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CROSS BORDER MERGER AND SHAREHOLDER'S RIGHTS

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To my family

INTRODUCTION

EC Directive 2005/56 on cross border mergers of limited liability company, adopted on October 26th,2005 relies for the fort time on several rules aimed at facilitating cross border merger between companies located within two different jurisdictions. The Directives is based on the principle that the Member States must allow the cross border merger of a national limited liability company with a limited company from another Member State, if the national law of the relevant Member State permits domestic mergers between such types of company. Cross border merger is permissible within European Union and cannot be made impossible between Member States. Dating back at 2003, SEVIC System AG, a German company, appealed a decision rejecting the application for registration in the German commercial register of its absorption of a Luxembourg company on the ground that the German Transformation Act only allowed mergers between domestic companies. The German company asked a preliminary ruling to the European Court of Justice (hence ECJ). The ECJ stated that the right of establishment set forth in Articles 43 and 48 of the EC Treaty covers EU company's right to participate in the economic life of another Member State, so there was been a violation of EC articles 43 and 48. According to this ground, a notable cross border merger was carried out after few years later, between an Italian public company and a public company from another Member State. On September 2005, Allianz AG and RAS Holding S.p.a announced their intention to merge RAS into Allianz AG and the board of management of Allianz AG and the Board of Directors agreed a merger plan. On February 2006, the shareholders' extraordinary meeting of Allianz AG approved the merger plan. Allianz AG changed its legal form to a European Company, SE, and absorbed RAS Holding S.p.a. The application of this Directive is limited to cross border merger between limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, proving that are governed by the laws of different Member States Furthermore, cross border merger guarantees the free movement of capital and they respond to the need for cooperation and consolidation between companies located in different Member States. Freedom of establishment of the companies is fundamental in order to achieve the creation of a European Internal Market. Corporate restructuring is an essential way of increasing competition and in addition the elimination of barriers allow companies to choose their corporate law. Several obstacles may occur in a cross border merger: taxation, economic barriers, and in particular the most important obstacle is the legal uncertainty due to the different level of "laws" in the different Member States. Several reasons may be taken into account for a merger: first of all the merger activity is the desire of expansion so the company may expand its business geographically. Another factor involved in conducting a merger is the so called synergies; in fact if two or more businesses join forces they will be able to create more shareholder value than if they worked separately. Further a company could be interested to merge with another company in order to access to a new market with a distribution and a market framework. The main topic that I want to face in my thesis relates to the mechanism of protection for the minority of shareholders. Article 4 of the Cross Border Merger Directive (hence CBMD) allows Member States to comply with the provisions and formalities of the national law, including the protection of minority shareholders. A level of harmonization relating to this topic is not guaranteed, in fact each Member States shall adopt the measure determined by national legal system. Albeit the protection of minority shareholders has been introduced in EU company law, neither SE , not the CBMD offer a mechanism for the protection. According to the Directive, the effect of a merger are such that one or more companies are dissolved without going into liquidation, while the assets and liabilities are transferred to the acquiring company or a newly formed company in exchange of securities, shares or cash payment. This means that the shareholder of the acquired company become the shareholder of the acquiring company hence subject to the new law. In addition a cross border merger have an impact on the right of shareholders to sell out. The right to exit allows shareholders to a fair valuation of their shares. Unlike in the Common law, in Civil law, for instance in UK, does not provide for exit right by the ground that the shareholder "owns" a binding closed nature with the limited company, because of capital maintenance rules or for other reason. The degree and way of protection differ among the different jurisdictions within European Union but the rights that could protect a shareholders are relating to the concept of information, voting right and the so called appraisal right, particularly used under Delaware legislation. As we know before a merger is initiated, each of the merging companies shall prepare a common draft terms of the merger and further an independent expert report shall be drawn up. These reports satisfy the right to be informed to the shareholders. They ensure that shareholders is informed in order to take decision about the business of the company. Moreover according to the article 6 of the CBMD the common draft terms of a cross border merger are to be published in a national gazette of each Member State at least one month before the general meeting. It will contain arrangements of each companies and such article satisfy the right to be informed for the shareholders in order to be able to cast a vote at the general meeting. Further, according to the article 10 paragraph 2 of the CBMD, when the law of a Member State contains a mechanism for the compensation of minority shareholder and does not prevent the cross border merger, such mechanism shall be explicit accepted by the other merging companies in their general meeting and that the members of that merging company can initiate that mechanism before the competent courts. Several Member States have provided dissenting shareholders mechanism, for instance Germany has provided dissenting minority shareholders with three remedies. These include an additional cash payment in the case the share exchange ratio is too low. Whereas different Member States have adopted mechanism of protection, no right are guaranteed in Belgium, France, Lithuania, and Bulgaria. According to Belgian law, dissenting minority shareholders are completely bound to the decision of the cross border merger and they will receive shares in the surviving company. The only ground that a shareholder is entitled to exit, is to argue the liability. Likewise in France, no rules exist for the protection of shareholders in a cross border merger while minority protection is available in the event of a domestic transaction. The only remedy that a shareholder is entitled, relied on the concept of "abus de majorité", the minority shareholders can bring an action to the court to seek the nullification of the shareholders' general meeting. In the light of information instead, there are many ways for shareholders to deal with this problems. In the case of an asymmetric information, where one party know more than the other party about some material aspect of a potential transaction and one party has superior power and information rather than the other. Information must be relevant to the decision making process. In addition agency problem can occur between minority and majority shareholders, by contrast there is not principal agent relationship when the principal does everything himself without relying on the other part (minority shareholders). The relevance of this theory can be illustrated also between a parent and subsidiary company. In order to steer a foreign subsidiary company, the concept of centralization, output control, formalisation, socialisation and expatriate control can be used. When buying shares in a company, every shareholders is consciously or unconsciously take the risk that the corporate structure of the company may be subject to change. Shareholders are perceived as the real owners of the company. A minority shareholder knows which remedies are available to him in such situations: right to be informed, appraisal rights and derivative suits. Minority shareholders' rights are linked to class of rights or better to class of shares. The situation is quite different in UK where the class of shares is much more flexible compared to Italy; in fact according the Italian Civil Code has seen as a rigid system. It provided company only with mandatory rules and it permits the issue of a few class of shares. When certain transactions such as the merger have the power to deprive shareholders, they are entitled to use the appraisal right in order to obtain the so called fair value regarding the valuation of their shares. It is a common technique used under Delaware legislation, in accordance with the article 262 DCGL which allows a shareholder to obtain the fair value under strict rules according to the statue of the company. Delaware Court can take into consideration various approaches in particular the so called cash flow mechanism. The concept of fair values has been improved by Delaware Courts and it has been analyzed in several cases. The old Delaware block Method of valuation was the most used but actually Courts analyze the fair value according to another technique such as the “discounted cash flow method”. The Delaware Block method has been used for a long time it was considered as the only to estimate the fair value but its weakness relies not on the weight given to each factors. In the case Weinberger , the Supreme Court of Delaware described the Delaware Block method as a technique where the factors such as assets, market price and earning are assigned to a weight and the resulting amounts is added to determine the value of shares. This method first of all does not integrate relevant factors that can lead to a realistic result for the valuation of shares. Secondly the method “ is equivalent to putting everything in a melting pot”. Weinberger undermined the Delaware block. Such method would be no longer considered and in addition it established a new method to be followed, not the assessment of factors but rather it would dealt with a range of elements and techniques. The Court in Weinberger set out new techniques for valuation standard and the merger process must met the test of fairness, required in these transactions. Weinberger underlined the importance to use the cash flow method , used nowadays under Delaware legislation. In fact an estimate value of the future earnings of a company is an adequate value for the valuation of shares and is a technique on which the different experts rely the most. Discounted cash flow method involve future cash flow of the company and expected long term growth rate and is particularly used by expert and by Courts in Delaware. As we have seen fairness is a principle involved in these kind of transactions and should not be forgotten; so when a shareholder is in a situation that trigger his right, he is entitled to use the appraisal right according to the article 262 DCG. This represents the only remedy for the protection of minority shareholder in a situation like that. The concept of appraisal right is common also in some European legislations such as in Germany and under Dutch law. The Dutch rules on cross border merger were implemented in the summer 2008, this right relies in the article 2.333h DCC and is available just in this case when the disappearing company is governed by Dutch law and the acquiring company by the law of another European Member States. The Netherlands introduced this right as mechanism of protectionism in order to ensure an appropriate protection for minority shareholders. Only the shareholder of the disappearing company who voted against the proposal for the merger are entitled to the appraisal right. Dutch statute is completely in line with the article 4 of the CBMD, which article refers to shareholders who have opposed the cross border merger. Shareholders who were not present at the general meeting, have abstained from voting or have cast a blank or invalid vote are not entitled to the appraisal right. Shareholder who voted against the cross border merger by means of proxy is entitled to the appraisal right. One of the main difficulties that occur in a business transaction is the valuation of the shares because when the appraisal right is invoked the statute does not contain any guidelines for the exchange ratio. Furthermore there is the risk that the auditors have certified the exchange ratio as unreasonable or the exchange ratio is incorrect. Even if these two trigger events occur, the legal merger can be effected. Neither statute nor the legislative history prescribe the valuation method that should be adopted for the valuation of shares. According to some scholars, the economic market values has to be taken into account, as a yardstick. On the other hand according to Germany legislation, the shareholder of a disappearing GmbH involved in a cross border merger is entitled to exercise the appraisal right if the acquiring company is not governed by Germany law. In addition, it differs from the Dutch rules, In fact under Dutch law, the appraisal right has to be effectuated before the cross border merger. Moreover in order to be qualified as shareholder for the appraisal right, he has to vote against the resolution. The appraisal right can be invoked against the disappearing company. After the cross border merger, the appraisal right must be invoked against the acquiring company as a universal succession of title, similar to some other obligations. The appraisal right instead is included under English and Wales law but in specific and limited cases but unlike in the Netherland and in Germany, it cannot be invoked in the event of a cross border merger, so in a situation like that, the shareholder is not entitled to exercise the right to exit the company. Furthermore, in England and in Wales there has been also a debate whether to extend the appraisal right to some other situations. As overview shareholders are the real owner of the company and in the course of the company's business their right would not be undermined by the majority. A cross border merger is a business transaction that involves different legislation and leads to a change in the corporate and in the structure of the company itself. The issue of minority shareholder protection is well recognized but a real legislation lacks. The CBMD provides an approach for the Member States n order to implement such issues. The result leads to different level of protection within European Union and is also detrimental for the cross border merger process. The protection of minority shareholders certainly shall enjoy a much more attention in the framework of the European Company and also by the European Legislator. The main question is whether this mechanism is neutral, beneficial or we need of an harmonization. On the other hand, for the company's interest that is the access to a new market, cooperation; the protection of minority shareholders should not constitute an obstacle that leads to prevent the cross border merger transaction. A fully harmonization should be considered not efficient but a partial harmonization would be aligned by a common denominator.

INTRODUZIONE

La Direttiva 56/2005 relativa alle fusioni transfrontaliere tra società di capitali, adottata il 26 ottobre 2005, contiene una serie di regole volte a facilitare una fusione transfrontaliera tra due società appartenenti ad una differente legislazione. Una fusione transfrontaliera deve essere resa possibile all'interno dell'Unione Europea. Uno dei primi casi scolastici, risale al 2003, SEVIC System AG, una società tedesca che si fonda con una società lussemburghese, ma successivamente appella la decisione di rigetto di registrarsi nel registro commerciale tedesco. La Germania permetteva soltanto fusioni tra società residenti in Germania, pertanto fusioni a livello nazionale. La società tedesca chiede un "preliminary ruling" alla Corte Europea di Giustizia. La CEJ statuisce che il diritto di stabilimento in base agli articoli 43 e 48 CE sanciscono il diritto per le società di partecipare alla vita economica di altri Stati Membri, pertanto vi era una violazione di cui agli articoli 43 e 48 CE. Seguendo la giurisprudenza in Sevic, nel 2005, Allianz Ag e RAS S.p.a annunciano la loro intenzione di creare un'unica società costituendo una Società Europea. Nel febbraio del 2006 l'assemblea straordinaria di Allianz approva il progetto di fusione, RAS S.pa viene inglobata in Allianz dando vita ad una SE. Lo scopo della direttiva fusione transfrontaliera è quella di creare e facilitare un mercato unico europeo, è possibile inoltre l'applicazione soltanto alle società che sono state formate in base alla legislazione di uno degli stati membri, ed hanno la sede legale, centro di amministrazione o sede operativa all'interno dell'Unione Europea. In una transazione come quella in questione, vari sono i fattori che possono creare delle barriere all'ingresso: tassazione, barriere economiche e la differente legislazione tra i vari stati membri. D'altronde invece, vari sono i motivi per una fusione: le società cercano di espandere il loro business geografico e creare delle sinergie, in fatti due o più società possono creare un unico valore., maggiore se lavorassero in maniera separata. Lo scopo principale della mia tesi è quello di capire se sussistano meccanismi di protezione per gli azionisti di minoranza. L'articolo 4 della Direttiva Fusione Transfrontaliera, permette agli Stati Membri di applicare gli stessi meccanismi di protezione per una fusione a livello nazionale. Tale protezione è contenta sia all'interno della Direttiva 56/2005, sia all'interno del Regolamento 2157/2001 per la costituzione di un Società Europea (SE). Una fusione transfrontaliera, ha certamente un impatto sugli azionisti, perché si vedono azionisti in una nuova società ed in aggiunta con una diversa legislazione, pertanto una protezione deve essere garantita. Il grado di protezione differisce in base alle varie legislazioni europee. I diritti che sono garantiti ad un'azionista sono: il diritto ad essere informato, il diritto di voto, ed il diritto ad una valutazione delle azioni "appraisal right", particolarmente invocato presso le Corti del Delaware. Prima che una fusione abbia i suoi effetti, un progetto di fusione deve essere redatto da entrambe le società in modo tale da assicurare tutte le informazioni utili per l'azionista. Nel caso di un'informazione asimmetrica, soltanto una parte conosce informazioni ulteriori rispetto alla controparte, tale situazione potrebbe ricadere nella teoria agency problem. In base all'articolo 10 paragrafo 2 della Direttiva 56, qualora uno Stato Membro possieda un meccanismo di compensazione per gli azionisti e non ostacola la fusione stessa, tale meccanismo può essere applicato qualora le altre società lo accettino nelle loro assemblee generali. Vari sono gli Stati Membri che non prevedono del tutto una protezione, tra i quali: il Belgio, la Francia, la Lituania e la Bulgaria. In Francia meccanismi di protezione in una fusione transfrontaliera non sussistono, ma soltanto in una fusione a livello nazionale. Nel caso di specie, l'unico rimedio previsto risiede nel concetto di abuso della maggioranza, gli azionisti di minoranza posso esperire un'azione alla corte e chiedere la nullificazione della fusione stessa. I diritti degli azionisti inoltre sono da collegare al concetto di classi di azioni, La situazione è molto diversa nel Regno Unito dove le classi di azioni sono molto più flessibili rispetto all'Italia. Uno dei rimedi per creare un margine di protezione, risiede nel diritto di valutazione delle azioni (appraisal right). Tale rimedio è usato presso le corti del Delaware, il cui procedimento risiede nell'articolo 262 DCGL; permette all'azionista una rivalutazione delle proprie azioni con metodi differenti. Il metodo Delaware block era il più utilizzato ed utilizzava vari fattori per determinare tale rivalutazione, ad ogni fattore era assegnata una percentuale che veniva sommata con le altre. Si trattava di valori di volta in volta ponderati, consistenti nel valore patrimoniale (net asset value), nei redditi di impresa (earnings valuation) e nel prezzo di mercato delle azioni prima dell'annuncio della fusione (market price). La block rule ha determinato il valore di un'impresa prendendo in considerazione i redditi di impresa negli ultimi cinque anni. Tale metodo è stato soggetto di critiche perché non contiene fattori rilevanti che possano creare un a valutazione reale delle azioni. Il caso Weinberger ha sottolineato l'importanza di creare nuovi metodi per considerare il "giusto valore" delle azioni, da qui il metodo "discounted cash flow" utilizzato presso le Corti del Delaware. Tale caso ha considerato oramai il "block metode" come "outmodel". Tale mutamento nasce anche nel considerare il vecchio modello troppo rigido. Il concetto di giusto valore è insito in tali transazioni. Il concetto di appraisal right lo si ritrova anche in alcune legislazioni europee, mi sono soffermato in Germani, Olanda e nel Regno Unito. La dottrina e la giurisprudenza concordano che l''appraisal right debba accertare il fai value delle azioni possedute dall'azionista dissenziente. I metodi più utilizzati nel Delaware restano il discounted cash flow, il metodo della capitalizzazione dei redditi, i metodi della società comparabili e delle transazioni comparabili e cono minore frequenza i metodi che fanno riferimento a grandezze patrimoniali. Anche in Olanda è possibile esercitare il meccanismo dell'appraisal right, qualora la società olandese venga acquisita da una società governata da una diversa legislazione. L’Olanda ha introdotto questo meccanismo come protezione degli azionisti e risiede nell’articolo 2:33 DCC. Soltanto l’azionista che ha votato contro la fusione è intitolata di tale diritto. Tale articolo è in linea con l’articolo 4 della direttiva 56/2005. Gli azionisti che non erano presenti all’assemblea generale, non hanno diritto ad esercitare tal diritto. Inoltre l’azionista che ha votato tramite voto elettronico a distanza può esercitare tale diritto. Una delle principali difficoltà che si incontra in tale transazione, risiede nella valutazione delle azioni; si ritiene che si possa tenere in considerazione il valore di mercato delle azioni, come punto di partenza. In Germania la situazione non è dissimile da quella Olandese, infatti gli azionisti di una società tedesca GmbH che viene assorbita da una società governata dalla legislazione di un altro Stato, sono titolari dell’appraisal right. L’unica differenza risiede nel fatto che la valutazione delle azioni deve essere effettuato prima della fusione secondo la legge olandese. Nel diritto tedesco invece tale diritto viene invocata nei confronti della società, come una successione a titolo universale. Il concetto dell’appraisal right lo si ritrova anche nel Regno Unito ma non in situazioni di cross border come una fusione. Infatti recentemente vi si è aperto un dibattito se sia possibile estendere il diritto alla valutazione anche in ipotesi di fusione transfrontaliera; ne consegue pertanto che in una tale circostanza, l’azionista è costretto a seguire le sorti della società, attraverso un cambiamento di corporate e business law, ovvero di legislazione. In conclusione, una fusione transfrontaliera coinvolge diverse legislazioni e la protezione degli azionisti di minoranza trova la sua fondamentale importanza anche se in un contesto dove manca una vera e propria armonizzazione tra i vari stati membri. Il risultato che scaturisce, è un diverso livello di protezione nei differenti Stati Membri. La protezione degli azionisti dovrà ottenere un’attenzione maggiore da parte del legislatore europeo, sia a livello di “corporate che di company law”. La domande principale che viene da porsi, è, se i meccanismi messi a disposizione da parte dei vari Stati Membri siano neutrali o mancano di un’armonizzazione. Inoltre sebbene la protezione degli azionisti rappresenti uno dei punti principali da riformare, nella casistica generale, non sono sorti ostacoli tali da impedire la fusione stessa.

CHAPTER

1) Historycal context

Mergers between companies located in different Member States are difficult, especially if the company will have its registered or head office in another State. The Directive 2005/56/EC is aimed at facilitating this type of mergers. Each company which takes part in a cross border merger remains subject to the provisions and formalities of national law which would apply in the case of a domestic merger. The Directive's rules have been transposed in the different national legislations in order to create an harmonisation of the Third Council Directive concerning mergers of public limited liability companies

EC Directive no 2005/56/EC on cross border mergers of limited liability companies set forth for the first time a set of rules aimed at facilitating cross border merger between various type of limited liability companies governed by different law of Member States. One of the main reason is to integrate the single market leading companies to do business within different countries. Prior to the Tenth Directive no common rules existed to govern Cross border Merger, and companies were seen as "creature of their own jurisdiction"[1] subject to different national legislations in relation to cross border transactions.

The first draft on rules facilitating cross border merger emerged in 1967 in order to guarantee " the possibility of mergers between companies governed by the laws of different countries"[2]. One of the first draft Convention was published in 1973 but has never been ratified. The Cross border Merger Directive is based on a proposal by the European Commission of 18 November 2003 for companies with share capital. The Economic and Social Committee formulated its opinion on 28 April 2004[3] and on 10 May 2005 the European Parliament sent the amended proposal back to the European Commission for finalisation. The Cross border merger directive entered into force on 26 October 2005.

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[1] UGLIANO: The New Cross border Merger Directive: "*Harmonisation of European Company law and Free movement,"* European business Law Review Volume 18 (2007)

[2] UGLIANO: The New Cross border Merger Directive: "*Harmonisation of European Company law and Free movement",* European business Law Review Volume 18 (2007)

[3] Official Journal C 117 of 30 April 2004, Notice No. 2004/ C117/11

1.1) Scope of application of Cross Border Merger

The application of the directive is limited to limited liability companies formed in accordance with the law of a Member State and which have their registered office, principle place of business or central administration within the European Economic Area; moreover a merger which has a cross border dimension, involves at least two of companies that are governed by the laws of different Member States. (Art 1 Directive). A company's central administration is considered to be its head office so these terms are uses interchangeably in the Community regulations and directive on company law, also in accordance with the European Court of justice's case law. The Cross border Merger is entitled to authorise merging without going into liquidation and the transfer of assets and liabilities to the surviving or newly formed company.

Firstly, the companies participating in the merger must be entitled to merge under their national law Art4(1)a Directive. Secondly the companies participating in a merger must fulfil provisions and formalities of national law to which they are subject 4.(2)b Directive.[4]

According to Article 2(2) of the Directive, a merger can be conducted in three ways:

1. One or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10% nominal value or in the absence of a nominal value, the accounting par value.

2. Two or more companies, on being dissolved and without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and if applicable a cash payment not exceeding 10% nominal value or in the absence of a nominal value, the accounting par value

3. A company, on being dissolved without going into liquidation, transfer all its assets and liabilities to the company holding all the securities or shares representing its capital (parent/ subsidiary merger, is a simplified merger)

[4] DIRK VAN GEERVEN (2005) " Cross border mergers in Europe" p 5

In the case of a merger between subsidiary and a parent company where this latter owns at 90% but less than 100% of the shares of the former, is qualified as a simplified merger but is not covered by the Art 2 of Directive.

In the point (2) , the merging companies which are going to set up a new Co, have the result to establish the merged company in a new jurisdiction different from the jurisdiction of the merging companies. In fact the establishment is an expression to achieve out the right of freedom of establishment within the internal market, guaranteed by the Art 49 TFUE.

The merger procedure shall be governed by the national law where the merging companies have their registered or head office, but they must compel different steps:

1) Common draft terms of cross border merger

The management or the administrative organ of each companies participating to the merger shall prepare a common draft term of cross border merger as set forth in Art5 Directive. This draft must include several information[5]:

(a) the form, name and registered office of the merging companies and for the company resulting from the cross border merger

(b) the ratio used for the applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;

(c) the allotment for securities or shares representing the capital of the company resulting from the cross-border merger;

(d) the impact for the employment post the cross border merger

(e) the date from which the holders of shares are entitled to share in profits and any special conditions affecting that entitlement;

(f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;

(g) the special rights which are conferred to the holders of shares and to the holders of securities other than shares representing the company capital

(h) any special advantages granted to the experts who examine the draft terms of the cross-border

[5] Article 5 Directive 2005/56

merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;

(i) the statutes of the company resulting from the cross-border merger;

(j) where appropriate, any relevant information regarding the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger, as set forth in the Article 16;

(k) information regarding the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;

(l) dates of the merging companies for accounting purposes used to establish the conditions of the cross-border merger.

The draft must be render public no later than one month before the general meeting for the approval of merger. Several information must be published in the official gazettes of the Member States and shall concern[6]: (i) the corporation form, name and registered office of each merging company, (ii) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are field in respect of each merging company, and the number of the entry in that register, (iii) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge

2) Management report

A report for the shareholder shall be drafted for the shareholders of each merging companies and also for the employee[7]. The draft shall contain economic and legal reasons in order to merge with the company/ies. The report shall be prepared by the administrative or management organ and is available to the shareholders and employee one month before the date of the general meeting.[8]

3) Report of the independent expert(s)

[6] Article 6 Directive 2005/56

[7] DIRK VAN GERVEN (2005) "*Cross border mergers in Europe*" p 15

[8] Article 7 Directive 2005/56

The independent expert(s)[9] shall prepare a written report for the merging companies' shareholders indicating also the method for share exchange ratio. No report shall be written if all companies' shareholder involved in the merger shall waive. The waiver should be signed by all the shareholders and must be produced at the general meetings of the merging companies. According to Article 8(3) Directive the experts are able to seek information of the merging companies, such as copies of documents and access to books of account and other relevant documents of the companies concerned. The experts are entitled to examine the management report of each merging companies.

4) Shareholder approval

The general meeting generally shall approve the cross border merger through a majority or quorum required by national law of each merging companies. Member State may provide that a simple majority is sufficient if at least the half of the subscribed capital is represented[10]. The general meeting is held at least one month after publication of the draft terms of cross border merger. In one case the general meeting is not required in the event of merger by absorption but just if the following requirements shall be fulfilled: (i) draft terms of cross border merger are published in the Member Stat of the acquiring company at least one month before the general meetings of the companies to be absorbed, (ii) all shareholders of the acquiring company are entitled to inspect the corporate documents (the draft terms of cross border merger, the annual accounts and management reports of the merging companies for the last three financial years, an accounting statement prepared no earlier than the first day of the third month preceding the date of the draft term of merger) , (iii) one or more shareholder holding a minimum percentage of the acquiring company are entitled to request that a general meeting be called in order to approve the merger. This percentage must be defined by national law but must not be higher than 5 per cent.[11]

5) Pre merger certificate and the scrutiny of the legality of a cross border merger

In a cross border merger . the character of such a transaction is subjected to a scrutiny of a notary or an authority. Such scrutiny is aimed at checking the formalities of each participating companies involving in the cross border merger but with a special consequence according to paragraph 3 of article 10 of the Directive. The articles provides the possibility that the national law has a different

[9]Article 8 Directive 2005/56
[10] Article 9 Directive 2005/56
[11] DIRK VAN GERVEN (2006) "*Cross border mergers in Europe*" p 17

procedures in particular the chance to check the ratio change of shares or the protection of minority shareholders but without preventing the merger. In such case , the procedures may be applied according to an agreement of all participating companies and hence the final decision will be binding for the resulting company post merger. Moreover a second scrutiny will be issued to a notary or to a specific authority

6) **Entry in force, registration and publication**

The resulting company[12] from the merger shall be entered into the effect on the date determined by the national law of the Member States where the company is set up. The completion of the merger is published in the Member States of the company participating to the cross border merger and the notice shall be published in the official gazette of each Member State. The information about the resulting company shall be filed in the public register and published in the official gazette of the Member State where the company is located. Once the cross border has entered into the fore, shall not be declared null and void[13]. In the event of a violation of a provision , third parties may be bring an action to the Court only for damages.

To sum up, the Cross border Merger is a milestone, in order to create a common market within Europe[14] and to not prevent a company from moving from one State to another one. This principle [15]is also set forth in the article 293 of the EC Treaty, proving that Member State shall enter into negotiation for the possibility of mergers between companies governed by the laws of different Member States.

1.2) Merger as synonymous of " the right of establishment": Sevic case

Cross border Merger must be seen in the light of the fundamental freedom of establishment (Art 49 TFUE) with the elimination of barriers in order to enable undertakings to operate and structure their own business in EU. According to Art 26 TFUE one of the goal of European Union is to create a common area creating an internal market characterised by the abolition of barriers for the free movement of good, persons, services and capital. A Cross border Merger sounds like a corporate

[12] UGLIANO: The New Cross border Merger Directive: "*Harmonisation of European Company law and Free movement",* European business Law Review Volume 18 (2007) p 610
[13] DIRK VAN GERVEN (2006) "*Cross border mergers in Europe*" p 17
[14] PAPADOPOULOS T (2011) " *EU regulatory approaches to cross border mergers: exercising the right of establishment*" p80
[15] ALAVI H, KHAMICHONAK T (2016) " *European Provisions for the protection of dissenting Shareholders within the framework of Cross border mergers*" p 74

restructuring and fall within the scope of action trying to abolish obstacle in an internal market[16]. One of the main goal relating to the freedom of establishment is to create a competitiveness of internal market, so an undertaking must be allowed to run its business in different Member States or otherwise the competitiveness in the European area shall diminish. Therefore in 2003 , the European Commission has tackled this issue as a priority in order to create an harmonisation of the different rules of the Member States in the context of the cross border restructuring[17]. A merger or a cross border merger is the expression of the creation an organisational structure, concerning legal and economic factors, thus if a company consider that this kind of organisational advantage, this transaction must be protected in accordance with the Article 49 TFUE (ex Art 43 EC Treaty). Thus a cross border mergers is a significant transaction in order to achieve corporate strategies, competitiveness and internal markets benefits relating to the right of fundamental freedom. After SEVIC Case[18], a cross border falls in the scope of Art 49 TFUE.

In 12 December 2012, a Commission Communication called Action Plan: European company law and corporate governance- a modern legal framework for more engaged shareholders and sustainable companies, stresses the importance of this topic, through a legislative and non legislative action, which can follow three guidelines:

- Transparency between companies and investors
- Long term shareholders engagement
- Improving the framework for cross border operations of companies

One has to bear in mind that according to art 3 TEU " The internal market shall comprise an area without internal frontiers in which the free movement of good, persons, services, and capital in ensured in accordance with the provisions of this Treaty", the Union is aimed to balance economic growth and price stability , social market economy and a high level of protection. From an economic point of view , cross border merger constitutes one of the most important elements of the internal market which fortifies the development of EU corporations not only at EU level but also on a global level[19]. A cross border merger is a transaction of restructuring where all assets and liabilities are transferred but without going into liquidation and does not require the consent of a third party , except a general meeting in each merging companies. A long debate that could arise

[16] STEIN H (1972) *"Harmonisation of European company law"* p 324
[17] *Modernising Company law and Enhancing Corporate Governance in the EU- A plan to Move Forward* (Company Law action plan)
[18] Case C 411/03 SEVIC System AG
[19] PAPADOPOULOS. T (2012*) " The magnitude of EU fundamental freedoms: Application of the freedom of establishment to the cross border mergers directive"*p 521

whether European Union is a new scenario as Delaware re(incorporation)[20], European Union is like a landscape where company law concerns the controlling of shareholders in such kind of transactions. Minority shareholders litigation is quite rare and takeover battle are rarely decided into the Court. Secondly the lack of harmonization of company law within European Member States conduces to consider EU landscape less attractive for investors.[21]

In the light of a cross border merger which falls in to the right of establishment, SEVIC case is a mile stone in order to discuss about it.

In SEVIC, a German company (SEVIC) tried to merge with a Luxembourgish company (Security Vision SA), with the absorption of the latter with the former, with the result that all assets of Security Vision were to be transferred to SEVIC company without going into liquidation and the Luxembourgish company would cease to exist. According to German law, it does not allow cross border merger but just domestic mergers, so SEVIC could not merge with Security Vision SA because cross border mergers were not permitted in Germany. One of the consequences of this situation was meaning that domestic mergers were allowed to be registered differently to cross border mergers. The German Court asked a preliminary ruling whether German law was compatible with articles 43 and 48 EC (articles 49 and 54 TFUE).In its judgement, the ECJ ruled that articles 43 and 49 EC Treaty don't allow a Member State to refuse registration in the commercial register, where one or more companies is established in another Member State, whereas such registration is possible under domestic law. Additionally, the Court affirmed a possibility of justification stating that:***"Such a difference in treatment constitutes a restriction within the meaning of Articles 43 EC and 49 EC, which is contrary to the right of establishment, and can be permitted only it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application must be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it."***

AG Tizzano stated that in order to guarantee a complete right of establishment, this right , must cover all measures which permit or even facilitate access to another Member State in order to run an economic activity in that Member State by allowing persons to participate in the economic life of the country effectively and under the same conditions as national operators. The ECJ stressed also the importance of a cross border merger as not only as a freedom of establishment but also as meaning of transforming companies pursuing an economic activity in a new form and in another

[20] ENRIQUES.L (2004) "*EC Company law and the fears of a European Delaware"* p 1264
[21] ENRIQUES.L (2004) *"EC Company Law and the fears of a European Delaware"* p 1266

Member State . Confirming the argument of AG Tizzano, the ECJ confirmed the concept that a cross border merger is a transaction of a corporate restructuring activity[22]. Therefore Sevic is a good case illustration of how the Court used the Art 49 TFUE stating that:

"Cross border mergers operations like other company transformation operations , respond to the need for cooperation and consolidation between companies established in different Memebr States. They constitute particular methods of exercise of the freedom of establishment , important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Art 49 TFUE

Additionally the ECJ did not distinguish between an inbound and outbound merger even if SEVIC is a case of inbound merger. An inbound merger has the aim to set up an establishment by the domestic company that acquires the foreign company. On the other hand , an outbound merger has the aim to set up a secondary establishment by the foreign acquiring company. Therefore the ECJ did not distinguish between the two kind of mergers, without expressing any differentiation, the AG TIzzano stated that Art 43 and 49 EC Treaty can ***"not prohibit any form of restrictions on entering and on leaving the national territory of a Member State"***. Thus inbound and outbound mergers are transactions which lay down under the protection of the freedom of establishment and cannot be allowed by Member States or would result a violation of Art 49 and 54 TFUE

1.3) The consequence of a Cross border Merger

A cross border merger has the consequence to eliminate barriers to facilitate economic change and creating the formation of domestic market and could have positive effect in order to allow the formation of growing relating to economic activity. Firstly a cross border transaction may increase the demand in a new market Member State and secondly the Member State has benefits in terms of productivity. Cross border merger is becoming more fashionable and also an alternative transaction cheaper for setting up a new CO. Additionally to some positive effect, a Merger integrates companies that are established in different member States so different legislations and tax issues. This brings to complex variables that must taken into account for the merged company. A good Merger is an operation where is bear in mind the business and legal structure of the merging companies. A merger is an investment model by expanding the internal organization through the

[22] PAPADOPOULOS.T (2011) *"EU Regulatory approaches to cross border mergers: exercising the right of establishment"*

external market trading[23].In addition, cross border advantages that derive from a merger are different but they may be subdivided into three areas:[24]

Brand resources: A merger deals with a synergy of both partied involved in the transaction , improving the technology and expanding their market in other area

Economies of scale: When a merger between two or more undertaking becomes effective, the combined market of the merging companies could help the Merged company to owns power to negotiate in different markets and power to negotiate with suppliers

Diversification: Two or more merging companies may help the merged company to become more diversified. A variety of products will help reducing business risk

In order to deal with a cross border merger, different strategic objectives drives for the achieving of the transaction:

Strategic Reasons

- i)Synergies
- ii) Market Power
- iii) Resource Seeking
- IV) Geographical Diversification

Synergies: This concept if one of the main reason of domestic or cross border merger and generally they create value in the case of an operating synergy economy of scale by contrast of an international synergies where the value of the transaction is higher than the individual value of company concerning (merging company)[25]**.** Operating synergies lead to increase the value of the firm taking the advantage to generate long term profit, on the other hand an economy of scale could derive from an operating synergy, reducing per unit the cost.

Market power: Synergies between the merging companies have the effect to produce a high degree of sustainability and competitive advantages conducing to maintain prices above competitive levels. An increase of market power generally is given by an horizontal merger or by contrast in the case of a vertical merger, the supplier of distributors control several segments of the value chain.

[23] GUO R. (2015*) "Cross Border Economic development and cooperation" in "Cross border management:Theory, method and application"* (2015) p 301
[24] GUO R. (2015) *"Cross Border Economic development and cooperation" in "Cross border management:Theory, method and application"* (2015) p 310

[25] GEORGEN. M, RENNEBOOG.L (2004) " Shareholder wealth effects of European domestic and cross border takeover bids" p 31

Resources Seeking: A merger independently whether has been conducted at domestic or cross border dimension, is an opportunity to acquire new knowledge especially in technology sector. A merger company(ies) could obtain the access to resources of patent technology.[26] Generally speaking it appears more efficiency to reach out to this goal when companies involved in the merger have complementary technologies, increasing the result involved. In 1992, the European Commission in its report[27] stated as follow: "***Merger may be carried out in the interests of economic of efficiency, permitting improved exploitation of economies of scale and the pooling of expertise, and may thus help Community industry adjust its structure to the challenge posed by the integration of the internal market and the internationalization of the economy".*** Hence it appeared a new era to encourage cross border merger transactions especially in the fields where the technology is involved. Additionally a merger may be used in the contest to obtain assets and to acquire the technology know-how much more rapidly so that to growing in a technological market

Geographical diversification: A company which wishes to grow and does not find a suitable partner in its domestic country, could beneficial of the cross border dimension for providing benefit so they will be able to run out their business activities in new entry markets and also promoting their market power, which markets are highly profitable[28]. Hence the diversification is a significant factor which attracts foreign companies that would increase their investment. The diversification draws up a new way to conduct business in the European Countries and it generates source value in cross border merger.

The minority shareholders

1.4) Why do they need protection?

As we discussed in chapter 1, one of the main goal of Cross border directive is to facilitate mergers with foreign companies which have registered offices in different member states. The importance of shareholders' protection has been acknowledge by ECJ in different cases law, linked with the

[26] GLAISTER K.W, MOHAMMAD.F.A (2010), *"Motives for Cross border mergers and acquisitions: Perspective of UK firms"* p 31
[27] Commission of the EC, XXI st report on competition policy, par 5, pag 18
[28] LU .W, BEAMISH. P (2004) *" International diversification and firm performance"* p 601

freedom of establishment and the freedom of capital. European Union approach is to create a high level of protection but with a lack of harmonization within the different European Member States . Additionally according to art 4.2 of directive member States are free to introduce clauses in order to implement the protection of shareholders. This provision is a gap for the implementation of a new harmonization in company law system. One of the harmonization mechanism of company law has been the adoption of the Third directive on merger , as a first step for the adoption of Cross border merger with the Tenth directive in 2005. In theory Member States are not allowed to prevent cross border merger and to introduce discriminatory measure for this kind of transaction.[29] Moreover according to SEVIC decision, Member States could impose restriction measure in order to guarantee public interest and also the protection of minority shareholders. Cross border Merger allows Member Stated to adopt measure for the protection of minority and for those who have opposed.[30] The Third directive on domestic merger does not propose additional measure for the protection of minority shareholder like the Tenth directive even if is too silent on which sort of remedied should be adopted for reached out that specific goal. The adoption of extra protection by Member States could not leading to constitute a restriction in accruing to articles 43 and 48 EC Treaty and render the cross border merger less attractive than a domestic merger.

Minority protection is an important issues because generally the decision making power is held by the majority so the parties concerned have to strike a balance between minority interest and on the other hand the majorities' interests. Generally the minority has the characteristic to represent less than 50% of the voting rights within a company. Minority shareholders also represent those who have opposed the merger but the European legislator has not clarified if must be taken into account also those who have not approved the cross border merger nor the opposed, leading to consider them as abstaining shareholders. One of the main question which has to bear in mind is if the abstaining shareholders must be qualified as minority shareholders or is a neutral vote. If we look at article 4.2 of Cross border mergers Directive, states that an " extra protection" is given to those who have opposed the merger, but abstaining shareholder are not included in this matter. A cross border merger is a change of corporate law , in fact shareholders which were governed by their national law, would be subject to company law of another Member State, leading to become shareholders of another company within a Member State. This change of applicable law could be detrimental for shareholders in relation to their level of guarantee rights, because it seem they are more familiar with their national law than an unknown law. Hence it appears obvious that dissenting and

[29] Sevic case C411/03- UGLIANO A. (2007) *"The New Cross-Border Merger Directive: Harmonisation of European Company Law and Free Movement" pag* 592

[30] WYCKAERT.M, GEENS.K (2008) "*Cross-border mergers and minority protection: An open-ended harmonization",* p 41

abstaining shareholders who have opposed the merger , should be granted appropriate rights in cross border merger. European legislator lacks of harmonization and clarification in this issues but in order to consider a high level of protection for investors, minority withdrawal right or appraisal right can be adopted in this area.[31]Even though a balance of interests between the minority and majority must be at stake , generally the majority tend to bind dissenting shareholders so they shall abide the decision of the majority which have a great impact on their rights, but ensuring to the minority and exit right.[32] The problem of minority shareholder is set forth in the conflict between the controllers of a company and controlling shareholders, hence an approach for the dispute resolution between these two shareholders' classes lies in a regulatory body, a court, entitling minority shareholder several right to bring an action against the directors. Even if the minority shareholders represent less than 50 percent, they are part in the company's investment, so they need a protection by guaranteeing them right conferred by law. Additionally they appear as stakeholders because they take the risk in the business activity of the company and take part in the affairs of the corporation[33]. So several right like: the right to the dividends, appraisal rights, the right to be consulted and be informed must be guaranteed. This theoretical basis as right of property could be conferred to minority shareholders but as fundamental right of the shareholders. Generally minority and majority shareholders are tied to the company by agreement, in this sense they are bind in the transaction with third parties[34]. A shareholder is also a stakeholder so if the contractual terms are not favoured to the minority shareholders, this could lead to a decrease of share value price with the risk that fewer investors will purchase shares of the company. The participation of minority shareholders in a company means to create a wealth notion[35]. Hence in a cross border merger, appears desirable to encourage minority shareholder to keep on creating their wealth in that merged company rather than exercising a withdrawal right. In this event, minority are conferring several rights[36] in order to take part in the company's life and in promoting corporate governance that contribute to the creation of wealth. The protection for minority shareholders relied not only on corporate law but on corporate democracy , especially they must be protected from damages caused by the abuse of the majority rule. A majority rule becomes legitimate when creates a ground of adequacy for all the participants involved in the company[37]. A good ground is established when it compels democratic values as such: fairness, equality, good faith. So if the minority shareholders'

[31] VENTORUZZO.M (2007),"*Freeze-Outs: Transcontinental analysis and reform proposal"* p 851
[32] LEE.J, (2005)," *Four models of minority shareholder protection in takeovers",*p 811
[33] BLAIR.MM (1995)," *Rethinking assumption behind corporate governance",*p 12-17
[34] PAPADOPOULOS.T (2009), "*The relationship between takeovers bids and mergers:Implications for the internal market of the European Union*"p 810
[35] PARKINSON.J,(1995)*"Corporate power and responsibility"* p 41
[36] CHANDER.A (2003)," *Minorities, shareholder and otherwise*",p123
[37] COHEN J(1997) *"Procedure and substance in Deliberative democracy, in democracy and difference*" p 412-413

interests are not taken into account, the democratic principle is broken and the majority rule is considered to be aggressive and should not accepted in a democratic society.[38]

1.5) The legal context of shareholder protection

As we discussed in the first chapter, mergers are one of the most complex transaction because involves different jurisdictions. In the light of domestic rules and of art 4.2 Cross border Merger Directive, the European legislator did not consider this issue for an harmonization relating to the protection of dissenting shareholder, hence the approaches of Member States are different. In a Communication " A plan to Move Forward" the Commission stressed the importance of shareholders' rights as an essential part of corporate law within Member States, leading to discover three macro area: access to information, shareholder democracy and shareholders' rights.[39] Their protection would be discover by mechanism left to the Member States, in accordance to art 4.2 of CBMD.

Article 4.2 states : ***"A Member State may, in the case of companies participating in a cross border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross border merger"***

Article 4.1 of CBMD, refers the company participating in a cross border merger are covered by a process aimed at creating a high level of protection. Specifically, Member States may adopt provision in order to reach out the aim, hence the world "may" is clearly indicative because they are not obliged to adopt extra provisions.

Additionally Article 6 of CBMD states that the common draft terms of a cross border merger are to be published in a national gazette of each Member State participating in the merger , at least one month before the general meeting. The publication must indicate , the arrangement of each merging company relating to the protection of shareholders minority in order to satisfy shareholder's right information and be able to cast a vote at general meeting for the approval of the cross border merger.

Further, article 10.3 provides that if the law of a Member State, provides for a procedure to compensate minority shareholders without creating obstacles to the transaction, such minority arrangement shall be applied if the other merging companies situated in other Member States, not having such procedures, have approved it during the approval of the draft term of the merger.

[38] COHEN J (1997) *"Procedure and substance in Deliberative democracy, in democracy and difference*" p 407
[39] COM 2003/0284 pag 3

The CBMD allows Member State to provide for arrangements protecting shareholders in the case of a cross border merger transaction, but lacks of harmonization in the different European countries and indeed the Directive does not qualify who is the minority shareholder and in which company the minority deserves protection or the nature of the protection itself[40]. Whereas several Member States have interpreted the Directive by introducing minority protection clauses , on the other hand some other Member States have not provide for such remedies, for example, Bulgaria, Belgium, France. Member States which have introduced mechanisms of protection, follow this options: i) the right of withdrawal; ii) repurchase of shares; iii) monetary compensation and in some national legislations, the compensation in case of inadequacy is bring before to a Court or a judge; iv) management and experts. Even though the European legislator does not provide for a common system, is still possible the transaction even id with a Member State which is not covered by minority protection clauses, hence the question that arises is whether this framework is clearly sufficient to balance the conflict inside the merging companies and could satisfy the dissenting shareholders'claims[41] In September 2014, the Commission in its consultation with scholar, practitioners, public authorities stressed the evidence relating to three questions: i) whether the minority of shareholders rights in a cross border merger shall be harmonised, ii) whether the date when minority shareholders can start exercising his/her rights shall be harmonised; iii) whether the period of time when minority shareholders may exercise those rights shall be harmonised. The Council of Bars and Law Societies of Europe, pointed out that there is no specific difference between domestic and cross border merger regarding minority protection. In the light of a certain level of minority shareholders protection, countries with high level of shareholder mechanisms protection, are able to pay high dividends; leading to the evidence that the investor protection laws influence corporate governance on stock prices and dividend policies.[42] On the other hand such protection could take an important role conferring to minority shareholders the possibility to monitor the actions of corporate bodies. In a transaction like the cross border merger, a balance between the different parties and the pluralism of interests shall be reached out giving a protection to minority shareholders. One has to bear in mind that article 4.2 of CBMD gives a umbrella definition of protection but in order to guarantee this aim, is quite important the concept of predictability and efficiency in a cross border merger and for instance the determination of the share exchange ratio such in domestic and cross border merger. A merger may be used as synonymous of

[40]WYCKAERT M, GEENS .K (2008) " *Cross border mergers and minority protection: An open ended harmonization"* pag 43

[41]ALAVI .H and KHAMICHONAK T. (2016) " *European provisions for the protection of dissenting shareholders within the framework of cross border mergers"*,pag 82

[42] BECK T, LEVINE R (2004) " *Legal institutions and financial development"pag 31*

migrating the business of some or all merging companies[43] so when the merger has the cross border dimension the change of applicable law gives the need for a protection hence the ground behind the article 4.2 of CBMD. Cross border merger is the easiest way to change the applicable law, without going into liquidation but a sort of reincorporation process, motivated by the creation of economies of scale or synergies between the merging companies. Another reason for a change of applicable law according to empirical studies of mergers, is that being subject to a jurisdiction that grants a level of protection have the positive effect to arise the share prices of the company[44] and a better access to financial markets. As consequence of a cross border merger, shareholders, or better, investors, have to take into account the different legislation within European Union, leading to an unfamiliarity with the new jurisdiction. The interest of the shareholder must be such that the value of the investments is maintained unchanged and the exchange ratio of the new shares must be congruent, in order to not alter the cash flow of post merger transaction but resulting greater than the merging companies. Additionally increasing the wealth of the shareholders' investment is to be attributed to the increase in the value of the shares hence this value will also increase the company's ability to generate income. One of the interests of the shareholder is to maintain the economic value of the position and the proportionate shareholding of the investment in the post merger company. It is difficult to imagine whether the appraisal of the administrators regarding the valuation method and the economic factors are untrustworthy.

1.6) Duty of loyalty

Majority shareholders as class have the interest in maintaining control over minority jeopardizing theri interests, by diluting their fair value price or voting rights. Generally the former oppresses the latter . acting or failing to act leading to prejudice minority's interests. Minority shareholder oppression might be defined as the following:

"As a visible departure from the standard of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely, and also a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members"

A dispute between these two classes of shareholders arise including: conflict of interests, personal clashes, and disagreement over business policy. An example of dispute could happen when the

[43] RICKFORD J. (2007) "*The proposed tenth Company law Directive on Cross Border Mergers and its impact in the UK",pag 1393*

[44] BRIS. A, CABOLIS C (2010) " *The value of investor protection: firm evidence from cross border mergers" pag9*

interest of the majority shareholder who are controlling the management, differ from the minority because they do not hold a management position. An oppression remedy could be faced by two remedies: equitable remedy and equitable solution. The latter should protect the reasonable expectation of the parties, while the former is particularly difficult to reach out because Courts tend to balance majority and minority's interests. Giving to much discretion to the Court on the other hand, this situation leads to the hypothesis that shareholders are unable to predict the remedy the court will grant them.[45] These remedies do not result always as suitable solution, further the only remedy which is both equitable and efficient is a contract or an agreement ensuring decision making power and predictability. In order to analyze the concept of protection of minority shareholders in freeze out mergers, is significant to stress who is a controlling shareholder[46] in a company: is a shareholder who, in accordance with his/her power, can appoint a majority of directors and may influence the activities of the company itself; generally he/she holds a majority of voting rights. In the light of Locati v Johnson , a controlling shareholder is ***: "an individual who owns a majority of the shares or who, for other reasons, has dominant or control of the corporation, or a member of a small group of shareholders who collectively own a majority of shares or otherwise have that domination or control."*** A good controlling shareholder can increase the wealth of the company and of the shareholders themselves by contrast of a bad controlling shareholder which can reduce the survival of the company. The most important tools which generally a controlling shareholder use to determine its power, include the block holding. This tool can give to the shareholders several powers such as legal powers ,so controlling the board of management or de facto power . On the other hand a balance of interest between the majority and minority must be recognized especially for the protection of this latter. This constraint is based on the distribution of power; in fact some provision of company law in Germany, according to the Aktiengesetz, gives each shareholder the right to bring proceeding against the company.[47]Moreover, a controlling shareholder, depends not only by the amount of the shares but on the ground that is a situation of an agency relationship between the shareholder and the board of director. In all jurisdictions, shareholder may be liable for unfair self dealing, Court in Delaware is used to apply the entire fairness test , even if recently Delaware has applied business judgement when the trusteeship is combined with a form of majority of the minority vote.[48] Additionally in a cross border merger the oppression is at a high level leading to create a protection for minorities much more higher than comparing to the domestic one.

[45] HILL. A.C, McDONNELL.B.H (2007) *" Stonev Ritter and the expanding the duty of loyalty"* p1771
[46] SEGATO.L (2006) " A comparative analysis of shareholder protections in Italy and the United States: Parmalat as a case study", p 411
[47] §241-257 AktG
[48] How does Delaware Corporate law work? UCLA Law Review (1997)

Merger pools two or more corporations into a single corporation and shareholder's ownership can be diluted , transformed or in some jurisdiction cashed out (Delaware). Merger can give rise to agency problems, but is addresses by a decision right strategy,[49] thus different jurisdictions require super majority shareholder authorization; according to the Third Company law Directive, a minimum approval of at least two third of the votes at the general meeting, by contrast most U.S jurisdictions require a majority of all outstanding shares to approve the merger, although is around 70 percent or more of shares. The main management- shareholder conflicts in a merger are: i) management's self interested refusal to agree to a merger which shareholders agree (managerial entrenchment); ii) self interest's management attempts to build empires or to negotiate their future job status.[50] In US the US the so called managerial entrenchment is addressed by a combination of trusteeship, reward strategy and appointment strategy right. A second manager shareholder agency problem arises when managers tend to build an empire. The strategy adopted in this case are quite similar in the different legislations, requiring approval by gatekeepers, for example EU law requires merging companies an independent expert's reports prior the shareholders' meeting. This conflict of agency between majority and minority arise in a freeze out merger, such as a parent-subsidiary company, considered as related party transaction. In this transaction the controlling shareholder attempt to eliminate the non controlling shareholder in cash[51]. Related party transaction falls into the so called "tunnelling" which covers all forms of misappropriation of value by corporate insiders. One way to stresses the related party transaction is to requite internal decision making are made by an independent party. Is unique the technique adopted in Brazil because the Brazilian Securities Commission has promoted the trusteeship strategy by suggesting the approval of an independent special committee in the context of a patents subsidiary Merger. All jurisdictions strengthen the protection of minority when the parent company hold more than 90 percent, in France for example a merger can be invalidated by the so called "abus de majorité" doctrine, by contrast in UK, the "unfair prejudice" is used for proving an exit right for the minority at a fair price. Moreover the concept of duty of loyalty is high in Delaware's Courts and plays an important role correlating to the "entire fairness" test. Delaware Courts are well known for their scrutiny of procedural fairness especially when the transaction is not in line with business purpose. While this may be "de facto necessary to pass the entire fairness test, generally it may not be sufficient because Delaware courts

[49] ARMOUR.J, HANSMANN H, KRAAKMAN R *" Agency problems and legal strategies*"in KRAAKMAN R.H (2017)" *The anatomy of corporate law: a comparative and functional approach*" p31

[50]ROCK E, DAVIES P, KANDA H, KRAAKMAN R, RINGE W *" Fundamental changes* "in KRAAKMAN R.H (2017)" *The anatomy of corporate law: a comparative and functional approach*" p184

[51] VENTORUZZO M (2007) " *Freeze Outs: Transcontinental analysis and reform proposal*" p 841

attempt to look at a range of facts.[52]As we discussed previously, a conflict of agency arises when a parent company holds more than of 90 percent of a subsidiary company, and in this case jurisdictions facilitate minority buyout. EU law jurisdiction offers the equivalent of an appraisal right and dispenses the need for a vote of the subsidiary company and also the expert independent assessment, an option inspired by Germany jurisdiction, Konzernrecht. US law also permits the so called cash out merger when the parent company holds less than 90 percent, but in addition the Delaware courts review parent subsidiary merger under the "entire fairness" test. The burden of the proof resides on the plaintiff which requires the transaction and hence the court plays an important role in the business judgement rule; such a framework of ex post review protection. A competing interest is high in parent subsidiary merger , where the parent post the merger acquire the control over the subsidiary; an interest of the parents company is also the elimination of a double tax where the subsidiary is taxed on its profit which in turn are taxed to the parent as dividends when they are distributed to its shareholders. So after a parent subsidiary merger, the second tax on the subsidiary's dividends is eliminated and the parent pays only the single profits tax. A judicial protection is demanding by Delaware Courts and in particularly the concept of entire fairness exposed above is one of the most important step in Delaware cases since : Sterling v. Mayflower Hotel Corp. In that case a parent company merged holding the 85 percent of its subsidiary company and offered one share of the parent's stock for each share of the subsidiary stock. Minority shareholders of the subsidiary company did not compel in enjoining the merger; hence the court passed the scrutiny test of entire fairness to the courts, stating that: *"the concept of entire fairness holds all the relevant circumstances and that liquidation value of minority shares is not the sole determining factor".*

In David J Green & Co v Schenley Indutries , Inc, involving a parent –subsidiary merger, the parent company had merger with its 85 percent, giving minority shareholders cash as consideration. The Court stated that minority shareholders in order to prove fraud by the parent company and contesting the price value of shares, they had the burden of the proof in the transaction. It was a dispute about the value regarding the evidence of the parent of its actions depressing the price value. Generally it occurs when a parent prior to the merger with a subsidiary company causes an unfair distribution of tax benefits between itself and its subsidiary such that the values is depressed[53]

[52] ENRIQUES L, HERTIG.G, *" related party transaction* "in KRAAKMAN R.H (2017)" *The anatomy of corporate law: a comparative and functional approach*" p155

[53] BIGGER R, (1978) "*The fiduciary duty of majority shareholders in Freezeout Mergers: A suggested approach"* p225

In the case Singer v Mangavox Co, the Court held that the elimination of minority shareholders was a violation of the majority shareholder's fiduciary duty to the minority. The case concerned a parent subsidiary merger where the parent company holds 85 percent of shares in the subsidiary. The minority shareholders of Mangavox were offered $9.00 per share but the plaintiff, one of the minority shareholder sought an order for nullifying the merger because the price share value was not appropriate. The lower Court stated that the only remedy was the appraisal right under Delaware legislation. The supreme Court stated instead, that the merger had been effectuated for the only purpose to freeze out the minority shareholders. The directors of the subsidiary had voted against the merger on the ground of an inadequacy of price but they withdrew their opposition after they were offered two year employment contracts by the parent company. According to the plaintiff, a business purpose arises when it follows the interest of the subsidiary company, hence the Court did not give a ground of business purpose so it left open whether the "business purpose" could be that of the subsidiary rather than that o the parent company. Exactly after one month, the Court would have answered to the new concept of entire fairness, in **Tanzer v International General Industries**; the Court stated that the requirement is satisfied when the merger leading to a business purpose of the parent company additionally, it substituted "bona fide purpose" for "business purpose". Hence the only reason to create that transaction of incorporation was to facilitate the parent's long term debt financing, a topic which according to the Court was valid. One has to bear in mind that the concept of entire fairness applied in these cases just arose in a freeze out merger , in contrast when a merges is accomplished between two or more companies . The adequacy of consideration must be considered in a freeze out merger , in fact the Court in Tanzer stated that all features of transaction, rather than just the adequacy of consideration, are relevant. Singer and Tanzer are two relevant cases because they attempt to harmonize this area, a needed for minority shareholders.[54] The Supreme Court of Delaware had not clarified the entire fairness test and has left Delaware Courts open to apply different mechanism for the protection but without acting a jurisdiction concerning the topic. Although a test of balance between the economic and non economic factors is adopted, surely Singer and Tanzer have been a mile stone for reaching out an adequate state protection for minority shareholders in these transactions. Moreover the concept of the business purpose has been abolished by Delaware Courts in the case ***Weinberger v UOP Inc.*** ***[55]***The Delaware Supreme Court had to rule on the validity of a cash merger between Signal and its subsidiary UOP which the latter owns the formers with 50,5 percent. The plaintiff of minority

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[54] BIGGART.R (1978), "*The fiduciary duty of majority shareholders in Freeze out Mergers: a suggested approach*", p 232

[55] KENYON-SLADE.S (2004)"*Mergers and takeovers in US and UK*",p 223-226

shareholders of the subsidiary company, UOP, sues Signal because the price value was unfair. The Court stated that this is a situation which should be analyzed according to the "entire fairness test" having two aspects: "fair dealing" and "fair price". According to the Court fair dealing is about: ***" when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stakeholders were obtained"*** On the other hand instead a fair price is about ***"economic and financial considerations of the proposed merger, including all relevant features: assets, market value, earnings, future prospects, and any other element that affects the intrinsic or inherent value of a company's stock"***[56] These two aspect were examined by The Supreme Court as a whole and not separately[57]. Additionally Delaware Supreme Court[58] ruled that it was not a case relating to the entire fairness and the fair price should be established by considering " any techniques or methods which are generally considered acceptable in the financial community"[59]. In an important footnote, the Courts for the first time added that for a validity of structure of a freeze out merger such in the case this procedural condition must be fulfilled: ***"The result here could have been entirely different if UOP had appointed an independent negotiating committee of its directors to deal with Signal at arm's length... Particularly in a parent subsidiary parties had in fact exerted its bargaining power against at arm's length is strong evidence that the transaction meets the test of fairness"***[60]

SC's were independent committees for the negotiation of freeze out merger but it was unclear what would be the legal consequence under the procedural law. This question was answered in the case: ***kahn v Lynch Communication Sys.*** The case concerned is about a freeze out merger where the controlling shareholder of Lynch Communication Inc, Alcatel attempt to squeeze out the minority shareholders. Alcatel own 43,3 percent of Lynch subscribed capital but according to Delaware Court it was sufficient to influence Lynch's decisions and its board of director. The Court reaffirmed that the standard of review is the entire fairness and not the business judgment, even if with the appointment of the special committee. In addition the Court stated that the although the special committee would have a special veto o the transaction, the burden of the proof had been shifted to the plaintiff. [61]The special committee should have real "bargaining power "and must "be truly independent "[62]. Two requirement for considering the committee independent arise from the case Rabkin v Olin Corporation: first of all the majority shareholder must not dictate the terms of

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[56] Weinberger,§ 711
[57] Weinberger §715
[58] STRINE. L.E (2002)" *The social responsibility of boards of directors and stockholders in charge of control transactions: is there any "there" there?",*p 509
[59] Weinberger § 713
[60] Weinberger §709
[61] Kahn§ 1117
[62] Kahn §1117-1120

the merger. Second, the special committee must have real bargaining power that it can exercise with the majority shareholder on an arms-length basis[63].In order to establish the entire fairness to the minority shareholders, the test mush compel with a procedural “clause”: must be approved by a special committee of independent directors.

The concept of the transaction of freeze out merger is not unknown within European Member States but we have to consider several differences rather than Delaware jurisdiction. Generally freeze out merger in Europe are unavailable.[64] According to the article 3 and 4 of the CBMD, a cash payment may not exceed the 10 percent of the nominal value and if they do not have nominal value we have to refer to the accounting par value. No country in European territory allow a fully cash merger also in order to tax consequences or they would not enjoy the fiscal neutrality . The idea behind this principle relies in the American view where the shareholders is like an investor just interested in the fair value of the shares.[65] However in the Netherlands stock merger and triangular merger are possible under the Dutch law. A triangular merger arises when a company A establishes a subsidiary and launches a takeover bid on a company B. Some of the shareholders of company B sell their shared to the subsidiary and on the other hand a number of minority shareholders of company B willing to hold on their shares . Company B is merger into the subsidiary hence the surviving minority shareholders of B receive shares in company A. Instead a stock merger company is a transaction less complicate and flexible: a company A launches a takeover bid on the shares of another company B. A large part of the shareholders sell their share to company A but some shareholders hold on their shares. Company B mergers into the company A and the minority shareholders of company B receive by contrast shares of company A. In both these transaction the principle element which has to bear in mind is about the protection of minority shareholders, in fact when a merger is used as such a freeze out technique , minority shareholders are protected under Dutch law; the management board draws up a merger proposal and must be approved by the supervisory board. The assessment shall contain different requirements: the exchange ratio of shares and its justification. In both transactions, majority shareholder must own 95 percent of the outstanding shares, but several cases are interesting to understand whether the validity of the merger is still considered as reasonable and fairness especially when the threshold of 95 percent is not reached.One of the case considered as a mile stone for the validity of freeze out technique is Leyinvest case. Vendex NV launched a takeover bid on NV koninklije Bijenkorf Beheer (KBB), acquiring the 93 % of the shares. In the documents Vendex announced its intention to squeeze out

[63] Case No 7547 (1990)
[64] VENTORUZZO.M (2010) ,” *Freeze-Outs: Transcontinental analysis and reform proposal”*,p 882

[65] VENTORUZZO.M (2010)*,” Freeze-Outs: Transcontinental analysis and reform proposal*”,p 911-912

the minority shareholders but whether the threshold of 95 percent would not be reached, it engaged in a merger (Vendex and KBB). The threshold was not reached out so a merger proposal was prepared. The competitor or KBB, Leyinvest which was the subsidiary of Blokker, held the 6.8 percent of the shares in KBB. Leyinvest sues Vendex and seek to the court to retract the merger proposal. The Court denied this request because the merger was a transaction in order to squeeze out the minority shareholder and it had been announced also in the takeover bid document. Leyinvest argued that the shares' price was unfair but the President of the Court stated that they were valued at the same price such as in the takeover bid.[66]The tribunal of Amsterdam stated that the merger violate the principle of reasonable and fairness in accordance of the article 2:8 of the Dutch Civil Code, hence Vendex should have take into account also Leyinvest's interests; the Court ruled that the merged entity from Vendex and KBB had to indemnify Leyinvest for its losses. The concept of duty of loyalty also relies in the case Versatel Telecaom Internationa NV. Versatel was established in 1995 in the Neterlands, it was a listed companies and run its business activities through subsidiary companies. Tele 2 AB was a corporation established in Sweden and operated through the subsidiary company Tele"FinanceBV(Tele2Finance). IN 2005 Tele2 Finance made a public takeover for the shares in Versatel with the result that Versatel would be the subsidiary of Tele 2 Fianance. According to this transaction two scenarios are offered: i) If Tele2 Finance would reach the threshold of 95 % of the capital of Versatel, the remaining shareholders would be squeezed out. ii) if Tele2 Finance would acquire less than the threshold of 95%, Versatel would enter into merger with Tele2Finance and cease to exist. The threshold reached out by Tele2Finance was less than 95% so entered into a merger with Versatel, creating a triangular merger. The remaining minority shareholders would become shareholder of Tele2 Holding. Some shareholders of Versatel asked for an investigation about the reasons of the merger. The Commercial Chamber ruled that there was no violation in the transaction and moreover the squeeze out technique was used to create benefit to the majority shareholders by contrast the minority shareholder held shares in another company, the Holding company according to the triangular merger. In 2007 the Supreme Court confirmed the decision of the Commercial Chamber stating that the transaction was not avoiding the law but it was legitimate to squeeze out minority shareholders within a company. Hence the decision of the Supreme Court also stressed out the idea that a triangular merger does not violate the principle of "reasonable and fairness" even if the application depends on the different circumstances involved in the case, through a balance between the interest of minority and majority shareh

[66] President tribunal of Amsterdam 11 June 1999, Leyinvest/Vendex/KBB, JOR 1999/174, note G. VAN SOLINGE, nr 10

1.7)A priori and a posterior protection

The central point is the strengthening of shareholders protection. The a priori protection generally leads to the right to be informed by contrast of a posterior protection which consist of a judicial control of the whole procedure. The main issue aimed at balancing the protective measure and on the other hand the interests of the merging companies. As we discussed in the first chapter a merger must be approved by a general meeting of shareholders which have to be informed about the economic and legal consequences[67]. The different players in a merger expect to gather information and take into account the group of right which are conferred by the shares[68]. An important element of the a priori protection involves the requirement of the approval of a qualifies majority of the shareholders in a general meeting , but is not dispensable in the case of a parents company already holds the 90 percent of shares in the subsidiary. The approval is a protective measure if the shareholders gets a fair value of shares' price . As basis for the merger a draft merger shall be draw up including all the relevant information and is published at least one month before the general meeting. But the directive lack of a further protection because it does not state the concept of goodwill of the management board to provide to shareholder as much information as possible. Additionally an expert's report shall examine the draft merger in order to guarantee the fair value of share price and the exchange ratio; these reports must be made available to the shareholders at least one month before the general meeting. One has to bear in mind whether the information is right sufficient because the directive provides a share of information by the point of view of the board of management or generally by the majority shareholders.[69] A balance between the information and the equal interest to participate in the economic life of the company must be guarantee and this interest is left in Germany to the Court , in fact most actions were based on the ground of insufficient information, leading to declare the whole merger as void. Moreover in the context of a cross border merger the shareholders or better the minority have to monitor the management but a problem could arise when the information is asymmetric, is a situation in which one party knows more than the other party about some material aspects of a transaction and both parties know that one party has superior information to the other.[70] Generally speaking those who will benefit of the information will be the shareholder which own enough economic knowledge for evaluating the information and influence to have a decisive vote in the approval procedure. What will be the life of the minority shareholders which do not hold a large amount of information? Minority shareholders

[67] STIGLER GJ, (1961) "*The economics of information*", p213-225
[68] GRUNDMAN.S,(2007), "*European Company law: Organization, Finance and Capital markets*",p 580
[69] MANTYSAARI.P (2010) " *The law of corporate finance: General principles and EU law"* ,p 352
[70] MANTYSAARI.P (2010) *" The law of corporate finance: General principles and EU law*" Volume III, p 339

could not relied in this situation also because they could not have interest to keep on the social and economic life of the company or they shall bother to read the elaborate reports and will not be going to participate in the approval at the general meeting. In several cases the merging company already know the information of the other party(ies) especially in a short merger between the parent and the subsidiary company; information will be not a sufficient ground for the protection of minority shareholders and also if they appear detailed they will never compel with the protection. The problem is that in cases as such, the protection comes too late and the main point in the transaction refers to the controlling interest. Information right is not sufficient alone to alter the asymmetric information structure, the management as the agent of the principal-agent relation will always have the advantage compared with the shareholders. independence of the management could be face through the capital market as market for corporate control. Additionally the topic of "the right to be informed" leads to a situation of agency problems which can be mitigate through disclosure and transparency: the latter one could induce the agent to fulfil the expectations of the principal and transparency aimed at facilitating disclosure and monitoring.[71] Generally speaking corporations have their shares constantly in flux so when the shareholder is entitle to exercise his voting right at the general meeting , is necessary to set a date. This date is called record date in order to facilitate the vote of shareholders and by contrasting the phenomena of selling shares before the general meeting. The involvement of an advisor could create agency problem, the same which is set forth between the relationship shareholders and managers. In a market of securities where predominate an absence of a regulatory, the non transparency hinders the effective monitoring between principal and shareholder[72]. It appears that the real owner of shares is the intermediaries even if is acting on behalf and in the name of the shareholder; but the term control here also includes all the intermediaries which have "non legitimized" power over the corporate world. Hence is fundamental to stress the importance of information delivery chain: information can be produced anywhere and located anywhere and moreover several parties could play an important role not only in the delivering it but also could produce the information or be the so called "end user information". This figure is generally labelled as "man on the spot"[73]. On the other hand as we discussed when shared are held by intermediaries, they must act on the behalf of the shareholder so this conduce to another important topic as such the quality of information. The quality of information is assessed by the accuracy , just determining if the information is accurate; by the generic and specific information.

[71] HAYEK.F.A (1945), "*The use of knowledge in society"* ,p 519-530
[72] BELINFANTI.T (2014), " Shareholder *cultivation and new governance*", p 384, 407- MASOUROS.PAVLOS.E (2010) ,"*Is the EU taking shareholder rights seriously?: An essay on the importance of shareholdership in Corportae Europe*",p195-203
[73] HAYEK.F.A (1945) , "*The use of knowledge in society"* ,American Review, p 525

Each information has its risk and generally when the shares are held by intermediaries, the risk is shifted on them but it does not disappear when is transferred. An information has the requirement to be useful when is really understandable by the intermediaries or by the shareholder. In order to express the shareholder's vote, the information must be relevant for the decision making power and to predict the transaction concerning. To be useful, information must own the reliable concept which lead to the faithful representation , a sort of portray of company , a disclosure of legal and economic information. Although according to the article 9 of Directive 2005/56/EEC: the administration or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio. The report shall also describe any special valuation difficulties which have arisen", the merger plan shall be reviewed by an independent auditors. With the passing of the time "a mistrust" has been increased for the appointment of auditors because of their previously professional relationship with society and therefore, their report do not always reflect the real situation within company. As a further element in order to guarantee the protection of minority protection, a judicial review of merger could arise when the management or directors are acting just in the interest of the company. This instrument stresses out the concept that is not possible to protect interest just of a certain group with a company but it requires an evaluation of the whole merger procedure by an independent auditor as I explained before and after by a notary such under the Italian civil code. The tool of judicial review is well known in European panorama but the main defences differ in each Member States, even if in Belgium , minority shareholder which have been freezing out ,could invoke the "abuse of majority" especially after a takeover bid. In the case Real Dolmen, the company Real launched a takeover bid and it announced that if it would not reach the threshold, Dolmen merged into Real. The threshold was around 80% so the merger was justified by commercial reasons. In a casa as such, the main defence is the so called " abuse of majority". Under Belgian law a decision of merger can be annulled if it constitutes and abuse of majority. But what is an abuse oj majority and when it arises? In order to establish when a defence like this one can be used, we have to refer to corporate governance and corporate law. As some scholar argue, the right to vote in a general meeting is an expression of the shareholder in the interest of the company itself, by contrast some other authors claim that the right to vote is exercised in the interest of shareholder as well in the company. The correct interpretation of this clause is the right to vote in the only interest of the shareholder . The abuse of the right to vote generally arises when there is a breach of duty of loyalty between the majority and minority and not exercising the normal diligence and prudence.

The criteria for determining this breach , must fulfil several requirements:

- the right to vote has been used in the sole intention to harm another shareholder or the company
- the right to vote has been exercised without any valid reason in a way that harms another shareholder or the company
- it has been exercised the most harmful exercise of the right to vote when some other measure were permissible

Hence Merger can be used as technique for freezing out shareholders and this constitute an abuse of majority. The use of this technique with the sole purpose to eliminate minority shareholders is invalid and would constitute and abuse of majority, not only relating to merger , but also in a case of dissolution or other technique.

As consequence of this brief overlooking of the unavailability of cash mergers, it appears that the only remedies which apply in a case as such in Delaware, will be the appraisal right. This topic will be discussed in Chapter 2 but, this remedy does not block the merger but it entitles shareholders to receive a fair and adequacy price for shares in case of cash merger. On the other hand, by contrast, looking at the Netherland legislation, the only remedies used are the so called "reasonable and fairness" and "investigation procedure" (enquêteprocedure)[74]. The former generally is used also by the Commercial Chamber relating to the investigation procedure , so a first way is to claim annulment of shareholder's meeting on the ground of the violation of "reasonable and fairness"[75]. Minority shareholders can also seek to Commercial Chamber an investigation, whether the Commercial Chamber find that there is an infringement, could also order the annulment of the decision or appointing one or more directors. This measure as such, represents not only and ex ante protection but also an ex post, is much more flexible and lead to reach out a balance of interest between the contracted parties.

It appears quite important instead to stress the measure of protection which the Slovakian legislation[76] has adopted in case of opposition by minority shareholders in the general meeting for the approval of cross border merger. The protection regards the exchange ratio in the same way as in the domestic merger. Whether the ratio is not adequate, each shareholder who: i) was a shareholder of a Slovakian merging company which took part in the general meeting; ii) was present at the general meeting, iii) has requested the disapproval for the share exchange ratio, iv) the shareholders shall be informed of such right at the general meeting [77]. Another requirement which

[74] Article 2:350 Dutch Civil Code
[75] Article 2:323; 2:15;2:8 Dutch Civil Code
[76] M JURKOVA in "*Cross Border Merger, "* D VAN GERVEN, CAMBRIDGE, 2010, pag 267
[77] Slovakian Commercial code, Art 218ja(1)

must be fulfilled for asking the Court a petition, is that the shareholder has not sold any shares. This petition could be asked the Court within one year from the registration in the commercial registry or it ceases to exist. On the other hand the Slovakian company has to send a new exchange ratio to the opposed minority at the general meeting, within thirty days following the meeting itself. The draft sent to the shareholder shall contain some other relevant information for the adequate exchange ratio and shall contain also the period for the accepting the new proposal but not less of fourteen days following the receipt of the proposal by the shareholder. If the shareholder does not ask the Court for the petition in the same period of that for accepting the new proposal, such new proposal will be deemed accepted by the shareholder and they are not entitled to seek for a petition[78]. On the other hand if the shareholder does not accept the new proposal, they are entitled to ask the Court for a petition about the value of shares, the Court itself shall appoint independent experts which are subscribed in a list; the value of cash payment will be determined between the difference of the values of shares in the merging company and the value of shares resulting from the merger. Moreover the adequate additional monetary payment must not be lower than:

- the value payment provided to any other individual shareholder of the same class of shares

- the difference between the value of shares of the company participating in the merger and the value of shares of the new surviving company; while the determined value of shares must not be lower than the value of net equity attributable to one share according to the last financial statements and in addition if the shares are traded on a regulated market, the value must not be lower than the average prices of shares during a period of twelve months preceding the submission of the draft merger to the Collection of Documents of the Commercial Registry[79]

Looking at this legislation, is quite unique because in countries like Austria and Czech Republic, the adequate cash payment is provided by the entity resulting from the merger. In contrast Slovakian legislation is criticized because if the shareholders don’t accept the proposal of the company, they can seek to the Court for a petition within a period of one year or otherwise this right ceases to exist. Hence for one year it remain uncertain how the adequate monetary payment will be paid to the shareholders.

[78] Slovakian Commercial code, Art218i(7)
[79] Slovakian Commercial Code Art (218i(9)

In addition to this domestic protection of shareholders, another provision is designed for the same ground, the so called " repurchase of shares" [80]by the Slovak participating company in the merger. Each shareholder of the Slovak legislation participating in the company, who:

-was present at the general meeting

- voted against the approval of the merger

-requested his disapproval to be entered into the minutes of the general meeting, together with his request to be sent a draft agreement on buyout of his shares

The participating Slovakian company is obliged to send to the shareholders a draft agreement within thirty days following the general meeting. The agreement shall contain:

- the proposal for an adequate monetary consideration
- the period for accepting the draft agreement, which cannot be shorter than fourteen days following the receipt of the draft agreement
- the procedure for repurchase of shares

On the other hand, looking at the Italian legislation, the mechanism of protection of minority shareholders are similar, first of all the approval of merger of shareholder meeting, is inadmissible if is not adopted in accordance with law and it can be appealed by absenting, dissenting or abstained shareholders, which they represent the 1percent of the subscribed capital. In contrast the shareholders which do not lies in this category, have the only action to seek for a compensation of damage (article 2377 com4 Italian Civil Code). Among the real remedies made available to a shareholder, the appeal for the*" majority abuse"* shall be counted. The shareholder, acts such a plaintiff and has the burden of proof to demonstrate that the directors and the controlling shareholder have planned the merger as *"intentio fraudis"* with the only aim to freeze out the minority. The injury would be whether the decision is made to prejudice minority shareholders or to reduce their protection. In any case when the merger has been perfected, the only remedy which a shareholder is entitled , is a monetary compensation even if is quite difficult for a Court to calculate it especially in the case of change of applicable law. Hence an effective remedy for shareholder is the exit right, leading to allow them to withdraw from the company as a consequence of an "undesired change of applicable law".[81]

[80] Slovakian Commercial Code Art 218i(11)
[81] M. VENTORUZZO, *Cross border Mergers, change of applicable Corporate Laws and protection of dissenting shareholders: Withdrawal rights under Italian Law",* forthcoming in ECFR 2007, pag 12

CHAPTER 2

2.1) A comparison of class rights with minority protection in cross border merger

In a cross border merger when the merging company set up a new company, one of the main consequences relating to the protection of minority shareholders, lies on the concept of the alteration of class rights. This latter are an important method to raise capital for the equity structure[82]. Each class of shares has its own rights in relation to dividends, voting and liquidation. Class of shares generally involves a balance between mandatory and default rules especially in the UK with a particular discipline on this topic. Company law involves a network of bargaining between shareholders, employees, creditors, directors and managers.[83] Hence , parties should be able to have information and to bargain themselves. This definition is the mile stone in order to subdivided the rules into three classes: "mandatory rules", which apply automatically, "default rules", when shareholders don't decide to opt out and "permissive rules"[84] . According to the section 125 CA 1985 Company law in UK, when a decision could affect the class right , a special meeting of holders of class of shares must be convene in order to approve this decision. The element of flexibility is set forth in the class of shares in UK, in fact a company may issue class of shares different from ordinary , as preferred or deferred shares, conferring them special rights but avoiding to prejudice special rights which had been previously conferred[85]. One of principle in the corporate finance, is the so called equality of shares, such principle prevents the companies to issue new shares which could confer preferential rights and be detrimental for the company structure. One of the case affirming the principle of equality of shares is **Birch vs Cropper[86]** , stating that shareholders are rank equally if shares does not specify which rights are conferred by particular classes and is not set forth a distinction relating to dividends, return of capital and voting rights[87] .
In each companies , ordinary shares represent the default class of shares and in addition according to article 104 of Table A of the Companies Act, the entitlement to the dividends is based on the

[82] CAHN and DONALD, (2010) *"Comparative company law: texts and cases on the laws governing corporations in Germany, the UK and the USA" p 270*
[83] CHEFFINS.B (1997) " Company law. Theory, structure and Operation", p 47
[84] EASTERBROOK F and FISCHEL R, (1989), *"The corporate contract"* p 1416
[85] CHEFFINS.B (1997*) " Company law. Theory, structure and Operation",* p 472
[86] BIRCH vs CROPPER, Re Bridgewater Navigation Co Ltd (1898), 14 App. Cas, 525, HL
[87] FERRAN.E (1999) *" Company law and corporate finance"* p 320-322

nominal values of the shares held by each shareholders . Other classes of shares may be issued relying on this model. Hence if shares are subdivided into a series of shares, each class of shares "should" indentify the rights attached to every class; or on the other hand if special rights are conferred to any of the class of shares , such statement shall be the same for the other issued shares of the same class[88]. The concept class of shares lies on the variation of rights conferred to shares and is not so clear if a real class of shares could exist or not.

In Hodge v James Howell & Co Ltd, a company's share capital is divided into two classes of share, ordinary and preferred. The issue of new preferred shares would be ranked below other preferred shares and before the ordinary shares. The Court of Appeal stated that the company was not precluded from issuing new classes of shares and shareholders holding ordinary shares would not be affected by such new issuing. So this new issue creates a fundamental principle of flexibility of equity financing, in UK. Classes of shares and classes of rights are linked with the bargaining between members of a company but the concept of flexibility , in favour of class member interests should be analyzed by the judge , case by case, in addition to enabling a company to structure the capital, such as in the case " Re Saltdean Estate Co Ltd", which involves a reduction of capital, affecting the shareholders with class rights.

Section 125if the CA 1985, does not underline the meaning of classes of shares but just stressed out the definition as the following" this section is concerned with the variation of the rights attached to any classes of shares in a company whose share capital is divided into shares of different classes". Generally judges are not so helped by statuary rules because they do not contain any definitions.

In **Cumbria Newsapers**[89], the plaintiff and defendant run the same business activity and in order to avoid to be acquired by a competitor, they entered into an agreement where the plaintiff acquired the 10 %of the share of the defendant and the right to appoint a director. After some years, the directors of the defendant proposed to convene an extraordinary assembly meeting to delete the right of appointment to the plaintiff. This latter argued instead that the special right which had conferred to appoint a director, was attached just to a member and not to a group of class of shares. In addition Scott j subdivided the class of rights into three modules : i) rights conferred to particular shares, ii) rights conferred on individuals and iii) rights conferred to a particular member and not to a class of shares, as such happened in the case Newspapers, linked to the right to appoint a director. The UK model of equity financing is quite flexible and company may shape the shares in an efficient way for shareholders. The concept of flexibility is highly controversial and judges have a

[88] CHEFFINS.B (1997) *" Company law. Theory, structure and Operation",* p 493
[89] Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing

role at analyzing the so called “bargaining shares” and classes of shares.[90] The reason for a flexibility in equity should be linked with the institutional investors[91] but surely an harmonization regarding this topic shall be decisive also according to the Second Directive.[92] The Italian situation is different, just few classes of shares rely on the Italian Civil code: redeemable shares, tracking stocks and no voting shares. According to article 2427 sexies, redeemable shares may be used “where the shareholder’s interest in the company’s equity is justified by non-shareholding arrangements, such as contracts for the supply of services or materials”. Various Italian scholars argue that those who hold such shares are in a symmetric position of the other shareholders because whether they rely in a separate class, the main consequence is linked with article 2367 of the civil code, stating that the requirements of law applicable to class meeting should equally apply to any company that has issued redeemable shares.[93] On the other hand, several problem may occur also in Portugal, in fact according to art 302 n 1 of the Code of Commercial Companies, states that “ the article of association may create classes of shares which confer different rights”. This principle generally is inspired to create a free bargaining and also offers to the company the possibility to shape the shares according to its interests. The Portoguese company law provides for different classes of shares: i) redeemable shares, i) non-voting preference shares[94].The situation in Spanish is getting complicate since the introduction of a limited liability company , the Sociedad Nueva Empresa, and without the presence of a public notary. The corporate finance in Spanish is divided into two classes: “common shares” and “ privileged shares”, in addition Spanish law recognizes “normal” privileged shares and “non-voting shares” and “redeemable share”[95]. This latter class of shares may be issued according to Spanish company law for up to 25% of legal capital. Actually just few companies has issued redeemable shares in Spain, Indra Sistema S.A and Sociedad General de Aguas de Barcelona S.A[96]

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[90] FERRAN .E (1999) *“Creditors’ interests and core company law”,* p 314
[91] BUXBAUM and HOPT.K.(1998), *“Legal harmonization and the business enterprise”,* p 235
[92] EDWARDS.R (1999), *“EC Company law”,* p 11
[9393] VITALI .M *“Class of shares and share redemption in the italian and UK context”,* p 46-52
[94] ANTUNES.J(), “ *An economic analysis of Portoguese Corporation law system and Current development “*

[96] VITALI.M “ *Classes of shares and share redemption in the Italian and in the UK context”, p57*

2.2) The transposition of the cross border Merger in the German law for an implementation

The debate of the transposition of the Cross border Merger is focused on the change of application of law. Several countries have already implemented the Directive but the approach of each one is quite different in order to protect the minority shareholders as such in Germany. The German bundestag implemented the Directive on 19 April 2007, introducing a protection as it had done for the SE Regulation. The adoption of this mechanics relies on the protection of merger in Germany but adding the cross border element which has influenced the adoption of this mechanism.[97] These protectionism mechanism generally are ex ante , in fact[98] :

i)each shareholder has the right to challenge the merger and to prevent it from taking place, consequently the court will decide whether the merger can be continued.

ii) in addition each shareholder may issue to the court the exchange ratio in order to obtain an improvement of it. This method is possible just if several conditions are fulfilled, the German company is the disappearing entity, if the law of the other Member States of the merging companies provide for a similar procedure or if the other merging companies accept as such procedure and shall be applied.

iii) The dissenting minority shareholders has the right to exercise the withdrawal right as in the case of national merger. Hence the Germany company is obliged to an acquisition of its own shares.

One has to bear in mind that the concept of fair value is one of the most important protection for minority shareholders especially when they exercise their withdrawal right, as such in Italy. The shares are first offered to existing shareholders or to third parties and the remaining shares are acquired by the company itself or they are annulled under the capital decrease mechanism.[99]. The withdrawal right has been introduced also in the Dutch draft law but only if the Dutch companies participating to the merger as public or private limited liability company and the shareholder of such companies become shareholders in a company situated in another Member State. (outbound merger). The situation appears more dramatic in France and In the UK where a basis for the protection of shareholder is absent, in fact minority shareholder are bound to the shareholder's general meeting but the Cross border merger must take into consideration the best interest for the

[97] VAN GERVEN.D (2005), *" Cross border mergers in Europe",* Vol I, p 198-200

[98] WYCKAERT M, GEENS K (2008), *" Cross-border mergers and minority protection. An open ended harmonisation",* p 44

[99] WYCKAERT M, GEENS K (2008), *" Cross-border mergers and minority protection. An open ended harmonisation",* p 45

company itself and not only for the majority group.[100] The protection of shareholder is a problematic topic especially in Spain because once the merger has been approved, is binding for all shareholders also for those has voted against the merger resolution. Whether the registered office of the merged company is located in a Member State other than in Spain , the shareholders are entitled to exercise the acquisition of their shares at a fair value. Hence the situation is particularly complex when the registered office is located in Spain and it seems that shareholder are not entitled to be protected[101].

2.3) Appraisal right in Europe

As we discussed in the Chapter 1 in the event of a Cross border merger, the valuation of shares ratio is important and generally relies on disclosure rules. In the written report, the independent experts shall indicate the method that had used for the valuation and whether such method is adequate in the case concerned. On the other hand each Member States can provide a particularly remedy for dissenting shareholders, the so called "appraisal rights". It mean that dissenting shareholders are entitled to receive a fair value of their shares and receive a cash payment following the procedure sets forth in the statute. The CBMD does not require as such remedy but Member States are free to create a ground of protection for dissenting shareholders but this situation is complex because there is no a specific method which can be followed be the companies involved in a Cross Border Merger.[102] Appraisal rights action is a proceeding which is invoked in the event of a corporate transaction involving the shareholder, in order to obtain a fair value and is aimed at protecting shareholder from an undervaluing of their shares. This action is often used in USA[103] and in Delaware[104] rather than in Europe due to the costs for the proceeding even if the court is just entitled to evaluate the shared under a business and economic analysis. One has to bear in mind that appraisal rights are less common in Europe than in USA[105] but is a possibility that exists in some Member States and the determination of fair values is made either by a court or by an administrative authority. According to the Article 4.2 of Cross Border Merger Directive, each Member States is entitled to adopt different measures to protect minority shareholders who had

[100] DESACHE. J.M " *FRANCE"* in VAN GERVEN.D (2005), *" Cross border mergers in Europe",* Vol I, p 23-24

[101] ESPESO J.M AND PANOS J.G.M " *SPAIN*" in VAN GERVEN.D (2005), *" Cross border mergers in Europe",* Vol I, p 198-200

[102] MANTYSSARI.P (2010), *" The law of Corporate finance: general Principles and EU law"* Vol III, p 373-374

[103] DAVIDOFF.S (2014) *" A New Form of shareholder Activism Gains Momentum"* New York Times

[104] BARRY.M, EISENHOFER J(2005) *" Shareholder Activism Handbook",* p 11-3

[105] GEIS.G (2011) *" An appraisal Puzzle"* p 1367

opposed the cross border merger and appraisal rights is a mechanism which reaches out this aim. [106] The situation is completely different in England and in Wales were the appraisal right had been introduces recently but not available in the event of a cross border merger, in fact some scholars argue that an appraisal right could alter the right valuation of shares[107]. Under the commercial code in England, just two appraisal rights are possible to be applied[108] ; it can be used in the case of a winding up of the company when the business or property is transferred to another company and the compensation relies on the exchange of shares in the transferee company . The other possibility to exercise the appraisal right in a takeover bid when a majority shareholder hold 90% of shares[109]. On the other hand in the case of application of the appraisal right according to the Section 111 IA 1986, some scholars argue whether the valuation is compatible with the Human Rights Act 1998, the implementation of ECHR[110]. The valuation must be carried out by a Court and two principles in order to determine the fair value shall be applied. The first on is to stress the value of shares as a proportionate value on a going concern prior to the transfer to the transferee company.. The second option is a proportionate value according to a consideration that is offered by the transferee company [111]. As it appears the situation differs from the two European Countries as such Germany and the Netherlands where the appraisal rights are available in the case of a Cross Border Merger, hence a minority shareholder who did vote against the cross border merger is not entitled to exit the company and in addition the English legislator has not yet introduced any rules regarding the protection of minority shareholders.

Appraisal rights are instead available in Germany in the event of a Cross Border Merger, which the directive has been implemented into the Reorganizational Act. The shareholder of a GmbH is entitled to exercise such right in a cross border merger if the acquiring company is not governed by the German law. This mechanism tend to protect minority shareholders because they "must not be forced to accept the modification of their rights and obligation resulting from another foreign legal entity." The shareholder who vote against the merger has such right. Comparing the German and the Dutch law, the appraisal right in the case of disappearing GmbH can be invoked against the acquiring company as universal succession title, by contrast Dutch law states that the appraisal right has to be effectuated before the cross border merger.

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[106] MANTYSSARI.P (2010), *" The law of Corporate finance: general Principles and EU law"* Vol III, p 251
[107] GOWER ,L.C.B, (2008) *" Gower and Davie's principles of modern company law"* p652
[108] SECTION 111 IA 1986
[109] GOWER ,L.C.B, (2008) *" Gower and Davie's principles of modern company law"* p1054
[110] GOWER ,L.C.B, (2008) *" Gower and Davie's principles of modern company law"* p1081
[111] DE VRIES PAUL (2010) *" Exit rights of minority sgareholders in a private limited company"* p 138-139

The situation regarding the appraisal right is different in the Netherland, first of all, the Dutch rules on Cross Border Merger were implemented into Dutch law in 2008. The concept of the appraisal right relies in the article 2:333h DCC, which states that:

- Any shareholder who opposed the merger , may request the disappearing company for indemnification within one month after such resolution, providing that the law of the acquiring company is governed by the law of another Member State
- Where no agreement exists, the indemnification shall be determined by independent experts

Hence the appraisal right is available just if the company is governed by the Dutch law and is acquired by another company of another Member State or EEA Member State. As we have seen, Article 4.2 of the CBMD, allows Member State to guarantee a ground for the protection of minority shareholders but the Dutch appraisal right is set forth according to the Recital 3 of the Tenth Directive, which states as such: *"none of the provision and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the freedom of capital save where these can be justifies in accordance with the case law of the Court of Justice and in particular by requirements of the general interest and are both necessary for , and proportionate to, the attainment of such overriding requirements"*[112]

The Dutch legislator has taken into consideration regarding the protection of minority shareholders in a cross border merger situation, relying on the fact that the shareholder of the disappearing Dutch company shall be protected because they are going to be confronted with the law and rules of another Member State. For instance the Dutch Minister of Justice pointed out the idea that appraisal right are generally not required because the Dutch law contain an adequate and appropriate level of protection for minority shareholder. Generally speaking the shareholder are protected by the so called inquiry proceeding regarding the exchange ratio of shares but is time consuming. In a second moment the Minister held that the appraisal rights are efficient to protect minority shareholders because they are entitled to receive the equal value of their stake in the disappearing company.[113]The appraisal right were introduced in order to guarantee protection for minority shareholders but also for another reason, national and cross border merger Dutch rules differ, in fact bear in mind that article 2.323 paragraph 5 DCC provides a system to guarantee minority shareholders, enabling the Court to order the company to pay damages when the shareholders incurred in any losses relating to the merger. This provision shall not be applied in the case of a cross border Merger. From this comparative panorama of national and cross border dimension, it

[112] Recital 3 of the Tenth Directive
[113] Parliamnetary Papers II 2006/07, 30 929, no 3 (MvT) p 18

appears that the protection of shareholder has not yet been harmonised.[114]Appraisal rights are a hot topic especially in the Netherland in fact some scholar such as Van Veen holds that these right are not vital for the company and shareholder themselves, because the shareholder of the disappearing company could be entitled to receive shares in the merging company and easily sells his shares for a reasonable price. On the other hand other scholars like Koppenol- Laforce do not agree with the position taken by Van Veen, because the market is filled and there is n liquid market for shares so it should not so easy for the shareholder selling his shares. But the solution prospected by Van Veen surely it appears no time consuming than the application of the appraisal rights.
In addition when the merges takes effect, the shareholders of the disappearing BV (srl) company become shareholders of the acquiring company, except for those who opposed the merger, voting aganst the proposal at the general meeting with the consequence to be entitled to the appraisal rights. Hence shareholders who were not present at the general meeting, abstained from voting or invalid vote, are not entitled to the appraisal rights[115]. Also in this case, the Dutch scholars Van Veen and Snijder-Kuipers stress the idea that the appraisal right could complicate the merger process and is time consuming and could have an impact relating to third parties. This right can be exercised within one month and the request must be issued to the disappearing BV company or after that period of time, it shall not be possible to be entitled to that right and with the consequence that the shares held by shareholder who had opposed the merger shall not be converted into the shares of the acquiring company. Referring to the class of shares, a holder of shares which do not include the voting right, are not entitled to the appraisal rights. In a case as such, one of the mechanism that the shareholder could exercise pursuant to Article 2:330 DCC, this articles entitles a class of shares to a right of prior approval whether the merger could affect their rights. By voting the shareholders receive back a veto power but albeit these shareholders "could" be protected by this article we have the consequence that if the majority class of that class of shares approve the merger, the effect shall rely also for those who opposed the cross border merger. When the appraisal rights are invoked in the situation of a cross border merger, the topic relating to the valuation of shares arises, because the statute does not contain any rules about this situation. The indemnification for the valuation of shares shall take into consideration the exchange ratio of auditors when the draft terms of cross border merger are deposited. Moreover even if the exchange ratio of auditors is reasonable it does not mean that the ratio is correct, or on the other hand if the ratio in unreasonable or incorrect, the merger can be effected.[116] The valuation of shares does not imply that shareholders receive an

[114] McCahery,Vermeulen, (2008) *"Corporate Governance of Non listed Companies"*
[115] MR PAUL DE VRIES (2010) " *Exit rights of minority shareholders in a private limited companies*" p 423
[116] [116] MR PAUL DE VRIES (2010) " *Exit rights of minority shareholders in a private limited companies*" p 426

indemnification according to the exchange ratio of auditors; it could be helpful and a mile stone also as affirmed by the Minister of Justice that " the indemnification does not rely on the value of exchange ratio used by auditors".[117]

2.4)Appraisal right in Delaware

Appraisal remedies have been the most relevant remedies in the USA, in fact shareholder are able to defend their rights and also to seek higher prices for the valuation of their shares bringing the action in a Court. The dissenting shareholders who opposed the merger are entitled to exercise this right within 120 days from the merger's closing and the exclusive remedy is cash. Before the introduction of shareholder appraisal right, dissenting non-controlling shareholders had to petition the court to prevent such transaction but this procedure was time consuming and expensive. Hence the legislation of each States implemented shareholder appraisal rights in order to allow shareholders to dissent particular transactions.[118]

NEW YOR 1890	OHIO 1906	LOUISIANA 1928	MAINE 1891	TENNESSEE 1907	IDAHO 1929	KENTUCKY 1893	MARYLAND 1908
INDIANA 1929	NEW JERSEY 1896	VERMONT 1915	CALIFORNIA 1931	DELAWARE 1899	ILLINOIS 1919	DISTRICT OF COLUMBIA 1931	CONNECTICUT 1901
NEW HAMPSHIRE 1919	MICHIGAN 1931	PENNSYLVANIA 1901	RHODE ISLAND 1920	WASHINGTON 1933	ALABAMA 1903	ARKANSAS 1925	HAWAII 1937
MASSACHUSETTS 1903	FLORIDA 1925	GEROGIA 1938	NEVADA 1903	NORTH CAROLINA 1925	ARIZONA 1939	VIRGINIA 1903	SOUTH CAROLINA 1925

The table shows the introduction of the appraisal rights in almost Each States

In 1927 the Uniform Business Corporation Act introduces legislation that would bring to an harmonization and clarification of such topic, but just in the 20th century all the States adopted

117 PARLIAMENTARY PAPERS II 2006/07, 30 929, NO.3 (MvT), p 18.19

118 LISA H, VRUBLEVSKAYA IRINA, (2015) " Dissenting shareholder appraisal right and shareholder oppression claims: similarities and differences in Securities valuation" p 9

dissenting shareholders appraisal right. The procedure involving in the evaluation of shares differs from State to State. The oppression that shareholders face generally result from a corporation point of view because the minority shareholder have been treated unfairly .In addition in the case of dispute for share exchange ratio, Delaware Courts have used the fair value standard. Fair value is defined in the RMBCA (Revised Model Business Corporation Act) and in the ALI Principles of Corporation Governance[119]. According to the RMBCA, the fair value is the value of shares immediately before the effectuation of the corporate action, while according to ALI, fair value "should be determined using the customary valuation concepts and techniques employed in the relevant securities and financial markets"[120]. This remedy is often used by shareholders in order to obtain the fair value of the shares and such right is only available for holders in a merging company and moreover the shareholders own the shares through the effective date of the merger. In order to exercise such rights, the dissenting shareholders must written a demand to the company which they intend to exercise the appraisal right and the demand must be received prior of voting the merger. In Delaware , the appraisal right is set forth in almost all statuary merger but according to the section 253; shareholders of a parent subsidiary company , are not entitled to exercise such right nevertheless the parent company had already owned all the shares in the subsidiary company, in this event instead , the minority shareholders are entitled to such right. The appraisal process relies in the section §262 and in the event of a merger, the company must give notice of the availability of appraisal rights prior to the general meeting. The notification shall include different information useless for the shareholders. A dissenting shareholder which intend to exercise the appraisal right first of all must not vote in favour of the merger and deliver a written demand for appraisal right to the company before the voting at the general meeting. Within a period of 10 days of the effective date of the merger, the surviving company shall notify to all shareholders which previously had required to exercise the appraisal right, that the merger has become effective. The appraisal proceeding shall commence within 120 days after the effective time of the merger filling a petition to the Delaware Court of Chancery. In order to exercise such right, the petitioner has the burden that has fulfil all the requirements of Section 262 also including that is a shareholder which had owned the shared prior the voting of merger.[121] In the case re Engle v Magnavox Co, the Court of Chancery stated that if a shareholder is prevented from making on time the demand to exercise the right for exceptional reasons, the shareholder is not deprived of such right. In this case the

[119] LISA H, VRUBLEVSKAYA IRINA, (2015) *"Dissenting shareholder appraisal right and shareholder oppression claims: similarities and differences in Securities valuation"* p 11
[120] TRAN L, VRUBLEVSKAYA I (2015) *"Dissenting Shareholder Appraisal Rights and Shareholder Oppression Claims: similiarities and Differences in Securities Valuation"* p 12
[121] EISENHOFER JAY.W, BARRY MICHAEL (2013) *" Shareholder Activism Handbook"*, p 11-11

shareholder attempted to attend the meeting for voting against the merger but his plane was prevented by mechanical reasons. The Court stated that" Even if the shareholder was prevented to exercise that right if must not be deprived by such right" Moreover one of the problem that The Court has to face regard the valuation of shares, prior to 1983, the only valuation technique which was used, was known as "Delaware Block Method" a method that relied on the combination of three approaches: the asset approach, the market approach and the earning approach. A percentage weight was the assigned to each method and the final value was determined by the weighted average of the three valuations.[122]. As I exposed in the first Chapter of my thesis, after the case Weinberger v UOP, Inc, the Court adopted a much more liberal method taking into consideration all factors and elements which might determine the final value: <<market value, asset value, dividend, earning process, the nature of the enterprise and any other elements at the date of the merger>>[123]. Following the case Weinberger, the Court considered to use some other techniques: **i) the discounted cash flow methodology, ii) the comparable company approach. iii) the comparable transaction approach.**

The first method is accepted by economists and relies on three components: cash flow projections, terminal vale and the discount rate. The precise mathematics valuation is as follows, where:

V= PV cash flow + PV terminal value

Cash Flow = The difference between cash and noncash inflows and outflows from operating activities reduced by taxes actually paid[124].

Terminal Value = Value of the firm at the end of the forecast period. It represents the future value of the corporation at the end of a fixed period.

PV = Present value as of the valuation date using the debtor's weighted average cost of capital as the discount rate[125]

V = Value of the enterprise on the date of valuation

The second method used by the Court is the **comparable companies**, identifying comparable traded companies, then the relevant multiples from pricing data, and finally applying those multiples to the revenues, earnings or some other values used for the valuation. The model itself has been described as valuation analogy. The main theme is to select companies to compare to leading to an accurate

[122] EISENHOFER JAY.W, BARRY MICHAEL (2013) *" Shareholder Activism Handbook",* p 11-22
[123] EISENHOFER JAY.W, BARRY MICHAEL (2013) *"Shareholder Activism Handbook",* p 11-22.1
[124] EISENHOFER JAY.W, BARRY MICHAEL (2013) *" Shareholder Activism Handbook",* p 11-23

[125] EISENHOFER JAY.W, BARRY MICHAEL (2013) *" Shareholder Activism Handbook",* p 11-23

analysis[126].The third method is the **comparable transaction** , is similar to the comparable companies method, but the former relies in finding similar transactions and quantify them through financial metrics and then apply those metrics to the company at issue. This method generally is common in Delaware litigation.[127]All these methods are used by Delaware Court, especially in trials, appearing complex than the other jurisdictions. Each case involves expert testimony. As aforementioned, the value of shares can be establishes by methods accepted by financial community and in addition the expert testimony is permissible. Under the Delaware Rule of Evidence 702, "if a witness qualifies as an expert by knowledge of scientific, technical skills or education may testify in the form of an opinion." This procedure was used in the case Shell Oil, stating that the appointment of an expert is within the discretion of the trial judge. The judge may "seek a list of experts by both parties and the court's expert should be compensated by the parties in such proportion as the trial court determines"[128] First of all the shareholder's expert shall justify the analytical technique used so is quite important to ensure that the expert has not given a contrary position in an article or in a report.[129]

2.5)Allianz-Riunione Adriatica di Sicurità (RAS) S.p.a

The Cross Border Merger Directive is aimed at facilitating the merger between limited liabilities companies in the European Union. The legal regime applicable in Italy was coherent with Sevic decision. Under this regime a cross border merger between an Italian public company and a German public company was carried out in 2007 .In 2005 Allianz AG and Riunione Adriatica di Sicurità Spa announced to merge. Allianz held over 55 percent of RAS Spa and the former was the group's holding company, while RAS its Italian subsidiary company. The effect of this merge was the registration of the merger in the German commercial register and in addition Allianz AG changed its legal form to a European Company (Societas Europea). The Societas Europea is a legal entity governed by and EU statute and became a new and original type of commercial company governed by EU Commercial law. The 28 Member States of the Union. Including Bulgaria and Romania have adopted the SE Statute into their national law. In addition a SE is the only company which benefit from complete freedom of establishment, hence the mobility is one of the advantage in order to set up a Societas Europea. Moreover the SE combines all the techniques of company mobility: cross

[126] EISENHOFER JAY.W, BARRY MICHAEL (2013) *" Shareholder Activism Handbook",* p 11-29
[127] EISENHOFER JAY.W, BARRY MICHAEL (2013) *" Shareholder Activism Handbook",* p 11-30
[128] Matter of Shell oil Co, 607 A.2d 1213, 122
[129] EISENHOFER JAY.W, BARRY MICHAEL (2013) *" Shareholder Activism Handbook",* p 11-36

border mergers, transfer of registered office and fiscal neutrality[130]. In order to create a SE, the options are four: **i) merger:** public limited companies formed under the law of a Member State, with registered offices and head offices within the EU; **ii) SE holding company:** Public and private limited companies with registered offices and head offices within the European territory or has for at least two years had a subsidiary or branch in another Member State; **iii) Formation of a Subsidiary SE:** public and private limited companies with registered offices and head offices within the European Union, may form a subsidiary SE subscribing for its shares or has for at least two years had a subsidiary or branch in another Member State; **iv) conversion of a Public limited company into an SE:** A public limited company which had its registered office and head office within the European Union may be converted into an Societas Europea if it has for at least two years had a subsidiary in another Member State. The principle of real seat governs a SE, so its registered office and its central administration must be located in the same location and this principle entitles the companies to be registered in the Member States of their choice.[131] For a group of companies formation of an SE has many advantages, gives the group a European identity , the continuity of business operations, the possibility to transfer the registered office of an SE within the Community without winding up.[132] By contrast there are some disadvantages, in fact article 2 paragraph 1 of the SE Statute states that the formation by merger is available for public limited companies and private companies are not included. There are several safeguards in order to guarantee the protection for minority shareholders but by far less protected than the CBMD. Article 8 paragraph 5 of the SE Statute states that a Member State in the case SEs are registered within its territory to adopt measures for the protection of shareholders who had opposed the merger. Another measure which is adopted in the case of merging companies, lies on the application of national law for shareholder's protection.[133]Article 19 of the SE states that the law of a Member State may provide that a company governed by the law of that Member State may not take part in the formation of an SE by merger if the competent authority opposes before the issue of certification in accordance to the article 25 paragraph 2 but an opposition as such may rely just on grounds of public interest. Moreover according to the article 10 of the SE Statute , an SE is treated in every Member State as if it were a public limited companies in accordance with the law of that Member State. A SE may be registered just an agreement for employee involvement has been drafted .In the case Allianz/RAS, the only action that the minority shareholders are able to bring is the action of

[130] Lenoir W (2008) *" The Societas Europea (SE) in Europe. A promising start and an option with good prospect",* p 17
[131] Lenoir W (2008) *" The Societas Europea (SE) in Europe. A promising start and an option with good prospect",* p 18
[132] E.Werlauff (2003) *"SE, the law of European Company"* p 56
[133] N. Stolowy (2012) *"Does the "Scoietas Europea" or " EUropean Company" make a significant contribution to construction of a European company law?"* p 366

annulment of shareholder's resolution for the merger, and in addition according to the implementation of SE under the German law, the minority shareholder will not be entitled to receive a withdrawal right because Allianz is the acquitting company and the legal seat will be locates in Germany hence is not possible the application of paragraph 7 of SEAG. By contrast the situation for RAS minority shareholders is easier in fact under the Italian civil code 2437, the shareholders are entitled to withdraw and the change ratio operandi is considering the price value on the stock Italian market for the last six months. The shareholders who had opted for such right wil not receive dividends from RAS Italia S.p.a.[134] The regulation 2157/2001 has been adopted to set up a Societas Europea, three years after the adoption of this regulation around 350 SEs have been created.[135] Germany and the Czech Republic have recourse to this type of society. The main reason for Germany relies on the flexible structure of a Societas Europea, because can be created also with a monistic model, compared to the Aktiengesellschaft, which can be created just with a dualistic model. Secondly, a Societas European established in Germany must assure the participation of the employee as well as in the Aktiengesellschaft; albeit the participation of employee is mandatory, at a later time a relocation of the registered office to another Member State could take place, transforming the SE into an domestic company of another Member State, leading to eliminate the participation of workers. Furthermore in the phase of the establishment of a European company, it is necessary to start negotiations between the workers and the governance of the company, in order to consider an involvement of the employee in terms of information and consultation. If the negotiations are unsuccessful, provisions will be applied to provide for and regulate minimum forms of involvement.[136] In Germany the SE is particularly widespread because the Regulation 2157/2001 facilitates the transfer of the SE headquarters to the territory of other Member States. Bear in mind that no SEs have been established in the Italian territory[137] and there are various reasons leading to this situation. The SE statute is governed by the EU Regulation but it requires an integration by the national legislation of the place where the SE has its registered office: capital, workers' participation, obligations, protection of creditors. The other Member States expect Italy, have accepted the Regulation and implemented a series of provisions aimed at creating a SE. The Italian legislator has been passive by adopting only a series of provisions for the involvement of

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134 https://www.allianz.com/v_1340972580000/media/investor_relations/en/general_meetings/archive_1999_2016/agm_2006_italian/verschmelzungsdokumentation_teil_2___italienisch.pdf p 182

135 www.seeurope-netwrok.org.

136 ALESSIO (2002) *" La società europea"* p 621

137 STROZZI (2005) *" Diritto dell'Unione Europea, Parte Istituzionale. Dal trattato di Roma alla costituzione Europea"* p 195

workers. /d.lgs 188/2005).[138] It is said that a SE is suitable for medium-sized companies hence in the Italian panorama where the small and medium sized companies predominate, it seems that the SE constituted an exorbitant and excessively expensive alternative. In addition the protection of minority shareholders and of creditors relies on national provisions[139]; according to the article 21 of the Regulation, each company participating in the merger is required to publish in the national bulletin of its Member State an indication of how to exercise the rights that may be recognized in these cases to its creditors and to its minority shareholder[140]. On the other hand article 25 states that the merger procedure shall be verified by a national authority and article 47 of the Regulation states that a SE's statute may in accordance with the rules applicable to public limited-liability in the Member State where the SE has its registered office, applies conditions for the eligibility for members representing the shareholders. Articles 55 and 56 of the Regulation 2157/2001 allows that a qualified minority of shareholders representing the 10% of the subscribed capital[141], have the power to request the convening of the general meeting and indeed to set one order of the business in the general meeting , as well as the registration of one or more new items on the agenda in a general meeting already convened.[142] Article 9 establishes the hierarchy of the rules governing a SE, at the highest level there are the rules of the Regulation itself, which are mandatory; going down, there are the rules expressed by the private autonomy in clauses contained in the statute of the SE, meaning for statute the documents considered unitarily and referred to as a constitutive act and to the statute in the strict sense. At a third level, in case of matters non regulated by the Regulations or by the statute, the domestic rules shall be applied. Not all matters are regulated by the Regulation, in fact Article 9 paragraph 1 letter c states that in these cases, it is possible the application of national law. For example, the problem of the dismissal of the members of the board of directors and the members of the board of auditors. Some scholars claim that the silence of the Regulation would lead to the conclusion that the dismissal of members of the board of directors is not permitted[143]. On the other hand, the lack of a European interpretative standard would be reduced to the application of national legal norms. This interpretation relies in the Article 10 of the Regulation which sets the principle of non-discrimination between SE and national company[144]. The Societas Europea can

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[138] MIOLA *"Lo statuto di società Europea nel diritto societario comunitario: dall'armonizzazione alla concorrenza tra ordinamenti"* p 351-352

[139] MIOLA *"Lo statuto di società Europea nel diritto societario comunitario: dall'armonizzazione alla concorrenza tra ordinamenti"* p 333

[140] CAPRIGLIONE (2003) *" Applicabilità del nuovo diritto societario agli intermediari bancari e finanziari. Problemi e prospettive*" p 30-41

[141] WENZ (2004) *"The European Company . legal concept and tax issues*" p 11

[142] AMOROSINO-RABITTI BEDOGNI (2004) *" La corporate governance nelle società quotate"* p 359-366

[143] RESCIO (2007) *" La partecipazione di società italiane alla costituzione di SE (Società Europea)* p 366

[144] RESCIO (2007) *"La Società Europea tra diritto comunitario e diritto nazionale"* p 78

facilitate business activities in various internal markets and encourage the flow of capital from abroad. Furthermore, it can be used to facilitate future transfers of the registered office, since even with all the freedom of movement is guaranteed, there is no directive on the transfer of a cross-border seat that promote the solution and removes obstacles between the different legal systems. Moreover employee involvement in the Societas Europea could serve to foster relationships within the company itself, hence changing this factor as a strength. Even though the Regulation has been labelled as European Company the "SE" does not reflect this status because of the influence of the national law. According to the Regulation the law governing public limited liabilities companies in the member state in which the SE has its registered office governs the procedure. Member State may also influence the SE's formation under article 21.24 and 25. Article 21 states that if a company registered in a member states is involved in a merger and that State imposes additional requirements, these requirements shall be announced in the national gazette. Article 24 paragraph 1 states that the relevant member state's law on the merger of public limited liability companies will apply to each merging companies in order to protect holder of shares or bonds. Article 25 allows the authorities to scrutiny the pre merger requirements. In addition is quite different the value of worker participation in company management. European legal culture are central to understanding the SE and its impact. The Regulation is silent on a central regulator for the SE, in fact article 68 of the Regulation states that member states shall make provision in order to ensure the application of this Regulation.[145] The SE incurs in several problems also in the taxation[146], the same connected in other companies. Also the area of taxation[147] is not governed by European law but by domestic law hence a SE shall be treated in the same way of a company governed by national law. SE is subject to the national corporate tax in the state of its residence. In addition to taxation in the state of residence[148], a SE can be subject to the national tax law in state in which it operates as permanent establishment. One of the main challenges that a SE face relates to cross border activities due to the different tax legislation. Furthermore in the direct taxation[149], the merger directive, the parent subsidiary directive have been adopted also for the SE. Generally tax problems are be like linked to problems connected with the transfer pricing, with the capitalization rules[150], with problems connected with the permanent establishment. As overall even thought the SE means the simplification in the area

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[145] Marychurch (2002) *" Societas Europea: Harmonization or proliferation of corporations law in the European Union?"* p15
[146] GAMMIE, M (2004) *"EU Taxation and the Societas Europaea - Harmless creature or Trojan horse*?" p 35
[147] BOVENBERG,CNOSSEN, MOOIJ *" Introduction: Tax Coordination in the European Union"* p 619
[148] EUROPEAN COMMISSION (2003) *" An internal market without company tax obstacles"*
[149] HELMINEN M (2004) *"The tax treatment of the running of an SE*" p 28
[150] CONCI P (2004) *"The tax treatment of the Creation of an SE"* p 15

of law, the problems connected with taxation still continue[151], hence the SE faces the same problems of any domestic company .[152] The SE has been criticized relying on national legislations leading to a race of the bottom in legislation of the Member States. Moreover in matter non regulated by the Regulation, nation law shall be applied. In addition the SE Regulation has been criticized for its high level of flexibility especially in the area of workers involvement. Despite this challenges, a SE has the potential to increase the competitiveness and social protection.[153]

2.6)Fiat-Chrysler

The cross border merger transactions taken place within the European Union, fight with different legal system and recently tax problems con occur[154]. Fiat-Chrysler case is an operation that starts in 2009 when Fiat makes an alliance with Chrysler. In 2012, Fiat holds 58.5% of Chrysler. On 21 January 2014, Fiat acquired the residual shares of the capital of Chrysler, which therefore became a subsidiary[155]. On January 29, 2014, the board of directors approved the merger by incorporation of Fiat S.p.a. in the subsidiary Fiat NV, renamed FCA. According to the new entity FCA, this operation would lead " to a positive impact on investor perception and valuation and in addition will improve the access to capital and to expand strategic opportunities for the Group[156]. The new entity moreover, relies on three strengths : 1) a well established, investor friendly corporate form[157], 2) an enhanced access to capital, 3) loyalty voting to promote stable and Supportive Shareholder Base. The board of directors also declares that the new entity will be able to benefit from the presence of stable investors who will be encouraged to obtain double voting rights compared to those that members normally enjoy[158]. The merger by incorporation will therefore allows the provision of the multiple voting mechanism to be included in the bylaws to facilitate the maintenance of shareholdings and thus the formation of a stable group of shareholders. The new entity FCA will be listed in the stock exchange of NYSE and of MTA at the same day. The merger did not involve a tax

[151] GABALGIO E (2002) *" The need for corporate tax reform in the EU"*
[152] NERUDOVA (2005) *"Societas Europea-tax and legal aspects"* p 124
[153] LINMONDIN (2003) *" The Euroepan Company(Societas Europea)- A Successfull Harmonisation of Corporate Governane in the European Union"* p 120
[154] FAKTOROVICH (2008) *" Globalization: How successful are cross- border Mergers and Acquisitions?"*
[155] BALCETT (2002) *" The impact of focused globalization in the Italian automotive industry*"
[156] SIEMS (2005) *" The europeam directive on cross-border mergers: an international model?"* p 179
[157] Form F4 Sec www.sec.gov " an Italian headquarter, Italian legal incorporation and sole Italian listing were no longer an adequate reflection of the nature and geographical footprint of the business and did not best serve our capital and financing objectives.
[158] ANGWIN (2004) *" Speed in M&A Integration. The first 100 days"* p 418

or civil litigation and it highlights how the freedom of establishment has made enormous progress allowing to avoid the obstacles that may arise in cases of transfer of the registered office.[159] The consequences of Fiat Chrysler merger and in particular the transfer of the registered office and the central administration abroad and its listing in another financial market relies on four profiles:1) an intra company profile characterized by the change in the legal system; 2) the relationship between the company and the stakeholders,3) tributary nature, 4) change in the financial market. The first profile is to balance the interests of the company and of the shareholders in favour of the merger with the transfer of the registered office abroad and subsequently to enforce a protection for minority shareholders. Regarding the tax plan, the holding company and the group remain subject to the taxation in the country of origin limited to the assets and revenues accrued. One of the main goal of FCA is to be listed in a stock exchange, NYSE, this choice highlights the problem of competition in progress between European and extra-European financial markets, not only in regulatory terms[160] but also and above all in financial terms. The main choice taken by FCA, is to attract foreign investors.[161] Furthermore the choice to be listed at the NYSE is not without correlations with the transfer of the registered office in the Netherlands. According to the Dutch legal system, Fiat is able to adopt "*a well established, investor friendly corporate form and to benefit from a neutral jurisdiction and of a governance regime that is expected to be attractive to investors in multinational enterprise and in addition of a flexibility in raising capital or making strategic acquisition or investment as well as in issuing awards as a tool to incentivize and reward management and employees"*[162]. FIAT Chrysler opens a new season due to the differences of company laws and it leads to induce a high harmonization through community instruments. One of the advantages offered by the Dutch legislation is to issue multiple voting shares, promoting the entry of new shareholders which are interested in long-term participation and in addition to establish a cooperative relationship with managers avoiding opportunistic measure in a short perspective duration.[163] Fiat shareholders have had the opportunity to join the loyalty voting structure within 15 days of the fiat meeting that approved the merger, provided that they have participated in the meeting and subsequently maintain the ownership of the shares until the merger

[159] MUCCIARELLI (2005) *" The transfer of the registered office and forum shopping in international insolvency cases: an important decision from Italy"* p 512
[160] VENTORUZZO (2002) *" listing standards nell'esperienza statunitense"* p 340
[161] SEC 2014 www.sec.gov "enhanced access to capital. Moving our primary listing to the NYSE, where the shares of the major automotive companies that have the majority of their sales and profitability located in North America are listed, together with a listing on the MTA, is expected to enhance liquidity in our shares and to further our ability to access a deeper pool of equity and debt financing sources" p 34
[162162] SEC 2014 www.sec.gov p 34
[163] BUSANI. A SAGLIOCCA M (2014) *" Le azioni non si contano ma si pesano: superato il principio one share one vote con l'introduzione delle azioni a voto plurimo e a voto maggiorato"* p 1084

entry into force. Fiat stated that the impossibility of adopting loyalty voting mechanisms would be one of the fundamental reasons to move the registered office in the Netherlands.[164] One has to bear in mind if the loyalty shares mechanism is one of the reasons for the movement of the registered office abroad, but if that were the case, it would not only be necessary to identify a balance between shareholders but an assessment of the circulation of companies within Europe and later to draw the consequences at national and European level. Firstly, the transfer of the registered office abroad allows a changing in the applicable law and as consequences the possibility of issuing loyalty shares is always a piece in the assessment of these transactions. Secondly, also the other components such as trade unions and political forces must be verified with respect to the collocation of the holding company.[165] The loyalty shares mechanism also serves to strengthen the relationship between investors and manager; the main intent is to use loyalty shares as a defensive technique compared to hostile takeovers.[166] According to a report by the law firm Sherman & Sterling, the presence of Control Enhancing Mechanism in national legislation and the possibility of issuing multi-vote shares and loyalty voting mechanism is a potentially relevant issue even in terms of corporate mobility.[167] The Report on the proportionality principle in the European Union elaborated by the European Commission in 2007, compares States such as Australia and Japan for the presence of CEM and these include also the presence of multiple votes and therefore loyalty shares.[168] The same report shows that the 41% of listed companies examined Italy, did not present any CEM mechanism but among the larger companies this percentage decreases to 15%[169].The loyalty voting mechanism was discussed in the DSM case. The case was submitted to the Advocate General al Timmermans.

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[164] FIAT INVESTEMENT N.V FORM F-4 2014 " The Board of directors believes that a strong base of core shareholders has benefited and will continue to benefit us. Multiple voting mechanism, particularly those that recognize the importance of core shareholders while encouraging new shareholders to invest for the long term can be effective in promoting long-term stability of a business. These mechanism in varying form are common in a number of jurisdictions such as the United States, Sweden, France and the Netherlands. Dutch law allows for the creation of multiple voting mechanism, which are not permitted under Italian law and therefore, the Merger will enable the adoption of an appropriate multiple voting mechanism

[165] SEC www.sec.gov "The board of directors believes that the long term support provided to us by our founding family has been beneficial to our strategic development historically and wishes for such support to continue. We also believe that the loyalty voting structure may provide additional strategic flexibility for us to pursue attractive acquisition and strategic investment opportunities because the loyalty voting structure will ease the impact of any dilution in the economic interest of these core shareholders. Furthermore, the Board of Directors believes that enhancing the stability and loyalty of our broader shareholder base will strengthen the relationship between management and shareholders by limiting the distractions that may tend to arise from opportunistic short-term mechanism. The loyalty voting mechanism is designed to encourage investment by shareholders whose objectives are aligned with our strategic long-term development plans" p 35

[166] Cfr *"European company law experts, Response to the European Commission's Report on the application of the takeover bids"* par 1.5

[167] Report on the proportionality principle in the European Union (2007) ISS

[168] HOPT (2010) *" The European Company Law Action Plan Revisited. Reassessment of the 2003 priorities of the European Commission"* Leuven University press p 178

[169] GILSON (2005) *" Controlling shareholders and corporate governance: complicating the comparative taxanomy"* p

It focused on the thesis that according to the DCC 2:92 paragraph 1 rule, regarding the attribution of a larger dividend, a statutory provision was necessary but not the creation of a specific category of shares.[170] The article 2:118 DCC allows the statute the attribution of a larger dividend non proportional to the nominal value of the shares. The Dutch legal system has not shown any particular direction at the beginning in fact there is not a well-established jurisprudence and provisions on the matter. The loyalty voting structure will be granted just to shareholders who have held their shares for an uninterrupted period of time, at least 3 years after the formation of FCA[171]. The loyalty share structure is an instrument in order to guarantee the long term stability in a company. On the other hand an investor in a public company is interested in the profit he can make especially considering the fact that FCA shares are traded in almost capital markets. Even if all shareholders are treated in the same manner and equally, this structure could favour the already controlling shareholders of the company and also strengthening their position as majority shareholders. This technique surely prevents the position of minority shareholders. The loyalty multiple voting right is allowed just in a few 28 Member States of European Union creating disadvantages for the minority shareholders.[172] Regarding the protection of minority shareholders, we have to dived Dutch shareholders and Italian shareholders; shareholders of FCA according to the prospectus will have no appraisal rights or exit rights as Dutch law does not recognize because the appraisal right is available in the situation that the disappearing company is governed by Dutch law and the acquiring company is governed by the law of another Member State of European Union or EEA Member States.As aforementioned, the loyalty shares represent one of the main advantages in the Netherlands regarding the corporate finance, generally one vote on share can be considered as default rule; each share attributes one vote in each general meeting and decision, votes can nit be subjected to conditions.[173]

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[170] KOPPERT (2008) *" Loyalty dividend and the EC Principle of Equal Treatment of shareholders"* p 173

[171] http://2014annualreport.fcagroup.com/en/report-operations/corporate-governance/loyalty-voting-structure (2015)

[172] VENTORUZZO M (2015) *"The disappearing taboo of multiple voting shares: regulatory responses to the migration of Chrysler- Fiat"* ECGI

[173] VENTORUZZO M (2015) *"The disappearing taboo of multiple voting shares: regulatory responses to the migration of Chrysler- Fiat"* ECGI p 6

COUNTRY	MULTIPLE VOTING SHARES
Belgium	NO
Germany	NO
Denmark	YES
Finland	YES
France	YES
Greece	NO
Ireland	YES
Italy	YES
Luxembourg	NO
The Netherlands	YES
Poland	NO
Sweden	YES
Spain	NO
United Kingdom	YES
Australia	NO
Japan	YES
USA	YES

All Member States which allow multiple voting shares

An interesting case is France, French MVS (multiple voting right) are double voting referring to shareholder who holds the shares for a minimum of two years while for listed corporation is four years.[174] This right is not attached to the shares but to the shareholder so in the event of transferring selling or conversion, there is the lost of such multiple voting.[175] The main goal is to incentivize the long term but in non listed corporation are less common because generally there is just one

[174] L225-123, Code Commerce
[175] VENTORUZZO M (2015) *"The disappearing taboo of multiple voting shares: regulatory responses to the migration of Chrysler- Fiat"* ECGI p 8

shareholder or a family; double voting shares can be established in this case with a supermajority of 2/3In addition the case of the Netherlands is worth taking into consideration, as one of the main reason for the cross border of Fiat; moreover all FCA shareholders that will register their shares in a special “Loyalty Register”, will be entitled to receive an additional voting right for every registered FCA share uninterruptedly held for 3 years[176]. However, the former Fiat shareholders that will vote at the extraordinary general meeting will be entitled to the initial allocation of the special voting shares. This voting structure could represent a breach of the basic principle of equality of shareholders[177] and this advantage i is only reserved to all Fiat shareholders that will vote at the upcoming EGM. In Italy the innovation introduced by the Decree No. 91/2014, converted with the law No. 116/2014, has regulated the Multiple voting right. The new article 2351 paragraph 4 Civil Code, allows non listed companies to issue MVS with a maximum of three votes per share while by contrast the situation according to article 127 quinquies of the Consolidated Law on Finance, states that the bylaws can adopt loyalty shares granting double voting but just for shareholder who hold them for a minimum period of two years but in the event that the shares are transferred, this privilege is lost. The shares with multiple voting are not considered as class of shares. An important question is whether the shares with multiple voting are lost in the event of a merger. If the bylaw does not provide differently. If a corporation holds double voting shares and merges with and into another corporation, the new entity retains that multiple voting[178]. The main question that arises from this discipline lies on the price value of them in the case of merger. It is an open question relating to corporate law, finance and accounting. After the introduction of multiple voting shares, just a few listed corporations have adopted them in their bylaws, such as Campari[179], Amplifon and Astaldi. The introduction of multiple voting shares in Italy is an evidence of evolution in our European system aimed at reinforcing the EU market and also a high level of attraction by foreign investors within our Country. This is a first step for harmonization and the three Italian companies have already adopted the MVS. The introduction of increased voting shares in the listed companies’ regulation is to stimulate medium-long term share investments preventing the exclusively short term considered as speculative.

Furthermore an analysis of Fiat's choice to transfer the FCA headquarters in the Netherlands, leads to tax purposes, creating competition among Member States.[180] The choice to disclose the registered

[176] http://www.ecgs.net/node/146

[177] VENTORUZZO M (2015) *“ The disappearing taboo of multiple voting shares: regulatory responses to the migration of Chrysler- Fiat”* ECGI p 9

[178] SAGLIOCCA M (2014) *“Le azioni non si contano, ma si pesano”* p 1050

[179]http://www.camparigroup.com/sites/default/files/downloadspage/rules_governing_the_special_list_for_entitlement_to_the_benefit_of_double_voting_rights_january_29_2016.pdf

[180] PINTO.C (2003) *“ Tax competition and EU law”* in Eucotax p 1

office in Holland and the fiscal office in Great Britain is not accidental, since between these two countries there was an agreement against double taxation[181]. On the basis of this agreement the fundamental criterion for the identification of the competent country is the Permanent establishment, which is identified on: 1) the place of management[182],2) a branch,3)an office.[183]In 2010 the new British government with the Chancellor of the Exchequer George Osborne indicated the strategic line in order to make the Great Britain as one of the most attractive country of the G20 where to place an international enterprise[184]. The corporate tax rate has been reduced from 28% to 20% by 2015, the lowest rate in the history of Britain and of the G7 and G20 countries.[185]In addition a new reform of the CFC, allows that the incomes of the subsidiaries non resident in U.K are taxed in the United Kingdom, as well as a regime for investments in research and development and the so-called "patent box" regarding the introduction of tax benefits on income derived from the exploitation of patents and other forms of intellectual property. The freedom of movement of legal entities and in particular of commercial companies constitutes one of the most the pillars for the construction of an European market. The gradual removal of obstacles regarding the freedom of establishment has led to the formation of a" level playing field." In the case of Fiat Chrysler, these are companies with a strong industrial importance during an expansion phase; in the second analysis, the reasons behind this merger are both corporate and especially fiscal.[186] According to the treaties, the freedom of establishment lies in the construction of a European market, but a European market should not exist without a fiscal harmonization. It is presumable that a tax competition can be triggered between the different Member States within Europe. Furthermore it does not appear to be consistent with Article 3 of the TEU, according to which the European market is based on a social economy with a sustainable development.[187]The automotive market[188] has always been characterised by strong competitive pressure since 1990s. This has had several implications

[181] According to the article 2 of the agreement, this will applied for Holland to the income tax, wages tax, company tax, dividend tax. For the Great Britain to the income tax, corporation tax, capital gains tax, petroleum revenue tax, supplementary charge in respect of ring fence trades. www.hmrc.gov.uk

[182] HASLINGER (2004) " *Place of effective management as a tie breaker rule. Concept, development and prospects"* p 377

[183] MARINO-MARZANO (2014) "*Il trasferimento della sede e della residenza fiscal all'estero e dall'estero in Italia"* p 371

[184] Speech Chancellor Exchequer 19 May 2010 " Our aim is to create the most competitive corporate tax regime in the G20, while protecting manufacturing industries..As well as lower rates and a simpler system, I want to reform the complex Controlled Foreign Companies rules that have been driven businesses overseas. I want multinational coming to the U.K not leaving.. I want Britain to be the easiest place in the world to start a business" www.gov.uk/government/speeches/

[185] HM Treasury, The corporate tax road map, November 2010

[186] MORGAN THOMAS (2013) *" Countering offshore tax evasion: A comparative look at initiatives by the United States, Canada, the United Kingdom and Japan"*, p 17

[187] SIAFIELL (2009) *"Towards a sustainable European Company Law"*

[188] MOSCHIERI C & CAMPA J.M (2009) *" The European M&A industry: A market in the process of construction" Academy of management perspectives "* p 71-87

especially for the management methods[189] adopted by automobile manufacturers. Between the end of the 80s and the beginning of 90s a first joint venture of Fiat and Chrysler failed. In the same period both automobile brands reached an agreement regarding the distribution of Alfa Romeo. Chrysler became the distributor for Alfa Romeo in North America. Looking at an industrial point of view, the Fiat situation in 2009 was characterised by ups and downs, first of all Fiat Professional, the LCV (light Commercial Vehicles) brand was well positioned in Europe, holding a high rate of sales in South America, especially in Brazil, secondly Fiat was one of the leader for technologies regarding technological solutions for CO2 emission. On the other hand the situation is different for Chrysler due to economic instability that led to bankruptcy. In order to survive and repay its debt, Chrysler received funding from U.S Government in 2008, but it was necessary to find an industrial partner which would provide advanced technologies. This was also one of the reason for the tentative agreement for Chrysler with Fiat. Moreover in terms of corporate governance, Fiat and Chrysler shared the same CEO and at the same time top management from Chrysler was involved in the restructuring process of Fiat[190]. Some managers from Fiat were asked to join Chrysler's teams to help with the process of integration. The acquisition of Chrysler provided for Fiat Group the opportunity to redefine the strategy and the market shares[191]. The new entity FCA acquired markets in North America and also in South America, One has to bear in mind that both Fiat and Chrysler maintained a reference role in their respective markets (European and Brazil for Fiat, North America and Mexico Chrysler). In addition relating to the Cross Border Merger, operating synergies[192], market power motivations, tax motivations are wider recognized in this case.[193] From an industrial perspective both philosophies is to produce cars for their respective market. For a successful cross border merger as such, a high degree of integration should be reached from industrial and financial points of view. Both brand were highly motivated to achieve the same goal. On the other hand albeit Chrysler received funding from U.S Government it would respect the condition to achieve a satisfactory turnaround or the alternative would have been the bankruptcy. Furthermore, changes following a cross border merger may refer to technologies, the location of plants and the models they produce. Fiat s.p.a. was a company with its divisions in 50 countries, on the other hand, Chrysler was located in the U.S, Canada and Mexico (NAFTA) and Venezuela. In

[189] AKGUNA (2007) *" New product development in turbulent environment: Impact of improvisation and unlearning on new product performance"* p 202-203
[190] BALCET,G, COMMISSO,G,CALABRESE,G (2013) *" Structuring and restructuring Fiat-Chrysler: can two weak carmakers jointly survive in the new automotive arena?"* p 183-197
[191] RUGMAN A, COLLINSON S (2004) *" The regional Nature of the World's Automotive Sector"* p 471-482
[192] CONTRACTORF,J,LORANGEP (2002) *"The growth of alliances in the knowledge-based economy"* p 485-502
[193] GRINBLATT,M,TITMAN,S (1998) *"Financial Market and Corporate Stratgey"*

FCA Business Plan for the period 2014-2018, data has been divided in several regions[194]: NAFTA, LATAM, EMEA, APAC.[195] The NAFTA region includes: Canada, USA and Mexico. The production plants of FCA in the NAFTA region is supported not only by external suppliers but also by internal suppliers , for instance companies which were owned by FIAT and now property of FCA (Magneti Marelli, Comau, Teksid). On the other hand in LATAM region, FCA facilities are concentrated in two countries: Brazil which has been one of the most profitable markets for FIAT and Argentina. Investments have been made for the creation of another facility in Goiana (Brazil) by 2015. In the EMEA region, FCA facilities are located in Italy, Poland, Serbia,[196] Hungary and Turkey. The EMEA and NAFTA are the most characterized by strategic changes The EMEA region suffer of over capacity problems. Mirafiori plant actually has a capacity of utilization of about 100%. FCA's goal is to reach 100% by 2018.[197] In APAC region are located in the two biggest markets, China and India. In China FCA has established a joint venture with Guangzhou Automobile Group for the production and distribution of Viaggio and Ottimo, while in India a joint venture with TATA, the owner of Jaguar and Rover. Regarding these regions, is important to stress the evidence about the relationship with Trade Unions. In FCA case is useful to address such topic to two point of view:1) Generalized regional scale;2) Specific national scale with focus on US and Italy only. The Trade Union is influenced by legal, social and economic conditions existing in a country. Moreover a generalized regional scale is useful to have references. LATAM region has a labour cost lower than NAFTA. Both NAFTA and LETAM plants have a capacity of utilization of 100%. FCA's facilities are also located in Italy and Eastern Europe and relationship with Trade Unions are not the best one in Poland, Serbia and in Turkey. The regulation in Serbia are bad at all where Trade Union[198]'s freedom is non-existent. The APAC region is characterised by lower labour-cost and the access to the market is possible just through Joint Ventures or Alliances. The access in China, relies just on the creation of Joint Ventures too with local car-makers.[199]

As we have seen FIAT Chrysler fall within the horizontal merger since they seek to gain access to products and market segments. Between 2013 and 2014 FIAT completed the acquisition of the remaining 41,5 % shares in Chrysler paying around €4.35 Billion.€1.75 were paid in cash, €1.9 in equity and €700 Million will be paid in the next four years by Chrysler Group to the VEBA[200]. The

[194] LAYAN and LUNG (2004*) " The dynamics of regional integration in the European car industry"* p 60
[195] FCA 2014 Business Plan
[196] NAOR (2009) *" The globalization of operations in Eastern and Western countries: Unpacking the relationship between national and organizational culture and its impact on manufacturing performance"*
[197] Ibid
[198] FEENSTRA (1998) " *Integration of Trade and disintegration of production in the Global Economy"* p 40
[199] McCormarck (1994) *" The new dynamics of global manufacturing site locations"* p 70
[200] The Voluntary Employee Beneficiary Association is a trust fund which provides benefits for employees. It is part of the United Automobile Workers (UAW)

Business Plan for the period 2014-2018 is much more complex , in fact FCA as new entity has to show to the investors the synergies and the possibilities the merger offered in every market. The NAFTA and APAC regions are strong enough. The LATAM region is a consolidate pillar and FCA has underline its position in order to defend from Volkswagen. In the NAFTA region, considering the U.S market only the goal is to become the 3rd car maker and overcome Toyota. Alfa Romeo brand will need to be positioned as a top segment brand. The APAC region is still to be penetrated. China and India represent a market worldwide for car makers but is quite hard to penetrate the market for non Japanese companies. The Plan stresses the goal to growth in China and in India, through Joint Ventures. The greater support in APAC region will be given by Jeep brand. In addition the future of competition will be based on engine efficiency and on the reduction of emissions of CO2. In fact the Group that will invest in technologies should have a high impact on markets and advantages which could be sustainable in the mid-term and therefore to gain a relevant amount of market shares.In addition Fiat Chrysler integration was based on the redefining Chrysler's organizational structure[201] and on the other hand on shared technical norms. Fiat Chrysler relies on a matrix organization which dimensions are geographical areas. Fiat decided to centralize the R&D area in order to increase coordination, to manage synergies and to create competences that can support all platforms. Moreover Car makers have to undergo under several norms and these differ in Europe and in U.S. As overall, Fiat and Chrysler have to harmonize more than 20.000 (10.000 for each firms) but they decided to focus just on 2.000 key norms. The norms concerning this process regards the project development and components design, while norms about the industrialization were not included.[202] Fiat and Chrysler started to compare the norms one by one but took a long time, so they divided the norms into clusters, for examples all norms about materials. As regard material, Chrysler Material Standards were selected because can be applied in NAFTA and in the EMEA regions, while Fiat norms don't respect the U.S requirements because id a more demanding legislation. The hardest decision of norms regarded the suspension durability, because they should be defined having in mind differences in each State, and in more details regarding roads. In addition Fiat is more focused on the manufacturing area compared to Chrysler, in fact Chrysler's norms are less reliable than Fiats norms regarding manufacturing issues. Hence harmonization about technical norms[203] was the main issue in the long and complex decision between Fiat and Chrysler. Is quite important to stress the concept of shared product platforms

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[201] MUFFATO M (1999*) " Introducing a platform strategy in product development" International Journal of Production Economics"* p 145-153

[202] CLOODT (2006) *"Mergers and acquisitions: their effect on the innovative performance of companies in high tech industries"* p 642

[203] GRAEBNER (2010) *" Success and Failure in Technology acquisitions: lessons for buyers and sellers"* p 75

especially regarding the B-SUV, generally platforms are shared across the countries and the design decisions are taken also by a shadow team.[204] In the B-SUV case the team responsible for the development is a Fiat team and the shadow team is a Chrysler team. Two Chrysler expertise were expected to join the responsible team and to shared decisions with Fiat team. The interaction between these two groups was enabled by the Fiat development team and the Chrysler shadow team with a chief engineer, product manager and a quality manager. Each members of the B-SUV team share an amount of data each data and selecting alternatives and solving trade-offs.[205] After the merger Fiat supported Chrysler adaption of Italian platform to the US market, about the 500 platform. Chrysler team was responsible for the development and Fiat shadow team supported Chrysler. Two managers[206] joined the Chrysler team: Vehicle Integration Responsible (VIR) and the Program Manager (PM). The former regarding the brand and the latter has the task to coordinate, to monitor new product development activities. Fiat and Chrysler were not able to find the VIR and the PM managers for the B-SUV projects.[207] The first reason regards in the language[208] and the second is the integration in a complex structure such that of Fiat.[209] The B-SUB responsible believes that although is possible the integration of human resources[210] in Fiat and Chrysler, the shadow team has a VIR and PM but lack in the Fiat so contradicting the principle of mirroring between the two structures.[211] As we said technical norms are different between Europe and US and in the B-SUV one of the challenge regarding how to define the design components. Fiat and Chrysler have to translate technical norms in client's needs. According to DiMuro the Head of EMEA region, he explained that this is a natural process and the most critical areas in the B-SUV was relating to the ergonomics. In addition clients prefer bigger handles that can be opened with snow gloves during winter while are non- esthetic for Italian clients. US clients prefer straight seats while Italians prefer enveloping seats. Furthermore DiMuro stressed the idea that the criteria to

[204] BANNERT,V and TSCHIRKYH (2004) *" Integration planning for technology intensive acquisition, R&D management"* p 481-494

[205] PURANAM, PHANISH, HARBIR, ZOLLO, MAURIZIO (2003) *" A bird in the hand or two in the blush? Integration trade-offs in technology grafting acquisitions"* European Management Journal, p 179-184

[206] BJORKMAN I, STAH G, VAARA E (2007) " *Cultural differences and capability transfer in cross border acquisitions: the mediating roles of capability complementarity, absorptive capacity, and social integration"* Journal of international business studies p 658-672

[207] SAMRA (2008) *" Effect of improvisation on product cycle time and product success: a study of new product development (NDP) teams in the United States"* p 180

[208] BAUER F & MATZLER K (2013*) "Antecedents of M&A success: the role of strategic complementary, cultural fit, and degree and speed of integration"*. Strategic Management Journal

[209] HUTZSCHERNREUTER (2010) *" The impact of added cultural distance and cultural diversity on international expansion patterns: a penrosean perspective"* p 305

[210] BIRKINSHAW J, BRESMAN,H, HAKANSON L (2004) *"Managing the Post acquisition Integration process: How the Human integration and Task integration processes Interact to foster Value creation" Journal of management studies* "p 395-425

[211] RANF (2002) *" Acquiring New Knowledge: The Role of retaining Human capital in acquisitions of high tech firms"* p 300

decide which clusters of norms to apply is useful but is risky and not always a guiding line in making decision

According to a study by Deloitte[212], several characteristic can define a favourable or les favourable conditions for a cross border merger: 1)Acquiring at the correct time[213],2)applying accumulated experience, 3) pursuing deals of an appropriate size, 4)funding transactions with equity or a mix of equity and cash.

1) Acquiring at the correct time: Merger takes place in positive business cycles and merger in automobile industry is much lower than in other periods. Deloitte stresses the point on the merger activity if should be considered favourable or not due to strong competition.[214]
2) Applying accumulated experience: The experience acquired is fundamental to evaluate the probability of a successful merger. FIAT's experience is limited to the national level and its deal has also been supported by Governmental institutions, therefore it does not own a consolidate history in merger activity.[215]
3) Pursuing deals of an appropriate size: Looking at the recent mergers, the deals involve two parts of very different size, FIAT's market capitalization was around €9 Billion while Chrysler's market was about €10 Billion, that means that the acquires was even smaller than the acquired[216]. FIAT and Chrysler faced the paradox of being too small to acquire and too big to get acquired[217]
4) Funding transactions with equity or a mix of equity and cash: The nature of transactions is important to understand the new links created between the companies. FIAT's actions was a mix of equity and cash and it was criticized by some analytics due to the high level of debts.[218]

The process of consolidation in the Automotive Industry[219] will continue and in addition the challenges faced by FIAT have been several: 1) Expanding while its home Country was facing the worst political economic crisis ever seen in Italy, 2) Handling an extremely difficult merger under unfavourable conditions, 3) Re-structuring Chrysler and paying back the loans taken by the Government, 4) Dealing with Trade Unions, 5) Integrating FIAT and Chrysler's activities, product

[212] DELOITTE (2013) " *Beating the Odds- How companies can improve value through M&A?"*
[213] SPATZ (2004) *" Globalization of the automotive industry: traditional locations under pressure?"* p 110
[214] GUGLER (2003) *" The effects of mergers: An international comparison"* p 625
[215] KOGUT (1988)*" The effect of national culture on the choice of entry mode"* p 411
[216] MOSCHIERI (2009) *" The European M&A industry: A market in the process of construction"* p 75
[217] HAGEDOORN (2002) *"The effect of mergers and acquisition on the technology performance of companies in a high-tech environment, technology analysis & strategic management "* p 70
[218] LEEPS & MISHRA (2013) *"Do mergers and acquisitions pay off immediately?"*
[219] GERPOTT (1995) *"Successful Integration of R&D functions after acquisition: an exploratory empirical study"* p 161

– portfolios and production processes. After the merger FIAT can enter the NAFTA and access a huge distribution and sales channel to re launch Alfa Romeo. In addition the Jeep brand represent the only resource to be used in the APAC region and to penetrate the market. Hence R&D contributes to identify also an integration mechanism between FIAT and Chrysler and build a unique set of shared technical norms, in order to be applied in multiple geographical aerea.

Conclusion

As we discussed, the investor protection has the function to create an efficient capital market. Nevertheless this function, further complications arise in the CBMD, relating to some critical questions such as whether the minority shareholders shall be protected in the acquired company and in the acquiring company. The protection of minority shareholders is fundamental and necessary in a Cross border Merger in order to create a fairness and equality economic impact where the absence of that might have trigger effects within the European market. The focus should be on whether we need a harmonization of this topic or an implementation of article 4.2 of the CBMD. The main problem in a cross border merger for a shareholder is the change of corporate law. A ground of protection could render this transaction more challenging than a domestic one. A change of corporate law is sufficient for such protection or might have a negative impact on the cross border merger transactions. A non adequate minority protection could be also detrimental for the market and also creating restriction on the freedom of establishment or the free movement of capital. On the other hand, the European legislator has not considered such topic to be so important and has not introduces Members States to introduce different clauses, he just allowed to do that. In addition a shareholder has different rights, the right to speak out in the general meeting and also voting rights and has also the option to claim the nullification of a resolution in court. Likewise, the minority shareholder is entitled to the right to be informed, in fact he has the right to review the notes to the merger proposal. Moreover the several rights that a minority shareholders can have rely on the class of shares so a harmonization in this topic must be forwarded by the European legislator. The remedy that a shareholder is entitled is the so called Appraisal right, where the main advantage is that a time consuming for the court is not required. This right represents a squeeze out proceeding and is available also in the case for minority shareholders of an SE, in the case of a cross border merger. Hence one protection is relating to the share values, a hot topic especially in Delaware where several methods are involved. The protection of shares is also set forth in the Article 1 Protocol of ECHR offering to the shareholders an adequate ground of protection of the property of shares and also the circumstances for the application. European law does not regulate the whole company law, so the European legislator should concentrate on narrow area, especially where the protection of minority shareholders lies. One of the right that result as a protection relies on the share exchange ratio which should be amended by a competent national authority. As we have seen article 4.2 CBMD allows Member States to adopt several measures for the protection of shareholders but some obscure point arise and should be clarified by the European legislator as such: who qualifies as minority shareholder, whether the shareholder of the acquired or the acquiring company are entitled to be protected and what should be the nature of this protection. On the other hand one of the main area interested in this topic relies on the corporate governance, which support the interest of shareholders. A governance regime is sufficient to prevent also the agency problems in a transaction as such. While corporate law deals with the relationship between the different counterparties, the minority shareholder protection is at stake. However the idea for protection is still an open topic especially whether inspired by the change of applicable law or to a protection relating to exchange ratio foe shares. In the light of the existing legislations and referring to the umbrella definition in the article 4.2 CBMD, substantive rules should be introduced to guarantee a ground of protection, albeit shareholders are entitled to several rights such as, the right to be informed, to be heard and to bring action to court in case of breach of duty. As overview, mergers are often the most complex transactions involving the laws of different jurisdictions and have been recognized to prevent the correct function of the common market and the freedom of establishment.

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