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CROSS-BORDER MERGERS – EXPERIENCES FROM POLAND

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Cross-Border Mergers – Experiences From Poland

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Abstract

The article provides theoretical and empirical study of cross-border mergers under the legal framework available in Poland following the implementation of the 2005 European Directive on Cross-Border mergers (CBMD). We begin with assessment of how the CBMD has been implemented into Polish company law and how it fits into general framework for domestic mergers. We then turn to presenting empirical data cross-border merger activity involving companies incorporated in Poland. The dataset embraces 126 transactions, whereby generally the publication of draft mergers terms counted as relevant for the inclusion into the cohort. Thus, what distinguishes this analysis is a focus not only on quantitative aspects but foremost on qualitative analysis of merger transactions. The results show a sharp increase in the number of cross-border mergers in the last three years. There is also an absolute prevalence of intra-group transactions. As regards the migration's direction the study reveals a balanced ratio of inbound vs outbound mergers. When it comes to foreign jurisdictions involved we demonstrate that Polish companies merge with entities incorporated in Cyprus or Luxembourg in more than half of the total number of transactions, which suggests a fiscal nature of the considerations underlying the operation. The article argues that there is a need to amend Polish rules on cross-border mergers in order to adjust them to the market expectations and demands.

Keywords: cross-border mergers, restructurings, (former) 10th company law directive, Polish company law, European company law, empirical studies of company law.

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1. Introduction

This paper seeks to examine certain issues concerning the implementation of 10th company law directive on cross-border mergers (hereinafter "CBMD")[1] into Polish company law and the practical implications of the transposing provisions for Polish companies 10 years after.[2] In particular, data on cross-border merger transactions was gathered for the purposes of analyzing cross-border mobility of companies governed by Polish law in this regard.

Currently, the legal framework for cross-border transactions in Poland covers only cross-border mergers (hereinafter "CBMs") of companies (private and public) and of course via direct application of EU law – the transfer of the seat of *Societas Europaea* within the territory of EEA as governed by the SE Regulation.[3] In addition, although Polish law does not provide for an explicit legislation on the cross-border conversion procedure of a Polish company (the process comprises company's seat transfer with an attendant change of applicable company law)[4], the possibility to conduct such operation may not be ruled out. Soon after the CJEU's Polbud decision (C-106/06),[5] there was one case in which an Italian company smoothly converted itself into a Polish private company.[6]

Therefore, CBMs remain a key mechanism to enable companies to achieve corporate mobility. The paper, first, outlines the legal framework for those transactions, with special focus on the most sensitive issues, i.e. creditor and minority shareholder protection. Secondly, it presents and analysis data on cross-border mergers in Poland between 2009 and mid-2018. The analysis encompasses 126 records of cross-border transactions and cross-border merger plans related thereto.

2. Legal framework for Cross-border mergers in Poland

Cross-border mergers of limited liability companies (public and private) and limited joint-stock limited partnerships (*spółka komandytowo-akcyjna*) was introduced in Poland as a result of the

[1] See Articles 118-134 of the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, O.J. 2017, L 169/1. Former, the European Parliament and Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, O.J. 2015, L 310/1.
[2] Polish company or any other nationality refers to company established and being governed by the rules of such state.
[3] See Art. 8 of Regulation (EC) No. 2157/2001 on the Statute for a European Company (SE), O.J. 2001, L 294/1. Worthy noting is that 2 cross-border transfers of the SE's seat (inbound and outbound) were carried out in Poland and one is now in progress (inbound).
[4] For an overview of the legislation on cross-border seat transfers in the European Union, see: T. Biermeyer, Stakeholder Protection in Cross-Border Seat Transfers in the EU (WLP, Oisterwijk 2015); see also C. GernerBeuerle, F.M. Mucciarelli, E. Schuster and M. Siems, Cross-border reincorporations in the European Union: the case for comprehensive harmonisation, Journal of Corporate Law Studies (2017).
[5] Judgment of the Court (Grand Chamber) of 25 October 2017, ECLI:EU:C:2017:804. See A Mucha, K Oplustil, Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law: a Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud, 15 ECFR 2018 (forthcoming).
[6] The time of the execution of that transaction was 7 days after the complete application was filed by the Italian company to Polish register court in Szczecin. Meanwhile, however, the register Court in Kraków dismissed application for the conversion of Polish company into Czech company reasoning that such operation is inadmissible under Polish law.

amendment to the 2000 Code of Commercial Companies (CCC)[7]. The said amendment entered into force on June 20, 2008. Needless to say, the introduction of the new section on cross-border mergers was motivated by the obligation arising from EU law to implement CBMD. The amendment was preceded by an extensive debate in the Polish academia and prepared by prominent legal scholars.[8]

The rules provided for in Chapter 2[1] of CCC comprise 19 provisions that are *legi speciali* to the general provisions for domestic mergers contained in Chapter 2. The way CBMD was transposed almost mirrored the legal framework for domestic mergers and clear reference was made to the respective provisions. However, some significant modifications are worth mentioning, as we do below.

A statutory merger may be structured as acquisition of the assets of the disappearing company or by formation of a new company[9] (cf. Article 492 § 1 CCC). In addition, a fast-track procedure (hereinafter "FTPs") is foreseen as a way to simplify intra-group mergers (between parent company and subsidiaries). The Polish legislator does not allow transactions, which would result in the shareholders of the acquired company to be only offered payment for they shares (freeze-out or cash-out merger, Germ. *Verschmelzung gegen Geld*), and thus without issuing shares in the company resulting from the merger. In the latter case, the shareholder of a company being acquired may receive only cash payment of the maximum of 10% of the accounting or nominal value of shares granted to the particular shareholder (Article 492 § 2 CCC). Thus, the 10% threshold was designed to be technical by its very nature as it is facilitative for transactions where arithmetic of the share exchange ratio would result in issuing fraction of shares. By capping the cash payment, the assets of the surviving company are vastly sustained, and minority shareholders are protected from being squeezed out. It seems, however, that the prohibition (*ex ante* instrument) of exceeding the 10% limit is too restrictive, especially if interested shareholders agreed to leave the company.[10] The possibility of such a merger could be particularly important for acquisitions of relatively small companies. The preservation of crucial assets and stable financial conditions of the acquiring company could in such a situation be achieved through other means. Examples may include the obligation for management board members to issue solvency declaration, i.e. the acquiring company's ability to buy out certain shareholders without significantly affecting the company's financial standing.

Refereeing to other normative types of mergers under Polish company law, there is no specific legal framework in place for sideways mergers, i.e. operations whereby one or more 'sister' companies merge into another sister company. Similarly, triangular mergers are not an option since

[7] *Kodeks spółek handlowych* of Sep15th, 2000, consolidated version Journal of Laws of the Republic of Poland of 2017, item 1577. The CCC is a comprehensive regulation of companies and partnerships, as well as their mergers, divisions and transformations.
[8] Instead of many see R Romanowski, A Opalski, Nowelizacja Kodeksu spółek handlowych w sprawach transgranicznego łączenia się spółek kapitałowych, (2008) 15 MOP special volume.
[9] Provisions on the cross-border merger by setting up a new company has been a dead letter since the implementation of them into Polish law. Practically, none of the transactions examined by the authors took place in that mode.
[10] Obviously, this can be achieved also by execution of exit right by the minority, described below.

shareholders may not be offered shares of the company not involved in a merger transaction. Therefore, in practice such operations need to be executed in two consecutive mergers deeming them lengthier and more susceptible to failure.

3. Cross-border merger procedure

Generally, Polish provisions on cross-border mergers follow the European model of structured and multi-layered procedure. The operation consists of three stages: information disclosure, decision making and third-party (judicial) control. First stage includes drawing up the draft terms of the merger (DTM) and of the management report justifying the merger. Additionally, an independent expert is to be designated in order to verify the DTM. The next stage comprises of the decision of shareholders in the form of the resolution made by the general assembly. The third stage starts with filling an application for the pre-merger certificate ('exit case') or registration of the merger ('entry case'). In the application, companies must demonstrate, subject to verification by the local register court, whether the minority shareholders' rights, such as the right to challenge company's resolution or right to be bought-out (appraisal right), and creditors' right to request that their claims be secured have been fulfilled.

There is no need here to go into details of each of the above outlined stages, as their detailed analysis has been provided elsewhere.[11]

On the basis of the assessment of Polish practice of cross-border mergers, it must be admitted that DTM, the basic document providing information on the envisaged transaction, tends to be prepared by management boards with due care and diligence required by the law. This applies, in particular to information covering data on companies participating in a merger and relationship between them. Yet it must be admitted that the prevailing number of CBMs involving Polish company are intra-group transactions, and most of them are carried out under FTP rules. Precise description included in the merger plan serves to prove that the proceedings may be conducted in the later mode, i.e. with laxer minority protection ("take it or leave it"-approach, i.e. tolerate or exit the company).

Furthermore, companies do not provide any special benefits to members of management bodies or independent experts, which seems to result from the Polish corporate governance model[12] and the dominant role of a majority shareholder in most companies.

The role of an independent expert in the information stage of CBMs, in general, is limited to verifying financial aspects included in the DTM – share exchange ratio. There is no clear indication in legal provisions as to what sort of information designated independent expert should include in its opinion or according to what kind of methods it should evaluate the economic value of merging companies. In practice, an independent expert is rarely appointed to participate in CBMs. In only 5

[11] For a very detailed description of the Polish law on cross-border mergers see: M. Wroniak and others, in: J. Vermeylen, I. Vande Velde (ed.), European Cross-Border Mergers and Reorganisations, OUP 2012, Ch. 14.
[12] See general on corporate governance models: J. Weimer, J. Pape, A Taxonomy of Systems of Corporate Governance, 7 Corporate Governance 2008, pp. 152–166.

out of 97 effective transactions (5%) an expert was appointed in Poland. This is due to the striking prevalence of intra-group merger transactions in the dataset. According to Article 516^{15} § 1 CCC, in case of a merger with a wholly owned subsidiary the requirement to appoint an independent expert is waived. Similarly, all shareholders of a merging company may express their will to opt-out from the requirement of having the merger plan examined by an expert (Article 516^{6} § 3 read in conjunction with Article 503^{1} § 1 point 3 CCC). It is worth pointing out that the use of the option to exclude an expert by the consent of shareholders in some situations, especially public companies with dispersed ownership, can be significantly impeded. A clear wording of art. 125 par. 4 directive (EU) 2017/1132 leaves no space to the national legislators for setting minimal threshold sufficient to waive the requirement in question.

Taking one step back it is pertinent to ask to what extent having an expert involved in the merger procedure adds value that, in terms of protecting minority shareholders, exceeds its costs (time and money). According to Polish provisions, presence of an expert in CBMs' procedure is characterized by a narrowly defined role that it has to play. Indeed, the latter is limited to the valuation of the company's assets and exchange ratio. Just for comparison, in Denmark an independent expert plays special part in creditor protection by assessing the impact of the transaction on the acquiring or new company's ability to meet its existing liabilities (Article 277 of Danish Company Law). A negative assessment improves chances of creditors to obtain proper safeguards of their claims (Article 278 of Danish Company Law).[13] Widening the role of an expert in Poland would certainly affect its remuneration to be paid, and therefore the total cost of the merger. In any case, the current position of an expert does not have any profound meaning for the practice. Expanding the competence of the expert to examine the effects of the merger would at least increase protection of creditors, which at the moment is based on the assessment made by a registry court that lacks sufficient expertise in that regard. The solution whereby expert's scope of involvement would be broadened would therefore positively affect creditors' situation. It merits attention that the proposed amendments to the CBMD go towards borrowing from the Nordic model to empower the expert and make the scope and means of creditor protection sensitive to the outcome of expert opinion.

The next stage of the cross-border merger procedure is about shareholders' approval and the associated question of minority shareholders protection, specifically shareholders opposed to the merger. When it comes to shareholders' say on the deal the provisions on cross-border mergers do not provide for any special formal requirements that would override or replace the ones applicable to domestic mergers. According to Article 506 § 1-5 CCC the resolution shall be made by a qualified majority (2/3 for listed companies or 3/4 for other companies, i.e. non-listed joint-stock companies and private companies) with a quorum amounting to a half of the share capital to be present or represented at the meeting and must be drawn up by a notary public. This means that the merger may be vetoed only by a group of 1/3 or 1/4 minority shareholders, respectively.

[13] See P.K. Andersen, E.J.B. Sørensen, The Danish Companies Act. A Modern and Competitive European Law, Kopenhagen 2013, pp. 250-251.

It follows from the above that the Polish legislator did not use the option of general exemption of the requirement to adopt a resolution by the shareholders of the acquiring company (cf. Article 126 (3) in conjunction with Article 94 of the Company Law Directive). This should be assessed negatively, as making this option available would significantly facilitate the merger of companies with small shareholders (holding less than 5% of shares capital). It must be admitted, however, that such a solution could raise doubts from the perspective of the Polish understanding of constitutional right to court, as in fact it would establish a threshold for shares to be held as a formal condition to appeal to the court against the merger decision.[14]

As a general rule in Polish company law, every resolution adopted by the shareholders' meeting may be challenged by every individual shareholder who voted against a resolution and fulfilled few other mainly procedural requirements. Moreover, filling of a complaint against a resolution to the court does not affect the effectiveness of a challenged resolution (cf. Article 423 § 1 CCC). However, this rule does not extend to instances where a claim against the resolution constitutes an obstacle to issue pre-merger certificate. Thus, even one shareholder with minimal fraction of shares may effectively slow down the entire transaction. Nevertheless, a merging company may be granted a leave to move forward with the operation in spite of a pending judicial dispute about the merits of the legal challenge to the resolution approving the merger. According to Article 516[18] § 1 CCC, the main basis for issuing the leave is that the interest of the company justifies the merger to be carried on without undue delay.[15] With no case-law in that regard it is hard to tell what impact that provision has on cross-border practice in Poland.

Switching focus to minority shareholders protection, apart from enabling minority shareholders to be involved in the decision-making process by voting against or challenging the merger resolution, Polish company law adopts specific remedies for minority shareholder protection, commonly known as appraisal right i.e. dissenters' exit remedy to withdraw from the company against adequate cash compensation (Article 516[11] CCC). Appraisal right substitutes an implied veto right with a statutory exit right. Thereby it aims at compensating the elimination of shareholders' rights to decide unanimously upon fundamental corporate changes in accordance with *Kaldor-Hicks* efficiency paradigm.[16] It also gets rid of the hold-out problem and its inherent allocative and technical inefficiencies that unanimity rule would have entailed. Since cross-border mergers involve not only anticipated synergies between consolidated companies but also change in corporate law applicable to (shareholders of) a merging (disappearing) company,[17] it may drastically change rules of the corporate game. In other words, companies may pick up a jurisdiction by using a merger procedure

[14] It was once ruled as unconstitutional by the Polish Constitutional Tribunal in case SK 23/03 of March 8th, 2004 in relation to general requirment of holding more than 1% of votes during shareholders meeting in order to be entitled to challenge any resolution.
[15] This provision is vastly based on § 16 sec. 3(1) and (3) German Transformation Act (*Umwandlungsgesetz*).
[16] See in context of cross-border restructurings: S. Lombardo, Regulatory Competition in Company Law in the EU after Cartesio, EBOR 4/2010, p. 647.
[17] Basically, company merges into a company set up in another Member State ('shell' company) in order to change its 'legal clothes' (downstream merger, also known as reverse vertical merger. See M Siems, 'European Directive on Cross-Border Mergers: An International Model?' [2008] 11 Columbia J. Eur. Law 167, pp. 179 et seq.

in order to eliminate or weaken some of the minority rights (CBM as an instrument of regulatory arbitrage or forum shopping). By voting against the merger shareholders may resort to exit right in order to be bought out from the company and retain (so the theory) the pre-transaction value of their shares. It only applies to outbound mergers (corporate emigrations), where the acquiring or the newly established company has its registered office in a country other than Poland. Hence the rationale lies with the change-of-applicable-law being the trigger of the appraisal remedy. Where there is no change of the *lex societatis* involved, dissenters are not granted exit right. Consequently, inbound mergers (corporate immigrations), like pure domestic combinations, do not trigger appraisal right. This is based on a premise that shareholders of the Polish acquiring company involved in a CBM should not be treated in a better way than if they participated in a domestic operation.

In general, once the appraisal remedy is triggered by the general meeting's approval of the outbound merger, dissenting shareholders may request that their shares be bought out. This requires fulfilment of certain procedural requirements such us voting against the merger resolution, requesting the objection to be recorded, and then submitting a relevant statement to the company (article 516^{11} § 1 CCC). Merging company's acquisition of own shares with a view of satisfying the claims of withdrawing shareholders are however capped by the law: the nominal value of the shares so acquired counted together with shares already held by the company may not exceed 25% of the total share capital of the company (Article 516^{11} § 6 CC). This raises a question of what should be done in a situation where the repurchase of shares from all dissenters wishing to exit the company would exceed the limits as set by the law. Accepting that the company may refuse to repurchase shares due to the potential exceeding of the 25% limit would mean that the right of exit based on art. 516^{11} § 6 CCC is actually conditional and, in many cases, illusory as it could be easy to dodge the obligation imposed on the merging company through earlier acquisition of own shares close to the legally allowed threshold. Nevertheless, in the literature, some authors express the view that share buy-back from all tendering shareholders should not be seen as *sine qua non* of a successful transaction.[18] In other words, as these authors believe, in case of an excessive number of shares put up for sale, the acquired company may continue with the operation and only should make a proportionate (pro rata) "reduction" of demands to redeem shares. A similar position was presented by K. Oplustil, who, however, remarked that "this cannot mean acceptance of the activities of the company and its majority shareholders, which would make illusory the right to exit for the minority shareholders". An example of this would be the acquisition of own shares by the company beforehand.[19] Opposing view, as represented by one of the co-authors[20] and with which the second co-author agrees, equals company's inability to satisfy the demand of all dissenting shareholders tendering all their shares with a negative condition of the merger. To put is simply: if too many shareholders wish to

[18] See M. Rodzynkiewicz, in A. Opalski (ed), Kodeks spółek handlowych. Tom IV. Łączenie, podział i przekształcenia spółek. Przepisy karne. Komentarz. Art. 491-633, (Warsaw, CH Beck, 2016), pp. 408-09.
[19] See K. Oplustil, in: Kodeks spółek handlowych. Komentarz, (Warsaw, CH Beck, 2015), p. 1258.
[20] See A. Radwan, Ius dissidentium. Granice konsensusu korporacyjnego i władzy większości w spółkach kapitałowych, (Warsaw, CH Beck, 2016), pp. 92-93.

withdraw, the transaction fails. This understanding is supported by one of the economic explanation of appraisal statutes: they are designed to incentivize the decision makers to design widely acceptable conditions of the deal, sanctioned by the prospect of the obligation of paying pre-transaction value or having the transaction stopped whatsoever.

Turning to creditor protection it is worth mentioning that Polish law grants no veto right. Creditor protection is based on the mechanism of securing the creditor's claims before taking any decision on the issuance of the pre-merger certificate (article 516^{10} § 2 CCC). In the event of a threat of satisfying creditors as a result of a merger, they may file the application for collaterals of their claims within one month from the publication of the merger plan. Then, the company is obliged to establish an appropriate security at the request of each creditor. In the event of refusal, the latter is entitled to bring an action before the court of law. It is difficult to provide a proven record of the workability of the said protective mechanism as there is no case-law reported and Polish commentators are divided with regard to the question how creditors may pursue their rights before competent courts. According to one position, the right to request security is autonomous and the request may be submitted separately from the main claim (substantive nature of security).[21] Other authors are of the opinion that it may be filed only "next to" the main claim close to (no more than 2 weeks) or after instituting the in-court proceedings (procedural nature of security).[22] Generally speaking, substantive company law on the issue in question, the mirror-image of EU secondary law provisions (Article 99 Directive (EU) 2017/1132), is not adjusted to procedural rules applicable to the proceedings before Polish courts. Therefore, it would cause much difficulties for creditors to use rights which are granted upon them according to EU law.

Different mechanism applies when the acquiring or newly set up company is to be located in Poland. Then, provisions on domestic mergers prevail and post-merger protection mechanisms apply. In accordance with Articles 495 and 496 of CCC, the acquiring company shall manage assets assumed from the acquired company separately until satisfying or securing the claims of all creditors who demand payment or security in relation with the merger. During the period of separate management of assets, creditors of the acquiring company will have the priority of being satisfied out of assets of the acquiring company while creditors of the acquired company will have the respective priority of being satisfied out of assets of the acquired company.

The procedure presented above is the default method of CBMs adopted in Polish law. Apart from that, the legislator provided for a simplified procedure (Articles 516 and 516^{15}-516^{16} CCC). At the same time, a subcategory of cases should be distinguished, namely mergers by acquisition of a wholly-owned and almost wholly-owned subsidiary, in which the acquiring company holds at least 90% of shares in the share capital. In relation to the merger of a wholly-owned subsidiary, it is not required to issue shares to the acquiring company. Hence, the observance of rules related to the formulation and verification of the share exchange ratio and the granting of shares in the acquiring

[21] See M. Rodzynkiewicz (n 17) pp. 152-154;

[22] A Szumański, in Sołtysiński, Szajkowski, Szumański, Szwaja, Komentarz KSH, wyd. 2 t. IV, (Warsaw, CH Beck 2009) p. s. 304; K. Oplustil (n 18), p. 1149.

company is not required (Article 516[3] points 2, 4-6 regarding the elements of the merger plan and Article 516[6] CCC imposing obligation to examine the plan by an expert). In case of a Polish acquired company it is pointless to adopt a resolution regarding the merger, which would be unnecessary formalism and therefore this obligation is removed by Article 516[15] § 2 CCC.

Considering mergers with nearly fully owned companies, the Polish legislator decided to tighten the formalities for companies involved in this type of operations (Article 516[15] § 3 CCC). Consequently, the absorption of nearly fully owned subsidiary requires to draw up an expert opinion (Articles 502-503 CCC), unlike for domestic mergers where expert opinion is not mandated (see Article 516 § 5 CCC). For the rest, the Polish acquiring company is not obliged to adopt a resolution on the merger (Article 516 § 1 in conjunction with Article 516[1] CCC). However, this provision does not extend to listed companies nor does it apply whenever a shareholder holding at least 5% in the share capital requested the shareholders vote on the transaction (Article 516 § 2 in conjunction with Article 516[1] CCC).

To sum up the section on the simplified modes of CBMs, it must be asserted that Polish provisions unduly overreach to embrace scenarios where the full merger procedure does not make much sense. This concerns mainly the merger of the so-called ‘sister companies’ (companies controlled by the same entity). In such a situation, it is not justified to require companies to exchange shares, and consequently apply provisions that are to guarantee the correctness of this element of the merger procedure. Even in such situations, however, a certain simplification of the procedure may be achieved by providing consent of the shareholders in order to circumvent the obligation to prepare an expert opinion (Article 516[6] § 3 CCC). In addition, Articles 516[15] § 1 and 516 § 1, 5 and 6 CCC do not take as relevant the fact that the threshold of 90% and 100% shares in the acquired company may be achieved by a group of shareholders acting in concert with the acquiring company. The possibility of reaching the indicated agreement should be treated as equivalent to the company holding all or almost all shares in the acquired company. The regulations discussed here are also not adapted to more complex capital structures, in which the relationship between companies depends indirectly on the control of other entities (pyramid structures). Bearing in mind that CBMs of group-integrated companies (parents’ and subsidiaries’ alike) represent the vast majority of cross-border mergers involving Polish entities, streamlining simplified mergers should be an important policy goal for the Polish legislator. As the above analysis demonstrated, there are at least a few areas where changes and new regulations are necessary to facilitate the implementation of certain types of mergers in order to meet the actual needs of the economy. Empirical data from other EU jurisdictions confirms the prevalence of intra-group CBM in the available datasets.

4. Data analysis of cross-border mergers with Polish companies

4.1. Methodology

This part of the paper presents data on cross-border mergers, in which at least one of the merging (acquiring or newly established) company was a company governed by Polish law. Overall, data has been collected for the time between 20 June 2008, when relevant provisions entered into force in Poland, to June 2018. So, the time-span amounts to 10 years. The observations are based on data gathered in the Polish KRS databases (‘National Court Register’) using the search engines of the Internet portal https://ekrs.ms.gov.pl/web/wyszukiarka-krs/strona-glowna run by Ministry of Justice, as well as the portals <https://imsig.pl>, <https://mojepanstwo.pl>. The two latter are commercial search engines containing information published in the National Official Journal (‘MSiG’). This is important since every CBM must be recorded in the MSiG (Article 508 CCC). In addition, databases of foreign registers, in particular Cypriot and Luxembourgian, were used (directly or via the portal <https://e-justice.europa.eu>).

The analysis of each merger was based on the content of the published merger plan (draft terms of merger) in MSiG and on the website of the companies concerned. Out of 126 observations in 5 cases, the merger plan could not be found, and the data was based on the partial information from the Polish business register. All cross-border transactions are subsequently checked via KRS (and in some cases, foreign business registers) for the relevant information needed to establish whether a given transaction went through, i.e. ended up with a completed merger (i.e., notices of deletion from the registries). Unfinished CBMs were divided into two groups. First, it was assumed that transactions in which the merger plan was published in a time span longer than one year from the date when this research has been conducted and there is no information in the Polish or foreign register about the completion of the merger are transactions that failed or have otherwise been abandoned. Second, other transactions were assumed as pending, i.e. being in progress (ongoing CMBs).

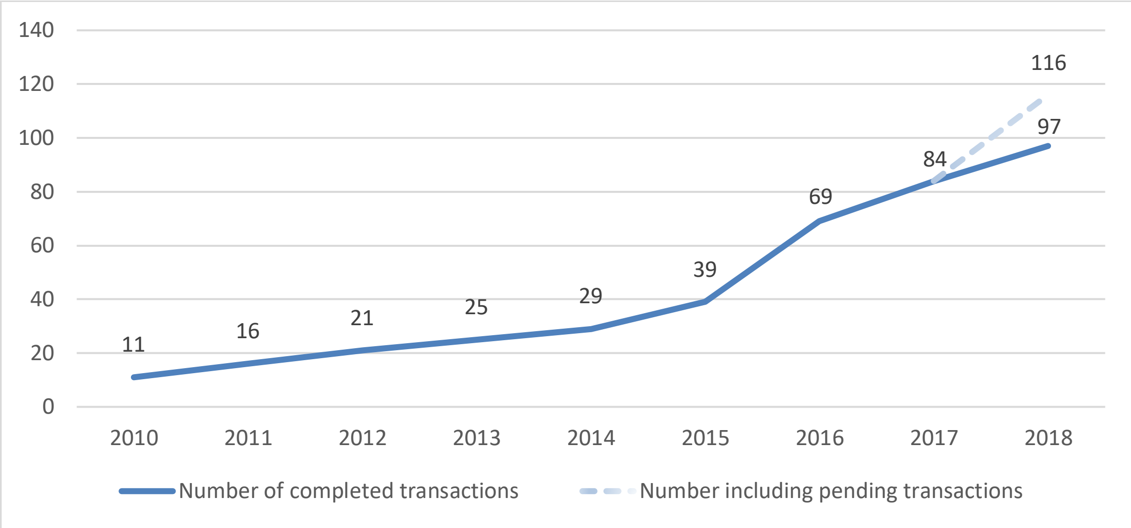
In this paper each multi-merger in the legal and economic sense (more than two companies apply for registration of a merger) is a set of individual mergers.[23] So, if 4 companies are involved in a merger procedure and one of them is a Polish company, there are 3 separate transactions indicated underneath. There was no transaction involving more than one Polish company.

4.2. CBMs in Poland: analysis and presentation of data

Referring to the number of CBMs involving Polish companies, the available data allows to identify 126 such cases from 2008 to mid-2018, with the first transaction commenced in 2009 and completed in 2010. Out of this number, 97 were successful, 19 are assumed to be pending (in progress) and 10 failed (see fig. 1 below). Between 2015-2018 a surge in number of transactions can be observed.

[23] Cf. T. Biermeyer, M. Meyer, Cross-border Corporate Mobility in the EU: Empirical Findings 2017 (February 1, 2018), pp 3-4. Available at SSRN: https://ssrn.com/abstract=3116042.

***Fig. 1** Aggregated number of CBMs with Polish companies, year by year; 2009-(mid)2018*



In 48 transactions, a Polish company was the acquiring company, whereas in 49 it was the acquired one. Breaking the figure down to corporate forms we identified 34 joint-stock companies (S.A.), and 61 limited liability companies (sp. z o.o.). In relation to foreign companies involved in those mergers, private limited companies appeared in 80 cases, whereas joint-stock companies in 17 (including three SEs). There is a clear domination of private foreign companies being employed to acquire Polish entities. The reasons for this situation may be twofold. Firstly, it is less costly to set up limited company especially in countries such as Luxembourg or Cyprus. Secondly, it can be assumed that foreign companies mostly serve as a tool for tax optimisation purposes and not for conducting a real economic activity abroad.

The next chart (fig. 2 below) shows what companies sorted by their nationality (governed by foreign law) were involved in mergers with Polish companies. Those companies come from 19 countries of the EEA. Not surprisingly, two first positions are reserved for popular tax heaven destination. Those are Cyprus and Luxembourg. The Netherlands comes third, which is one of the most "congested" Member States in terms of companies traffic in Europe.[24] Companies from those three countries represent almost 66% of all merger transactions with Polish companies.

[24] Cf. T. Biermeyer (n 23), p. 6.

Fig. 2 Foreign Companies involved in merger with Polish companies by their origin

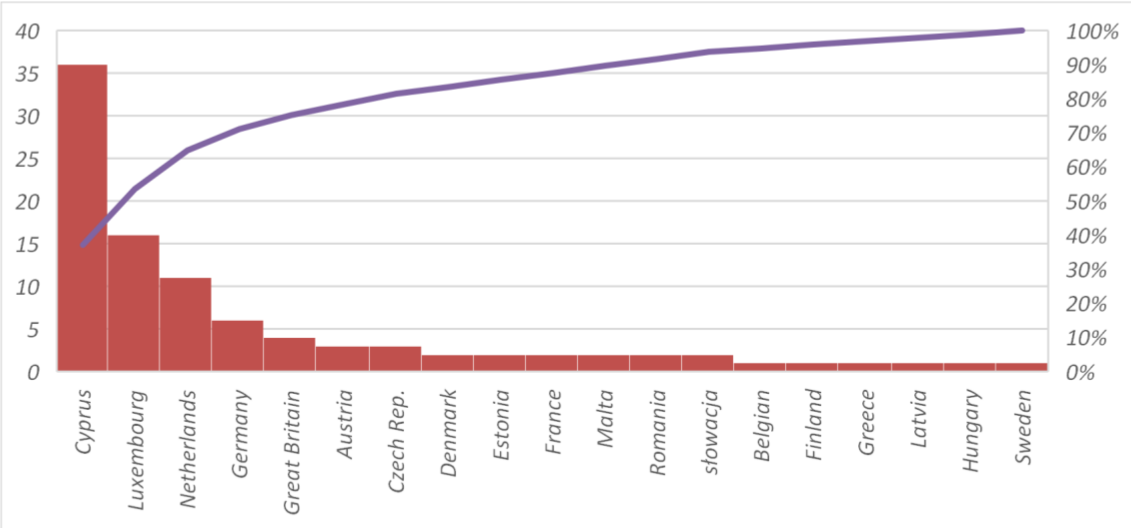
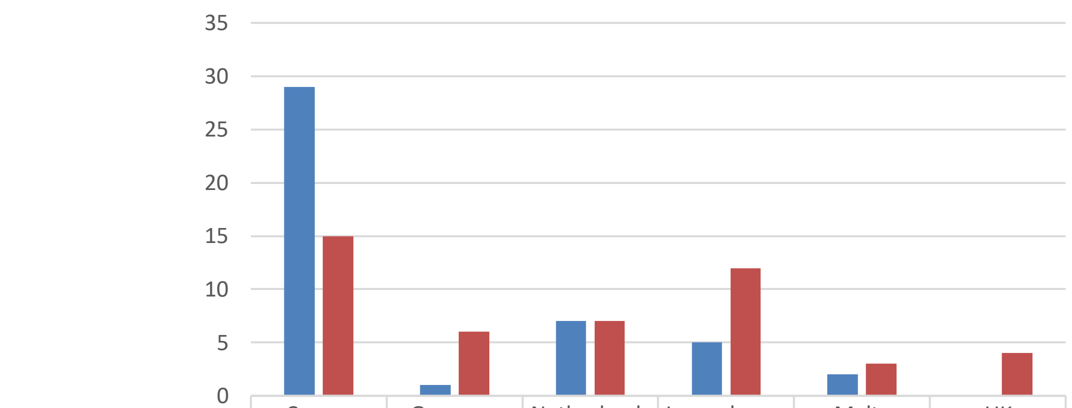


Figure 3 below presents the "transaction balance" between Poland and a sample of countries embracing top-5 most transaction-intense jurisdictions. The balance results from the juxtaposition of immigration (entry) with emigration (exit) cases. For the former category a Polish company was the acquiring company (entry cases), whereas for the latter category a Polish company was the acquired entity (exit cases). The country with the highest negative balance vis-à-vis Poland was Cyprus, where the entry/exit surplus amounted to 14. We identified a reverse trend for mergers between Poland-incorporated and Luxembourg-incorporated companies, where the exit operations (as seen from Poland) exceed immigrations by 6.

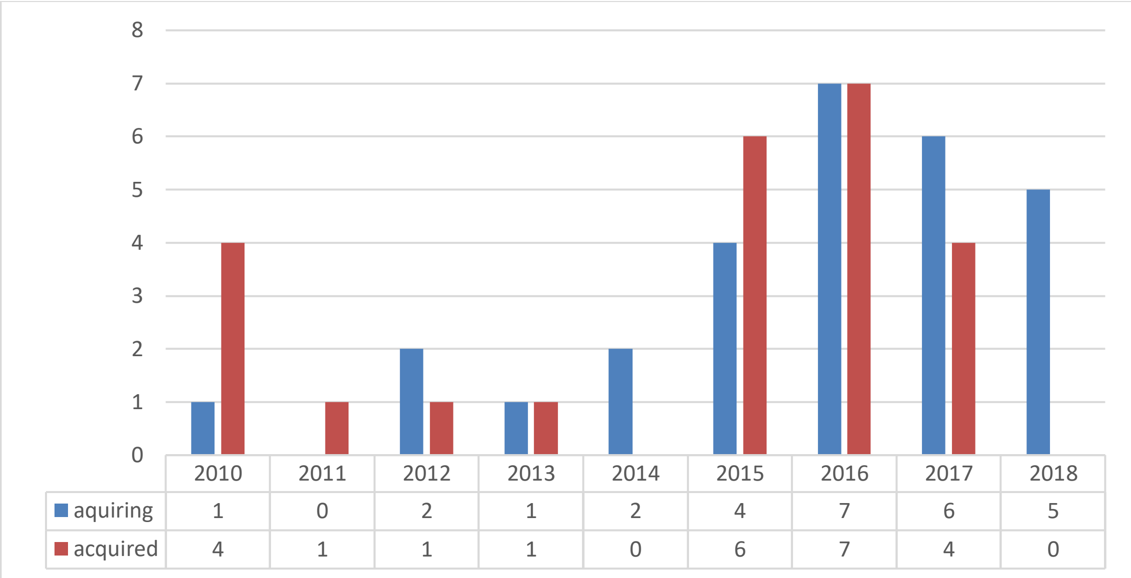
Fig. 3 CBMs per EU Member State with involvement of Polish companies as acquiring or acquired company



	Cyprus	Germany	Netherlands	Luxembourg	Malta	UK
aquiring (entry cases)	29	1	7	5	2	0
acquired (exit cases)	15	6	7	12	3	4

Mostly, mergers were conducted with the participation of companies from Cyprus or Luxembourg (over 50%). The figure 4 below illustrates the fact that the number of acquiring Polish companies has outweighed those acquired by companies from the mentioned Member States in the last few years. However, the positive balance is a relative narrow margin and there is no strong basis for asserting any clear tendency at that regard.

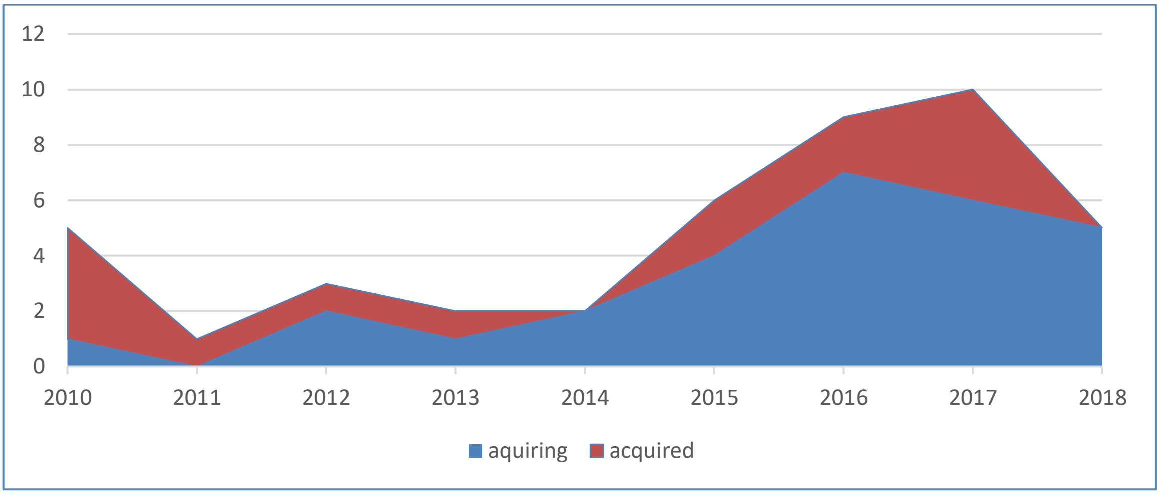
Fig. ***4*** *Number of CBMs with involvement of Polish companies as acquiring or acquired company with companies from Cyprus and Luxembourg*



It is worth noting, however, that the number of emigration transactions (a Polish company acting as acquired company) was *de facto* lower in 2015 and 2016, because then some multi-mergers occurred. More specifically, those were 4 reorganisations designed as coordinated acquisitions of more than one Polish company by a single foreign entity. Hence, they were 2 transactions in 2015 instead of 6, and 2 instead of 7 transactions in 2016 (see fig. 5 below). Considering those data, we identify an increasing trend in acquisitions of Cypriot and Luxembourgian companies by Polish companies. This seems to be a tax driven development as it correlates with entering into force (January 1, 2015) of new tax legislation in Poland regarding direct taxation of income obtained through controlled foreign companies (CFCs).[25]

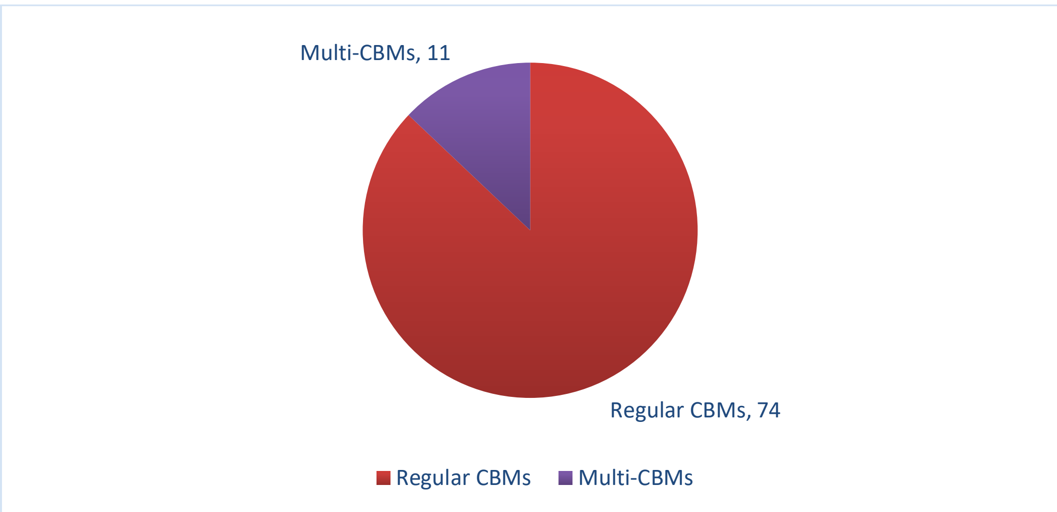
[25] See art. 24a of Act of February 15, 1992 on legal person's income tax, consolidated text: Polish OJ of 2018, item 1036.

Fig. 5 Relation between number of Polish companies as acquiring and acquired company with companies from Cyprus and Luxembourg in case of multi-CBMs



As regards multi-mergers, figure 6 below shows that 13% of CBMs involved more than two companies and are thus qualified as multi-CBMs. The remainder of CBMs took place between two companies, one from Poland and one foreign. It must be added, however, that some 'regular' CBMs (4) were *de facto* multi-CBMs since companies intentionally divided one economic transaction into more merger operations in order to take advantage of preferable legal regulation, in particular FTPs.

Fig. 6 Overview of multi-CBMs with Polish companies found between 2008-2018



4.3. Some additional remarks

Some other observations follow from the analysis of CBMs common terms, which is worth to be mentioned here. The average time span needed to complete CBMs amounts to 6 full months (5,5 month for entry cases; 7 months for exit cases), this is from the moment of publishing a merger plan till registration of the transaction by the competent authority.[26] As we already mentioned above, the most interesting fact is that almost all CBMs were used for intra-group restructurings with arm's length mergers, if any, remaining a small fraction in the dataset (for 7 transactions the gathered data does not allow us to make a clear finding). This factual setup made it possible for 89% transactions to be conducted under the simplified FTP procedure.

Even though reverse cross-border mergers are often considered as a method for choosing the most favorable corporate law, there were only 2 downstream mergers involving Polish company, in both cases acting as the acquiring entity.

In none of the transactions analyzed we saw the rules for sustaining board-level employee representation activated since no such participation existed in Polish companies involved. Neither have we identified cases where appraisal right was made use of by minority shareholders of Polish emigrating (acquired) companies.

5. Summary

Providing legal framework for cross-border restructurings is the art of balancing between interests of those involved therein and hence an attempt to reconcile flexibility with protective paradigms. As long as the EU lawmaker has limited its intervention to minimum harmonization with and members states remained free to gold plate, mismatches, gaps and overlaps are virtually impossible to be avoided. This is now being changed through a shift towards full harmonization with the revision of the CBMD in the European legislative pipeline.[27] The said interoprational difficulties between different legal systems limit the actual workability of the legal framework. Consequently, the transactions are mostly executed as intra-group mergers. Empirical evidence from Poland strongly supports this finding.

It is difficult to clearly assess the rules on cross-border mergers of companies in Polish law. Undoubtedly, it is the most extensive and the only (apart from SE regulations) set of rules for the international corporate restructuring procedures in Poland so far. However, it should be noted that the EU model of regulating cross-border mergers has been designed with a view of facilitating mergers of companies with a dispersed shareholding structure and hence so much emphasis is placed

[26] One reservation needs to be done here: in case of an exit transaction, in which Polish companies were merging into foreign company, the date of completing merger was the moment of deleting Polish company from the commercial register. The main reason for this is scarcity of data from foreign registers.

[27] Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance), COM(2018) 241 final, 2018/0114(COD) (25.4.2018).

on providing relevant information to shareholders. Meanwhile, in the Polish ‘insider’ corporate governance system companies are usually controlled by a small group of shareholders or even one single shareholder. Another common feature of the Polish corporate system is a frequent existence of corporate groups based on cross-shareholdings creating the so-called 'pyramid' or 'cascade' structure of corporate ownership. Therefore, it would have been wise in the process of implementing EU law provisions on cross-border mergers to adequately mitigate this dichotomy and adjust the national rules to the factual situation, specifically the ownership patterns as are commonplace in Poland (concentrated ownership). It seems that relatively little has been done in that regard as exemplified by the lack of regime facilitating some forms of intra-group reorganisations, such as a merger of “sister-companies” or triangular mergers.

One positive point is the introduction of shareholders’ right to exit a company in the wake of reincorporation to a different jurisdiction. This is at the expense of the legal possibility to challenge the decision on the merger. In addition, FTPs vastly contribute to the efficient conduct of cross-border operations.

Some shortcomings in the current regime need to be pointed out. The role of an independent expert is of little importance and doubtful even from the point of view of protecting the interests of minority shareholders. The manner of appointing, remunerating and the lack of clear determination of the independence requirements means that in many cases it will be a person largely dependent on the majority shareholder of a company involved in a merger. At the same time, the rules of liability of the expert are vague and the burden of proof rests on the shoulders of the aggrieved person. Consequently, the presence of an independent expert in the merger procedure is a mere ‘threshold of decency’ protecting mostly against cases of fraud rather than safeguarding entire fairness.

Finally, it is worth referring to the matter that has already been mentioned, namely the types of mergers that can be carried out under Polish law. Triangle and sideways mergers facilitate, in particular, achievement of aims set in holding structures. Even though, there are clearly some transactions amounting to this sort of restructurings, they are not foreseen in Polish company law. This loophole leads to inefficiencies causing additional costs in some transactions, which could be avoided or reduced trough the introduction of appropriate frameworks concerning mentioned types of mergers. Therefore, it is necessary to extend the "menu" of cross-border mergers for Polish companies through appropriate legislative amendments.

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