Секция «Английский язык и право (на английском языке)»

The Cross-border Mergers of Companies in the European Private Law

Сафронова Анастасия Владимировна

Студент (бакалавр)

Национальный исследовательский университет «Высшая школа экономики»,
Юридический факультет, Москва, Россия

E-mail: a.v.safronova@inbox.ru

1. Nowadays, the international market development is expressed in the technological development, increase in demand, and improvement of competition. Under these conditions companies need to merger not only within the ambit of one country but within the World as well. The reasons of the trans-boundary (cross-border) mergers are different. The aspiration of companies to stability in the international market is recognized as the most widespread motive. Other reasons to start the cross-border merger process are the marketing development, improvement of product quality etc.

To recognize the trans-boundary merger as valid its general stages shall conform to the special rules. In general, the merger process is implemented according to the national law of each merging company. However, there are some cases where provisions of the national legislation laying down the rules concerning the merger process are not unique. It is a case of the European merger control that is carried out to facilitate the cooperation and consolidation of the limited liability companies. To accomplish this purpose the European Union (the EU) issues such legal acts as the regulations, directives and decisions obligatory for all Member States. As a result the Member States are subject to the two-level legislation consisting of the national law as a first level and the law of the EU as a higher law. The purpose of this project is to understand the mechanism of the cross-border merger in the European private law.

2. The key role in the regulation of the cross-border merger process belongs to Directive 2005/56/EC (or CBM directive) that establishes the legal definition of the trans-boundary merger and its main characteristics, describes the general stages of the cross-border merger process, and addresses the issue of protection of the third parties' rights.

Thus, the CBM directive defines the cross-border merger as the merger of the limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different Member States. Formulated differently, this legal act emphasizes three general criteria according to which the trans-boundary merger can be described. Those are the form of the merger, the subjects of the merger and their place of business.

According to the CBM directive the cross-border merger can be realized by three ways − by the acquisition, by the formation of a new company or by the transferring of the merging company's assets and liabilities to the company holding all shares or securities of the former - when the merging companies are dissolving without going into liquidation. The merger by the acquisition marked by Council Directive 78/855/EEC as the main form of the merger consists in the transferring of all assets and liabilities by one or more merging companies to the another existing company resulting from the cross-border merger. The cross-border merger by the formation of a new company differs from the first merger form only in the additional procedure of a new company formation that shall be carried out in any Member State. All the above mergers have the form of exchange of the assets and liabilities of the merging companies to the securities or shares of the company resulting from the trans-boundary merger. The third form of the cross-border merger has a simple structure due to the fact that it has a form of the transferring of all assets and liabilities of one company to the company holding all securities or

shares of the former.

As a subject of the cross-border merger the CBM directive determines only the limited liability companies which shall be formed in accordance with the law of Member State.

The final criteria of the trans-boundary merger is the business place of the merging companies that shall be subject to the legislation of at least two Member States and have the registered office, central administration or principal place of business within the EU.

3. The core act defining the process of the cross-border merger is the forenamed CBM directive. According to this one there are several essential stages that shall be carried out by each merging company. The first step involves the drawing up by governing bodies of merging companies a common draft. It seems appropriate to mark that all provisions of the CBM directive establishing the essential clauses of the common draft are based upon the article 20 of the Council Regulation (EC) № 2157/2001 on the statute for a European company (SE). Thus, it shall consist of such information on the companies as a business legal structure, name, registered office, and those of the company resulting from the trans-boundary merger. Besides, the CBM directive determines as obligatory the ratio applicable to the exchange of securities or shares, clauses of securities or shares allotment in the company resulting from the cross-border merger, potential repercussions on employment, the date when shareholders will be entitled to share in profits, the date when transactions of the merging companies will be treated as being those of the company resulting from the cross-border merger, the rights conferred by the company resulting from the cross-border merger on members having special rights, special advantages conferred on the experts examining the common draft or the special organs controlling the cross-border merger process etc. The common draft of the cross-border merger shall be published in compliance with the national law of the Member States of the merging companies. Apart from the above it is essential to draw up a special report by the governing bodies and the report by the expert of each merging company for its members.

The second stage of the trans-boundary merger process is expressed in an insight of the members into the said documents. Hereafter these documents shall be approved by the general meeting of each merging company. As the exclusive right of the general meeting the CBM directive defines the right of refusal from the expert analyze in case of the unanimous vote in each merging company. To recognize the merger process as valid the approval of the cross-border merger shall be received from the general meeting of each merging company.

All these stages are described by the Directive as pre-merger procedures that shall be scrutinized by the special organ participation of which depends on the national legislation of the merging company. If all above stages are respected, the certificate resulting from the special organ's scrutiny is received and the legality of the cross-border merger is verified this trans-boundary merger will take effect on the date established by the national legislation of each merging company.

Apparently from the foregoing the influence of the CBM directive and the legal act of the EU is evident. The Member States shall transpose the directives into their national law and, in fact, they carry it out. For instance, after the CBM directive enactment the Commercial Code of France had been amended. Thus, the article L.236-10 had been extended by the provision on the forementioned right of refusal from the expert analyze in case of the unanimous vote.

4. The important problem demanding solution is the protection of the employees' rights during the merger process. There are two general questions appearing from the cross-border merger which are, firstly, how to save the work-places for employees and, secondly, what to do with those who are entitled to participate in the company management.

Directive 2005/56/EC describes issues of employment except for questions of the participation rights of employees as subject to the national legislation of each merging company. Here the CBM directive refers to the legislation of the EU such as Council Directive 98/59EC, Council Directive 2001/23/EC etc. constituting the general rules in the employment area for all Member States. In spite of the fact that the CBM directive does not directly determine the rights of employees in this case it establishes the very important rule of employees' rights and obligations transferring to the company resulting from the cross-border merger. According to the article 14 of the CBM directive all rights and obligations arising from the merging companies' contracts of employment shall be transferred to the company resulting from trans-boundary merger on the date when this one takes effect. As a result employees of the merging companies cannot be fired for the sole reason of the cross-border merger process.

The question of the participation rights is more detailed by CBM directive that defines the general circumstances of employees' participation in the company resulting from the cross-border merger. As a general rule the company resulting from the trans-boundary merger is subject to the rules in force of the Member State where this one was registered. Taking into consideration the fact of co-existing in the EU of different legal systems characterized by proper legal particularities, the participation rights can be prejudiced in the Member State in the Member State of the company resulting from the cross-border merger. To avoid the breach of employees' rights the CBM directive empowers the Member State of the merging companies to regulate the participation of employees *mutatis mutandis* in accordance with principles and procedures defined in the CBM directive and other appropriate legal acts of the EU. This way of protection of the employees' participation rights is named as the principle “Before-after” adopted from the Directive on the European Company with intent of serving the interests of each Member State.

5. Taking into consideration the fact that the CBM directive describes the main issues concerning the cross-border mergers and is obligatory for all Member States, it seems logical to conclude that the European private law influences directly the trans-boundary merger process. However, such an influence the author does not consider as a limitation of the Member States rights in a regulation of the cross-border merger. In fact, the Member States are empowered to govern the cross-border merger in compliance with the EU legislation that makes possible for them to establish more specific detailed rules.

Источники и литература

1) Бегаева А.А. Корпоративные слияния и поглощения: проблемы и перспективы правового регулирования / отв. ред. Н.И. Михайлов. М.: Инфотропик Медиа, 2010. 256 с.
2) The Treaty on the Functioning of the European Union, 1957, available at: http://eur-lex.europa.eu
3) The Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies, 2005, available at: http://eur-lex.europa.eu
4) The Council Regulation (EC) № 2157/2001 on the Statute for a European company (SE), 2001, available at: http://eur-lex.europa.eu
5) The Council Directive 78/855/EEC based on article 54 (3) of the Treaty concerning mergers of public limited liability companies, 1978, available at: http://eur-lex.europa.eu
6) The Commercial Code of France, 2007, available at: http://www.legifrance.gouv.fr