Abstract
This paper will examine the 10th Company Law Directive on Cross-Border Mergers in the light of the fundamental freedom of establishment (Arts. 43, 44, 48 EC Treaty\Arts 49, 50 and 54 Treaty on the Functioning of the European Union (TFEU)). The EU fundamental freedoms could constitute the “Visible Hand” in the area of EU corporate law. They could impose certain safeguards which derive directly from the Treaty on the Functioning of the European Union. The ECJ had interpreted the freedom of establishment with regard to cross-border mergers. According to the ECJ’s case law (SEVIC), cross-border mergers constitute an exercise of the freedom of establishment. This paper scrutinizes the main provisions of the Cross-Border Mergers Directive and analyses their relationship with the fundamental freedom of establishment as interpreted by the ECJ. Special emphasis is given on creditor protection, on the protection of minority shareholders and on the liberalisation of the consideration provisions in the internal market context. The relationship between SEVIC and the Cross-Border Mergers Directive will also be discussed and some conclusions would be drawn. The EU Mergers and Acquisitions market is a fragment of the internal market and as such all the corporate financial mechanisms of this market must comply with the EU fundamental freedoms.

I) Introduction.

The object of the interpretation of the freedom of establishment by the European Court of Justice (ECJ), as well as of the harmonising company law, is to ensure that companies can exercise efficiently this fundamental freedom and establish themselves in other Member States. This choice of companies to establish themselves in other Member States should be accompanied by the necessary flexibility for corporate restructuring; should not be disadvantaged due to the cross-border nature of their establishment; and should not incur excessively high costs or burdensome formalities, which could potentially result in obstacles (e.g. Dutch legislation in Inspire Art).1 For

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these reasons, companies should enjoy the possibility to conduct cross-border mergers which constitute an exercise of the freedom of establishment and a quite effective method of corporate restructuring.

The legal basis of the Cross-Border Mergers Directive is Art. 44 EC Treaty (Art. 50 TFEU). The treaty basis for the company law harmonization programme is Art. 44 (2)(g) EC Treaty (Art. 50 TFEU). The regulatory goal of this provision is provided by Art. 44 (1) EC Treaty (Art. 50 TFEU) and is the attainment of freedom of establishment. Any harmonising legislation in the field of company law must eliminate obstacles to cross-frontier business activities, mobility, expansion and investment and/or eliminate appreciable distortions of competition. Additionally, the high degree of competitiveness of EU businesses and market proclaimed by Art. 2 EC Treaty (replaced, in substance, by Art. 3 TEU) as one of the primary tasks of the Community shall also be pursued by the harmonising measures which have to try to reduce the transaction costs involved in cross-border business activity. Hence, the Cross-Border Mergers Directive is supposed to contribute to the freedom of establishment in the internal market context. We are going to see the extent to which the main provisions of the Cross-Border Mergers Directive facilitate this EU fundamental freedom.

The EU fundamental freedoms could constitute the “Visible Hand” of the regulatory legal frameworks in the area of EU corporate law. They could impose certain safeguards which derive directly from the Treaty on the Functioning of the European Union. As a matter of fact, the aim of these Treaty safeguards is to establish a robust internal market. Only an integrated market could respond effectively to an economic crisis affecting EU corporations. If EU corporations could exercise freely their EU fundamental freedoms, the EU market in Mergers and Acquisitions which constitutes part of the internal market would gain benefits. The Mergers and Acquisitions market is a fragment of the internal market and as such all the corporate financial mechanisms of this market must comply with the Community fundamental freedoms.

II) Historical development and background of the Cross-Border Mergers Directive.

Before the adoption of the 10th Company Law Directive on Cross-Border Mergers, there were certain legislative efforts to regulate mergers. In 1967 and 1972, the European legislature endeavoured to regulate cross-border mergers by proposing a draft Convention on international mergers under Art. 220 (now Art. 293) EC Treaty. Art. 293 stated that ‘Member States shall, so far as is necessary, enter into

3 D. A. Wyatt and A. Dashwood, op. cit. n 2 supra, at 864.
4 Art. 293 was repealed by the 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.
negotiations with each other with a view to securing for the benefit of their nationals: … the possibility of mergers between companies or firms governed by the laws of different countries’. The caveat ‘so far as necessary’ should not cast doubts on the efficiency of cross-border mergers, because they constitute a mode of corporate restructuring that assists companies in their exercise of the freedom of establishment and contributes to market integration. With regard to cross-border mergers, Art. 293 was inserted because of the initial doubts that existed as to whether the scope of the Community’s legislative powers were sufficiently broad to allow for the enactment of a Community Directive or Regulation on cross-border mergers. The convention has never come into force (it was abandoned in 1980), and it’s the draft therefor was subsequently replaced by the draft of the 10th Directive.

In 1985, the draft 10th Company Law Directive on Cross-Border Mergers was proposed by the European Commission. This reveals that the European Commission had changed its stance towards the scope of the legislative powers of the Community as far as cross-border mergers are concerned. Cross-border mergers became part of the EC company law harmonisation programme, and any efforts to conclude an international convention among the Member States were abandoned. The European Commission clearly claimed legislative power by invoking Art. 44(2)g (Art 50 TFEU) as the legal basis of this Directive. Nevertheless, there was not much progress in this legislative initiative of the Commission due to German concerns about employee participation (co-determination) in the company’s management. The Commission tried to alleviate the German concerns by conferring an exemption to Germany from Art. 1(3) until such time as the 5th Company Law Directive on the structure of public companies had coordinated and solved the problem of employee participation on EU level. However, the European Parliament had blocked this 1985 draft Directive and, in 2001, the Commission abandoned it. After many years of legislative inaction in the field of cross-border mergers, the Company Law Action Plan provided a new impetus for the regulation of cross-border mergers. The European Commission, in accordance with the 2003 Company Law Action Plan, which was based on the 2001 report of the High Level Group of Company Law Experts, drafted a new proposal for a Cross-Border Mergers Directive. The German reactions, based on the lack or reduced level of employee participation, were mitigated with the help of the

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6 J. Welch ‘Tenth draft directive on cross-border mergers’ (1986) 7 Company Lawyer at 69-70.
7 P. Behrens, op. cit. n. 5 supra at 1671.
8 P. Behrens (n 5) 1671. Art. 44(2)(g) (Art 50 TFEU), the specific remit for the harmonisation of company laws, constituted the legal basis for many EU Directives related to corporate restructuring. With regard to the early Community harmonising measures in the area of company law, the removal of legislative discrepancies rather than the mutual recognition or coordination of national company laws was the primary result of these harmonisation efforts. J. Rickford ‘Current Developments in European Law on the Restructuring of Companies: An Introduction’ [2004] European Business Law Review 1225 at 1235.
9 P. Behrens, op. cit. n 5 supra at 1671.
10 P. Behrens, op. cit. n 5 supra, at 1671.
11 Its members were: J. Winter (The Netherlands), J.Rickford (UK), J. Simon (France), K.Hopt (Germany), J.M. Garrido Garcia (Spain), J.S. Christensen (Denmark), G. Rossi (Italy).
Employee Participation Directive\(^{13}\) accompanying the SE Statute. The European Commission believed strongly that the Employee Participation Directive, which provided the solution in the case of an SE, could also apply, with some adjustments, to the case of cross-border mergers.\(^{14}\) The predictions of the Commission were verified, and it was only in 2005 that the Cross-Border Mergers Directive was finally adopted.\(^{15}\)

### III) Other Community legal instruments relevant to mergers.

The early Community harmonising measures in the area of company law also provided some of the necessary prerequisites for the adoption of the Cross-Border Mergers Directive (which, nonetheless, was adopted much later). The 1\(^{st}\) and 2\(^{nd}\) Company Directives provide security of legal transactions and equivalence of treatment for creditors and shareholders in relation to company capital; and, as a result, level the playing-field and achieve equality of competition for EU companies.\(^{16}\) The Fourth, Seventh and Eighth Company Directives regulate disclosure of financial information; and thus are quite important for corporate restructuring, because they provide a secure climate for legal relations and cross-border investments throughout the Community.\(^{17}\)

There is also the 3\(^{rd}\) Company Law Directive, which establishes a framework for domestic mergers, and the 6\(^{th}\) Company Law Directive concerning the division of domestic companies. The 3\(^{rd}\)\(^{18}\) and 6\(^{th}\)\(^{19}\) Company Law Directives could play a central role in cross-border investments within the internal market. They combat psychological obstacles by encouraging foreign investors to establish companies in other member States and then to expand their activities in this new market by conducting domestic mergers with other companies established in that new Member State.\(^{20}\) Moreover, the 3\(^{rd}\) and 6\(^{th}\) Company Directives are very important for cross-


\(^{14}\) P. Behrens, op. cit. n. 5 supra, at 1671.


\(^{16}\) J. Rickford, op. cit. n. 8 supra at 1235. First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ L65/8–12, Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L26/1–13.


border mergers, because they harmonise the law on domestic mergers and domestic divisions of companies.\textsuperscript{21} This leaves open all the possibilities for a company that does not yet know whether it could proceed to domestic or cross-border mergers or to divisions. Quite often, the M&As market requires a company to conduct both domestic and cross-border mergers in order to rationalise its corporate structure.

The significance of the 3\textsuperscript{rd} and 6\textsuperscript{th} Company Law Directives for the Cross-Border Mergers Directive is shown by the fact that the latter Directive (Art.4(1)(b) and Recital 3 of the Preamble) demands that a company taking part in a cross-border merger comply with the provisions and formalities of the national law, including, obviously, the harmonised national rules on domestic mergers and divisions. Although the drafting process in the field of cross-border mergers encountered many difficulties (e.g. the German co-determination of employee participation in company management) and, as a result, delays, the 3\textsuperscript{rd} Company Law Directive\textsuperscript{22} concerning national mergers of public limited liability companies was adopted in 1978. The main features of the 3\textsuperscript{rd} Directive on Domestic Mergers are: the transfer of all assets and liabilities by operation of law, the disappearance of any company(-ies) whose assets and liabilities are transferred, the provision that the shareholders of the disappearing company(-ies) become shareholders of the acquiring company,\textsuperscript{23} extensive publicity for shareholders and others of the nature of the proposals in advance (i.e. of the merger terms, the board’s justification for the merger and independent certification of the fairness of the valuations built into the share exchange and any balancing cash items), a qualified-majority general meeting of all the participant companies apart from the newly created company which had the same shareholders as the participating ones and a few provisions on creditor protection which is supervised by a national authority.\textsuperscript{24} The 3\textsuperscript{rd} Company Law Directive provides discretion to Member States to relax these provisions and to apply a more lenient version of them (e.g. just one experts’ report for all the companies, and not a separate one for each of them).\textsuperscript{25} On the one hand, the acquiring company can be a new company, in which case the merger is called a ‘merger by formation of a new company’; the acquiring company can also be an existing company, in which case the merger is called ‘merger by acquisition’.\textsuperscript{26}

These Community legal instruments on domestic mergers and divisions are not only important for the harmonisation of national laws on mergers and divisions; they also play a role in the preparation of the harmonisation of cross-border mergers. The harmonised provisions of domestic mergers provides the common basis for the

\textsuperscript{21} It was argued that, even prior to the adoption of the Cross-Border Mergers Directive, many cross-border mergers were conducted on the basis of private international law and the harmonization of domestic mergers. This was possible through the cumulative application of the harmonized rules on domestic mergers and the mutual recognition of the results of the corporate financial technique (e.g. in 1993, the Barclays merger with its French subsidiary). A. Dorresteijn and others \textit{European Corporate Law} (2\textsuperscript{nd} ed. Kluwer, The Netherlands 2009) at 63, 241.


\textsuperscript{25} J. Rickford, op. cit n. 24 supra, at 1396.

\textsuperscript{26} G. van Solinge, op. cit. n. 23 supra, at 146.
necessary coordination of cross-border mergers. The adoption of the Cross-Border Mergers Directive required prior coordination of some national company rules on mergers and divisions, which would then be used as a point of reference during the cross-border mergers operation. The 3rd and 6th Company Law Directives prepared the ground for the adoption of the Cross-Border Mergers Directive by harmonising a few national rules essential to the cross-border mergers and by completing the legal framework for corporate restructuring at EU level.

IV) The ECJ’s approach to the Freedom of Establishment and Cross-Border Mergers.

In SEVIC, a German company (SEVIC) tried to merge with a Luxembourghish company (Security Vision SA), with absorption of the latter by the former. As a result, all the assets of Security Vision were to be transferred to SEVIC without liquidation, and Security Vision would cease to exist. However, the case was brought before the ECJ, because German law allowed only domestic mergers and did not permit cross-border mergers. Therefore SEVIC could not merge with Security Vision SA because cross-border mergers were not permitted in Germany. The ECJ ruled that Arts 43 and 48 EC Treaty (Arts 49 and 54 TFEU) preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

The SEVIC ruling discussed the subject of a cross-border merger supported directly by the freedom of establishment of the EC Treaty. The SEVIC ruling tackled the issue of prohibition of cross-border mergers by the Member State of one of the participating companies. The cross-border merger is highly advantageous for European wide re-organisations because, formerly, complex and cost-intensive structures had to be selected in order to achieve an economically comparable result. In SEVIC, the ECJ stressed the importance of mergers as a method of corporate restructuring and as an exercise of the freedom of establishment, declaring that a merger such as that at issue in the main proceedings constituted an effective means of

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transforming companies. Such mergers make it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing the complications, times and costs associated with other forms of company consolidation: for example, those that entail the dissolution of a company with liquidation of assets and the subsequent formation of a new company with the transfer of assets to the latter.\textsuperscript{32}

More specifically, in \textit{SEVIC}, the ECJ found that cross-border mergers are a corporate restructuring activity covered by the freedom of establishment. It confirmed the argument of AG Tizzano and stated that the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national market participants.\textsuperscript{33} AG Tizzano had previously opined that the Court subjected to Arts 43 and 48 EC Treaty (Arts 49 and 54 TFEU) not only the national rules and practices relating directly and specifically to the pursuit of the economic activity in question but also all those ‘relating to the various general facilities which are of assistance in the pursuit of those activities’; therefore, the right of establishment covers all measures which permit or even merely facilitate access to another Member State and/or the pursuit of an economic activity in that Member State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.\textsuperscript{34}

The German and Dutch governments alleged that cross-border mergers are not covered by freedom of establishment, because the merging company loses its legal personality and the freedom of establishment cannot be interpreted as granting companies the right to dissolve themselves by taking part in cross-border mergers. AG Tizzano rebutted\textsuperscript{35} these arguments, opining that, throughout the stage preceding the merger and right up to the registration thereof, both companies existed and operated as legal persons, entirely capable of negotiating and entering into the merger contract. It is only when the merger is completed, and, in particular, when this act is registered, that one of the two persons ceases to exist. However, until such a point in time, this is not the case, because, if the operation has not been completed, the company which was to have been incorporated would continue to exist as an autonomous legal person. Thus, the participating companies in a cross-border deal are protected by the freedom of establishment. AG Tizzano says that the argument of the German and Dutch governments is structured in a reverse way: a consequence of the merger, namely the dissolution of the incorporated company, is the reason why that company is unable (even before it is dissolved!) to carry out the merger and is therefore the justification for the prohibition on registration which precisely precludes this operation.\textsuperscript{36}

\textsuperscript{32}Case C-411/03 para. 21.
\textsuperscript{33}Case C-411/03 \textit{SEVIC Systems AG} [2005] ECR I-10805. para. 18. As far as market integration is concerned, academics have argued that firms incorporated in jurisdictions with better access to external capital will acquire those firms in countries with poor corporate law systems, leading to the presence of more and bigger companies in the ‘good’ regimes than the initial incorporations alone would have allowed one to predict. J.A. McCahery and E. Vermeulen \textit{The evolution of closely held business forms in Europe} (2001) 26 Journal of Corporation Law 855 at 862. B. Angelette \textit{The revolution that never came and the revolution coming-De Lasteyrie du Salliant, Marks & Spencer, Sevic Systems and the changing corporate law in Europe} (2006) 92 Virginia Law Review 1188 at 1204.
\textsuperscript{34}Opinion of AG Tizzano Case C-411/03 \textit{SEVIC Systems AG} [2005] ECR I-10805, para.29-30.
\textsuperscript{35}Opinion of AG Tizzano Case C-411/03 para. 26-27.
\textsuperscript{36}Opinion of AG Tizzano Case C-411/03 para. 25.
The ECJ concluded that cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member 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. 43 EC Treaty (Art 49 TFEU).\(^\text{37}\) Apart from the exercise of the right of secondary establishment by forming or acquiring a subsidiary or a branch in the host State, a company can now acquire another company in another Member State through merger and then operate a branch in the latter Member State.\(^\text{38}\) The understanding of the freedom of establishment is broadened, because the free access to the territory of other Member States through the establishment of subsidiaries, branches and agencies is not enough for the exercise of the freedom of establishment and does not exhaust its content; corporate restructuring within the internal market is equated with approved methods for the exercise of the freedom of establishment. One of these approved methods for the exercise of the freedom of establishment is the conduct of a merger. Therefore, this approach widens the previous understanding of the right of establishment.\(^\text{39}\)

The case law on companies and the right of establishment (and also the free movement of capital) are connected to the secondary EU legislation in directives and regulations (in our case, the 10\(^{\text{th}}\) Company Law Directive). The main purpose of the secondary legislation is to materialise and give effect to the fundamental freedoms (free movement) in the EC Treaty.\(^\text{40}\) The case law of the Court of Justice develops the content of the fundamental freedoms and the ways in which they are to be given effect, and defines the legal basis for the secondary legislation in directives and regulations. The provisions of directives and regulations must comply with the freedoms as they are developed in the case law.\(^\text{41}\) In SEVIC, the ECJ had confirmed its stance towards the relationship between harmonisation and the fundamental freedoms. It stated, in para. 26 of the judgement, that, whilst Community harmonisation rules are useful for facilitating cross-border mergers, the existence of such harmonisation rules cannot be made a precondition for the implementation of the freedom of establishment laid down by Art 43 and 48 EC Treaty (see, to that effect, Case C-204/90 Bachmann).\(^\text{42}\) Where the legislative process has not led to agreement on outcomes, legislation may be superseded by the case law, setting aside national law.\(^\text{43}\) It could be alleged that company law has now entered a phase where this form of negative harmonisation (complementing the positive harmonisation in directives and regulations) has become very important, as has been demonstrated by the SEVIC ruling.\(^\text{44}\)

\(^{37}\) Case C-411/03 para. 19.  
\(^{38}\) T. Ronfeldt and E. Werlauff, “Mergers as a method of establishment: on cross-border mergers, transfer of domicile and divisions, directly applicable under the EC Treaty’s freedom of establishment” (2006) 3 European Company Law 125 at 126-127  
\(^{39}\) T. Ronfeldt and E. Werlauff, op. cit. n. 38 supra, at 126-127.  
\(^{40}\) M. Andenas ‘Member States, courts and free movement of companies (Editorial)’ (2006) 27 Company Lawyer 1, 1.  
\(^{41}\) M. Andenas, op. cit n 40 supra, at 1.  
\(^{42}\) Case C-204/90 Bachmann [1992] ECR I-249, para. 11  
\(^{44}\) M. Andenas, op. cit. n. 43 supra, at 1

A) Methods of conducting a merger.

The Cross-Border Mergers Directive (Art. 2(1)) describes three methods of conducting a merger:

‘(a) 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% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
(b) two or more companies, on being dissolved 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% of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or
(c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.’

It is presumable that, at least in the case of the formation of a new company through a cross-border merger, the resulting company could be established in a new jurisdiction different from the jurisdictions of the participating companies; and that this results in intra-Community migration of the businesses of the participating companies.\(^{45}\) As a matter of fact, this establishment in a new jurisdiction different from the jurisdictions of the participating companies entails an exercise of the right of establishment. This argument is also supported by Art. 5(2) of the Cross-Border Mergers Directive, which regulated experts’ reports and which confirms that the resulting company could be formed in a jurisdiction different from the jurisdiction of the merging companies.\(^{46}\)

The third method of conducting a merger might follow a successful takeover bid (maybe after a mandatory bid, a squeeze-out or sell-out). This could result in the transformation of the offeree company into a 100%-owned subsidiary. An individual or company seeking to acquire a controlling holding that confers influence over a target company would also fall within the scope of the right of establishment.\(^{47}\) Hence, the conduct of a takeover bid involves an exercise of the right of establishment. The EU market for corporate control is a part of the internal market, and thus its integration is a prerequisite for the integration of the other. Therefore, the third method of conducting a merger constitutes not only an exercise of the right of establishment itself, but also facilitates the exercise of the freedom of establishment

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\(^{45}\) J. Rickford, op. cit. n. 24 supra, at 1394.

\(^{46}\) The same possibility is also provided in the formation of an SE by merger (Art. 22 SE Statute), yet subjected to the real seat doctrine of the SE Statute. Rickford, op. cit n. 24 supra, at 1394. Moreover, Art. 14 of the Cross-border Merger Directive describes the consequences of these categories of mergers.

\(^{47}\) D. A. Wyatt and A. Dashwood, op. cit. n. 2 supra, at 850.
through a takeover bid by providing an additional subsequent tool of corporate restructuring (a successful takeover bid followed by merger). Therefore, an exercise of the freedom of establishment through a takeover bid could be followed by an exercise of the freedom of establishment through a merger.

B) Definition of the term of ‘cross-border’ transaction: differences between company law and competition law.

The definition of the term of ‘cross-border’ transaction in the field of mergers and acquisitions depends on the legal perspective that is followed. If a company law perspective is chosen, it means that participating companies are located in different countries and are subject to different company laws. The companies’ locations and the applicable company law are the decisive factors for the definition of internationality. If a competition law perspective is chosen, the applicable company law does not play any role at all. It is the cross-border effects of a transaction on a market that is decisive. Hence, a completely national merger (at least under the ‘standard company law’ definition of internationality) can have an international competition effect and bring the authorities of a foreign competition authority into play.

C) Public and private limited liability companies.

According to Art. 1 of the Cross-Border Mergers Directive, both public and private limited liability companies are caught by the provisions of the Directive. This means, of course, the public and private limited liability companies of Art. 48 EC Treaty (Art 54 TFEU). The extension of the provisions of the Directive to private limited companies is something quite impressive, considering that the 3rd Company Law Directive covers only public limited liability companies. This constitutes an advantage of the Cross-Border Mergers Directive, because it could also be used as a method of corporate restructuring and cross-border establishment by some small and medium-sized enterprises formed as private limited liability companies. Thus, cross-border methods is not a corporate financial technique limited only to large listed companies; smaller companies with limited liability can also enjoy this product of European integration. We should not forget that small and medium-sized companies are special and sensitive parts of the internal market, and deserve always the care of the European legislature. Nevertheless, it remains to be seen just how the private

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49 N. Horn, op. cit. n. 48 supra, at 5. One of the most important factors impacting on levels of takeover and merger activity in Member States is EU Competition Law. Provided that the takeover meets the requirements of being a concentration and has a Community dimension, the EC Merger Regulation will apply. For the application of the EC Merger Regulation, including the changes it has been through and the current climate in which the EC Merger Regulation operates, see: N. Harvey, G. Norman and A. Nourry ‘Takeovers and Mergers in the European Union—an Overview’ in A Practitioner’s Guide to Takeovers and Mergers in the European Union (4th ed. City & Financial Publishing, London 2005) at 5-15. For a comment on political pressures and competition law influence not to pursue a merger, see: M. Siems ‘The European Directive on Cross-border Mergers: An International Model?’ (2005) 11 Columbia Journal of European Law 167 at 184.
limited companies comply with the complicated process of the Cross-Border Mergers Directive, which is quite costly and characterised by some obscure points. Moreover, it is apparent that this reference to the companies caught by Art. 48 (‘having their registered office, central administration or principal place of business within the Community’) allows pseudo-foreign or letter-box companies coming from a third country to merge under the articles of the Directive. This is in contrast with the SE Statute (Art.2(1)-(4) and Art. 5), which requires the head office of participating companies to be located in the Community unless a Member State relaxes this condition.

Art. 2(1) explains the term of a limited liability company as used by this Directive, and says that the Cross-Border Mergers Directive applies to companies as referred to in Art. 1 of the First Company Law Directive. This refers to public and private limited liability companies and their equivalents as listed in the First Company Law Directive. The category of ‘equivalents’ to limited liability companies is companies with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by First Company Law Directive for the protection of the interests of members and others. It was argued that this probably means companies incorporated with limited liability (excluding guarantee companies) and which, under their national law, happen to satisfy the requirements of the First Company Law Directive on registration, accounting, publicity, capacity, nullity and representation; although it is not clear whether all of these are to be regarded as conditions concerning guarantees.

D) Other types of companies within the meaning of Art. 48 EC Treaty(Art 54 TFEU).

Although, in SEVIC, the ECJ examined a merger between a German and a Luxembourghish public limited liability company, the ECJ’s ruling could have a wider effect by embracing other types of companies within the meaning of Art. 48 EC Treaty(Art 54 TFEU), e.g. cooperatives, mutuals, friendly societies, partnerships and foundations. The ECJ had ruled in general terms that cross-border merger operations constitute particular methods of exercise of the freedom of establishment by companies. It could be deduced that although the cross-border mergers of limited liability companies could be based on the 10th Company Law Directive, the right to cross-border mergers of other types of companies could derive from the fundamental freedom of establishment. A prerequisite for these other types of companies to merge across borders under the freedom of establishment provisions is that their home Member States allow them to proceed to a domestic merger.

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52 J. Rickford, op. cit. n. 24 supra, at 1400-1401.
53 J. Rickford, op. cit. n. 24 supra, at 1401.
54 J. Rickford, op. cit. n. 24 supra, at 1401.
55 J. Rickford, op. cit. n. 24 supra, at 1401-1402.
57 G. J. Vossestein, op. cit. n. 56 supra, at 182.
58 J. Pieper, op. cit. n. 56 supra, at 173.
Furthermore, some categories of companies within the meaning of Art. 48 EC Treaty (Art 54 TFEU) do not fall explicitly within the scope of the 10th Company Law Directive. The restricted scope of the 10th Company Law Directive is clearly at odds with the freedom of establishment, as well as with the aims of market integration in general. Art. 3 restricts the scope of the Directive by excluding explicitly and mandatorily, or by conferring the possibility on Member States to exclude some categories of legal persons from the provisions of the Cross-Border Mergers Directive. Art. 3(2) states that Member States may decide not to apply this Directive to cross-border mergers involving a cooperative society, even in cases where the latter would fall within the definition of "limited liability company" as laid down in Art. 2(1). However, the Directive does not specify the position of the European Co-operative Society. It remains to be seen how many Member States will opt out and exempt their cooperative societies from the provisions of the Directive. Art. 3(3) states that this Directive shall not apply to cross-border mergers involving a company whose object is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and whose units are, at the holders’ request, to be repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption. It would be a quite problematic situation for the harmonised regime imposed by the 10th Company Law Directive, if one of these companies excluded from the scope of the 10th Company Law Directive invoked its right (freedom of establishment) to proceed to a cross-border merger as recognised by the SEVIC ruling. However, only companies which have the right to conclude a domestic merger have the right to merge across borders, because Arts 43 and 48 EC Treaty (Arts 49 and 54 TFEU) secure equal treatment of national and foreign companies. For companies not able to merge on the national level, this method of cross-border establishment is not directly available under the Treaty articles.


The equal treatment approach is followed by the Cross-Border Mergers Directive. An additional requirement which must be fulfilled by the participating companies is that cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States (Art. 4(1)(a)). This acknowledges the significance of the principle of equal treatment which constitutes the foundation of the fundamental freedom of establishment. This requirement is quite obscure because it does not clarify what would happen in the case where, in one Member State (e.g. the UK), a merger is allowed between a public and a private company, even though this transaction is not allowed in another Member State. Would it possible for a private company located in the former Member State to merge with a public limited company located in the latter Member State? One possible answer is that the use of plural in the phrase ‘relevant Member States’ could imply

59 T. Ronfeldt and E. Werlauff, op. cit. n. 38 supra, at 125
60 T. Papadopoulos, op. cit. n. 51 supra, at 2.
that all the Member States concerned must allow mergers of the relevant type.\textsuperscript{62} It seems difficult to accept that the private company from the prior Member State acquires the right to disregard the company law provisions of the latter Member State and to merge with one of its public companies. Here, we have a double requirement: company A must be able to merge under the law of company B as well as under its own law and vice versa for company B.\textsuperscript{63} This requirement seems to be outwardly in conflict with the ECJ’s reasoning in para. 17 of \textit{SEVIC}, which applies to all companies falling within the scope of Art. 48 EC Treaty(Art 54 TFEU).\textsuperscript{64} However, if national company law does not grant the right to a company to merge with another domestic company, the company will not have the right to participate in a cross-border merger (even though it has complied with all the other requirements of the Cross-Border Mergers Directive). The national legislature enjoys the discretion to prohibit a type of company from participating in cross-border mergers by repealing its competence to merge with another domestic company. However, this scenario is not so probable, because those Member States (e.g. Germany) which are not keen on cross-border mergers allow domestic mergers nonetheless, because company and employment law interests are not endangered in national mergers. It would be interesting to see how a possible legislative initiative like this would interact with \textit{SEVIC}, which declared that cross-border mergers fall within the protective scope of the fundamental freedom of establishment.\textsuperscript{65}

\textbf{F) Compliance with the national mergers legislation.}

The rules regulating the cross-border mergers of companies must follow as closely as possible the rules applying to domestic mergers.\textsuperscript{66} The companies planning to merge must comply with the national mergers legislation of their home State, and the new provisions which implement the Cross-Border Mergers Directive must tackle various cross-border issues.\textsuperscript{67} Those cross-border issues regulated explicitly by the Cross-Border Mergers Directive concern: a joint merger plan (Art. 5), the possibility of preparing a joint expert report on the merger plan (Art. 8), the Member State’s prior checking that the merger is legal and issuing of certification for it (Art. 10), the Member States’ subsequent checking that the actual merger is implemented (Art. 11), the merger’s coming into force, its registration and effects (Arts 12-14), and the employees’ privileges in relation to participation rights (Art. 16).\textsuperscript{68} Two key provisions of the Cross-Border Mergers Directive are Art. 4 (1) (b) and Art.4(2), which state that:

\begin{quote}
[Art.4(1)(b)]… a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. The laws of a Member State enabling its national authorities to oppose a given internal merger on
\end{quote}

\begin{footnotesize}
\textsuperscript{62} J. Rickford, op. cit. n. 24 supra, at 1402.
\textsuperscript{63} P. Storm illustrates the various aspects of his argument by providing a very interesting example of a cross-border merger between a Dutch cooperative society and an English company (Ltd). P. Storm “Cross-border Mergers, the Rule of Reason and Employee Participation” (2006) 3 European Company Law 130, at 133.
\textsuperscript{64} P. Storm, op. cit. n. 63 supra, at 133. C. P. Schindler, op. cit. n. 31 supra, at 117.
\textsuperscript{65} T. Papadopoulos, op. cit. n. 51 supra, at 2.
\textsuperscript{66} L. Hansen, op. cit. n. 30 supra, at 186. A. Dorresteijn and others, op. cit. n. 21 supra, at 241
\textsuperscript{67} L. Hansen, op. cit. n. 30 supra, at 186.
\textsuperscript{68} L. Hansen, op. cit. n. 30 supra, at 186.
\end{footnotesize}
grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable.

[Art.4(2)] ... The provisions and formalities referred to in paragraph 1(b) shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 16. 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.

Recital 3 of the Preamble also confirms that participating companies are subject to the relevant provisions of national law. However, this Recital tries to pre-empt any abuse of this provision by stating explicitly that the national measures regulating participating companies in any cross-border merger must comply with the freedom of establishment and the free movement of capital case law of the ECJ, and especially with the ‘Gebhard Test’. The implication of these provisions on public companies is that the 3rd Directive on domestic mergers must be applied to the decision-making process.69 The decision-making provisions of the 3rd Directive require a qualified majority, and provide for a possible benefit of Member States optional let-out with minority protection for the acquiring company resolution. The optionality established by the 3rd Company Law Directive concerning decision-making as well as other important corporate issues will not result in harmonised approaches to these issues among the Member States.70 The disadvantages of optionality as established by the 3rd Company Law Directive will also now be transferred to the field of cross-border mergers.

However, national law for private companies (falling outside of the scope of the 3rd Directive) could be made less strict and more flexible by requiring a simple majority resolution (e.g. in the case of an English private company).71 However, the implementation of national company law provisions in the case of private limited companies participating in a cross-border merger could create problems due to the lack of harmonisation in this area. This is in contrast with the area of public companies, where harmonisation is more advanced and there is also the 3rd Company Law Directive on Cross-Border Mergers.72 The law on private limited corporations has been harmonised to a significantly smaller extent than has the law on public

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69 J. Rickford, op. cit. n. 24 supra, at 1403.
70 A. Dorresteijn and others, op. cit. n. 21 supra, at 241. However, the fact that certain provisions of the 3rd and 6th Company Law Directives could still be evaded at the implementation stage must be criticised here, because the EU had taken no further steps to eliminate these practices. The UK adopted rules that catch a very limited set of transactions, de facto granting the discretion to companies to attain the same planned corporate restructurings as those normally sought through mergers and divisions, by choosing transactional structures not covered by the directives. C. Villiers European Company Law- Towards Democracy? (Ashgate, Aldershot 1998) at 37. L. Enriques, ‘EC Company Law Directives and Regulations: How trivial are they?’ (2005) ECGI Working Paper Series in Law No 39/2005 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=730388> accessed 17 March 2008, at 33 (also published in (2006) 27 UPaJInt’lEconL 1-76)
71 J. Rickford, op. cit. n. 24 supra, at 1403.
limited companies (joint stock corporations). Therefore, the provisions on cross-border mergers of private limited corporations will become one of the few harmonised areas in the field of private limited companies. This legislative approach seems to be quite inconsistent; the European legislature should have followed a more coordinated policy in the field of private limited companies before deciding to include them in the Cross-Border Mergers Directive. It should be stressed that, in all cases of cross-border merger, Art. 9 of the Cross-Border Mergers Directive requires approval by the General Meeting. The reason for the insertion of this provision was probably the fears that companies engaging in cross-border mergers would seek to evade the implementation of strict national rules by their home Member State.

G) Blocking a cross-border merger on grounds of public interest.

In the same article (Art. 4 (1)(b)), Member States are given the discretionary power to block a cross-border merger on grounds of public interest. It states that the laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This constitutes a clearly protectionist provision, which follows on from the same protectionist ideas underpinning the opt-in/opt-out/reciprocity system of the Takeover Bids Directive (Arts 9, 11, 12). The effectiveness of cross-border mergers as a method of cross-border establishment and of corporate restructuring is reduced, because this public interest objection can be raised by any Member State of the participating companies against any participating company, even if that company is located in a different jurisdiction from that of the Member State raising the objection. This provision is differentiated from the general principle of the Directive, according to which Member States law does not apply to participating companies outside its jurisdiction. It is true that this provision permitting public interest opposition to a cross-border merger could prove to be a disincentive for choosing this particular method of corporate restructuring.

VI) Creditor protection in the internal market context.

Creditor protection is highly deficient as regulated currently by the Cross-Border Mergers Directive. Creditors need special protection in cross-border mergers. The claims of the creditors of the acquired company are endangered when liabilities of the acquiring company exceed the assets of the acquiring company and, subsequently, the claims of the creditors of the acquiring company are jeopardised when the liabilities of the acquired company exceed the assets of the acquired company. Art. 4 (2)
includes protection of creditors of the merging companies among the national provisions which should be followed by the merging companies. Hence, the protection of creditors was entrusted to national laws of Member States. An additional provision referring to creditor protection is Art. 6(2) (c) dealing with publication issues. It states that for each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, 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 shall be published in the national gazette of that Member State. The 3rd Company Law Directive Law provides only minimum provisions for the protection of creditors in domestic mergers, and leaves ample flexibility to Member States as regards what specific measures they will adopt for creditor protection. This choice of the European legislature has led to wide diversity, and, sometimes, to conflicts among national systems of creditor protection in cross-border mergers at the EU level.

Creditor protection may be roughly categorised into two systems: the ex ante and the ex post system. In an ex ante system (e.g. the Netherlands and France), protection for creditors is provided before the date of the merger becomes effective. The advantage of this system is the legal certainty that characterises the position of the shareholders before the cross-border merger. The claims of creditors are more or less secured; and it is less likely that this cross-border transaction will have a negative influence on them after the completion of the merger. However, this system could delay the completion of the merger. In an ex post system (e.g. Germany), creditors can only invoke their rights and demand prompt payment after the merger has become effective. This saves time, and the completion of the merger is not delayed. Nevertheless, this system guarantees no certainty to the position of creditors after the merger, because only the acquiring (and surviving/resulting) company is liable for the claims. The existence of those two completely distinct, unharmonised systems of regulation of creditor protection could create numerous problematic situations in cross-border mergers. These two systems operate smoothly in domestic mergers, but


G. Raaijmakers & T. Olthoff, op. cit. n. 79 supra, at 37.

G. Raaijmakers & T. Olthoff, op. cit. n. 79 supra, at 37. For a law & economics analysis of investor protection (i.e. creditor protection), see: A. Hytinen & T. Takalob 'Investor protection and business creation' (2008) 28 International Review of Law and Economics at 113–122

G. Raaijmakers & T. Olthoff, op. cit. n. 79 supra, at 37.

G. Raaijmakers & T. Olthoff, op. cit. n. 79 supra, at 37. For a criticism of the English system of creditor protection in a group of companies characterized by many weaknesses, and a subsequent possible application of German law to English pseudo-foreign companies provided the ‘Gebhard Test’ is successfully passed, see: E. Bicker 'Creditor Protection in the Corporate Group' (2006). Available at SSRN: <http://ssrn.com/abstract=920472> accessed 19 June 2008. For another German approach, especially in the framework of the SE, see: C. Teichmann 'Restructuring Companies in Europe: A German Perspective' [2004] European Business Law Review at 1338.

G. Raaijmakers & T. Olthoff, op. cit. n. 79 supra, at 38.
are inefficient and uncoordinated on a cross-border level.\textsuperscript{88} One example illustrates the problem: creditors of a disappearing company in an ex ante jurisdiction may be confronted, after the merger, with an acquiring company in an ex-post jurisdiction, with surprising safeguards being conferred on the ‘local creditors’, which could be detrimental to their own interests.\textsuperscript{89}

It is easily understood that the interests of creditors are not protected adequately by any individual Member State’s legislation. The EU should coordinate, to the necessary extent, the safeguards for ‘creditors’, as Art. 44(2)g (Art 50 TFEU) stipulates. We should not overlook the fact that ‘creditors’ fall within the scope of the term ‘others’ of Art. 44(2)(g) (Art 50 TFEU). The current status of creditor protection in cross-border mergers presents many deficiencies, and, instead of combating psychological obstacles to cross-border transactions (as is mandated by the Commission’s harmonisation programme), it creates additional ones by diminishing the level of legal certainty. This highly deficient creditor protection in case of cross-border mergers definitely works against effective corporate restructuring at EU level. Creditors wishing to secure their claims might oppose strongly a possible cross-border merger, if the merging companies will not provide adequate safeguards. Certainly, this lack of coordination with regard to creditor protection discourages the exercise of the freedom of establishment through cross-border mergers of corporations.

\textbf{VII) The protection of minority shareholders in the internal market context.}

The protection of dissenting minority shareholders is another issue of the Cross-Border Mergers Directive that is open to criticism. Minority protection can take various forms, including: a) their right to be informed, b) their right to be consulted, c) their right to challenge majority decisions, and d) specific minority rights such as monetary compensation rights, withdrawal rights or appraisal rights.\textsuperscript{90} Dissenting minority shareholders deserve special protection in a cross-border merger, because of a possible change of corporate nationality and the ensuing shareholder rights.\textsuperscript{91}

\textsuperscript{88} See also, for the recent legislative initiatives and an up-to-date review of the creditor protection on Community level, G. Raaijmakers & T. Olthoff, op. cit. n. 79 supra, at 38-39.
\textsuperscript{89} G. Raaijmakers & T. Olthoff, op. cit. n. 79 supra, at 38.
\textsuperscript{90} M. Wyckaert and K. Geens “Cross-border mergers and minority protection. An open-ended harmonisation” (2008) 4 Utrecht Law Review 40, at 45. For an analysis of the Italian legislation addressing the issue of the protection of minority shareholders who do not consent to the merger (or acquisition), see: M. Ventoruzzo ‘Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law’ (2007) 1 European Company and Financial Law Review at 47-75. In \textit{Diamantis}, the ECJ among others stated that the fact that a minority shareholder is exercising his rights and invokes provisions of the 2\textsuperscript{nd} Company Law Directive cannot be deemed an abuse of these rights. However, Community law does not preclude national courts from applying a provision of national law which enables them to determine whether a right deriving from a Community law provision is being abused, or the remedies available for a situation that has arisen in breach of that provision, where a shareholder has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate. Case C-373/97. \textit{Dionysios Diamantis v Elliniko Dimosio (Greek State) and Organismos Ikonomikis Anasygkrotisis Epicheiriseon AE (OAE).} [2000] ECR I-1705.
\textsuperscript{91} M. Wyckaert and K. Geens, op. cit. n. 90 supra, at 49. For an empirical analysis of the influence of change of applicable company law of the acquired company after a cross-border merger on firm value, see: A. Bris and C. Cabolis ‘The value of investor protection: firm evidence from cross-border mergers’ (2008) 21 Review of Financial Studies at 605-648. This article concludes by declaring that the better the shareholder protection and accounting standards in the acquiror’s country, the higher the merger premium in cross-border mergers relative to matching domestic acquisitions. See also an interesting perspective on freeze-out mergers: B.L. Silverstein and D. McBride ‘Norberg v Security
Minority shareholders were treated according to the law of the home State of the participating company; after completion of the cross-border merger, the minority shareholders become shareholders of the resulting company and, as a result, could be subjected to the new law of the home Member State of the resulting company. This change of applicable law could make more difficult the exercise of shareholders’ rights, could diminish the protection enjoyed by the shareholders hitherto, and could impose conditions and obligation unknown to the shareholders. Hence, the protection of dissenting minority shareholders is justified.

The 3rd Company Law Directive contains only one provision for minority protection, and delegates the regulation of minority protection to national legislatures. The only relevant provision of the 3rd Company Law Directive is Art. 28, which awards a sell-out right to minority shareholders: in cases of merger where one or more companies are acquired by another company which holds 90% or more, but not all, of the shares and other securities of each of those companies the holding of which confers the right to vote at general meetings, the minority shareholders of the company being acquired must be entitled to have their shares acquired by the acquiring company; if they exercise that right, they must be entitled to receive consideration corresponding to the value of their shares. In the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a court. It is quite surprising that the SE Statute (Art.24 (2) and Art. 25(3)) and the Cross-Border Mergers Directive contain provisions for minority protection in cross-border mergers, but their model the 3rd Company Law Directive regulates partly this subject matter.

As far as the Cross-Border Mergers Directive is concerned, the most important provision regulating minority protection is Art. 4 (2), which states that: 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. It is very regrettable that the minority protection is optional for Member States, as the word ‘may’ indicates. In addition to being optional, the minority protection is characterised by some obscurities. The Directive does not specify who qualifies as a minority shareholder, nor in which company (the resulting entity or the terminating entities) the minority shareholders deserve protection, nor what kind of protection should be conferred. Additionally, we also have Art 6(2)(c), which arranges publication issues and that states that for each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, an indication, for each of the merging companies, of the

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92 M. Wyckaert and K. Geens, op. cit. n. 90 supra, at 49.
94 See also: E. Werlauff SE, The Law of the European Company (DJOF Publishing, Denmark 2003) at 49. For the German approach, especially to minority protection of the SE, see: C. Teichmann, op. cit. n. 86 supra, at 1336.
95 M. Wyckaert and K. Geens, op. cit. n. 79 supra, at 41. We should mention that the basic provisions of the Takeover Bid Directive aiming at shareholders’ protection are: the mandatory bid rule (Art. 5), the squeeze-out right (Art. 15) and the sell-out right (Art. 16).
96 M. Wyckaert and K. Geens, op. cit. n.79 supra, at 43.
97 M. Wyckaert and K. Geens, op. cit. n. 79 supra, at 43.
98 For a Delaware approach, see: M.I. Steinberg ‘Short-form mergers in Delaware’ [2002] Delaware Journal of Corporate Law, at 489.
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 shall be published in the national gazette of that Member State.

Moreover, there is also Art. 10(3), which states that, if the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies situated in Member States which do not provide for such a procedure explicitly accept, when approving the draft terms of the cross-border merger, the possibility of the members of that merging company having recourse to such procedure, to be initiated before the court having jurisdiction over that merging company. This means that all shareholder meetings should approve the arrangement that minority shareholders should satisfy their claims against the resulting company following the special approved procedure in their home Member State. If this special procedure is approved and operates, then the minority shareholders cannot affect the merger any more.99 These special procedures can accelerate the conduct of the cross-border merger and facilitate significantly the exercise of the right of establishment through a cross-border merger. Alternatively, if the previous route is not approved by the general meetings of the participating companies, the merger can be effected nonetheless if all minorities have been compensated.100 It seems that the European legislature realises the importance of minority protection in cross-border mergers, and allows Member States to adopt provisions for minority protection at a cross-border level, even if they do not have equivalent rules for national mergers.101 It is worth mentioning again that this national legislation regulating minority protection on cross-border mergers should comply with the ‘Gebhard Test’ requirements, as stipulated by Recital 3 of the Preamble; otherwise, they would constitute an unjustified barrier to the freedom of establishment of companies choosing this particular method of cross-border restructuring.102

VIII) Liberalising the consideration provisions.

The consideration provisions of the Cross-Border Mergers Directive are quite interesting, as they differ significantly from the same provisions of the 3rd Company Law Directive on domestic mergers. The 3rd Company Law Directive does not permit the cash balancing component of the consideration to exceed 10 per cent of the aggregate nominal value of the new shares in case of absorption and of the resulting...
company shares in case of formation of a new company. This limitation assists in preserving the character of the transaction as a merger; otherwise, the transaction would be more similar to a takeover bid, which requires the payment of cash (as opposed to a share-for-share transaction in a pure merger) without any limitation on the acquisition of shares. The merger preserves its character as a pooling of interests when there is a maximum cash payment for consideration. Nevertheless, Art. 3(1) of the 10th Company Law states that this Directive shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment to exceed 10 per cent (and could potentially reach up to 99.99% if the Member State allows that) of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger. It is believed that this rule is more realistic and closer to capital market conditions. This rule takes account of a firm’s value in a better and more efficient way. The contracting parties are free to assess the value of the firm and the benefits of this restructuring transaction and to determine the consideration. It also provides flexibility to participating companies in their determination and allocation of the proportion of shares and cash in the consideration.

The fact that the Cross-Border Mergers Directive permits a merger without a maximum cash payment discharges this corporate restructuring transaction from an additional requirement, and allows the participating parties to exercise their right of establishment in accordance with their own transactional terms. When the participating parties, such as the merging companies, exercise their freedom of establishment, they should have the opportunity to take advantage of all the available market mechanisms, e.g. cash payments.

Moreover, the consideration could consist of securities or shares representing the capital of the company resulting from the cross-border mergers (i.e. acquiring or newly established company). This provision, apart from further liberalising the field of consideration, creates questions as to whether convertible securities or bonds could be used instead of, or in parallel with, ordinary shares. The problem lies in the determination of the nominal value which is the basis for the calculation of the cash limit. This determination is further based on the par or nominal value of such securities or shares, which valuation could prove extremely difficult and complicated operation, given the uncertainty governing debts or convertible instruments.

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104 However, in some takeover bids, the offeror company offers own shares as offer consideration (‘consideration shares’). Consideration shares could diminish debt-financing of the bid and could attract new investors willing to acquire a stake in the target company. J. Von Lackum, O. Meyer and J.-A. Witt ‘The offering of shares in a cross-border takeover’ [2008] European Company and Financial Law Review 101 at 101.
105 J. Rickford, op. cit. n. 24 supra, at 1402.
106 T. Papadopoulos, op. cit. n. 51 supra.
107 J. Rickford, op. cit. n. 24 supra, at1403.
108 J. Rickford, op. cit. n. 24 supra, at1403.
109 This provision was probably inserted in favour of corporations which are caught by the Directive but do not have ‘shares’. (e.g. French ‘parts’ and English ‘participations’) J. Rickford, op. cit. n. 24 supra, at 1403.
IX) Other procedural provisions.

The Cross-Border Merger Directive also contains procedural rules governing the pre-merger and merger processes. Art. 5 deals with the common draft terms of cross-border mergers, Art. 6 deals with some publication issues, Art. 7 deals with the report of the management or administrative organ, Art. 8 provides the details for the Independent Expert Report. Art. 9 contains a very important provision which requires the approval of the merger by the general meeting of each of the participating companies, while Art. 10 describes the issuance of a cross-border certificate. Art. 11 provides for the scrutiny of the legality of the cross-border merger, and Art. 12 deals with the entry into effect of the cross-border merger. Art. 13 states the details of the registration of the merger; Art. 14 describes the consequences of the cross-border merger; Art 15 adopts a liberal and flexible approach by adopting some simplified formalities and Art. 16 tackles the problems of employee participation that will probably arise in the resulting company. Art. 17 talks about the validity of the merger. 

X) The relationship between SEVIC and the Cross-Border Mergers Directive

A crucial question is what is the relationship between SEVIC and the Cross-Border Mergers Directive. SEVIC resulted in the establishment of direct effect of freedom of establishment provisions in case of cross-border mergers and in the possibility of infringements proceedings (Art. 226 EC Treaty\Art 258 TFEU) against member States breaching the freedom of establishment in case of cross-border mergers. Yet, the Cross-Border Mergers Directive by the introduction into the law of Member States of a set of similar provisions is aimed at ensuring, in a general and systematic way, that restrictions are eliminated. Hence, recourse to direct effect and to infringement proceedings will diminish, if Member States apply consistently the provisions of the Directive; direct effect and the infringement proceedings could maintain their role as overarching safeguards for the protection of freedom of establishment.

When the EU legislature adopts full harmonisation, national measures must be examined in the light of the provisions of the harmonising instrument and not of the fundamental freedoms. Notwithstanding this rule, exceptions apply to cases where a directive only determines a minimum standard and Member States can adopt stricter provisions. In these latter cases, the implementing provisions are scrutinised on the

111 For a thorough analysis of these procedural rules in pre-merger and merger phase, see: A. Ugliano, op. cit. n. 72 supra, at 602-612. For a concise presentation of its provisions and its proposed implementation in UK, see: B. Cain ‘Cross-Border Mergers Directive’ (2007) 31 Company Secretary Review at 9.
112 G. J. Vossestein, op. cit. n. 56 supra, at 181.
basis of the Treaty provisions on the fundamental freedoms.\textsuperscript{114} This could be proved to be very interesting for the relationship between \textit{SEVIC} and the Cross-Border Mergers Directive.

After \textit{SEVIC}, national regulations that exceed the minimum standards of the Cross-Border Mergers Directive became subject to scrutiny, since they were restrictions on a fundamental freedom. Without the effect of \textit{SEVIC}, Member States would have needed to comply only with the minimum standards of the Directive, and been free to adopt more restrictive national laws in order to protect their national interests or to pursue other policy objectives (national legislation is found between the Directive’s ‘floor’ and the fundamental freedom’s ‘ceiling’).\textsuperscript{115} Any national provision stricter than the Directive’s provision must fulfil the conditions of the ‘\textit{Gebhard Test’}.\textsuperscript{116} This latter requirement was declared by Recital 3 of the Cross-Border Mergers Directive, which stated that none of the provisions and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the free movement of capital, save where these can be justified in accordance with the case-law of the Court of Justice and, in particular, by requirements of the general interest, and where they are both necessary for, and proportionate to, the attainment of such overriding requirements.

The Cross-Border Mergers Directive provides the legal framework for the coordination of the national legal orders which try to regulate cross-border mergers.\textsuperscript{117} Its underlying rationale is to achieve legal certainty in the area of cross-border mergers through harmonisation.\textsuperscript{118} A cross-border merger affects many interests, in various Member States, and, as a result, it is an issue of great interest for many legal orders. A directive should seek to solve possible clashes between different national rules which try to regulate the same subject matter. Thus, this coordination of national legal orders by means of a Directive will result in a more efficient and harmonious exercise of the freedom of establishment.

The Cross-Border Mergers Directive also removes barriers to freedom of establishment which ‘survive’ due to their justification according to the ‘\textit{Gebhard Test’} or Art. 46 EC Treaty (Art 52 TFEU).\textsuperscript{119} A Member State retains the power to justify and, as a consequence, to preserve a national measure found to be a barrier to freedom of establishment. The justification could be based either on Art. 46 (Art 52 TFEU), or on mandatory requirements in the general interest.\textsuperscript{120} In \textit{British American Tobacco},\textsuperscript{121} AG Geelhoed\textsuperscript{122} discussed, as regards Art. 95 EC Treaty (Art 114 TFEU) and the free movement of goods, the competence of European legislature to set aside justified barriers by adopting harmonisation measures in the relevant area. It is the Community legislature’s responsibility under Art. 95 EC Treaty (Art 114 TFEU) to remove the obstacles which remain — or which are created — whenever a national legislature applies one of the derogations from the Arts. 28 and Art. 29 EC Treaty (Arts 34 and 35 TFEU) prohibitions. National statutory measures to protect specific

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\textsuperscript{114} M. Andenas, T. Gutt and M. Pannier, op. cit. n. 113 supra, at783.
\textsuperscript{115} B. Angelette, op. cit. n. 33 supra, at 1214.
\textsuperscript{116} B. Angelette, op. cit. n. 33 supra, at 1214.
\textsuperscript{117} G. J. Vossestein, op. cit. n. 56 supra, at 181.
\textsuperscript{118} J. Pieper, op. cit. n. 56 supra, at 173.
\textsuperscript{119} G. J. Vossestein, op. cit. n. 56 supra, at 181.
\textsuperscript{120} G. J. Vossestein, op. cit. n. 56 supra, at 181.
\textsuperscript{121} Case C-491/01 \textit{The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd} [2002] ECR I-11453
\textsuperscript{122} Opinion of AG Geelhoed. Case C-491/01\textit{The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd}. [2002] ECR I-11453
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recognised public interests, such as public health, constitute a prime example of measures which generate barriers to trade.\textsuperscript{123} In order to set aside this barrier to trade, the Community legislature is entitled to adopt measures by which it takes over from the national legislature the protection of the matter of public interest.\textsuperscript{124} One example of this is the protection of employees by means of Art. 16 of the Directive.\textsuperscript{125} The Directive provides a framework for the protection of the interests of employees, and the ECJ would not accept very easily this reason as a mandatory requirement in the public interest due to its harmonisation. G.J. Vossestein\textsuperscript{126} criticises the approach of the Cross-Border Mergers Directive towards justified restrictions due to Recital 3 of its Preamble, which states that none of the provisions and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the free movement of capital, save where these can be justified in accordance with the case-law of the Court of Justice and, in particular, by requirements of the general interest, and where they are both necessary for, and proportionate to, the attainment of such overriding requirements. It is obvious that the European legislature permits the existence of justified restrictions (in accordance, of course, with the ECJ’s case law) in the areas harmonised by the Directive, although the primary aim of this Directive was the abolition of those (justified or unjustified) barriers (Recital 1 of the Directive’s Preamble reads: ‘...as regards cross-border mergers of limited liability companies, they encounter many legislative and administrative difficulties in the Community’).

Another issue which pertains to the relationship between SEVIC and the 10\textsuperscript{th} Company Law Directive has to do with the possibility of extension of the ‘Gebhard Test’ to the provisions of EU Law instruments, such as Directives, in order to benefit from the non-application of the overly strict and rigid effect of Treaty articles. Thus, an article of a Directive could infringe the freedom of establishment, but this infringement would be upheld as a justified one.\textsuperscript{127} This kind of justification must, of course, fulfil completely the conditions of the ‘Gebhard Test’. The European legislature is equally bound by the ECJ’s interpretation of the fundamental freedoms.\textsuperscript{128} This was affirmed by the ECJ for the free movement of goods, and can be transposed to the rest of the fundamental freedoms.\textsuperscript{129} A Community legal instrument could itself contain a clause which grants the possibility of application of the ‘Gebhard Test’, like Regulation 1612/68 on freedom of movement for workers within the Community,\textsuperscript{130} which does not require the application of Art. 3 par. 1 in conditions relating to linguistic knowledge required by reason of the nature of the post

\textsuperscript{123} Opinion of AG Geelhoed. Case C-491/01 para. 103.
\textsuperscript{124} Opinion of AG Geelhoed. Case C-491/01 para. 106. G. J. Vossestein, op. cit. n. 56 supra, at 181.
\textsuperscript{125} G. J. Vossestein, op. cit. n. 56 supra, at 181.
\textsuperscript{126} G. J. Vossestein, op. cit. n. 56 supra, at 181.
\textsuperscript{127} P. Storm, op. cit. n. 63 supra, at 132.
\textsuperscript{128} C. P. Schindler, op. cit. n. 31 supra, at 118.
\textsuperscript{129} The community institutions must also respect the free movement of goods within the Community which is a fundamental principle of the internal market. It is settled law that the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the Community institutions (Case 37/83 Rewe-Zentral AG v Direktor der Landwirtschaftskammer Rheinland [1984] ECR1229 para. 18, Case 15/83 Denkavit Nederland v Hoofdproduktchap voor Akkerbouwprodukten [1984] ECR 2171, para,15, Case C-51/93 Meyhui v Schott Zwiesel Glaswerke [1994] ECR 1-3879, para. 11, Case C-114/96 Criminal proceedings against René Kieffer and Romain Thill [1997] ECR I-3629 para. 27 ). C. P. Schindler, op. cit. n. 31 supra, at 118.
\textsuperscript{130} Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2-12
to be filled.\textsuperscript{131} This was also confirmed in \textit{Groener}.\textsuperscript{132} In addition, the ECJ, in Case C-168/98 \textit{Luxembourg v European Parliament and Council}, required that respect be shown to the public interest of Member States, and permitted a measure of discretion concerning the use of mandatory requirements of the public interest as possible justifications.\textsuperscript{133} This discretion is only intended to be interpreted narrowly, and can only be invoked only when there is an explicit reference in the relevant EU legal instrument.

It seems that the combined interpretation of two provisions of the Cross-Border Mergers Directive allows the adoption of discriminatory provisions which infringe the freedom of establishment.\textsuperscript{134} The first one is Art. 4 par.1, which states that a company taking part in a cross-border merger must comply with the provisions and formalities of the national law to which it is subject. The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. The second one is Art. 4 par. 2, which requires special consideration of the cross-border nature of the merger, when national provisions concerning the protection of creditors of the merging companies, debenture holders and the holders of securities or shares apply. It states that 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.\textsuperscript{135} Member States can adopt provisions for cross-border mergers which provide additional protection and are different from the relevant provisions for domestic mergers.\textsuperscript{136} Hence, when a Member State adopts national legislation which provides additional protection and safeguards to minority shareholders\textsuperscript{137} in case of cross-border mergers, the freedom of establishment may have been breached. This infringement of freedom of establishment derives from the additional requirements which aim at the protection of

\textsuperscript{131} P. Storm, op. cit. n. 63 supra, at 133.

\textsuperscript{132} A permanent full-time post of lecturer in public vocational education institutions is of such a nature as to justify the requirement of linguistic knowledge, within the meaning of the last subparagraph of Article 3(1 ) of Regulation No 1612/68 of the Council, provided that the linguistic requirement in question is imposed as part of a policy for the promotion of the national language which is, at the same time, the first official language and provided that that requirement is applied in a proportionate and non-discriminatory manner. Case C-379/87 \textit{Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee} [1989] ECR 3967. P. Storm, op. cit. n. 63 supra, at 133.

\textsuperscript{133} In that regard, the ECJ observes that, in the absence of coordination at Community level, the Member States may, subject to certain conditions, impose national measures pursuing a legitimate aim compatible with the Treaty and justified on overriding public interest grounds, which include the protection of consumers. They may thus, in certain circumstances, adopt or maintain measures constituting a barrier to freedom of movement. Art 47(2) of the Treaty authorises the Community to eliminate obstacles of that kind in order to make it easier for persons to take up and pursue activities as self-employed persons. When adopting measures to that end, the Community legislature is to have regard to the public interest pursued by the various Member States and to adopt a level of protection for that interest which seems acceptable in the Community (see, to that effect, Case C-233/94 \textit{Germany v Parliament and Council} [1997] ECR I-2405, paras 16 and 17). It enjoys a measure of discretion for the purposes of its assessment of the acceptable level of protection. Case C-168/98 \textit{Luxemburg v European Parliament and Council of the European Union}, [2000] ECR I-09131 para.32. P. Storm, op. cit. n. 63 supra, at 133.

\textsuperscript{134} P. Storm, op. cit. n. 63 supra, at 133.

\textsuperscript{135} P. Storm, op. cit. n. 63 supra, at 133.

\textsuperscript{136} J. Rickford, op. cit. n. 24 supra, at 1408.

\textsuperscript{137} The issue of the treatment of minority shareholders in the framework of the Cross-Border Mergers Directive was discussed above more extensively.
minority shareholders, but which could in fact delay or annul the conduct of the cross-border merger. The imposition of additional requirements in favour of minority shareholders as regards cross-border mergers could constitute a barrier to the exercise of freedom of establishment by the merging companies, and hence it needs justification. The ‘Gebhard Test’ plays a very important role here, because Member States must fulfil its conditions in order to able to proceed to the adoption of these (justified) additional protective provisions. Therefore, the regulatory aim of protection of minority shareholders is definitely an accepted one; yet, the national legislative means for the achievement of this goal must comply with the conditions of the ‘Gebhard Test’.  

XI) Concluding remarks.

The most important provisions of the Cross-Border Mergers Directive were analysed in the light of the freedom of establishment as was interpreted by the Court’s case law. After SEVIC, any national provision stricter than the Directive’s articles must fulfil the conditions of the ‘Gebhard Test’. It was observed that the contribution of some provisions of this Directive to freedom of establishment is questioned. The choices of the European legislature are definitely open to criticism. Some categories of companies within the meaning of Art. 48 EC Treaty (Art 54 TFEU) do not fall explicitly within the scope of the 10th Company Law Directive. The restricted scope of the 10th Company Law Directive is clearly at odds with the freedom of establishment, as well as with the aims of market integration in general. The principle of equal treatment is quite obscure because it does not clarify what would happen in the case where, in one Member State, a merger is allowed between a public and a private company, even though this transaction is not allowed in another Member State. Additionally, the disadvantages of optionality as established by the 3rd Company Law Directive will also now be transferred to the field of cross-border mergers. According to Art. 4 (1)(b), Member States are given the discretionary power to block a cross-border merger on grounds of public interest. It is easily understood that this constitutes a clearly protectionist provision. Creditor protection and protection of minority shareholders are deficient as regulated currently by the Cross-Border Mergers Directive. This liberalization of the consideration provisions is something quite positive but it is still open to criticism.

Nevertheless, these deficiencies of the Cross-Border Mergers Directive are not something extremely worrying within the framework of the internal market. A provision of secondary EU law could infringe the freedom of establishment, but this infringement would be accepted as a justified one. This kind of justification must, of course, fulfil completely the conditions of the ‘Gebhard Test’. Although the harmonization of company law is not a self-standing objective and requires the existence of a link between the adopted legislation and the fundamental freedom of establishment, that goal calls for a wide and flexible interpretation in accordance with

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138 P. Storm, op. cit. n. 63 supra, at 133.
139 In addition to this, we should not neglect the importance of Recital 3 of the Directive’s Preamble, which requires that national provisions regulating cross-border mergers must comply with the ECJ’s case law on restrictions to the freedom of establishment and free movement of capital.
140 B. Angelette, op. cit. n. 33 supra, at 1214.
141 P. Storm, op. cit. n. 63 supra, at 132.
the general approach of ECJ over the last five decades to the construction of Treaty articles.\textsuperscript{142} In \textit{Saldanha and MTS Securities Corporation}\textsuperscript{143}, the ECJ stated that:

‘Article 44(2)(g) EC Treaty empowers the Council and the Commission, for the purpose of \textit{giving effect to the freedom of establishment}, to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 of the EC Treaty with a view to making such safeguards equivalent throughout the Community. \textit{It follows that rules which, in the area of company law, seek to protect the interests of shareholders come within the scope of the Treaty and are for that reason subject to the prohibition of all discrimination based on nationality.’(emphasis added).

\textit{SEVIC} had liberalised cross-border mergers by conferring explicitly on them the protection of the fundamental freedom of establishment. This decision is also important in ensuring that the national provisions applied to cross-border mergers will not constitute restrictions to fundamental freedoms; or, if they constitute restrictions, that these restrictions are compelled to be justified. The importance of the Directive lies not so much in the liberalisation of cross-border mergers, which had been effected through \textit{SEVIC}\textsuperscript{144} in a more intensive way than the Directive, that is, by allowing all the ‘Companies’ of Art. 48 EC Treaty (Art 54 TFEU) to pursue cross-border mergers. Its importance lies in the procedural rules which were established. These procedural rules deal with the numerous procedural problems which usually appear during a cross-border merger. These procedural problems create many psychological obstacles to companies that consider merging across borders, and diminish legal certainty.\textsuperscript{145} Recital 1 of the Directive’s Preamble verifies this approach by declaring, as one of the basic motivations for the legislation, the existence of many legislative and administrative difficulties in the Community. Therefore, the procedural framework established by the Cross-Border Merger Directive contributes to the legal certainty of the corporate financial transactions taking place in this part of the internal market, and provides adequate safeguards for the interested parties. The importance of the Cross-Border Mergers Directive lies not in its enabling companies to conduct cross-border mergers, but in providing a procedural framework which will coordinate such a process.\textsuperscript{146} This procedural framework could also be provided, in its respective field, by the 3\textsuperscript{rd} Company Law Directive. Hence, \textit{SEVIC} does not diminish the importance of the 3\textsuperscript{rd} Company Law Directive and the 10\textsuperscript{th} Company Law Directive as legislative measures aiming at harmonising national laws and at obliging Member States to adopt

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\item\textsuperscript{142} V. Edwards, op. cit. n. 20 supra, at 7.
\item\textsuperscript{143} Case C-122/96 \textit{Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG}. \citep{SEVIC1} ECR I-05325.
\item\textsuperscript{144} It should be stressed, however, that \textit{SEVIC} does not imply an obligation of Member States to positively enact merger laws in order to make mergers possible in the first place. P. Behrens (n ) 1688.
\item\textsuperscript{146} J. Pieper, op. cit. n. 56 supra, at 173.
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a harmonised framework for the regulation of cross-border mergers. Every Member State needs to offer these different procedural frameworks for cross-border mergers to its companies.

147 P. Behrens, op. cit. n. 5 supra, at 1688.