PART II Cross-border M&A

2. Should cross-border mergers be possible between different company types in general, ….?

Yes. In general, ecoDa would like to promote that the European company law environment should allow EU companies to organize their corporate structure in the most efficient and effective way.

3. Should the rights of creditors in case of a cross-border merger be harmonised?

Yes. This question is but one element in a series of corporate aspects (see below) where a higher degree of harmonisation might be welcome.

6. Should the rights of minority shareholders in case of a cross-border merger be harmonised?

Yes. However the question of protection of minority shareholders is much broader than the context of this consultation document (see e.g. also the proposals for amendments to the shareholder directive). Given the crucial role of minority shareholders in many of the European listed companies, ecoDa is of the opinion that a focused reflection on this topic, with reflections on each of the specific business decisions that might affect minority shareholders, might bring a very valuable contribution to a better functioning of the different governance models, active throughout the Member States. Moreover, nuances in line with the type of shareholding structures (widely dispersed versus controlling structures; structure and type of minority shareholding) are essential in our eyes and could be better developed in an approach that focuses on all aspects of minority shareholders.

9. When a cross-border merger involves the issuance of new shares, the valuation of assets and liabilities may be necessary. Among Member States two different types of valuation methods are used: the fair value method and the book value method. Since the two methods may result in different valuations, should common rules be set across all Member States?

As already pointed out in question 3 and 6, also these valuation methods might benefit from a more harmonised approach in order to facilitate that legal barriers would lead to sub-optimal decision-making and limit the business rationale as the leading beacon.

14. Should the rules currently in force under the CBMD on the employee participation be modified?

As is the case for minority shareholders protection, the question of employee participation lately pops up in different proposals for amendments to European Directives (see also the recent Shareholder Directive discussion). It is the opinion of ecoDa that the item of employee participation is too important and at the same time politically too sensitive to be integrated sideways in amendments to the CBMD. A more thorough reflection is probably the best route ahead for this discussion.

Part III Cross-border divisions

1. Why would a company want to carry out a cross-border division?

The topic of corporate structuring is a very important topic from a business-economic perspective as well as a legal perspective. One of the great challenges for any group structure is how to align the corporate and operational structures (most of the time developed with a pure business rationale as guiding principle) with the legal structures (often structured to cope with different legal structures as well as fiscal and/or risk management intentions). Most corporate law approaches (including the consultation document) neglect this challenge and focus on the legal structures. Therefore, ecoDa would like to stimulate the European Commission to further reflect on the governance challenges corporate groups are confronted with. Although this theme is much broader than the question of cross-border divisions, it is necessary to place the whole discussion on cross-border divisions in this broader scope of internal governance (see also new publication on this theme).

4. What are the main issues related to cross-border divisions that should be regulated at EU level?

What matters most in cross-border M&A as well as in corporate structuring (with cross-border divisions, etc), is ensuring a correct level of protection of the interests of all relevant stakeholders. The consultation document correctly points to the interests of creditors, of minority shareholders and employees. A key facilitator in this protection process is lacking in our opinion. ecoDa -as the voice of European directors- would like to put more emphasis on the role of the board in the strategic decision making process around M&As and corporate structuring; it is clear that the board duties -with an emphasis on the corporate interest as well as the obligations to take the interest of all stakeholders into consideration[1]- is the best guarantee for a well-balanced decision-making process. This aspect is lacking up till now in the CBMD and in the consultation document.

Part IV General Comments

The general question of harmonisation is very important in order to allow EU companies to make optimal use of the Single Market environment. This is all the more relevant for cross-border transactions, M&As and multi-national organisation structures. Whenever possible, the EU framework should be the reference rather than corporate decisions being hampered by or focused on national boundaries. To this end, ecoDa's opinion is fully in line with the outcome of the 2012 consultation on the future of European company law showing that the majority of stakeholders would be interested in further harmonisation in the field of cross-border mergers and divisions. However, ecoDa would like to warn against too much 'additional' red tape (at EU level) and too much gold plating (at Member State level); in this respect we fully agree with Business Europe, making a plea for 'proportionate' measures, and where feasible, a reduction in the regulatory burden.

[1] As an example, reference can be made to decisions on M&A, where conflicting interests may be at stake. An important guarantor for a focus on the corporate interest and for managing those potential conflicting interests is indeed the board (see e.g. new proposal for amendments to the Shareholder Directive).