All clear? Disputes, uncertainties and delimitation issues regarding the scope of cross-border operations covered by the Company Law Directive (CLD)

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September 2026

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Keywords: cross-border operations, mergers, divisions, conversions, Company Law Directive, Mobility Directive

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Following the creation of a special EU legal framework for cross-border mergers in 2005, the Mobility Directive of 2019 introduced further special EU legal frameworks for cross-border conversions and cross-border divisions into **the Company Law Directive (CLD). As a result, there is now, at last, a secure foundation for all three "classic" types of cross-border operations. However, regarding its precise scope, a wide range of disputes, uncertainties and delimitation issues persists. The paper examines where** exactly these boundaries currently lie and which desiderata arise from them *de lege ferenda*.

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This paper is a slightly updated and amended version of a German paper entitled „Bahn frei? Streit-, Zweifels- und Abgrenzungsfragen zum Anwendungsbereich grenzüberschreitender Umwandlungen nach UmwRL und UmRUG" published in Bayer/Krieger/Löbbe (eds.), Festschrift für Jochem Reichert zum 70. Geburtstag, 2026, p. 1015-1037 (Verlag Dr. Otto Schmidt KG). It has been reprinted with their kind permission.

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All clear?

Disputes, uncertainties and delimitation issues regarding the scope of cross-border operations covered by the Company Law Directive (CLD)

Following the creation of a special EU legal framework for cross-border mergers in 2005[1], the Mobility Directive of 2019[2] introduced further special EU legal frameworks for cross-border conversions and cross-border divisions into the Company Law Directive (CLD)[3]. In Germany, the Mobility Directive was implemented by the UmRUG[4] and the UmRMitbestG[5]. As a result, there is now, at last, a secure foundation for all three "classic" types of cross-border operations. However, regarding its precise scope, a wide range of disputes, uncertainties and delimitation issues persists. The paper examines where exactly these boundaries currently lie and which desiderata arise from them *de lege ferenda*.

I. Prologue: the ambiguous terminology of the German language version

Especially at the beginning, the somewhat unfortunate terminology caused some misunderstandings, at least in German-speaking countries: After the Mobility Directive had been negotiated primarily in English, in the German language version the term "cross-border conversion" was translated as "grenzüberschreitende Umwandlung". In Germany, however, the term "Umwandlung" is traditionally used as the umbrella term for mergers, divisions and conversions (as well as transfer of assets) (cf. § 1(1) UmwG[6]). "Cross-border conversion" should actually have been translated as "grenzüberschreitender Formwechsel". The German legislator has therefore consistently used the term "grenzüberschreitender Formwechsel" in the context of the implementation of the requirements of the Mobility Directive in the UmwG by the UmRUG in order to prevent corresponding misunderstandings at the German level.[7]

[1] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2025, p. 1.
[2] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, p. 1.
[3] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), OJ L 169, 30.6.2017, p. 46; last amended by Directive (EU) 2025/25 of the European Parliament and of the Council of 19 December 2024 amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law, OJ L 2025/25, 10.1.2025.
[4] Gesetz zur Umsetzung der Umwandlungsrichtlinie und zur Änderung weiterer Gesetze v. 22.2.2023, BGBl. 2023I Nr. 51.
[5] Gesetz zur Umsetzung der Bestimmungen der Umwandlungsrichtlinie über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitenden Umwandlungen, Verschmelzungen und Spaltungen v. 4.1.2023, BGBl. 2023 I Nr. 10.
[6] Umwandlungsgesetz (Transformation Act).
[7] Cf. Explanatory Notes to the UmRUG, BT-Drs. 20/3822, p. 1, 45.

II. Types of cross-border operations covered

1. "Cross-border" operation

To begin with, there have been uncertainties and delimitation issues as regards the concept of a "cross-border" operation.

a) Cross-border mergers and divisions

However, it is expressly clear from the legal definitions in Art. 118 CLD and Art. 160a(1) CLD that the cross-border character of a merger or division is not determined by the geographical location of the participating companies, but by whether the participating companies are governed by the laws of different Member States (different *lex societatis*[8]): a merger or division is of a cross-border nature if at least two of the participating companies are governed by the laws of different Member States.

Considering the continuing lack of harmonisation of the conflict-of-laws rules governing company law, this connecting factor based on the *lex societatis* is admittedly not without its difficulties. Ultimately, however, it is the only consistent and coherent solution for delimiting the scope of application of the provisions on national mergers or divisions on the one hand and cross-border mergers or divisions on the other.[9] In addition, the problem has been significantly "defused" by the case law of the CJEU on freedom of establishment (*Centros*[10], *Überseering*[11], *Inspire Art*[12], *Aures Holdings*[13], *Edil Work 2*[14]) and the resulting "European incorporation theory": If a company has been incorporated under the law of Member State X and has its registered office there, all other Member States must recognise this company as a company governed by the law of Member State X even if it has its central administration in another Member State from the outset or transferred it there later.[15] Nevertheless, the harmonisation of the conflict-of-laws rules governing company law remains an eminent legal policy desideratum: the EU should adopt a Rome Regulation based on the universal application of the incorporation theory as the general rule.[16]

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[8] Cf. as regards cross-border mergers: Cf. *de Raet* in Kindler/Lieder (eds.), European Corporate Law, 2021, Art. 118 CLD para. 52; *Kalss/Deutsch* in Ludwigs, Handbuch des EU-Wirtschaftsrechts, 62nd supplement 2025, § 20 para. 184; *Stiegler* in Jung/Krebs/Stiegler, Gesellschaftsrecht in Europa, 2019, § 24 para. 29; *Stiegler* GmbHR 2016, 406, 411; *Vermeylen* in Vermeylen/Vande Velde, European Cross-Border Reorganisations, 2012, 1.31; on the German implementation: *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 27; *Drinhausen* in Semler/Stengel/Leonard, UmwG, 6th ed. 2025, § 305 UmwG para. 10; *Frenzel* RIW 2008, 12, 13. For cross-border division: *Bader/Börner* in Kindler/Lieder, European Corporate Law, 2021, Art. 160a CLD para. 14 ff.; *J. Schmidt* DK 2018, 273, 275; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 320 UmwG para. 30.

[9] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.43. Assenting: *de Raet* in Kindler/Lieder, European Corporate Law, 2021, Art. 118 CLD para. 53.

[10] CJEU, 9.3.1999, *Centros*, C-212/97, ECLI:EU:C:1999:126.

[11] CJEU, 5.11.2002, *Überseering*, C-208/00, ECLI:EU:C:2002:632.

[12] CJEU, 30.9.2003, *Inspire Art*, C-167/01, ECLI:EU:C:2003:512.

[13] CJEU, 27.2.2020, *Aures Holdings*, C-405/18, ECLI:EU:C:2020:127.

[14] CJEU, 25.4.2024, *Edil Work 2*, C-276/22, ECLI:EU:C:2024:348.

[15] Cf. *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 5.81 with further references.

[16] *Bayer/J. Schmidt* BB 2018, 2562, 2572; *EGPIL* ZEuP 2017, 500; *Gerner-Beuerle/Mucciarelli/Schuster/Siems*, Study on the law applicable to companies, 2016, doi: 10.2838/527231, 17; *Hübner* ZGR 2018, 14 ff.; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 5.96; *J. Schmidt*, Cross-

At any rate, on account of the different *leges societatis* involved, where, for example, an Irish Ltd. with registered office in Dublin and central administration in Berlin is merged with a German GmbH with both registered office and central administration in Berlin, this constitutes a cross-border merger. Similarly, where a German GmbH with both its registered office and central administration in Frankfurt transfers part of its assets and liabilities by way of a partial division to a Maltese Ltd. with registered office in Valletta and central administration in Frankfurt, this constitutes a cross-border division.

b) Cross-border conversion

Correspondingly, pursuant to the concept of the CLD, a conversion is already of a cross-border nature where the *lex societatis* changes in the course of the transfer of the registered office to another Member State. Art. 86b no. 2 CLD defines a cross-border conversion an operation whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality. In accordance with the CJEU's landmark ruling in the *Polbud* case[17], the cross-border conversion by way of an isolated transfer of the registered office is therefore also covered. The attempt made in the course of the legislative procedure to introduce a requirement of a "genuine economic activity"[18] has fortunately failed; such a requirement would be incompatible with the *Polbud* case law and EU primary law.[19] However, a cross-border conversion by way of an isolated transfer of the registered office is of course only possible if the host Member State requires only the registered office of "its" companies to be located within its territory; if, on the other hand, the host Member State mandates that the central administration of "its" companies is also located within its territory, a cross-border conversion by way of an isolated transfer of the registered office is not possible.[20]

With § 333 (1) UmwG, in accordance with Art. 86b no. 2 CLD, the German legislator has unambiguously permitted cross-border conversions by way of an isolated transfer of the registered office. From a German perspective, a cross-border conversion by way of an isolated transfer of the registered office is now possible without any problems: § 5 AktG[21] and § 4a

border mergers and divisions, transfers of seat: Is there a need to legislate?, 2016, PE 556960, 33; *J. Schmidt* EuZW 2021, 613.

[17] CJEU 25.10.2017, *Polbud*, C-106/16, ECLI:EU:C:2017:804.

[18] Report JURI, A8-0002/2019, recital 7, 22, 27a, 35b, 40, 52; Art. 1a para. 17, 86n para. 2, 128a para. 3 CLD-JURI-draft and p. 232. Similarly Bundesrat, BR-Drs. 179/18(B), p. 1.

[19] *Bayer/J. Schmidt* BB 2019, 1922, 1927; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.41; *J. Schmidt* ECFR 2019, 222, 233; *J. Schmidt* ZEuP 2020, 565, 567; see also *Garcimartín/Gandía* ECFR 2019, 15, 21.

[20] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.41; *J. Schmidt* ZEuP 2020, 565, 567; see also *Tasman,* The EU Legal Framework on Corporate Seat Transfers: Lifting the Roadblock to the Freedom of Establishment or Digging Bureaucratic Rabbit Holes?, 2022, http://dx.doi.org/10.2139/ssrn.4312731, 3.3.1. Cf. already on *Polbud*: *Bayer/J. Schmidt* ZIP 2017, 2225, 2231; on the draft directive: *Garcimartín/Gandía* ECFR 2019, 15, 21.

[21] Aktiengesetz (Stock Corporation Act).

GmbHG[22] only require a registered office in Germany; the central administration can be located at any place in Germany or abroad.[23]

2. Cross-border division by formation of new companies and cross-border division by acquisition

a) EU legal framework

Whereas the EU legal framework on national divisions in Title II Chapter III CLD covers both divisions by formation of new companies and divisions by acquisition, the EU legal framework for cross-border divisions in Title II Chapter IV CLD covers only cross-border divisions by formation of new companies.

However, the exclusion of cross-border divisions by acquisition from the scope of the CLD does not mean that they are impossible. They are, in fact, already possible *de lege lata* on the basis of freedom of establishment (Art. 49, 54 TFEU) in its manifestation as the "freedom to divide".[24] Nevertheless, the lack of a special EU legal framework not only entails considerable legal uncertainty for companies and forces them to use complex and costly "detours", but it also results in a lower level of protection for (minority) shareholders, creditors and employees.[25] *De lege ferenda*, the scope of application of Title II Chapter IV CLD should therefore be extended to cross-border divisions by acquisition.[26] Art. 4(3) Mobility Directive contains a corresponding review clause.

Incidentally, however, Member States are also *free de lege lata* to go beyond what the CLD requires and provide also for cross-border divisions by acquisition in their national laws.[27] Contrary to the opinion of some scholars[28] (and apparently initially also some German courts),

[22] Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Act on Limited Liability Companies).
[23] See only Explanatory Notes to the MoMiG, BT-Drs. 16/6140, p. 29; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.42.
[24] See only *Bayer/J. Schmidt* BB 2019, 1922, 1926; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.63; *J. Schmidt* FS Heckschen, 2024, p. 621, 623; Explanatory Notes to the UmRUG, BR-Drs. 371/22, p. 133.
[25] Cf. *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.63; *J. Schmidt* NZG 2022, 579, 580; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 UmwG para. 3; *J. Schmidt* FS Heckschen, 2024, p. 621, 624; *Teichmann* NZG 2019, 241, 243; and Explanatory Notes to the UmRUG, BR-Drs. 371/22, p. 133.
[26] *Bayer/J. Schmidt* BB 2019, 1922, 1935; *Bormann/Stelmaszczyk* ZIP 2019, 353, 355; *Brandi/M. Schmidt* AG 2023, 297, 300; *Bungert/Becker* DB 2019, 1609, 1617; *Knaier* GmbHR 2019, R132, R134; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.63; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 UmwG para. 3; *J. Schmidt* FS Heckschen, 2024, p. 621, 634; *Teichmann* NZG 2019, 241, 243.
[27] Explanatory Notes to the UmRUG, BR-Drs. 371/22, p. 133; *Bayer/J. Schmidt* BB 2019, 1922, 1935; *Bungert* FS Krieger, 2020, p. 109, 111; *Cathiard* BJS 2023, 45, 48; *Conac* Rev. soc. 2023, 782, 786; *Heckschen* DNotZ 2024, 404, 410; *Heckschen/Salomon* LRZ 2024, para. 627, 680; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.64; *Reygrobellet* Rev. soc. 2023, 732, 735; *J. Schmidt* EuZW 2019, 801, 802; *J. Schmidt* NZG 2022, 579, 580; *J. Schmidt* FS Heckschen, 2024, p. 621, 624; *Thomale* RdW 2020, 424, 429; see also *Weiler* NotBZ 2024, 321, 331.
[28] *Kappenhagen/Wentz* WM 2023, 2113, 2114; *Mayer/Weiler* in Münchner Handbuch des Gesellschaftsrechts, volume 3, 6th ed. 2023, § 72 para. 787e; *Schulte* GmbHR 2020, 139, 144.

Title II Chapter IV CLD does not operate as a "barrier" in this respect.[29] Just as the restriction of Title II Chapter III CLD to (national) full divisions does not prohibit the Member States from applying the rules on national divisions laid down in the directive also to partial divisions and divisions by separation[30], the restriction in Title II Chapter IV CLD does not prohibit Member States from applying the rules on cross-border divisions by formation of new limited liability companies *mutatis mutandis* also to cross-border divisions by acquisition.[31] However, extending the CLD standards *mutatis mutandis* also to cross-border divisions by acquisition only helps companies if all the Member States concerned have done so.[32] So far, however, only some Member States have done this.[33]

b) German legal framework

The German legislator has fortunately decided to extend the CLD standards also to cross-border divisions by acquisition via § 332 UmwG. However, pursuant to § 332 sentence 1 UmwG, the UmwG covers only cross-border divisions by acquisition where all companies involved have, in the six months prior to the disclosure of the draft terms of the cross-border division, an average number of employees less than 4/5 of the applicable threshold, as laid down in the law of the Member State of the company being divided, for triggering the participation of employees ("cross-border divisions by acquisition not relevant in terms of codetermination").[34] The rationale is to ensure that the level of protection of codetermination in case of cross-border divisions by acquisition is not lower than the level of protection which the 4/5-threshold laid down in Art. 160l(2) CLD ensures for cross-border divisions by formation of new limited liability companies.[35]

Finally, a special problem arises in the case of an outbound cross-border division by acquisition if the German transferring company is a so-called "Tendenzunternehmen" ("tendency enterprise", i.e., an undertaking pursuing political, religious, charitable, or similar ideological aims, exempt from certain co-determination requirements). In this case, there is *a priori* no risk concerning co-determination, because the provisions of co-determination law do not apply to such tendency enterprises anyway (see § 1(2) DrittelbG[36], § 1(4) MitbestG[37]).[38] In line with the underlying legal rationale of § 332 sentence 1 no. 1 UmwG, as well as the value judgment

[29] *Heckschen* DNotZ 2024, 404, 410; *Heckschen/Salomon* LRZ 2024, para. 627, 680; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.64; *J. Schmidt* FS Heckschen, 2024, pp. 621, 624; see also *Weiler* NotBZ 2024, 321, 331.
[30] CJEU, 30.1.2020, *I.G.I.*, C-394/18, ECLI:EU:C:2020:56, para. 53.
[31] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.64; *J. Schmidt* FS Heckschen, 2024, pp. 621, 624.
[32] *Bungert* FS Krieger, 2020, pp. 109, 111; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.64; *J. Schmidt* NZG 2022, 579, 580; *J. Schmidt* FS Heckschen, 2024, p. 621, 632 et seq.; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 UmwG para. 6 with further references.
[33] For an overview see *J. Schmidt* FS Heckschen, 2024, p. 621, 628 ff.
[34] For more details see *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 UmwG para. 5 ff.; *J. Schmidt* FS Heckschen, 2024, p. 621, 625 ff. with further references.
[35] Explanatory Notes to the UmRUG, BR-Drs. 371/22, p. 134; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.65; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 UmwG para. 5; *J. Schmidt* FS Heckschen, 2024, p. 621, 625; see also *Schollmeyer* NJW-Spezial 2023, 207, 208.
[36] Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat.
[37] Gesetz über die Mitbestimmung der Arbeitnehmer.
[38] *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 UmwG para. 12.

reflected in § 30 MgFSG, §§ 320-332 UmwG must therefore be applied to cross-border divisions of such tendency enterprises regardless of the number of employees.[39]

III. Companies eligible to participate in cross-border operations

1. "Origin" of the company

a) Companies incorporated under the law of an EU/EEA Member State

Pursuant to Art. 86a(1), 118, 160a(1) CLD, only companies that have been formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business in the Union may participate in cross-border operations. The CLD thus links up with Art. 54(1) TFEU; the wording is therefore, in principle, to be interpreted in the same manner as under that provision.[40] Since the scope of application of the CLD and the Mobility Directive has been extended to the EEA Member States[41], the EEA Member States are also covered in addition to the EU Member States.

However, the phrase "nach dem Recht eines Mitgliedstaats gegründet" used in the German language version (English: "formed in accordance with the law of a Member State") has led to misunderstandings. Some have understood it to mean that only companies originally formed under the law of an EU/EEA Member State are eligible to participate.[42] Other language versions, however, are more open in this respect (see English "formed in accordance with the law of a Member State", French "constituées conformément au droit d'un État member"). What is meant is that the company exists as a company governed by the law of a Member State at the time of its participation in the cross-border operation.[43] It is irrelevant whether it was originally formed under the law of that Member State, or whether it was originally formed under the law of another Member State or of a third state, and then transformed into a company governed by the law of that Member State only by way of some kind of restructuring measure.[44] Correspondingly, in the case *Edil Work 2*, the CJEU classified a company that was originally formed as an Italian Srl but then converted into a Luxembourg Sàrl as a company incorporated under Luxembourg law and granted it freedom of establishment as such.[45] The

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[39] *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 332 UmwG para. 12; concurring *Biller* in Kallmeyer, UmwG, 8th ed. 2024, § 332 UmwG para. 5; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 332 UmwG para. 16.

[40] See also OLG Karlsruhe, 24.4.2024 - 1 W 40/23 (Wx), NZG 2024, 1189 para. 17.

[41] Decision of the EEA Joint Committee No 200/2019 of 10 July 2019 amending Annex XXII (Company law) to the EEA Agreement, OJ L 298, 17.11.2022, p. 37; Decision of the EEA Joint Committee No 85/2025 of 14 March 2025 amending Annex XXII (Company law) to the EEA Agreement, OJ L, 2025/1000, 12.6.2025.

[42] AG Mannheim, 26.6.2003 – 00 AR 1323/23, BeckRS 2023, 51397; *Biller/Wilk* in Kallmeyer, UmwG, 8th ed. 2024, § 306 UmwG para. 5; *Polley* in Henssler/Strohn, GesR, 6th ed. 2024, § 306 UmwG para. 9.

[43] OLG Karlsruhe, 24.4.2024 - 1 W 40/23 (Wx), NZG 2024, 1189 para. 18; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 321 UmwG para. 13; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.28; *Luy* in BeckOGK UmwG, edition 1.7.2026, § 334 UmwG para. 27; *Schumacher/Urhahn* NZG 2024, 1171 ff.; see also *Winter* in Schmitt/Hörtnagl, UmwG, 10th ed. 2024, § 334 UmwG para. 8.

[44] Cf. OLG Karlsruhe, 24.4.2024 - 1 W 40/23 (Wx), NZG 2024, 1189 para. 18; *Heckschen* in Widmann/Mayer, 218th supplement 2025, § 321 UmwG para. 13; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.28; BeckOGK UmwG/*Luy*, as of 1.4.2025, § 334 UmwG para. 27 et seq.; *Schumacher/Urhahn* NZG 2024, 1171 et seq.

[45] CJEU, 25.4.2024, *Edil Work 2*, C-276/22, ECLI:EU:C:2024:348, para. 23-28.

requirements that must be met for a company to exist as being governed by the law of a Member State are determined by the individual Member State.[46]

b) Third-country companies?

Cross-border operations involving third-country companies are generally not within the scope of Title II Chapters -I, II, IV CLD.[47] In the context of the preparatory work for the Mobility Directive, it had been considered to also cover third-country companies.[48] Ultimately, however, this was dropped because it was feared that there could be a negative impact through unfair treatment of EU creditors or minority shareholders if the third-country company law requirements were too lax.[49]

However, it is controversial whether international treaties can result in companies from third countries being able to participate in cross-border operations. Treaties that have been discussed in this respect are in particular the Treaty of Friendship, Commerce and Navigation between Germany and the USA[50], the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU[51] and the EU-UK TCA[52]. So far, this approach has been widely rejected.[53] However, there are good arguments for the fact that "national treatment" and "most favoured nation" clauses of an international agreement may result in companies from the corresponding third country also being able to participate in cross-border operations on the basis of the respective national provisions implementing Title II Chapters -I, II and IV CLD.[54]

[46] CJEU, 27.9.1988, *Daily Mail*, C-81/87, ECLI:EU:C:1988:456, para. 19 ff.; CJEU, 25.10.2017, *Polbud*, C-106/16, ECLI:EU:C:2017:804, para. 34; CJEU, 25.4.2024, *Edil Work 2*, C-276/22, ECLI:EU:C:2024:348, para. 26.

[47] *Bader/Börner* in Kindler/Lieder, European Corporate Law, 2021, Art. 160a CLD para. 21; *Bayer/J. Schmidt* NJW 2006, 401; *de Raet* in Kindler/Lieder, Art. 118 para. 70; *Garcimartín/Gandía* ECFR 2019, 15, 22; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 306 UmwG para. 101 ff.; *Heckschen* DNotZ 2024, 404, 411 ff.; *Kiem* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 306 UmwG para. 13; *Kiem/Sitter* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 321 UmwG para. 8, § 334 para. 10; *Kühnle* in Kindler/Lieder, European Corporate Law, 2021, Art. 86a CLD para. 1; *Lencou/Menjucq* D. 2009, 886, 889; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.29; *Stelmaszczyk* in Widmann/Mayer, UmwG, 205th supplement 2023, § 334 UmwG para. 21; *Stiegler* in Jung/Krebs/Stiegler, Gesellschaftsrecht in Europa, 2019, § 24 para. 17; *Vermeylen* in Vermeylen/Vande Velde, European Cross-Border Reorganisations, 2012, 1.30.

[48] See SWD(2018) 141, 1.15.4.

[49] See SWD(2018) 141, 1.15.4.

[50] Gesetz zu dem Freundschafts-, Handels- und Schifffahrtsvertrag vom 29. Oktober 1954 zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika, BGBl. 1956 II 487.

[51] Comprehensive Economic and Trade Agreement (CETA) between Canada, as the one part, and the European Union and its Member States, of the other part, OJ 11, 14.1.2017, p. 23.

[52] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L, 30.4.2021, p. 10.

[53] *Biller/Wilk* in Kallmeyer, UmwG, 8th ed. 2024, § 306 UmwG para. 6; *Drinhausen* in Semler/Stengel/Leonard, UmwG, 6th ed. 2025, § 306 UmwG para. 10; *Frenzel,* Grenzüberschreitende Verschmelzung von Kapitalgesellschaften, 2008, p. 171 ff.; *Frenzel/Axer* RIW 2007, 47, 54; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 306 UmwG para. 101 ff.; *Hörtnagl* in Schmitt/Hörtnagl, UmwG, 10th ed. 2024, § 306 UmwG para. 8; *Lieder/Hilser* FS Heckschen, 2024, pp. 395, 405; *Luy* ZGR 2025, 418, 426; *Reidt* in KK-UmwG, 2nd ed. 2024, § 333 UmwG para. 67.

[54] For a corresponding effect of the Treaty between Germany and the USA: *Kiem* WM 2006, 1091, 1093; *Kiem* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 306 UmwG para. 14; *Klett* in BeckOGK UmwG, 1.7.2026, § 306 UmwG para. 39; *Kiem/Sitter* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 321 UmwG para. 8, § 334 UmwG para. 10; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.30;

Of course, this can only work if the law of the third country in question also "plays along" accordingly.[55] Yet, until a clear ruling by the CJEU, caution is advised in practice.

At any rate, Member States are free to provide for the possibility of cross-border operations of "their" companies with third-country companies[56] – either based on purely autonomous rules or by way of applying the national provisions implementing Title II Chapters -I, II, IV CLD *mutatis mutandis* to such operations (insofar as this is possible in view of the specific particularities resulting from the participation of third country companies)[57]. In fact, there are quite a number of Member States that – in various forms – successfully facilitate cross-border operations involving third country companies (e.g. Luxembourg[58] or Spain[59]).

Overall, the legal situation regarding cross-border operations involving third country companies is thus characterised by legal fragmentation and, in many areas, by legal uncertainty. *De lege ferenda*, a special EU legal framework should therefore also be created for cross-border operations involving third country companies.[60] This could be done, for example, by providing for universal application of Title II Chapters -I, II, IV CLD (following the example of the Rome Regulations)[61] – combined with some specific special provisions for cross-border operations involving third country companies, insofar as this appears necessary and appropriate.[62] This would ensure a harmonised legally secure foundation for cross-border operations involving third country companies (at least on the EU side) as well as sufficient stakeholder protection.[63]

2. Restriction to limited liability companies

a) Limited liability companies eligible to participate

aa) Enumeration principle and "small general clause"

Since the term "limited liability company" is understood differently in the various Member States, the European legislator has traditionally been using, since the 1968 Publicity Directive[64], the enumeration principle to precisely define the types of limited liability companies

affirmative in principle for the Treaty between Germany and the USA as well as for the CETA, but ultimately opposed because of § 1 UmwG: *Zwirlein-Forschner* ZGR-Sonderheft 26, 2023, pp. 195, 219 ff.; considering for the EU-UK TCA: *Sørensen* (2021) 18 ECL 117, 121 ff.

[55] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.30. See also *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 20; *Kiem* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 306 UmwG para. 15.

[56] See already SWD(2018) 141, 1.15.4. See further *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.31.

[57] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.31.

[58] Art. 1020-1(3), 1030-1(3), 1061-1, 1061-2, 1061-3 Loi du 10 août 1915, concernant les sociétés commerciales (current version available at: <http://data.legilux.public.lu/eli/etat/leg/loi/1915/08/10/n1>).

[59] Art. 121 et seq. Real Decreto-ley 5/2023, de 28 de junio, BOE núm. 154, de 29/06/2023 (current version available at: <https://www.boe.es/eli/es/rdl/2023/06/28/5/con>.

[60] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.32.

[61] On this option, see also SWD(2018) 141, 1.15.4.

[62] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.32.

[63] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.32.

[64] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination 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

covered. It has also followed this concept in the context of the Mobility Directive. Regarding cross-border conversions and cross-border divisions, the national types of limited liability companies eligible to participate are listed exhaustively in Annex II, to which Art. 86b no. 1, 160b no. 1 CLD refer. The rules on cross-border mergers in Title II Chapter II CLD also apply to all national types of limited liability companies listed in Annex II (cf. Art. 119 no. 1 lit. a CLD[65]).[66] Annex XXII No. 1 to the EEA Agreement[67] also extends the scope of application to the EEA limited liability companies referred to therein.

However, for cross-border mergers, there is also a dynamic “small general clause”, which is intended to ensure that all (national or European) types of companies that already meet these criteria or – in the case of new forms of companies – will meet them in the future are covered (without the need for an amendment of the CLD).[68] According to Art. 119 no. 1 lit. b CLD, a “limited liability company" within the meaning of Title II Chapter II CLD is also any other company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and that is subject, under the national law governing it, to conditions concerning guarantees such as are provided for by Section 2 of Chapter II of Title I and Section 1 of Chapter III of Title I CLD for the protection of the interests of members and others. It is unclear why such a “small general clause” was not also included for cross-border conversions and cross-border divisions.[69] *De lege ferenda*, this is recommended in order to establish synchronisation in this respect and to prevent new national types of limited liability companies from being able to carry out cross-border mergers but not cross-border divisions or conversions.[70]

bb) Variants of legal forms?

The creativity of many Member States in the creation of new legal forms and legal form variants has raised the question of whether newly created legal form variants of the types of national limited liability companies listed in Annex II CLD are also covered. From a German point of view, this is relevant for the UG as a legal form variant of the GmbH[71], but also, for example, for the currently discussed “company with asset lock”, if this would be designed as a legal form

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second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65, 14.3.1968, p. 8.

[65] Originally: Art. 2 No. 1 lit. a CBMD.

[66] Cf. *Lutter/Bayer/J. Schmidt*, European Company and Capital Markets Law, 7th ed. 2026, 23.35; *Thomale* JBl. 2021, 621, 625; *Zwirlein-Forschner* ZGR-Sonderheft 26, 2023, 195, 199; see as regards the background in the context of the Publicity Directive: *Einmahl* AG 1969, 131.

[67] [Agreement on the European Economic Area](), OJ L, 3.1.1994, p. 3.

[68] Cf. Lutter/*Bayer/J. Schmidt,* 7th ed. 2024, § 306 UmwG para. 14; *Bayer/J. Schmidt* NJW 2006, 401; Kindler/Lieder/*de Raet*, European Corporate Law, 2021, Art. 119 CLD para. 6; *Drinhausen* in Semler/Stengel/Leonard, UmwG, 5th ed. 2021, § 122b UmwG marginal no. 4; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 306 UmwG marginal no. 62 et seq.; *Kiem* in Habersack/Drinhausen, SE-REcht, 4th ed. 2025, § 306 UmwG marginal no. 10; KK-UmwG/*Klaassen-Kaiser*, UmwG, 2nd ed. 2024, § 306 marginal no. 6; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.35; *Menjucq* in: Conac (éd.), Fusions transfrontalières de sociétés, 2011, pp. 15, 19; *Neye* ZIP 2005, 1893, 1894; Jung/Krebs/Stiegler/Stiegler, Gesellschaftsrecht in Europa, 2019, § 24 para. 20; *Zwirlein-Forschner* ZGR-Sonderheft 26, 2023, 195, 200.

[69] See also *Zwirlein-Forschner* ZGR-Sonderheft 26, 2023, 195, 199.

[70] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.35.

[71] See only Explanatory Notes to the MoMiG, BT-Drs. 16/6140, p. 31; BGH, 11. 4. 2011 – II ZB 9/10, NZG 2011, 666 para. 13.

variant of the GmbH[72]. However, this problem also arises in other Member States, e.g. in Luxembourg with regard to the Sàrl-S[73] or in Austria with regard to the FlexKap[74].

The question of the coverage of such legal form variants is, of course, not limited to cross-border operations and Annex II CLD, but is of a much more fundamental nature: it arises in the case of all company law directives and regulations that determine their scope of application on the basis of the enumeration principle.

Some scholars have argued that such legal form variants are not covered unless they are also explicitly listed in the relevant annex.[75] The reasoning given for this is that the German KGaA and the French SAS are expressly listed, although the German KGaA is only a legal form variant of the German AG and the French SAS is only a legal form variant of the French SA.[76]

However, this line of argument does not hold water, if only because the German KGaA, according to established case law[77] and the prevailing view in academic literature[78], is precisely not a legal form variant of the German AG.[79] Likewise, the SAS is also understood in France as an independent legal form and not as a legal form variant of the SA.[80] The basic premise of this legal opinion is therefore incorrect. Above all, however, it would also be in blatant contradiction to the rationale of the enumeration principle: to create legal certainty and legal clarity by including all national legal forms listed within the scope of application the directive/regulation in question. If, according to the respective national legal understanding, it is a mere variant of a national legal form listed, it must consequently also be covered by the scope of application of the respective directive/regulation. Otherwise, the Member States could simply dispense with their obligations under EU law by creating a new legal form variant that differs from one of the legal forms listed in the annexes to a directive/regulation only by minimal deviations.

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[72] The first drafts of an academic working group from 2020 and 2021 (available at <https://www.gesellschaft-mit-gebundenem-vermoegen.de/der-gesetzesentwurf/>) were based on the concept of a special form of limited liability company. The academic draft of 2024 (DOI 10.1628/978-3-16-164077-3), on the other hand, provides for the creation of an independent legal form. Accordingly, the coalition agreement between the CDU, CSU and SPD for the 21st legislative period (lines 2815-2817) also provided for the introduction of an independent legal form. The German government's framework concept of March 2026 also envisages a company type *sui generis* (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/2026_GmgV.html).

[73] *Société à responsabilité limitée simplifiée*, introduced in 2016 by Loi du 10 août 2016, Mémorial A n° 167, today regulated in Art. 720-1 ff. Loi du 15 août 1915 (current version available at: <http://data.legilux.public.lu/eli/etat/leg/loi/1915/08/10/n1>). For more details, see *Corbisier* rps-trv 2017, 416, 466 et seq.

[74] Bundesgesetz über die Flexible Kapitalgesellschaft (Flexible Kapitalgesellschafts-Gesetz – FlexKapGG), eingeführt durch das Gesellschaftsrechts-Änderungsgesetz 2023 (GesRÄG 2023), BGBl. 2023 I Nr. 179.

[75] *Möslein/Sanders* JZ 2022, 923, 933.

[76] *Möslein/Sanders* JZ 2022, 923, 933.

[77] BGH, 24.2.1997 - II ZB 11/96, NJW 1997, 1923, 1925: "not a mere variant of the AG, but an independent type of company".

[78] *Arnold* in Henssler/Strohn, GesR, 6th ed. 2024, § 278 AktG para. 1; *Perlitt* in MüKoAktG, 6th ed. 2023, Vor § 278 AktG para. 31; *Sethe* in GroßkommAktG, 4th ed. 2021, Vor § 278 AktG para. 57a; *Servatius* in Grigoleit, AktG, 3rd ed. 2025, § 278 AktG para. 1; *K. Schmidt* in K. Schmidt/Lutter, AktG, 5th ed. 2024, § 278 AktG para. 1; deviating *Bachmann* in BeckOGK AktG/*Bachmann,* edition: 1.8.2026, § 278 AktG para. 2 ("special form of the AG").

[79] *Obernoster* GmbHR 2023, 434, 437.

[80] Cf. *Couret* BJS 2024, n°10, p. 33 f.; *Guyon* Rev. soc. 2000, 255 n° 1; *Lecourt* Rev. soc. 2004, 223 n° 3; *Urbain-Parleani/Conac* in: Conac/Urbain-Parleani (eds.), La Société par actions simplifiée (SAS), 2016, XI.

Consequently, if any of the national legal forms listed in the Annexes have different variants or subtypes, they all fall within the scope of application of the respective directive/regulation – regardless of how the respective legal form variant or subtype is designated in national law.[81]

Thus, in particular, the German UG as a legal form variant of the German GmbH[82] and the Luxembourg Sàrl-S as a legal form variant of the Luxembourg Sàrl, are also covered by the scope of application of the regulations on cross-border operations in Title II Chapters -I, II, IV GesRRL.

However, according to the correct view, the Austrian FlexKap is also not an independent legal form[83], but a mere legal form variant of the Austrian GmbH[84]. It must be admitted, of course, that even the explanatory memorandum is at least misleading in this respect: on the one hand, it talks about a "new form of corporation", but at the same time emphasizes that the "subsidiary applicability of the GmbHG [...] allows us to fall back on the wealth of experience of GmbH law" and at the same time ensures that FlexKap "also enjoys all the advantages of an Austrian GmbH at the level of EU law".[85] However, the decisive factor in this respect – as in general – must be the actual substantive legal structure, and according to this, FlexKap is not an independent legal form, but a legal form variant of the Austrian GmbH[86].

cc) SE

A further point of contention is the extent to which SEs may participate in cross-border operations under Title II Chapters -I, II, IV CLD. Specifically, the question arises whether and to what extent the *numerus clausus* of the ways of forming an SE laid down in Art. 2 and Art. 3 SE Regulation as well as the rules on the cross-border transfer of the registered office of an SE in Art. 8 SE Regulation and the conversion of an SE into a national AG in Art. 66 SE Regulation have a blocking effect or *are leges speciales*. In this respect, the following applies:

Via Art. 9 para. 1 lit. c no. ii SE Regulation, the national provisions implementing Title II

[81] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 9.21, 23.35.
[82] *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 12; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 306 UmwG para. 67; *Hörtnagl* in Schmitt/Hörtnagl, UmwG, 10th ed. 2024, § 306 UmwG para. 5; *Klett* in BeckOGK UmwG, edition 1.7.2026, § 306 UmwG para. 8; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.39; *Obernosterer* GmbHR 2023, 434, 436 ff; but dissenting *Möslein/Sanders* JZ 2022, 923, 933.
[83] Considering the FlexKap to be an independent legal form e.g. *Artmann* ZGR 2024, 482, 485; *Fleischer/Pendl* GmbHR 2024, 174, 184; *Rastegar* ecolex 2023, 909, 910.
[84] *Heinrich-Pendl/Pendl* GmbHR 2023, R224; *Wünscher* in Wünscher, FlexKapGG, 2024, § 1 para. 8.
[85] EBRV 2320 BlgNR 27. GP 1.
[86] See the references in footnote 84.

Chapter II CLD (cross-border mergers)[87] and Title II Chapter IV CLD (cross-border divisions)[88] also apply to the SE. However, the participation of an SE in a cross-border merger or division is only permissible to the extent that the SE is the transferring or acquiring company. By contrast, the formation of a new SE by way of a cross-border merger[89] or cross-border division[90] is not permissible due to the *numerus clausus* of the ways of forming an SE.

With regard to cross-border conversions of an SE, a distinction must be made: For a cross-border transfer of the registered office to another Member State while retaining the legal form of the SE, Art. 8 SE Regulation is *lex specialis*.[91] For a conversion into a national public limited liability company, Art. 66 SE Regulation is *lex specialis*.[92] By contrast, Title II Chapter -I CLD applies to a cross-border conversion into a national limited liability company listed in Annex II CLD which is governed by the law of another Member State;[93] however, the two-year

[87] Cf. *Olympus UK Ltd & Ors* [2014] EWHC 1350 (Ch), para. 39; *Bayer/J. Schmidt* NJW 2006, 401; *J. Schmidt* in Lutter/*Bayer,* UmwG, 7th ed. 2024, § 306 UmwG para. 13; *Biller/Wilk* in Kallmeyer, UmwG, 8th ed. 2024, § 306 UmwG para. 3; *Brocker* BB 2010, 971, 972; *Cathiard* BJS 2023, 90, 94; *de Raet* in Kindler/Lieder, European Corporate Law, 2021, Art. 119 CLD para. 7; *Drinhausen* in Semler/Stengel/Leonard, UmwG, 6th ed. 2025, § 306 UmwG para. 5; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 306 UmwG para. 72 ff.; *Inwinkl* ZfRV 2008, 69, 72, 75, 77; *Kalss/Deutsch* in Ludwigs, Handbuch des EU-Wirtschaftsrechts, 62nd supplement, § 20 para. 206; *Kiem* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 306 UmwG para. 9; *Kiem/Sitter* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 321 para. 6; *Klaassen-Kaiser* in KK-UmwG, 2nd ed. 2024, § 306 UmwG para. 18 ff.; *Krause/Kulpa* ZHR 171 (2007) 38, 54; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.36; *Rickford* EBLR 2005, 1393, 1411; *Stiegler* in Jung/Krebs/Stiegler, Gesellschaftsrecht in Europa, 2019, § 24 para. 20; *J. Vetter* AG 2006, 613, 615; see also Explanatory Notes to the 2. UmwÄndG, BR-Drs. 548/06, p. 29.

[88] *Brandi/M. Schmidt* AG 2023, 297, 299; *Cathiard* BJS 2023, 90, 95 ff.; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.36; *Recktenwald* BB 2023, 643, 644; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 321 UmwG para. 9.

[89] *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 13; *Biller/Wilk* in Kallmeyer, UmwG, 8th ed. 2024, § 306 UmwG para. 3; *Cathiard* BJS 2023, 90, 94; *de Raet* in Kindler/Lieder, European Corporate Law, 2021, Art. 119 CLD para. 7; *Drinhausen* in Semler/Stengel/Leonard, UmwG, 6th ed. 2025, § 306 UmwG para. 5; *Drygala/von Bressendorf* NZG 2016, 1161, 1162; *Frotz* in Frotz/Kaufmann, 2nd ed. 2013, § 3 EU-VerschG para. 6; *Grambow/Stadler* BB 2010, 977, 978; *Heckschen* in Widmann/Mayer, UmwG, 218th supplement 2025, § 306 UmwG Rn. 77; *Kiem* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 306 UmwG para. 9; *Kiem/Sitter* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 321 UmwG para. 6; *Klaassen-Kaiser* in KK-UmwG, 2nd ed. 2024, § 306 UmwG para. 15; *Krause/Kulpa* ZHR 171 (2007) 38, 54; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.36; *Lutz* BWNotZ 2010, 23, 26; *Stiegler* in Jung/Krebs/Stiegler, Gesellschaftsrecht in Europa, 2019, § 24 para. 20; *Thiermann,* Grenzüberschreitende Verschmelzungen deutscher Gesellschaften, 2010, p. 201 ff., 216, 219. See also *Inwinkl/Schneider* RIW 2008, 4, 11.

[90] *Cathiard* BJS 2023, 90, 95; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.36; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 321 UmwG para. 9 with further references.

[91] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.37; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 334 UmwG para. 8; *Kiem/Sitter* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 334 UmwG para. 6; *Luy* ZGR 2025, 418, 423; *Menjucq*, Droit international et européen des sociétés, 7th ed. 2024, para. 505; *Wicke* DStR 2018, 2642, 2643; *Cathiard* BJS 2023, 90, 92 ff.

[92] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.37; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 334 UmwG para. 8; *J. Schmidt* in Lutter/Hommelhoff/Teichmann, SE-Kommentar, 3rd ed. 2025, Art. 66 SE-VO para. 4 et seq. with further references. However, apparently deviating *Luy* ZGR 2025, 418, 242.

[93] *Drinhausen* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, Art. 66 SE Regulation para. 7; *Kiem/Sitter* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 334 UmwG para. 7; *Kühnle* in Kindler/Lieder, European Corporate Law, 2021, Art. 86a CLD para. 4; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.37; *Luy* ZGR 2025, 418, 4224; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 334 UmwG para. 8;

blocking period of Art. 66 para. 1 sentence 2 SE Regulation applies *mutatis mutandis* in this respect[94].

b) Consequences for partnerships

In the context of the Company Law Package, there had been widespread calls for an extension to partnerships.[95] However, both the Commission's draft[96] and the ultimately adopted text of the Mobility Directive retained the restriction to limited liability companies. This was justified first by the fact that cross-border mergers had so far mainly been carried out by limited liability companies.[97] However, this was probably also largely due to the fact that a harmonised EU legal framework only existed for limited liability companies.[98] Second, it was argued that an extension could lead to practical difficulties because the provisions of EU company and accounting law (at that time) only applied to limited liability companies.[99] Such problems may indeed exist, but they could be solved.[100] The decisive factor is that freedom of establishment – and thus also the freedom to merge, divide and convert[101] – is not only enjoyed by limited liability companies, but by all legal entities within the meaning of Art. 49 and 54 TFEU. *De lege ferenda*, the scope of application of Title II Chapters -I, II and IV CLD should therefore be extended to partnerships or at least to commercial partnerships, in order to provide them with a secure EU legal framework for exercising their mobility rights.[102] Now that commercial partnerships[103] have been integrated into the EU register system by the Digitalisation Directive II

J. Schmidt in Lutter/Hommelhoff/Teichmann, SE-Kommentar, 3rd ed. 2025, Art. 66 SE Regulation para. 4 ff.; *Winter* in Schmitt/Hörtnagl, UmwG, 10th ed. 2024, § 334 UmwG para. 2; see also *Biller/Wilk* in Kallmeyer, UmwG, 8th ed. 2024, § 334 UmwG para. 1.

[94] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.37; *Luy* ZGR 2025, 418, 425; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 334 UmwG para. 8; *J. Schmidt* in Lutter/Hommelhoff/Teichmann, SE-Kommentar, 3rd ed. 2025, Art. 66 SE-VO para. 9 with further references; *Kiem/Sitter* in Habersack/Drinhausen, SE-Recht, 4th ed. 2025, § 334 UmwG para. 7; *Reidt* in KK-UmwG, 2nd ed. 2024, § 334 UmwG para. 6.

[95] *Bayer/J. Schmidt* BB 2018, 2562, 2572; *Bayer/J. Schmidt* BB 2019, 1922, 1925; *Bernard* D.A.O.R. 2018, n° 127, 5, 12; *Bormann/Stelmaszczyk* ZIP 2019, 300, 302; *Bormann/Stelmaszczyk* ZIP 2019, 353, 354; *Brandi* BB 2018, 2626, 2630; *Bungert* FS Krieger, 2020, pp. 109, 111; *Bungert/Wansleben* DB 2018, 2094, 2104; *Butterstein* EuZW 2018, 838, 841 ff.; *Handelsrechtsausschuss des DAV* Opinion 31/2018, p. 5; DNotV Statement of 4.7.2018, p. 28 et seq.; *Habersack* ZHR 182 (2018), 495, 497, 503; *Mörsdorf* EuZW 2019, 141, 143; *J. Schmidt* DK 2018, 273, 285.; *J. Schmidt* (2019) 16 ECL (2019) 13; *J. Schmidt* ECFR 2019, 222, 230; *Wachter* GmbH-StB 2018, 283, 286; *Wicke* DStR 2018, 2642, 2643.

[96] COM(2018) 241.

[97] COM(2018) 241, p. 22.

[98] *Bungert* FS Krieger, 2020, pp. 109, 111; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.33; *J. Schmidt* DK 2018, 273, 285.

[99] COM(2018) 241, p. 22.

[100] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.33; *J. Schmidt* DK 2018, 273, 285.

[101] On the freedom of establishment as freedom of merger, division and convert, see *J. Schmidt*, Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?, 2016, PE 559.960, pp. 11-12.

[102] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.33.

[103] *Papadopoulos* EBLR 2023, 893, 899; *J. Schmidt* ZEuP 2020, 565, 566; see also *Baschnagel/Hilser* ZPG 2024, 81, 86; *Weiler* NotBZ 2024, 321, 331.

(DigiD II[104])[105], the basic “infrastructure” now also exists as regards commercial partnerships – a corresponding extension of the scope of application of the rules for cross-border operations is only a logical and long overdue next step.[106]

It is true that the Member States are already free *de lege lata* to implement the rules of the CLD on cross-border operations *mutatis mutandis* also for partnerships.[107] However, so far only very few Member States have done so. German law, for example, permits cross-border mergers with a German commercial partnership with generally no more than 500 employees as the acquiring company (since 1 January 2019: § 122b (1) no. 2 UmwG[108], since 1 March 2023: § 306 (1) no. 2 UmwG).

Apart from that, *de lege lata* partnerships are still left with nothing but the arduous and considerably uncertain path of a cross-border operation solely on the basis of Art. 49 and 54 TFEU.[109] It is disputed what this means in concrete terms for German partnerships that are not covered by the scope of §§ 305-345 UmwG. According to the correct view, §§ 305-345 UmwG are to be applied by analogy[110]; in addition, the respective provisions on national transformations involving partnerships are to be applied *mutatis mutandis*, where appropriate[111].

3. Special cases and exceptions

a) Special purpose vehicles

Some commentators consider that the participation of companies that do not engage in any economic activity, as well as of pure special purpose vehicles or shelf companies that have been established solely for the purpose of carrying out a cross-border operation, is not

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104 Directive (EU) 2025/25 of the European Parliament and of the Council of 19 December 2024 amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law, OJ L 2025/25, 10.1.2025.

105 For more details, see *J. Schmidt* NZG 2024, 563, 564 et seq.; *J. Schmidt* ECFR 2024, 563, 569 ff. with further references.

106 *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.33.

107 *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.33.

108 Introduced by the Viertes Gesetz zur Änderung des Umwandlungsgesetzes v. 19.12.2018, BGBl. I 2018, 2694. See on this *Bayer/J. Schmidt* BB 2019, 2178, 2187 with further references.

109 *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.33.

110 *Baschnagel/Hilser* ZPG 2024, 81, 85 ff.; *Klaassen-Kaiser* in KK-UmwG, 2nd ed. 2024, § 306 UmwG para. 10; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.40; *Luy* in BeckOGK UmwG, edition 1.7.2026, § 334 UmwG para. 17; *Reidt* in KK-UmwG, 2nd ed. 2024, § 333 UmwG para. 64; *Reidt/Gläßner* ZPG 2024, 121, 129 ff.; *Rosenkranz* RNotZ 2024, 361, 377; *Schön* ZHR 187 (2023) 123, 156, 162; *Winter* in Schmitt/Hörtnagl, UmwG, 10th ed. 2024, § 334 UmwG para. 5; see also *Klett* in BeckOGK UmwG, edition: 1.7.2026, § 306 UmwG para. 34; dissenting: *Biller/Wilk* in Kallmeyer, UmwG, 8th ed. 2024, § 334 UmwG para. 4 (no analogous application of §§ 333 ff. UmwG); *Leuering/Billerbeck* in KK-UmwG, 2nd ed. 2024, § 321 UmwG para. 5; but see also *Biller/Wilk* in Kallmeyer, UmwG, 8th ed. 2024, 8th ed. 2024, § 306 UmwG para. 11 (§§ 305 ff. UmwG by way of analogy); *Drinhausen/Keinath* in BeckOGK UmwG, edition: 1.7.2026, § 1 UmwG para. 39, 45, 46 are also sceptical.

111 *Baschnagel/Hilser* ZPG 2024, 81, 85 et seq.; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.40; *Luy* in BeckOGK UmwG, edition 1.7.2026, § 335 UmwG para. 21; *Luy* ZGR 2025, 418, 421; *Reidt/Gläßner* ZPG 2024, 121, 129 et seq.

permitted.[112] However, this view is not only not supported by the wording of the CLD, but is also incompatible with its objective of facilitating cross-border operations[113].[114] As in the context of the SE, it is also allowed in the context of Title II Chapter II CLD to make creative use of the instruments made available by the EU legal framework.[115] After all, the very rationale of the CLD is improving the cross-border mobility of companies within the internal market.[116] In this respect, the use of special vehicles in the form of companies formed or acquired specifically for the purpose of carrying out cross-border operations (including shelf companies) is also permissible.[117]

b) Cooperatives

In the case of cross-border mergers, cooperatives are generally also included, provided that they meet the criteria of Art. 119 no. 1 lit. b CLD[118].[119] However, Art. 120(2) CLD[120] gives the Member States an opt-out right in this respect. The background to this is that several Member States[121] had expressed concerns about the lack of harmonisation of cooperative law.[122] In addition, in light of the possibility of establishing an SCE, some also saw no practical need for allowing cooperatives to participate in cross-border mergers.[123] Based on similar considerations, in the context of the Company Law Package, it was decided not to include cooperatives at all within the scope of the newly introduced EU legal frameworks for cross-border divisions and cross-border conversions.[124]

The German legislator had already made use of the opt-out right with the former § 122b(2) no. 1 UmwG[125] because in light of the possibility of establishing an SCE where was seen no practical need for the participation of cooperatives.[126] This position was retained when the provision became § 306(2) no. 1 UmwG in the course of the implementation of the Mobility

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[112] *Re Easynet Global Services Ltd.* [2016] EWHC 2681 (Ch). In the specific case, a total of 22 group companies were to be merged, 21 UK companies and a non-trading Dutch BV. The High Court ruled that it was in fact not a cross-border merger at all.
[113] Cf. recital 55 p. 1 CLD; recital 58 p. 1 Mobility Directive; see also recital 1 CBMD.
[114] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.46.
[115] *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 11; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.46.
[116] *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 11; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.46.
[117] *Re ITAU BBA International Ltd* [2012] EWHC 1783 (Ch) (for cross-border mergers); *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 11; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.46, 23.61; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 321 UmwG para. 7.
[118] Originally: Art. 2 No. 1 lit. b CBMD.
[119] Cf. *Neye* ZIP 2005, 1893, 1895; *Neye/Timm* DB 2006, 488.
[120] Originally: Art. 3 para. 2 CBMD.
[121] The provision goes back to the initiative of Germany, Austria, France and the UK, which wanted to completely exclude cooperatives from the scope of application, see ST 7068/04, p. 7. However, after some other Member States rejected this, an opt-out was included at the suggestion of Italy, based on the model of Art. 87(2) CLD, see ST 9294/04, p. 7.
[122] See IP/04/1405; *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 27; *Drinhausen/Keinath* RIW 2006, 81, 82; *Klein* RNotZ 2007, 565, 576; *Ratka* GeS 2006, 52, 54.
[123] Cf. *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 27; *Neye* ZIP 2005, 1893, 1895.
[124] Cf. SWD(2018) 141, 2.3.1.
[125] *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 27.
[126] Cf. Explanatory Notes to the 2. UmwÄndG, BR-Drs. 548/06, p. 30.

Directive. Consequently, the German legislator also refrained from extending the scope of application of the rules on cross-border divisions and conversions to cooperatives (see §§ 321 sentence 2, 334 sentence 2 UmwG).

c) UCITS

Pursuant to Art. 86a(2), 120(3)[127], 160a(3) CLD, undertakings for collective investment in transferable securities (UCITS) are expressly excluded from the subjective scope of application. Since there is a special legal framework for them at Union level in the form of the UCITSD[128] , the European legislator also wanted to reserve the corresponding rules on cross-border operations exclusively for this special framework.[129] The exclusion covers not only UCITS within the meaning of the UCITSD, but also open-ended public alternative investment funds (AIF).[130]

In German law, this is implemented by § 306 (2) sentence 1 no. 2, 321 sentence 2, 334 sentence 2 UmwG.[131]

d) Companies in economic difficulties

The exceptions and exemption options for companies in economic difficulties in Art. 86a(3)-(4), 120(4)-(5), 160a(4)-(5) CLD are intended to prevent companies from abusing a cross-border operation to evade an orderly resolution procedure or to disadvantage creditors.[132] In detail, a whole series of delimitation questions arise, also due to the complex interaction of the CLD with sector-specific special legal acts and the various Member State options.

aa) Mandatory exceptions

Firstly, a mandatory exception applies to companies that are in liquidation and have already begun to distribute their assets to their members (Art. 86a(3)(a), 120(4)(a), 160a(4)(a) CLD). With the beginning of the distribution of the assets, the shareholders have already made it clear to the outside world that they no longer wish to continue the company[133]; if a cross-border operation was permissible at that point in time, capital and creditor protection

[127] Originally: Art. 3 para. 3 CBMD.

[128] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), OJ L 302, 17.11.2009, p. 32; last amended by Directive (EU) 2024/2994, OJ L 2024/2994, 4.12.2024.

[129] Cf. *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 28; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.75; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 321 UmwG para. 16; § 334 UmwG para. 15. S. also with regard to cross-border mergers: *Drinhausen/Keinath* RIW 2006, 81, 82; *Inwinkl/Schneider* RIW 2008, 4, 6; *H.-F. Müller* NZG 2006, 286, 287; *Neye* ZIP 2005, 1893, 1895.

[130] See in detail: *J. Schmidt,* FS Ekkenga, 2026, p. 799, 807 ff.

[131] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.76..

[132] *Bayer/J. Schmidt* BB 2019, 1922, 1927; *Bormann/Stelmaszczyk* ZIP 2019, 300, 301; *Knaier* GmbHR 2018, 607, 617; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026,23.79; *J. Schmidt* DK 2018, 229, 239; *J. Schmidt* ZEuP 2020, 565, 567; *Wachter* GmbH-StB 2018, 283, 287.

[133] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.80. On the parallel issue in § 274 (1) sentence 1 AktG, see: BGH, 8.4.2020 – II ZB 3/19, NZG 2020, 1182 para. 39 with further references.

provisions could be circumvented[134]. In German law, this exception results from § 305(2) UmwG in conjunction with § 3(3) UmwG; §§ 320(2), 124(2), 3(3) UmwG and §§ 333(2) no. 1, 191(3) UmwG.[135]

Secondly, there is a mandatory exemption for companies that are the subject of recourse to the resolution tools, powers and mechanisms provided for in Title IV BRRD[136], Title V CCPRRR[137] or Title III IRRD[138] (Art. 86a(3)(b), 120(4)(b), 160a(4)(b) CLD).[139] This is intended to ensure that rapid and effective intervention by the resolution authorities is not hindered by the requirements of Title II Chapters -I, II or IV CLD.[140] In Germany, this is taken into account with regard to BRRD and CCPRRR by the special provisions of the SAG[141];[142] the German legislator plans to implement the IRRD by a new VSAAG[143].

bb) Member State options for further exemptions

In addition, the Member States are given the option of exempting companies that are the subject of insolvency proceedings or preventive restructuring frameworks (Art. 86a(4)(a), 120(5)(a), 160a(5)(a) CLD). The Commission draft had still provided for mandatory exceptions in this respect.[144] However, this has rightly been criticised as economically irrational, because cross-border operations can serve as important restructuring tools.[145] Moreover, an outright

[134] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.80. On the parallel issue in § 274 (1) sentence 1 AktG, see: BGH, 8.4.2020 – II ZB 3/19, NZG 2020, 1182 para. 39 with further references.
[135] *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 30; *J. Schmidt* in Lutter, UmwG 7th ed. 2024, § 321 UmwG para. 30, § 334 para. 17.
[136] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190.
[137] Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132, OJ L 22, 22.1.2021, p. 1.
[138] Directive (EU) 2025/1 of the European Parliament and of the Council of 27 November 2024 establishing a framework for the recovery and resolution of insurance and reinsurance undertakings and amending Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 and Regulations (EU) No 1094/2010, (EU) No 648/2012, (EU) No 806/2014 and (EU) 2017/1129, OJ L, 2025/1, 8.1.2025.
[139] A corresponding exception for BRRD measures was first introduced by the BRRD in Art. 3(4) CBMD, which then became Art. 120(4) CLD in 2017. The Mobility Directive extended this exception to cross-border divisions and conversions. Later it extended to CCPRRR measures by the CCPRRR and to IRRD measures by the IRRD.
[140] Cf. recital 122 BRRD; COM(2012) 280, 4.4.17; recital 85 CCPRRR.
[141] Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen (Sanierungs- und Abwicklungsgesetz – SAG) vom 10.12.2014, BGBl. I 2014, 2091.
[142] Cf. *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 31; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 321 UmwG para. 31, § 334 UmwG para. 18; see also *Berger* in Münchner Handbuch des Gesellschaftsrechts, volume 8, 6th ed. 2024, § 64 para. 2.
[143] See the draft law in BT-Drs. 21/6561.
[144] COM(2018) 241, Art. 86c(2)(a), (b), (e); Art. 120(4)(a), (b), (e); Art. 160d(2)(a), (b), (e) CLD-draft.
[145] See opinion ECON PE625.345v03-00, pp. 35, 37, 91 ff.; *Bayer/J. Schmidt* BB 2019, 1922, 1927; *Bormann/Stelmaszczyk* ZIP 2019, 300, 301 ff.; *Garcimartín/Gandía* ECFR 2019, 15, 22 ff.; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.84; *J. Schmidt* ECFR 2019, 222, 236.

prohibition would also be at odds with the European legislator having committed itself to a "European rescue culture" by adopting the Reconstruction Directive[146] and requiring Member States to provide for preventive restructuring frameworks in their national law.[147] It was therefore finally agreed to downgrade the mandatory exceptions to mere Member State options.[148]

These "I&PR" Member State options are independent of each other, i.e. Member States may decide to only exclude companies subject to insolvency proceedings, companies subject to preventive restructuring frameworks, or both.[149] Moreover, the use of the "I&PR" Member State option has general effect: if any of the Member States involved has made use of them, the respective cross-border operation is not possible if one of the participating companies is the subject of insolvency proceedings or preventive restructuring frameworks.[150]

Corresponding Member State options also exist regarding companies that are the subject of other liquidation proceedings or of crisis prevention measures within the meaning of Art. 2(1) point 101 BRRD, Art. 2 point 48 CCPRR or Art. 2 point 79 IRRD (Art. 86a(4)(b), (c), 120(5)(b), (c), 160a(5)(b), (c) CLD).

The German legislator deliberately refrained from using the "I&PR" Member State options under Art. 86a(4)(a), 120(5)(a), 160a(5)(a) CLD because cross-border operations can serve as restructuring tools for such companies in economic difficulties.[151] The risk that such companies will evade the creditor-protection provisions of German law by way of a cross-border operation to the detriment of their creditors is taken into account by the affirmation or notification obligations pursuant to §§ 315(3) sentence 1 no. 4, sentence 2; §§ 329 sentence 1, 315(3) sentence 1 no. 4, sentence 2; §§ 342(3) sentence 1 no. 4, sentence 2 UmwG.[152] In addition, the register court may take this into account in the context of the abuse assessment pursuant to §§ 316(3), 329 sentence 1, 343(3) UmwG.[153]

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[146] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172, 26.6.2019, p. 18.

[147] *Bayer/J. Schmidt* BB 2019, 1922, 1927; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.84; see also *Suchan/Albrecht* WPg 2019, 1181, 1182 et seq.

[148] *Bayer/J. Schmidt* BB 2019, 1922, 1927; *Papadopoulos* EBLR 2023, 893, 898; *J. Schmidt* GS Mankowski, 2024, pp. 691, 694.

[149] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.85; *Papadopoulos* EBLR 2023, 893, 898; *J. Schmidt* GS Mankowski, 2024, pp. 691, 694, 701.

[150] *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.85. For more details*, see J. Schmidt* GS Mankowski, 2024, pp. 691, 695, 701; similarly probably also *Mastrullo* ECFR 2024, 417, 431.

[151] Explanatory Notes to the UmRUG, BR-Drs. 371/22, p. 117.

[152] Explanatory Notes to the UmRUG, BR-Drs. 371/22, p. 117; *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 32; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026,23.87; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 321 UmwG para. 32, § 334 UmwG para. 19.

[153] Explanatory Notes to the UmRUG, BR-Drs. 371/22, p. 117; *Bayer/J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 306 UmwG para. 32; *Lutter/Bayer/J. Schmidt,* Europäisches Unternehmens- und Kapitalmarktrecht, 7th ed. 2026, 23.87; *J. Schmidt* in Lutter, UmwG, 7th ed. 2024, § 321 UmwG para. 32, § 334 UmwG para. 19.

IV. Summary

(1) In contrast to the traditional German understanding, the term "grenzüberschreitende Umwandlungen" used in the German language version of Title II Chapter -I Company Law Directive (CLD) covers only cross-border conversions.

(2) The cross-border nature of a merger, division, or conversion is determined by the *lex societatis*: in case of a cross-border merger or division, at least two of the companies involved must be governed by the law of different Member States; in the case of a cross-border conversion, the *lex societatis* changes in the course of the transfer of the registered office to another Member State.

(3) *De lege lata* the CLD covers only cross-border divisions by formation of new companies. *De lege ferenda,* its scope of application should also be extended to cross-border divisions by acquisition. However, the Member States are already *free de lege lata* to provide for cross-border divisions by acquisition beyond the requirements of the CLD.

(4) A company is "formed in accordance with the law of a Member State" within the meaning of Title II CLD if it exists as a company governed by the law of a Member State at the time of participation in the cross-border operation (even if it was originally formed under the law of a different Member State or a third country).

(5) Cross-border operations in which one or more third country companies are involved are, in principle, not covered by the scope of Title II Chapters -I, II, IV CLD. However, they may be possible based on an international treaty. In addition, the Member States are free to allow "their" companies to carry out cross-border operations involving third country companies. *De lege ferenda,* a special EU legal framework should also be created for cross-border operations involving third country companies.

(6) If one of the national legal forms listed in the annexes to the CLD has different variants or subtypes, they all fall within the scope of application of the CLD – regardless of how the respective legal form variant or subtype is designated in national law.

(7) SEs may participate in cross-border operations on the basis of the CLD if and to the extent that the provisions of the SE Regulation are not *leges speciales*.

(8) De *lege lata,* partnerships are not covered by the scope of Title II Chapters -I, II, IV CLD. However, Member States are free to provide that national rules implementing the requirements of the CLD on cross-border operations apply *mutatis mutandis* also to partnerships*. De lege ferenda*, the scope of Title II Chapters -I, II, IV CLD should at least be extended to commercial partnerships.

(9) It is permissible to use special purpose vehicles and shelf companies to carry out cross-border operations.

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ECGI is an international non-profit membership organisation that provides a platform for debate and dialogue among academics, policymakers, and business leaders, with a focus on major corporate governance, ESG, and stewardship issues.

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