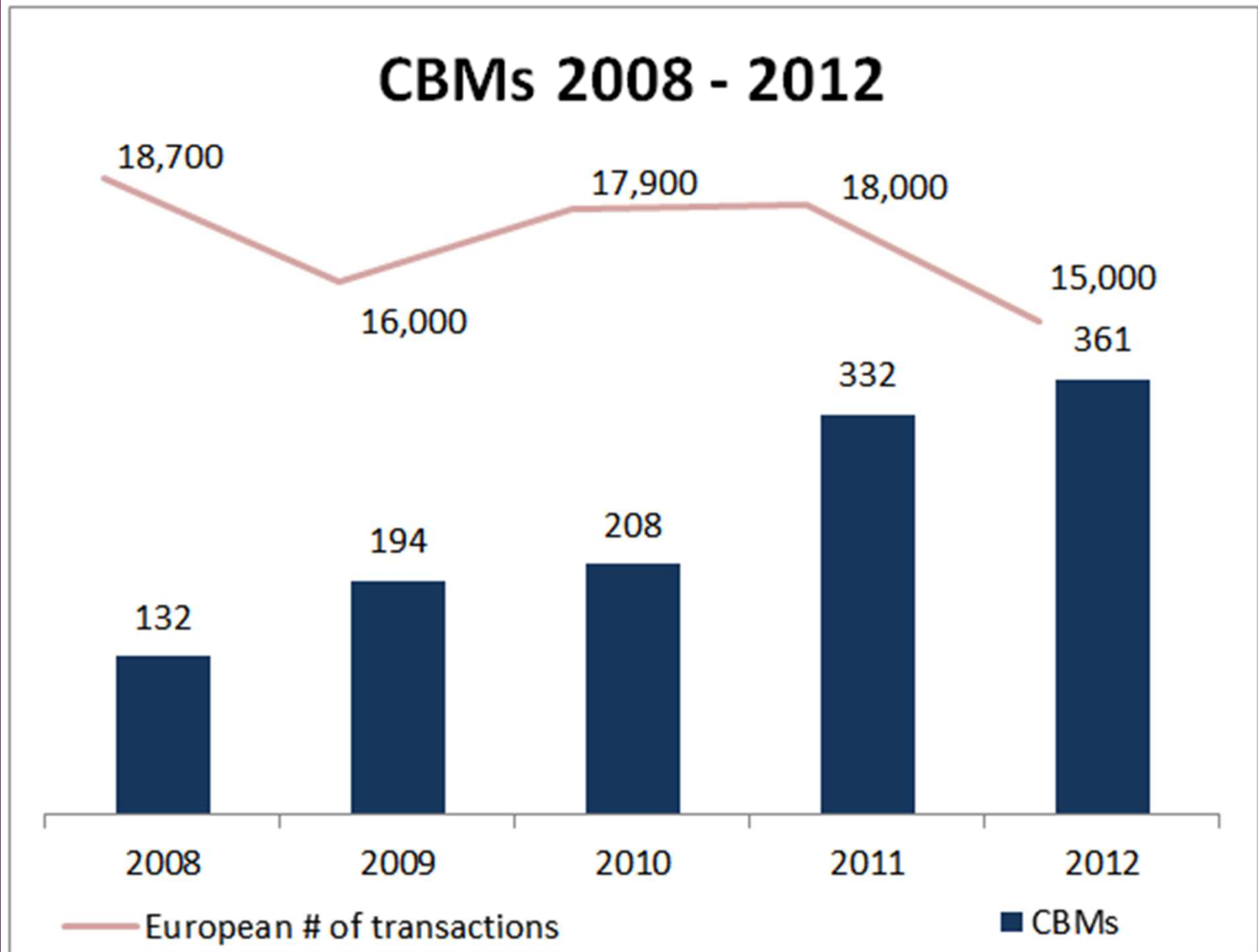
Case-study: CBMD



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Mergers and cross-border mergers in EU and EEA from 2008 to 2012

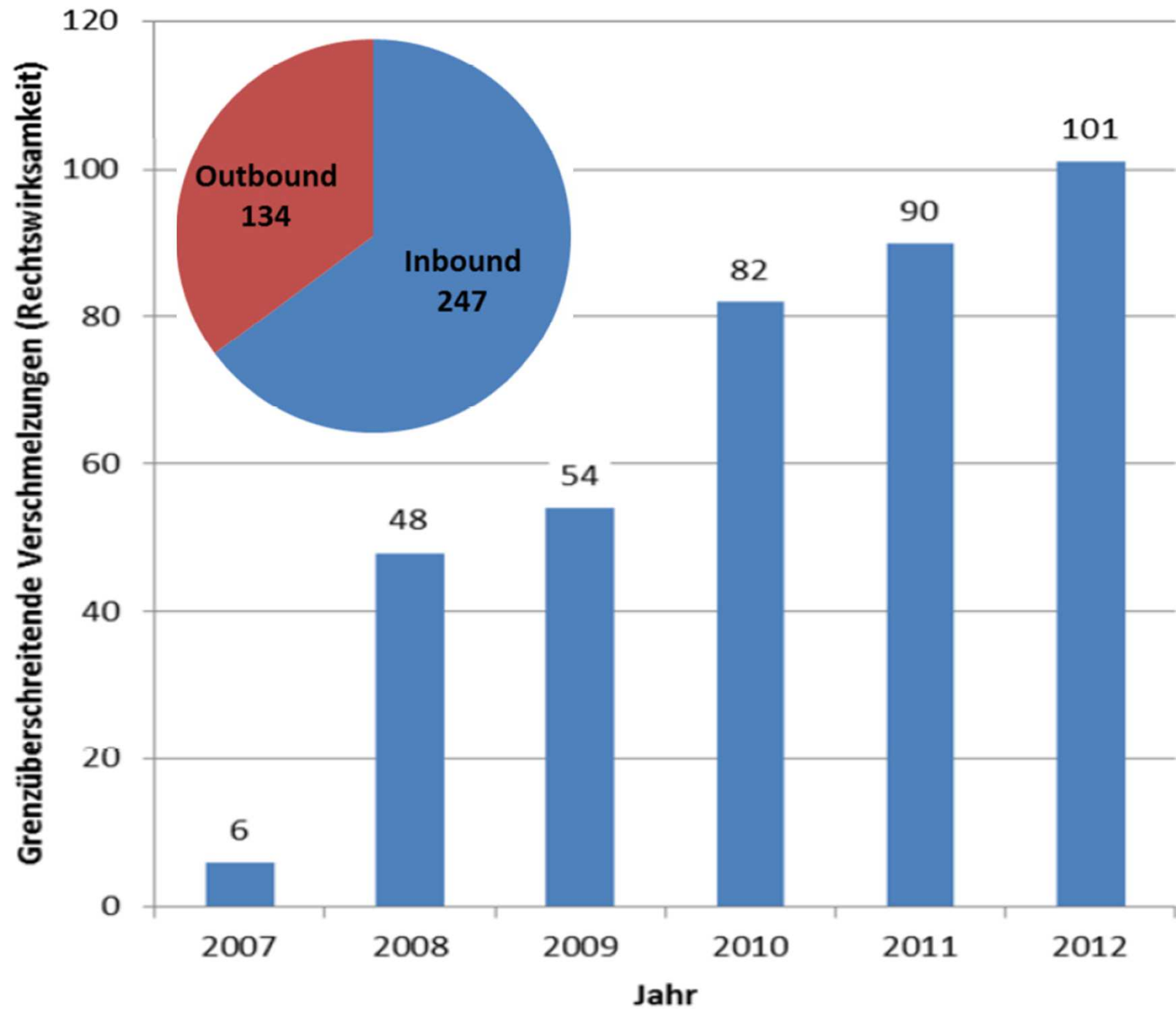
Data: Lexidale, Thompson Financial, Institute of Mergers, IMMA





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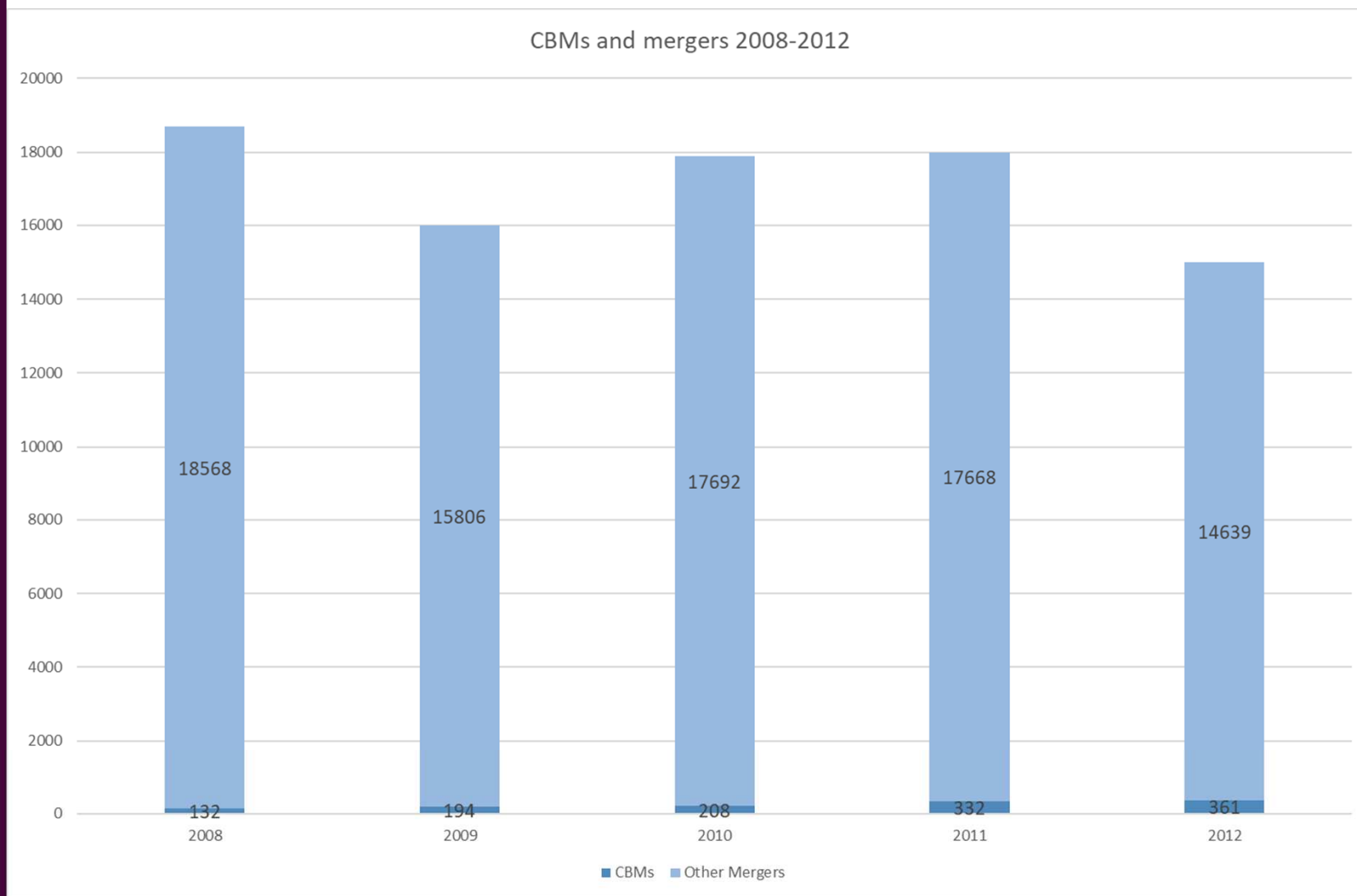
CBM-activity in Germany (2007-2012). Data: W. Bayer.





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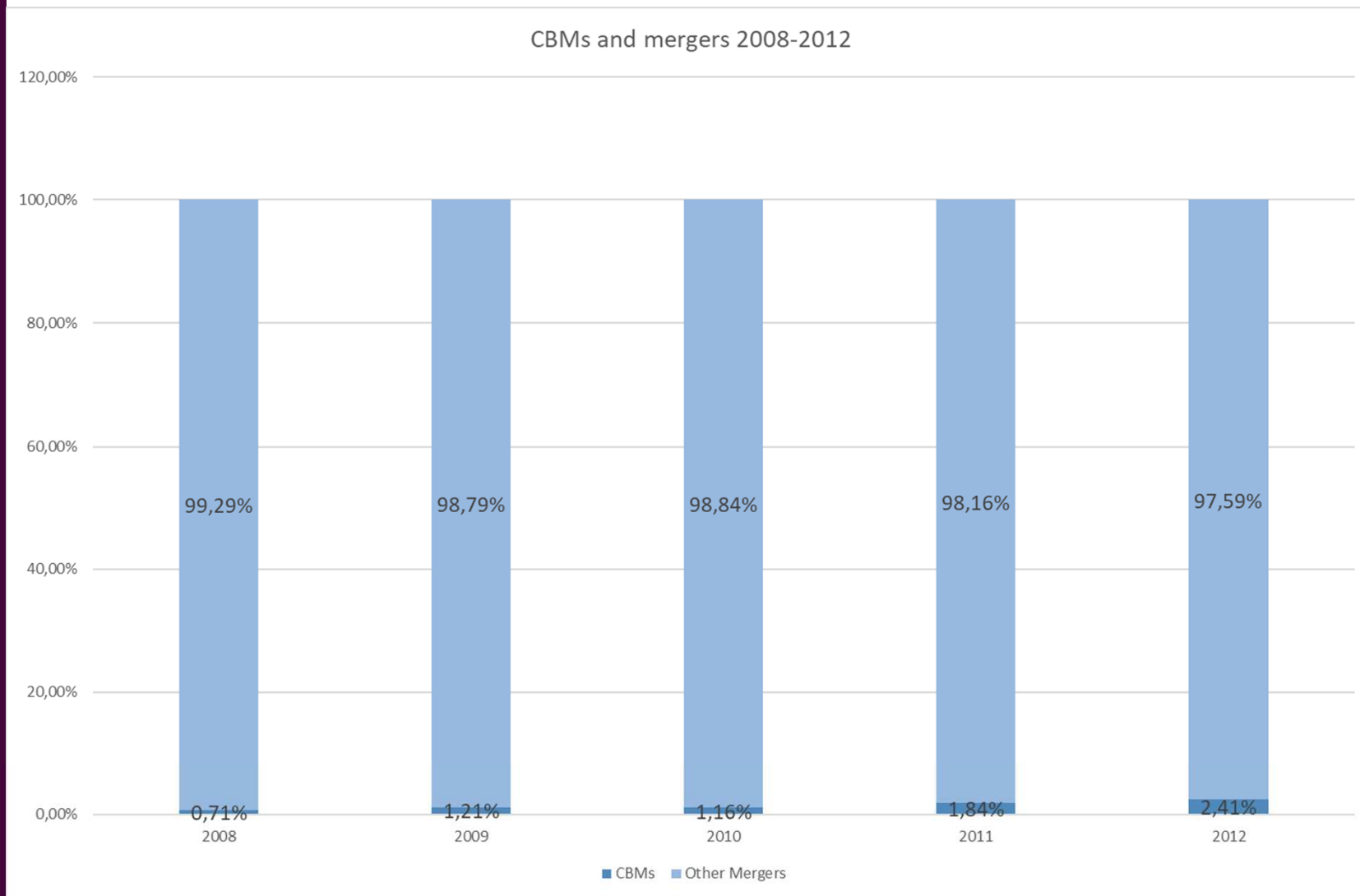
CBMs relative to domestic mergers (numbers)





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CBMs relative to domestic mergers (%)



evaluation

- **Increase by 173% (2008-2012) against the slowdown of the overall merger activity in the EU&EEA**
- The growth in number **partially attributable** to the enactment of **Tax Merger Directive (2009/133/EC)**
- Still CBM account for a **small fraction** of the overall merger activity in Europe



evaluation

- Mergers pursuant to CBMD are executed mainly:
 - as **intra-group transactions** (literature review; anecdotal evidence; ee BBL study: „*the overall main driving force for CBMs*” – at least 38%; ee from DE: at least 73 out of 247 inbound CBMs (\approx 30%) (source: W.Bayer)
 - where **employee participation is not an issue** (ee from DE: only 6% of CBMs involved BLER (source: W.Bayer)
 - anecdotal evidence: **particularly useful for reorganisations within banking groups** (trend towards converting subsidiaries into branches via CBMs driven by expected benefits in the area of licensing and supervision)

evaluation

- CBMD suboptimal for
- mergers between independent or stand-alone companies
 - where BLER is involved

Problems associated with the CBMD

- **Harmonisation philosophy: minimum harmonisation**
 - **mismatches** between rules adopted by the MS (substantive and procedural)
 - **gold-plating** by the MS (exemplified in BBL-Study, at pp. 135-173) resulting in either widening the scope of the CBMD (e.g. through including partnerships), or aggravating the mismatches between MS laws (through additional safeguards for the interests affected by the merger)
 - „**under-harmonisation**” (BBL-Study)
- **Substantive rules: (i) scope, (ii) stakeholder protection, (iii) procedure & technicalities**

Scope / Companies covered

- **Limited liability companies⁽¹⁾ formed in accordance with the law of a MS⁽²⁾, from two different MS⁽³⁾, mergeable under national law⁽⁴⁾**
 - ⁽¹⁾ extend the scope so as to **cover other forms, in particular partnerships?**
 - advocated by J.Schmidt/JURI & ICLEG/Report
 - many MS actually did so in line with the case-law of the CJEU (8/30 ← BBL-Study)
 - ICLEG/dCBMD: no change ← systematic considerations, see codification exercise (Directive 2017/1132/EU, Annex II)
 - ⁽²⁾ embrace **companies not formed in the EU/EEA?**
 - advocated by BBL-Study (at p. 85)
 - EC/Consultations: 78% in favour
 - ICLEG/dCBMD: no change ← Directive 2017/1132/EU, Annex II
 - ⁽³⁾ make a : „c1(A) + c2(A) → C(B)”-type of CBM possible?
 - advocated by ICLEG/R → found in ICLEG/dCBMD
 - ⁽⁴⁾ **abolish restriction as imposed by Article 4(1)(a) CBMD (case of LT)**
cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States
 - advocated by ICLEG/R → found in ICLEG/dCBMD

Scope / Operations covered

- **CBMD**

- merger *per incorporationem*
- merger *per unionem*
- **simplified** merger of **wholly-owned subsidiary** into a parent

- **ICLEG**

- Adopted (ICLEG/dCBMD)
 - merger of **wholly-owned sister-companies**
 - merger of **symetrically-owned subsidiaries**
 - **triangular merger** (involving the parent of the acquiring company) – optional for MS
- Considered
 - compulsory share exchange / scheme of arrangement ? (EMCA, ICLEG/Report)
 - sequential (multi-step) mergers ?

Minority shareholders protection

- **CBMD**

- decision & information rights
 - no problems reported on the procedure concerning information & voting by GM
 - framework conditions harmonised by the Directive 2011/35/EU (for PLC)
- protection of dissenting SH left up to the MS → divergences, e.g.
 - safeguards (usually exit rights)
 - entitlement: SHs who voted against vs SHs who did not vote in favour → cost & liquidity
 - duration of protection (between 10 days and 3 months)

Minority shareholders protection

- **EC/Consultation:** 65% in favour of harmonisation, amongst those supporting harmonisation – 71% in favour of full harmonisation
- **No special protection needed?** (M. Wyckaert & K. Geens, 'Cross-border mergers and minority protection: an open-ended harmonization', 4 *Utrecht Law Review* 1, 2008)
- Harmonisation of **exit (appraisal) rights** (EMCA, J.Schmidt/JURI, EC/Consultation – 70%; ICLEG/Report)

Minority shareholders protection

- ICLEG/dCBMD

- **exit (appraisal) right**

- in form of a cash offer made to dissenting SH
 - only for SHs voting against CDTM
 - acceptance by SHs within 1 month of the GM (if no GM – 2 months after the publication of CDTM)
 - judicial review by court of a home MS; law of the home MS applicable
 - order effective only upon those SHs who initiated or joined the proceedings

- **compensation in case of inadequate share exchange ratio**

- restricted to those who voted against CDTM
 - request within 1 month after the merger takes effect
 - jurisdiction of the home MS, applicable law of the host MS
 - order effective only upon those who voted against in respect of shares for which votes were cast against (but won't Institutional Investors' caution kill the deal? → opt-out for companies worth considering ?)



Creditor protection

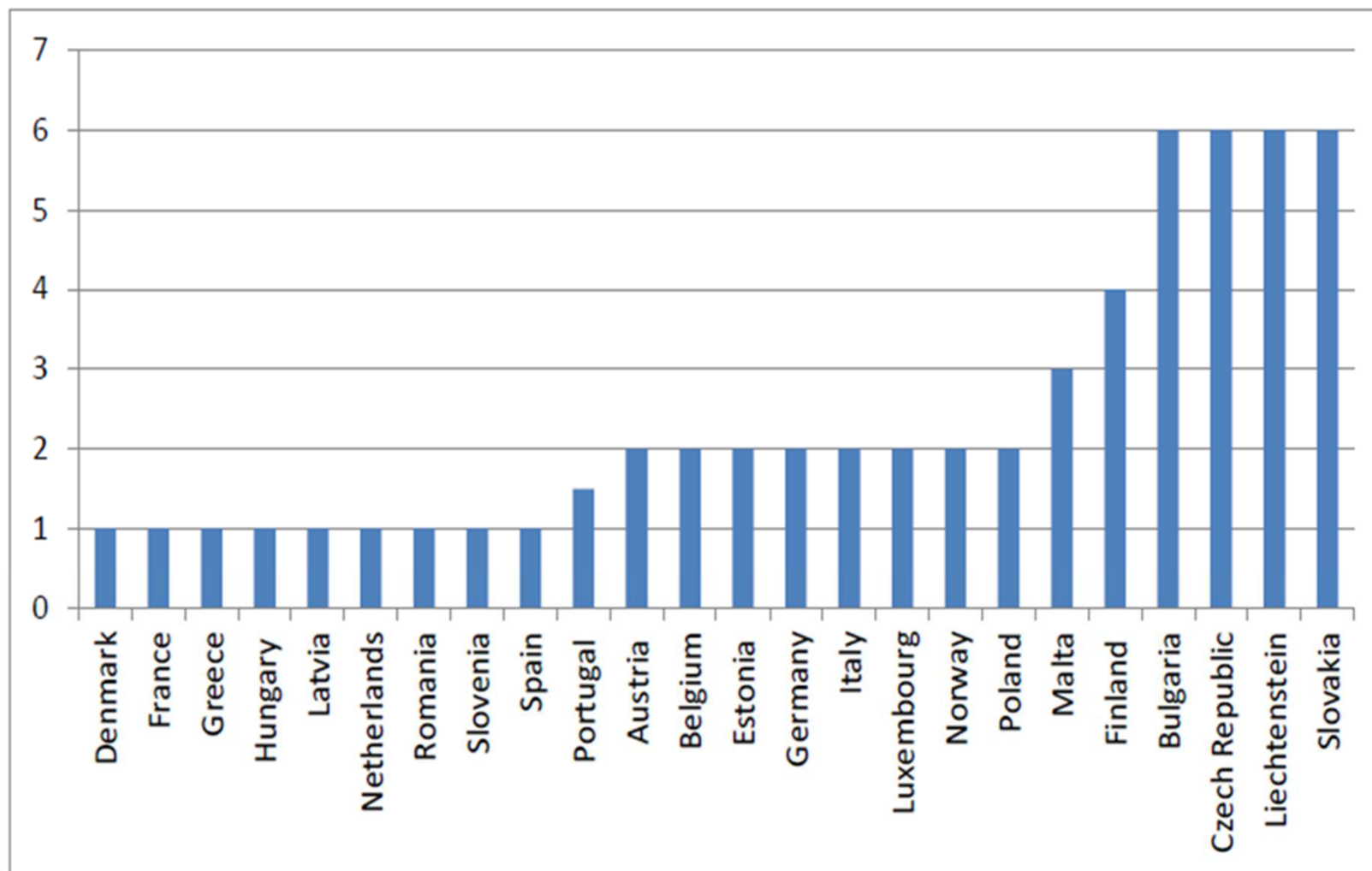
- Particularly troublesome – diverging **tools**⁽¹⁾, diverging protection **periods**⁽²⁾, diverging **philosophies**⁽³⁾ among MS
 - (1) creditor meetings, requesting guarantees, mandatory separate management of assets and liabilities etc.
 - (2) 1-6 months
 - (3) *ex ante* vs *ex post* protection; veto vs no veto



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Creditor protection

Length (in months) of the duration of creditor protection. (Cyprus, Iceland, Ireland, Lithuania, Sweden and United Kingdom are not included due to different mechanisms or because option is not used) Data: Lexidale.



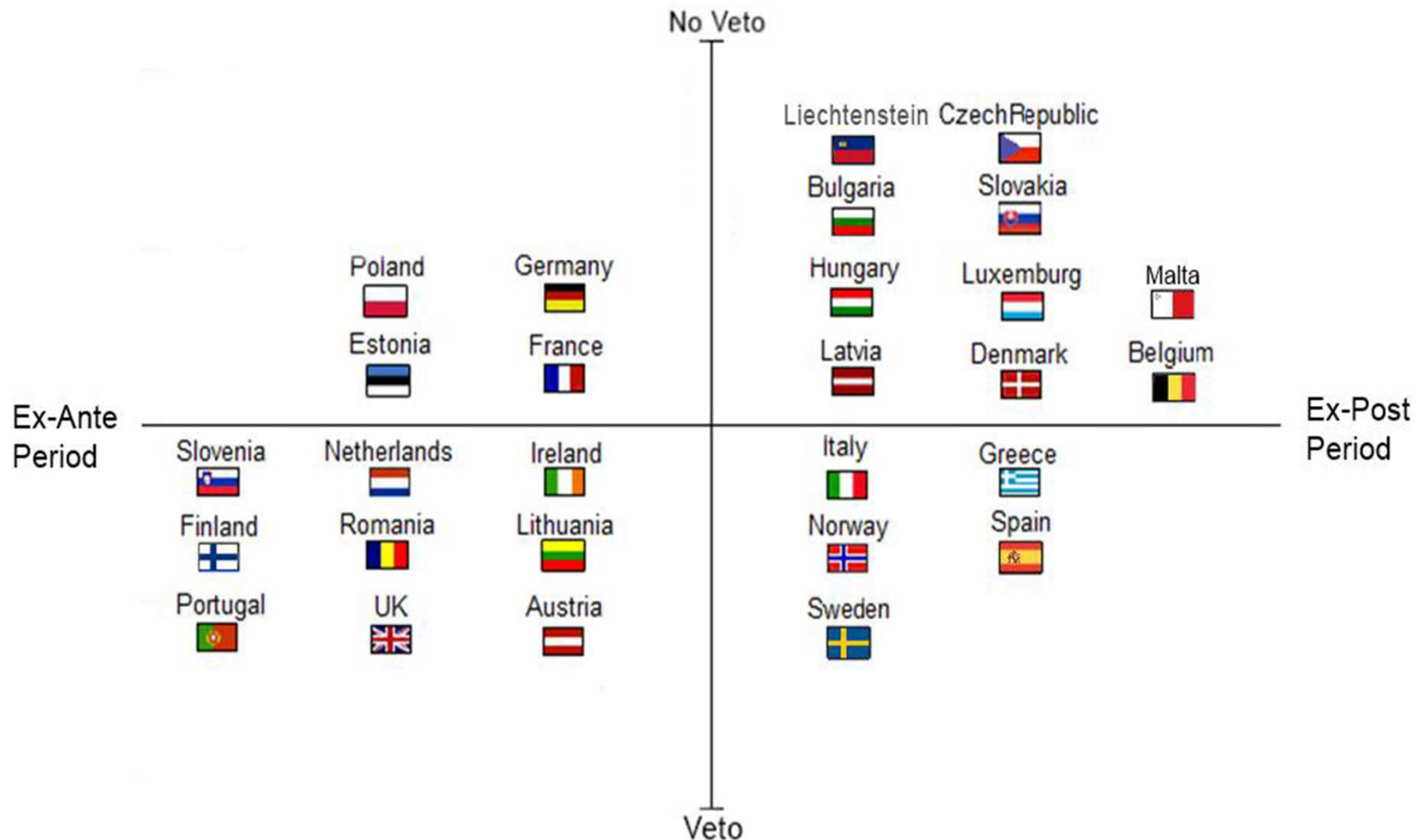


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Creditor protection

Grouping MS based on whether they provide for 'Ex-Post' or 'Ex-Ante' protection and whether creditors can block the CBM

Data: Lexidale



Creditor protection

- **EC/Consultation:**
 - 80% in favour of harmonisation, of which 70% supported full harmonisation
 - 85% in favour of harmonisation of the protection period, of which 75% supported *ex ante* approach
- **BBL-Study:** full harmonisation preferred
- **J.Schmidt/JURI:** full harmonisation, *ex post* approach
- **EMCA:** expert report – declaration, if creditors sufficiently protected
- **ICLEG/Report:**
 - overall goal: balance safeguards with enabling framework → attain to least-cost method of ensuring that the value of creditor claims remains protected
 - *ex ante* approach

Creditor protection

- **ICLEG/dCBMD**
 - Creditors may petition to the court of the home MS to obtain protection
 - within **2 months** of the publication of **CDTM** (*ex ante*)
 - only those who are able to **demonstrate** to be **reasonably likely to be prejudiced** (no prejudice if independent expert so concludes or equivalent claims offered to creditors)

Board Level Employee Representation (BLER)

- **CBMD** – fine-tuned version of the SE-Directive on BLER
- **J.Schmidt/JURI**: for reasons of political sensitivity („Pandora Box”) stick to existing rules
- **ICLEG/dCBMD**: same as CBMD with additions:
 - 4 months time limitation on negotiations
 - obligation on the company to inform the employees whether it chooses to apply standard rules or whether it enters into negotiations

Technical & procedural issues

- Simplifications by the **ICLEG/dCBMD**
 - publication on the company's **website** (or – MS opt-in – in central electronic platform) grants exception from the usual publication requirement
 - communication between authorities – now **BRIS**
 - **online filings**
 - formalities – **two separate reports** (for **SHs**, for **employees**)
 - definition of **independence of an expert** → auditors' directive (2006/43/EC)

Accounting date & regime

- ICLEG/dCBMD:
 - **date** specified by the **CDTM** to be treated (for accounting purposes) by national laws as single definite date
 - **accounting regime** of the **acquiring company** as a basis for valuation of assets and liabilities

Fast track procedures

- Limited availability of fast-track (simplified) procedures in CBMD:
 - absorption of **wholly-owned** subsidiary
 - absorption of **90%-owned** subsidiary, provided cash compensation (MS opt-in possible)
- Additional FTP recommended by BBL-Study, J.Schmidt/JURI, EMCA, EC/Consultation (62%), ICLEG/Report
- Additional FTP in ICLEG/dCBMD:
 - **if no employees** other than members of company's organs → exemption from the duty to draw up report for employees
 - **if waived by all SHs** → exemption from the duty to draw up report for SHs



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Milchkaffee, Cappuccino, Au Lait or Melange?





- Commission's new legislative package on corporate mobility (new CBMD, CBDD, CBCD) in making & forthcoming
- Clear shift towards full harmonisation
- *Ceteris paribus*-approach wherever possible
- Integrated approach – codification into one company law directive: CBMergers, CBDivisions, CBConversions as separate chapters/sections, yet consistency among three different CB-reorganisations assured



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Summary



- **Impact of the EU law on MS laws:**
 - **Case law (Luxembourg):**
 - restriction of the applicability of the real seat doctrine
 - non-discrimination
 - Gebhard (for valid reason of public policy, proportionate)
 - **EU's secondary legislation (Brussels)**
 - Direct (transposition of directive)
 - Indirect (spill-over: e.g. extension of CBMD on legal forms other than limited liability companies)
- **Don't do this at home!**
 - **inherent shortcomings** of leaving the cross-border legal framework up to the sole discretion of MS (principle based approach as well as minimum harmonisation insufficient, as they both result in **mismatches** that are deal-breakers for transactions)
- Reverse influence: **impact of MS laws on EU law**
 - new forms of mergers (merger between sister companies, triangular merger); new simplified procedures



Thank you for your attention!

Ačiū už dėmesį!

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