croatiamergers.eu

University of Rijeka Faculty of Law

Development and trends of Croatian mergers regulation in light of the accession to the European Union

Prof. dr. sc. Dionis Jurić, Faculty of Law University of Rijeka

Dr. sc. Mihaela Braut Filipović, Faculty of Law University of Rijeka

WORKING PAPER NO. 1

1 JULY 2015

"LEGAL ASPECTS OF CORPORATE ACQUISITIONS AND KNOWLEDGE DRIVEN COMPANIES' RESTRUCTURING"

CSF PROJECT 9366/2015

Abstract:

This article will provide only a brief overview of EU development in the field of mergers of companies. The goal of this article is to bring together EU and Croatian law in order to analyze whether Croatia promptly followed changes in EU law, compared in three different periods following the legislative changes on the EU level. Also, authors shall analyze mergers of Croatian companies in the post-accession period, precisely in the reference period from 1st July 2013 till the 31st December 2014. The goal is to establish whether EU membership had a significant impact on Croatian companies in the way of enhancing domestic and cross-border mergers.

Key words: merger, cross-border merger, mergers of Croatian companies

Development and trends of Croatian mergers regulation in light of the accession to the European Union

1. INTRODUCTION*

There is a vast literature on mergers regulation as a statutory change of companies in EU and comparative national legislations. This Article will provide only a brief overview of EU development in the field of mergers of companies, which includes both public limited liability company (*die Aktiengesellschaft, la société anonyme, dioničko društvo*) and private limited liability company (*die Gesellschaft mit beschränkter Haftung, la société à responsabilité limitée, društvo s ograničenom odgovornošću*). This Article shall put in the focus mergers which are status changes and which are as such treated in relevant EU and Croatian regulation. Other forms of contractual transfers of assets, regardless of whether they represent significant part of the company, shall not be discussed. The impact of EU law on Croatian mergers regulation is undisputed. The goal of this Article is to analyze whether the Croatian legislator promptly harmonized national provisions with relevant provisions of the EU law. For that purpose, authors divided development of EU merger regulation in three significant periods, depending on the legislative changes on the EU level. Also, authors shall analyze mergers of Croatian companies in the post-accession period, precisely in the reference period from 1st July 2013 till the 31st December 2014. The goal is to detect whether EU membership had a significant impact on Croatian companies in the way of enhancing domestic and cross-border mergers.

2. GOALS OF THE EU MERGER REGULATION

For start, it is crucial to understand goals of the EU merger regulation. The primary one is to facilitate process in which two or more companies want to achieve external growth by merging their businesses under one company. By achieving this economic unity, they seek to enhance their position on the market.[1] This is particularly important in order to be competitive towards enterprises in the global market (especially towards USA).[2]

However, one should bear in mind that mergers and acquisitions process (further in text: M&A) can be very costly, and that available data show that many M&A transactions turn out not to be successful in the international arena.[3] Beside mergers, companies can achieve the goal of growth through various strategic partnerships and joint ventures. That means that a M&A transaction is not either the only possible path nor is the most successful

* This work has been fully supported by Croatian Science Foundation under the project Legal Aspects of Corporate Acquisitions and Knowledge Driven Companies' Restructuring, no. I-165-2015.

[1] Petrović, S., Pripajanje dioničkih društava i druge koncentracije u pravu društava, Doctoral dissertation (unpublished), Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 1998., p. 18.

[2] Grundmann, S., European Company Law, Intersentia, Antwerpen – Oxford, 2007, p. 547.

[3] Gaughan, P. A., Maximizing Corporate Value through Mergers and Acquisitions, A Strategic Growth Guide, John Wiley & Sons, New Yersey, 2013, p. 30.

way of achieving company growth and better competitiveness on the market. Still, mergers of companies, especially in the EU market when merging companies are from different EU Member States, would practically not be possible without the intervention of the EU legislator. Facilitating both domestic and cross-border mergers, thus, provides an additional strategic possibility for the companies in the EU market.

The second major goal is to simplify structures when companies are connected such as parent company and subsidiary or other types of group of companies.[4] In that regard, Directive 78/855/EEC[5] adopted simplified procedure for mergers of parent company and subsidiary, including when the acquiring company holds 90% or more of the shares of the company being acquired.[6]

Mergers regulations also facilitate the transfer of companies' assets, such as goods, intellectual law property, human capital and others values from one company to another, where, as a result of a merger, also a new company can be formed.[7]

These goals clearly speak of the importance of both national and cross-border mergers regulation. Thus, authors shall further discuss development of merger regulation on both EU and Croatian level.

3. PERIOD FROM 1978 TO 2005

As a starting reference for this period, authors determined the 1978 as the year when Directive 78/855/EEC on mergers of public limited liability companies, was introduced on the EU level. This Directive was in force until 2011.

However, authors took the 2005 year as a reference for ending this period as it is the year when Directive 2005/56/EU[8] on cross-border mergers of limited liability companies was enacted.

3.1. Third company law Directive 78/855/EEC

Third Company law Directive 78/855/EEC[9] is a fundamental legal source for mergers regulation within the EU. The legal basis for its enactment was former Article 54 of

[4] Grundmann, S., European Company Law, op. cit., p. 547.
[5] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, OJ L 295, 20.10.1978, p. 36–43.
[6] See Articles 24-29 of the Directive 78/855/EEC.
[7] For individual *versus* universal transfer of assets relevant for mergers see Garcimartin, F., Company Restructurings and Universal Transfers of Assets: A Proposal to deal with the Conflict of Law Problem, International Insolvency Law Review, 2, 2013, pp. 149 – 159, 149 etc.
[8] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p. 1–9.
[9] This directive is further amended by two directives. The first is Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies, OJ L 300, 17.11.2007, p. 47–48. The second is Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and

the Treaty establishing the European Economic Community.[10] Importantly, the scope of this directive includes only the public limited liability companies.[11] Thus, private limited liability companies are left to national laws of Member States.

EU merger law, besides this Directive, encompasses a system of merger tax law which is of crucial importance to merging companies, especially in cross-border mergers. The first directive (Directive 90/434/EEC)[12] was brought in 1990, and repealed by the new Directive 2009/133/EC.[13] Although tax regulation is not in the focus of this Article, it is necessary to bear in mind that mergers imply both legal and economical consequences for the companies, where tax treatment of different Member States can be a decisive element.

Directive 78/855/EEC was brought within the coordination framework regarding formation of public limited companies and alteration of their capital, which both occurs in the process of mergers. The Preamble of the Directive clearly states that its goals are, beside the coordination between Member States, to protect shareholders of merging companies and creditors.

There are basically four main pillars on which EU merger law is created. The first concerns disclosure requirements towards primarily shareholders of merging companies.[14] The second relates to decision making process in order to ensure that shareholders take adequate part in it.[15] The third concerns above mentioned aim to protect interested parties, primarily shareholders and creditors of merging companies.[16] The fourth explicitly defines legal consequences of the merger.[17]

Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions, OJ L 259, 2.10.2009, p. 14–21.

[10] Mar. 25 , 1957, 298 U.N.T.S. 11.

[11] Article 1 of the Directive 78/855/EEC provides different national expressions for this type of company in order to avoid any confusion. In Croatia, this directive relates to „dioničko društvo“, as regulated by the Croatian Companies Act.

[12] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225, 20.8.1990, p. 1–5.

[13] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009, p. 34–46.

[14] In that regard, Article 6 of the Directive 78/855/EEC requests that the draft terms of merger must be published (while the minimun content of these drafts are regulated by Article 5). Also, shareholders must be able to inspect the draft terms of merger and other specified information at least one month before the date set for the general meeting (Article 11). Finally, succesfull merger must be published (Article 18).

[15] Accordingly, Article 7 of the Directive 78/855/EEC sets down the necessary approval of the general meetings of the merging companies. Before the general meetings are requested to decide, management bodies should submit written report explaining the draft terms of merger (Article 9). Additionaly, Article 10 calls for an external control of the draft terms of merger by independent experts.

[16] One of the most important information for shareholders of a company being acquired is the share exchange ratio and the amount of any cash payment. It is set that these information must be provided in the draft terms of merger (Article 5/2/b of the Directive 78/855/EEC). Also, independent experts must mention in their report opinion on whether the ratio is fair and reasonable (Article 10/2). Management board of a company being acquired plays an important role for ensuring protection of its shareholders' right. Thus, Directive provides that Member States should lay down the rules to regulate civil liability of management board (Article 20) and of independent experts (Article

Directive recognizes existence of various types of mergers. Two main are „merger by acquisition“[18] and „merger by formation“[19] of a new company. Beside these two, Directive distinguishes “acquisition of one company by another which holds 90% or more of its shares”[20] and “other operations treated as mergers”.[21]

3.2. Croatian merger regulation from 1978 to 2005

Before constitution of the Republic of Croatia in 1991,[22] it was a part of former Yugoslavia. Yugoslavia was a socialist state where companies and trade law were significantly different than nowadays. In the period from 1978 to 1991, it suffices to mention there were two relevant laws. First was the Associated Labour Act (*Zakon o udruženom radu*) from 1976,[23] and second was the Enterprises Act (*Zakon o poduzećima*)[24] from 1989. The latter was transferred to Croatian legislature,[25] and it was on force until 1995.[26]

The Enterprises Act regulated mergers of companies in a very narrow scope, providing only one or two relevant Articles. It recognized both types of limited liability companies (*dioničko društvo* and *društvo s ograničenom odgovornošću*), although provisions relevant to companies and partnerships were regarded as insufficient with many open issues left to practice and party autonomy, which finally led to legal

---

21) towards shareholders of a company being acquired. Also, shareholders have the right to request for the nullity of the merger, although in restricted cases (Article 22). As for the creditors of merging companies, they should have the right to obtain additional adequate safeguards, under the condition that their claim originated before any publication of the merger and which have not fallen due before that moment (Article 13). Special treatment is also provided for debenture holders (Article 14) and for holders of securities other than shares (Article 15).

[17] Directive states that provided consequences take effect *ipso jure* and simultaneously (Article 19 of the Directive 78/855/EEC). Those are: transfer of all assets and liabilities of the company being acquired to the acquiring company, shareholders of the company being acquired become shareholders of the acquiring company and the company being acquired ceases to exist. What is laso important, Member States should determine the date on which a merger takse effect (Article 17).

[18] Directive in its Article 3 (1) offers a definition: „*the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value*.”

[19] Directive in its Article 4 (1) offers a definition: “*the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.*”

[20] Articles 24 – 29 of the Directive 78/855/EEC.

[21] Articles 30 – 31 of the Directive 78/855/EEC.

[22] See decision of Croatian Parliament: Odluka Sabora Republike Hrvatske od 8. listopada 1991. o raskidu državnopravne sveze s dosadašnjom SFRJ (NN 53/1991).

[23] Official Gazette of SFRJ no. 53/1976, 57/1983, 85/1987, 6/1988, 77/1988, 40/1989, 60/1989.

[24] Official Gazette of SFRJ no. 77/1988, 40/1989, 46/1990, 61/1990.

[25] See Zakon o preuzimanju saveznih zakona iz područja organizacije i poslovanja gospodarskih subjekata koji se u Republici Hrvatskoj primjenjuju kao republički zakoni (Official Gazette of Republic of Croatia no. 53/1991).

[26] There was only one subsequent amendment of this law in Official Gazette no. 58/1993.

incertainty.[27] In other words, although this act reintroduced certain types of companies to Croatian law, it was not adequate and it called for a thorough structural changes. Regarding mergers, the focus was on the liability of acquiring company for obligations of companies being acquired. It provided that acquiring company is liable for all obligations of the company which, after a merger, ceased to exist.[28] Such solution was not altered through subsequent amendments of this act, and we can say it corresponded with current EU and Croatian legislation. Besides that, it provided that decision on mergers should be brought in accordance with the statute of the company,[29] and that rights and obligations between merging companies are governed by the contract.[30] We can conclude that process of mergers, as well as rights of interested parties were mainly left to party autonomy, i.e. to autonomy of merging companies. Such a solution was clearly not satisfactory, and it was not in accordance with current Croatian and EU mergers regulation.

Modern development of Croatian company law and mergers regulation started with the adoption of Croatian Companies Act (further in text: CCA) in 1993,[31] which was applicable beginning from 1st of January 1995. It is necessary to state that Croatia was not in the process of negotiation with the EU at that time. It became official candidate Member State in 2004.[32] However, creators of the CCA in 1993 already took into account many EU regulations. Model for the CCA were relevant German and Austrian provisions on company law. The reason for doing so was to facilitate trade between EU Member States and Croatia.[33] In spite of that fact, it cannot be said that Croatian company law was harmonized with EU law at that time.[34]

The CCA from 1993 defined both mergers by acquisition and mergers by formation, which were defined in accordance with the Directive 78/855/EC, and stayed unchanged until today.[35] Although mergers regulation went through subsequent amendments, it should be noted that basic features of EU merger regulation were already set in the CCA from 1993. Additionally, it provided for mergers between public limited liability companies and private limited liability companies,[36] which basically remained the same till now. Likewise, it regulated national mergers of two or more limited liability companies.[37] Until 2005, there was only one relevant amendment of the CCA regarding merger regulation in 2003.[38]

[27] See Barbić. J., Pravo društava, Opći dio, Treće, izmijenjeno izdanje, Organizator, Zagreb, 2008, p. 92.
[28] Article 14/2 Zakona o poduzećima (Official Gazette of SFRJ no. 77/1988).
[29] Article 14/1 Zakona o poduzećima (Official Gazette of SFRJ no. 77/1988).
[30] Article 14/4 Zakona o poduzećima (Official Gazette of SFRJ no. 77/1988).
[31] Official Gazzete no. 111/93, 34/99, 52/00, 118/03, 107/07, 146/08, 137/09, 111/12, 68/13.
[32] For overview of relation between Croatia and EU see the webpage of Ministry of Foreign and European Affairs, http://www.mvep.hr/en/croatia-and-the-european-union/negotiation-process/, 16th of April 2015.
[33] See Barbić, J., Zakon o trgovačkim društvima, Šesto, izmijenjeno i dopunjeno izdanje, Zagreb, 2013., p. 3.
[34] Barbić mentions that around 75% of CCA from 1993 was harmonized with EU law. *Loc. cit.*
[35] See Article 512 of the CCA.
[36] Article 534 and Article 549 of the CCA from 1993.
[37] Article 535 to 548 of the CCA from 1993.
[38] Act on Amendments to the Companies Act, Official Gazette no. 118/03.

When comparing the CCA from 1993 and Directive 78/855/EEC, we can conclude that Croatian law adopted most of the provisions as set in the Directive.[39] However, there are three differences which we put in focus.

First, regarding the obligation that independent experts examine draft terms of mergers, the CCA from 1993 provided that they should be appointed by the board of directors for each merging company,[40] instead by the judicial or administrative authority as provided by Directive 78/855/EEC. [41] This provision aims to protect primarily shareholders of the merging companies, so it is important to ensure independency of the experts who examine terms of mergers, especially regarding the share exchange ratio. Solution of Croatian legislature called for a change, which happened in 2003, when the CCA was amended with the new provision which provided that these independent experts (auditors) should be appointed by the commercial courts.[42]

Second, as to the nullity rules for mergers, the CCA from 1993 only provided that claim for nullity of merger contract must be directed towards acquiring company.[43] There were no time restrictions for bringing this claim or other conditions set in Article 22 of Directive 78/855/EEC. The only other provision regarding nullity of merger contract was Article 532 of the CCA from 1993 which provided that merger contract cannot be claimed as null for the reason that the share exchange ratio is considered to be set too low.[44] Whereas the time restriction was one of the important conditions for nullity of mergers, Croatian legislature needed to be amended. That was done in 2007[45] when the new Article 532 of the CCA provided that the claim to declare the nullity of the decision on merger of the general meeting can be filed only within 30 days of the date of the decision. Such solution is within the time restriction of the six months after the date on which merger became effective set by the Article 22/1/c of Directive 78/855/EEC.

Third, regarding the merger when acquiring company holds 90% or more of the company being acquired, the CCA from 1993 in Article 531/1 provided that it was not necessary to obtain decision on merger from the general meeting of the company being acquired. Contrary to that, Directive 78/855/EEC provided that the Member States do not need to obtain the approval by the general meeting of the acquiring company.[46] Position of EU legislator was clearly aimed to facilitate process of mergers by speeding up the

[39] For example, it provided that board of directors of the merging companies prepare and conclude merger contract, where obligatory provisions of that contract correspond to Directive 78/855/EC (Article 513/2 of the CCA from 1993 and Article 3/2 of the Directive 78/855/EC). Also, it provided for the same consequences of a merger (Article 522/3 and 522/4 of the CCA from 1993 and Article 19 of the Directive 78/855/EC). It even provided for mergers where acquiring company holds all or 90% of shares in the company being acquired (Article 531/1 of the CCA from 1993 and Article 27 of the Directive 78/855/EC).

[40] Article 515/2 of the CCA from 1993.

[41] Article 10/1 of the Directive 78/855/EEC.

[42] Article 253 of the Act on Amendments to the Companies Act, Official Gazette no. 118/03.

[43] Article 529 of the CCA from 1993.

[44] To a certain extent, we can argue that such a provision is in the spirit of the preambule and of the Article 22/1/d of Directive 78/855/EEC which provides that Member States should provide that defects in mergers are remedied wherever possible in order to avoid nullity of mergers.

[45] Article 134 of the Act on Amendments to the Companies Act, Official Gazette no. 107/07.

[46] Article 27 of Directive 78/855/EEC.

procedure on the part of the acquiring company (following certain conditions), but by no means to threaten interests of shareholders of the company being acquired. It is naturally to expect that shareholders of the company which is about to cease to exist shall be given the opportunity to vote about that decision. Article 531/1 of the CCA was amended in 2003[47] according to provisions of the Directive. It provides that when acquiring company holds 90% or more of the company being acquired, there is no need for the approval from the general meeting of the acquiring company. Minority shareholders of the acquiring company who represent twentieth part of the subscribed capital may demand that this matter is decided on the general meeting.

As mentioned, the CCA from 1993 contained provisions regulating mergers of private limited liability companies (*društvo s ograničenom odgovornošću*). Directive 78/855/EEC did not regulate mergers of these types of companies. Exclusion of private limited liability companies from the Directive 78/855/EEC was criticized, as they should also have the opportunity to achieve external growth through mergers.[48] Thus, mergers of these types of companies are left to national legislations.

Provisions of the CCA from 1993 regarding the mergers of private limited liability companies remained mostly unchanged until today. When comparing with mergers of public limited liability companies, we can conclude that it is a similar process. To start with, mergers of both types of companies are equally defined.[49] General meetings of merging private limited liability companies should decide upon mergers, with the minimum threshold of voices which represent 3/4 of given voices on the general meeting which decides on mergers.[50] Also, protection of creditors of merging private limited liability companies is provided.[51]

However, merger of private limited liability companies as set in CCA is simpler then mergers of public limited liability companies. There are four main differences. First, CCA does not provide for the obligatory content of the merger contract of private limited liability companies. Accordingly, merger contract does not have to contain provision relating to ratio of the share exchange, which is on the other side, one of the most important obligatory provisions in the merger contract of public limited liability companies.[52] Second, there is no obligation for the management body to draw up a detailed written report which would explain draft terms of mergers, as it is set for the management bodies of the merging public limited liability companies.[53] Third, there is no requirement that independent experts examine the draft terms of

[47] Article 266 of the Act on Amendments to the Companies Act, Official Gazette no. 118/03.
[48] See Grundmann, S., European Company Law, op. cit., p. 551.
[49] Compare Article 535 with Article 512 of the CCA.
[50] See Article 536/2 and Article 516/2 of the CCA.
[51] Importantly, Article 542/1 of the CCA from 1993 provided only for protection of the creditors of the company being acquired, but not and for creditors of the acquiring company. That was corrected in Act on Amendments to the Companies Act, Official Gazette no. 118/03, Article 276. Thus, current provision 542/1 responds to Article 523 of the CCA.
[52] See Article 513/2 of the CCA and Article 5/2 of the Directive 78/855/EEC.
[53] See Article 514/1 of the CCA and Article 9 of the Directive 78/855/EEC.

mergers of public limited liability companies.[54] Fourth, there is no time restriction for the nullity of mergers, as required for mergers of public limited liability company.[55] It is provided only that any claim for the nullity of mergers should be filed towards acquiring company,[56] and that it cannot be annulled for the reason that the share exchange ratio is considered to be set too low.[57]

4. PERIOD FROM 2005 TO 2011

As a starting reference for this period, authors took tenth company law Directive 2005/56/EU, which regulated cross-border mergers of both public limited liability companies and private limited liability companies,[58] thus having a broader scope of application then Directive 78/855/EEC.

In 2011, new Directive 2011/35/EU[59] concerning mergers of public limited liability companies was brought. Accordingly, we determined the 2011 as the final year of this period.

4.1. Tenth company law Directive 2005/56/EU

Coordination of national mergers of Member States done by Directive 78/855/EEC was a prerequisite for coordination of cross-border mergers in EU internal market. Its main goal is to facilitate cross-border mergers between various types of limited liability companies of different Member States.[60] Cross-border mergers were considered crucial for external growth of EU companies in order to be competitive towards larger USA and other companies on the global market.

However, in spite of its importance, it took a long time for EU legislator to bring this Directive. It began in the 1972 with Draft Convention on the international merger of companies.[61] The idea of regulating cross-border mergers through a convention was abandoned, and first Proposal for a Tenth Directive concerning cross-border mergers of public limited companies (further in text: Proposal 1985) was made in 1985.[62] The new modernized proposal - Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital (further in text: Proposal 2005) was made in 2003,[63] and the Directive 2005/56/EU was finally adopted in 2005.

[54] See Article 515 of the CCA and Article 10 of the Directive 78/855/EEC.
[55] See Article 529 of the CCA and Article 22 of the Directive 78/855/EEC.
[56] Article 546 of the CCA.
[57] Article 547/1 of the CCA.
[58] See Article 2/1 of Directive 2005/56/EU.
[59] Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies Text with EEA relevance, OJ L 110, 29.4.2011, p. 1–11. This directive was subsequently amended by Directive 2009/109/EC, Directive 2012/17/EU and Directive 2014/59/EU.
[60] See Preambule 1 of Directive 2005/56/EU.
[61] Brussels, December 20, 1972.
[62] COM(84) 727 final.
[63] COM(2003) 703 final.

Although proposals from 1985 and 2003 are mostly similar, there are some major differences. We would like to emphasize two of them.[64] Firstly, while the Proposal 1985 included only public limited liability companies, Proposal 2003 provided for a broader scope of application which encompassed private limited liability companies as well. Secondly, Proposal 2003 added employee participation in cross-border mergers which should enhance their position in process of mergers.

Before Directive 2005/56/EU was finally brought, Court of Justice of the European Union (further in text: ECJ) allowed a cross-border merger between companies from different Member States in seminal Sevic case.[65] It found that different treatment between domestic and cross-border mergers represents the violation of the freedom of establishment according to Articles 49 and 54 of TFEU.[66] In other words, the ECJ concluded that the company from one Member State should have the same treatment as national companies in the Member State where the company wishes to establish itself. Consequently, the registration of cross-border merger should be allowed in commercial registers of Member States, thus facilitating the cross-border mergers.

Although in cross-border area, Directive 2005/56/EU clearly states that a merging company must comply with the national law to which it is subject.[67] Also, Member States are allowed to oppose to the cross-border merger on grounds of public interest. Thus, national merger regulation still plays a significant role in facilitating cross-border mergers.

When analyzing Directive 2005/46/EU, it is clear that its content is mostly based on the content of the Draft Convention on the international merger of companies and the Directive 78/855/EEC on national mergers.[68] In fact, it reflects the structure and main features of national mergers, such as disclosure of information to shareholders of merging companies,[69] decision making process in which shareholders take adequate part with inclusion of employers' rights,[70] protection of shareholders and creditors[71] and defined legal consequences of the cross-border merger.[72]

---

[64] See Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital', (COM(2003) 703 final.

[65] Case C-411/03. The finding of the ECJ is: „*Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State*."

[66] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

[67] Article 4/1/b of Directive 2005/46/EU.

[68] See Grundmann, S., European Company Law, op. cit., p. 574.

[69] For example, Article 6 of Directive 2005/46/EU which provides that common draft terms of mergers mucst be published, Article 7 of Directive 2005/46/EU which provides that management body of each of the merging companies must draw up a report for the shareholders and other.

[70] Article 9 of Directive 2005/46/EU provides that merger must be approved by the general meeting of each of the merging companies. In comparison with Directive 78/855/EEC, there is no threshold set for minimum majority in general meeting when deciding about merger. However, since each merging company must comply with formalities of national law to which is subject, majority of at least two thirds of the votes present in the general meeting when deciding about merger as set by Article 7 of Directive 78/855/EEC shall apply.

Specific difference is that a cross-border merger which took its effect cannot be declared null and void, which is allowed for national mergers under certain conditions.[73] Such solution strives to achieve legal certainty for subjects involved in cross-border mergers. Another difference relates to the role of national competent bodies in cross-border mergers before which merging companies must obtain a pre-merger certificate,[74] ensuring the legality of the cross-border merger[75] and completion of the merger by registering it in public registers of Member States of merging companies.[76]

4.2. Croatian merger regulation from 2005 to 2011

The greatest change that occurred in this period is adoption of cross-border merger regulation by Act on Amendments to the Companies Act in 2007.[77] It was done in order to implement Directive 2005/56/EU. However, articles 549.a – 549.k which regulate cross-border regulation entered into force when Croatia became a Member state, on 1st July 2013.[78]

Croatian national merger regulation plays a significant role for cross-border mergers regulation. In particular, Article 549a/5 of the CCA calls for a subsidiary application of national merger regulation as set in CCA unless otherwise regulated by the cross-border mergers provisions. Thus, Croatian cross-border mergers are primarily regulated by cross-border merger provisions (Article 549a – 549k of the CCA) and secondly by national merger provisions of the CCA.[79] For example, CCA does not provide special rules on legal consequences of cross-border mergers, but due to the subsidiary application of national merger provisions, Article 522 of CCA, which defines legal consequence of national mergers, shall apply.

When comparing provisions of Directive 2005/56/EU with CCA from 2007, we can state that Croatian cross-border regulation is harmonized with the EU cross-border regulation. For example, scope of application of Croatian cross-border regulation includes both public and private limited liability companies,[80] merging companies are obliged to have a common draft terms of cross-border mergers,[81] management bodies of merging

---

[71] Determination of *ratio* for the exchange of securities or shares in common draft terms of cross-border mergers (Article 5/b of Directive 2005/46/EU), independent expert report (Article 8 of Directive 2005/46/EU), same level of protection for creditors in cross-border mergers as in national mergers (Article 4/2 of Directive 2005/46/EU).
[72] Legal consequences as determined in Article 14 of Directive 2005/46/EU correspond to legal consequences of national merger in Article 19 of Directive78/855/EEC.
[73] Compare Article 17 of Directive 2005/46/EU with Article 22 of Directive78/855/EEC.
[74] Article 10 of Directive 2005/46/EU.
[75] Article 11 of Directive 2005/46/EU.
[76] Article 13 of Directive 2005/46/EU.
[77] Official Gazette no. 107/07.
[78] Article 174 of Act on Amendments to the Companies Act in 2007.
[79] See also Barbić, J., Pravo društava, Društva kapitala: Dioničko društvo, Organizator, Zagreb, 2013., p. 1516.
[80] Articles 549.a/1 and 549.a/2 of CCA from 2007.
[81] Article 549.b of CCA.

companies must report about legal and economic impact of mergers to both general meetings and employees' representatives[82] and other provisions.

Protection of creditors of merging companies is not specifically regulated by Directive 2005/56/EU, but it is left to national provisions to which the merging company is subject.[83] Croatian legislature adopted a specific solution for creditors of cross-border merging companies, which differs from creditors' protection regime of national mergers. Article 549h of CCA from 2007 provides that to creditors of the company being acquired must be given insurance, if they apply for it in writing within two months of the date of the announcement of the merger plan. The claim that can be insured can only be the claim arising prior to or no later then 15 days after the announcement of the merger plan, under the condition that they prove that the merger threatens the fulfillment of their claims. In comparison with creditors' protection in national mergers as set in Article 523 of CCA, it is evident that creditors have shorter deadline to apply for insurance of their claims (two instead of six months) and that it applies only to claims which have arisen in a significantly shorter period then is the case for national mergers. Thus, Croatian legislature aims to facilitate cross-border mergers by shortening the period in which creditors can apply for an insurance of their claims. Consequently, such applications cause a delay in merging process. At the same time it preserves creditors' rights when fulfillment of their claims is threatened in the merger.

In order to implement provisions of Directive 2005/56/EU which aim to ensure the legality of the cross-border mergers,[84] CCA from 2007 designated competent bodies for supervision of mergers[85] as well as the date on which the cross-border merger shall take effect.[86] Both depend on the fact whether the company with registered seat in the Republic of Croatia is a company being acquired or an acquiring company.

CCA also adopted simplified procedure for cross-border mergers when a company holds 90% or more of shares in another company.[87] However, employee participation is dominantly regulated by the labour law.[88]

---

[82] Article 549.d of CCA.
[83] Article 4/2 of Directive 2005/46/EU.
[84] Especially in regard to Articles 10, 11 nad 13 of Directive 2005/46/EU.
[85] Article 549i of CCA provides that when the company being acquired has registered seat in the Republic of Croatia, the court in whose register the company has entered has jurisdiction to supervise all activities concerning that company. Pre-merger certificate is the announcement of the entry of the merger to the register of the court in whose register the company being acquired is registered (Article 549i/5 of CCA). Article 549j of CCA provides that when acquiring company has registered seat in the Republic of Croatia, the court in whose register the company has been entered or will be entered has supervision over the implementation of the megrer and verification that merging companies have validly adopted common draft of mergers and all issues regarding employeee co-decision.
[86] For the acquiring company with the registered seat in the Republic of Croatia, merger shall take effect upon the entry of the merger in the court register of that company. For the company being acquired with the registered seat in the Republic of Croatia, merger shall take effect according to the law of the state where acquiring company has its registered seat (Article 549k of CCA).
[87] Article 549 of CCA from 2007, which was subsequently modified by Act on Amendments to the Companies Act, Official Gazette no. 137/09.
[88] In Croatian Labour Act, Official Gazette no. 93/14.

Importantly, Croatian legislature adopted an additional layer of protection for the shareholders of the company being acquired, either when the company being acquired has the registered seat in Croatia[89] or in other Member State.[90] It concerns to the special right of shareholders of the company being acquired who opposed to merger. They are given the right to seek for redemption of their shares under adequate price,[91] if they submit such request within two months after the merger entered in the court register.[92] The open issue remains as to which company should shareholders address such a request: to the company being acquired or to the acquiring company. The logical answer would be: to their own company, that is to the company being acquired. However, once the merger enters the court register, the company being acquired ceases to exist. Thus, in order to allow the shareholders to exercise this right (within two months *after* the merger entered the court register), authors are of the opinion that shareholders can make such a request to acquiring company as well.

As regards the validity of cross-border merger, CCA did not provide for an explicit provision that cross-border mergers may not be declared null and void, as it is set in Article 17 of Directive 2005/56/EU. This issue is regulated by subsidiary application of Article 529 of CCA (which was in its current form introduced by amendment from 2007) for national mergers according to which there can be no nullity of merger but only nullity of the decision on merger. In particular, a claim to set aside the decision on merger may be filed only within 30 days of the date of the decision. In addition, Article 530 of CCA expicitly provides that if a merger is entered in the court register of the acquiring company, any deficiences in the process of merger have no effect on the validity of merger. However, if there are any deficiences in the process of merger, injured parties may request for compensation of damages.[93] These provisions *de facto* provide that mergers, both national and cross-border, may not be declared null and void once they entered into force.

5. PERIOD AFTER 2011

Again, as a staring reference for this period, we took the last significant legislative change on the EU level in the area of mergers of the companies - the Directive 2011/35/EU[94] which entered into force on 1 July 2011.

---

[89] Article 549i/2 of CCA.
[90] Article 549g of CCA.
[91] Both Articles 549i/2 and 549g of CCA call for the application of Articles 562 and 570 of CCA which provide this special rights for shareholders in case of transformation of a public limited liability company in some other type of company or partnership.
[92] Article 562 of CCA provides that the due of two months counts from the moment when the transformation of public limited company is entered in the court register. When applying this solution to mergers, as Articles 549i/2 and 549g of CCA call for, we consider that the proper interpretation is that the relevant moment is when the merger of companies enter the court register.
[93] Article 530/2 of CCA.
[94] Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies**,** OJ L 110, 29.4.2011, p. 1–11. It is subsequently amended by two additional directives. First is the Council Directive 2013/24/EU of 13 May 2013 adapting certain directives in the field of company law, by reason of the accession of the Republic of Croatia,

In this period, also the Directive 2012/17/EU[95] was brought which regulates interconnection of central, commercial and companies registers, what is relevant for both national and cross-border mergers.

5.1. Directive 2011/35/EU

Directive 2011/35/EU repealed the Third company law Directive 78/855/EEC.[96] However, its purpose is to codify Directive 78/855/EEC and its subsequent amendments. The very fist Preamble of the Directive 2011/35/EU clearly states: "*In the interests of clarity and rationality the said Directive should be codified*". Thus, it does not bring new concepts and solutions in the area of national mergers, but it rather serves the described reasons.

5.2. Croatian merger regulation from 2011 onwards

In this period, the only relevant amendment of the CCA for the mergers of companies was done by Act on Amendments to the Companies Act from 2012.[97] For example, it introduced an obligation to the management bodies of merging companies to inform the general meeting of any material change in the assets and liabilities between the preparation of the draft terms of mergers and the date on which general meeting will decide on mergers.[98] Also, it adopted provisions which further enhance the communication between the merging companies and their share/unit holders by introducing possibility of electronic communication and greater role of the Internet pages of the companies.[99]

Also, Act amending the Court Register Act from 2013,[100] introduced provisions in order to facilitate cross-border mergers of companies, all in accordance with the cross-border regulation set in Croatian Companies Act.

6. TRENDS OF CROATIAN MERGERS IN THE POST-ACCESSION PERIOD

Authors shall further analyze trends in Croatian companies' mergers in the post-accession period. More precisely, authors took the period between 1st July 2013 and 31st

---

OJ L 158, 10.6.2013, p. 365–367. The second is Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190–348.

[95] Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, p. 1–9.

[96] Article 32 of Directive 2011/35/EU.

[97] Official Gazette no. 111/12

[98] See Article 514/4 of the CCA, which implements the Article 9/2 of the Directive 2011/35/EU.

[99] See for example Article 517/4 and Article 549c of the CCA.

[100] Official Gazette of Republic of Croatia no. 148/13.

December 2014 as a reference period for this research. Collected data are available from the court registers of commercial courts in Croatia. Any differences between collected data and actual number of Croatian companies in mergers may result from possible inconsistent entering of data in court registers. However, authors perceive this possibility of a minor influence for the research.

The leading court register, with the highest number of mergers, was the Commercial Court of Zagreb. This information does not surprise, as Zagreb is the capital city and the economic centre of Croatia. Other court registers with certain number of mergers are court registers of commercial courts of Pazin, Rijeka, Dubrovnik and other.

The highest rate of mergers is by far registered in the sector of turism, followed by agricultural, trade and textile industry. Other sectors are also present, although in smaller numbers, such as banks, insurance companies, construction and other.

In the period from 1st July 2013 till the end of 2013, there were 30 registered mergers in Croatia. All of them are mergers by acquisition (*pripajanje*), while there is no registered merger by formation (*spajanje*) in this period. In the period from 1st January 2014 till the end of 2014, there were 24 registered mergers in Croatia. The same as previously, all are mergers by acquisition.

Authors also explored what were the reasons for these mergers. The starting point for this analysis were reports which management bodies of merging companies must submit about legal and economic impact of mergers.[101] However, most of the mergers took place between a parent company and its subsidiary, which triggered the exception under Article 531/2 of CCA. It provides that management companies are not obliged to write these reports if the acquiring company holds all of the shares of the company being acquired. Thus, the reasons for the mergers were often available only through newspapers or at the Internet pages of the merging companies.

There are three main reasons for mergers among Croatian companies. The first, which is also the dominant one, is increasing of business efficiency and rationalization. It includes restructuring of human and other resources as well as cost efficiency. This reason is usually invoked for mergers between parent company and its subsidiary. Over 80% of mergers of Croatian companies fall under this category.

The second is expansion and growth on the market. There are several cases in Croatia where merger was conducted in order to gain new market and to strengthen the position on the market. Through such mergers acquiring companies are enhancing their competitiveness, achieving better management of human resources, improving their services towards customers and other.

The third is concentration of companies in order to get a better position on the market. This trend occurred in the sector of tourism. Reasons for such mergers are enhancing of management by lowering the costs of administration, improving financial stability and better access to capital, integration of specific knowledge in tourism, branding the services, better management of human resources and other.

[101] See Article 514 of CCA for domestic, and Article 549d of CCA for cross-border mergers.

In the reference period, there was only one cross-border merger, where a Croatian company acquired the company with the seat in another Member state. However, in this case we cannot speak of the expansion of the market, as the acquiring company was also a parent company to the company being acquired. Thus, the merger was done for better business efficiency and rationalization, which falls under the dominant category of reasons for mergers of Croatian companies.

7. CONCLUSION

As it has been demonstrated, EU legal development in the area of national and cross-border mergers made a significant influence on the Croatian merger regulation. Specific Croatian position reflects in the fact that prior to 1990 it was a part of a former Yugoslavia, where entire company law was drastically different then today. With the CCA which is on force from 1st of January 1995, began the modern development of Croatian company law, and within it, the merger regulation. The major changes towards nowadays Croatian merger regulation were done in the period from 1995 to 2011. Adaptability of Croatian merger regulation to EU regulation was best demonstrated in the case of cross-border merger development. In particular, Directive 2005/56/EU on cross-border mergers was adopted in 2005, and already in 2007 Croatian legislature amended the CCA in order to implement it. Thus, we conclude that Croatian both national and cross-border mergers are harmonized with the EU merger regulation. In addition, Croatian legislature also adopted a simpler procedure for national mergers of private limited liability companies. On that way, Croatian companies enjoy the same possibilities for enlarging as other EU companies on the European internal market, thus facilitating the growth of Croatian market economy. Authors analyzed mergers of Croatian companies in the reference period from 1st July 2013 till the 31st December 2014. The mergers are mostly domestic conducted for the reasons of enhancing business efficiency and rationalization, where most of the companies were connected previously as a parent company and subsidiary. It is yet to be seen if the EU membership shall have a significant impact on Croatian companies for their restructuring and growth through domestic and cross-border mergers.

AUTHOR Information

Prof. dr. sc. Dionis Jurić

djuric@pravri.hr

Dr. sc. Mihaela Braut Filipović

mbraut@pravri.hr

Project Information
Legal Aspects of Corporate Acquisitions and Knowledge Driven Companies' Restructuring
Croatian Science Foundation project No. 9366.
info@croatiamergers.eu

croatiamergers.eu