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From:	Presidency
To:	Permanent Representatives Committee
No. Cion doc.:	8561/18 + ADD1 + ADD2
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. - Analysis of the final compromise text with a view to agreement

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**I. INTRODUCTION**

1. On 25 April 2018, the Commission adopted the "Company Law package", which consists of two proposals for Directives amending Directive (EU) 2017/1132: a Directive on the use of digital tools and processes in company law and a Directive on cross-border conversions, mergers and divisions. The package aims to facilitate the use of digital technologies throughout a company's lifecycle and cross-border conversions, mergers and divisions.

2. The "mobility" proposal aims to provide specific and comprehensive procedures for cross-border conversions, mergers and divisions to foster cross-border mobility while, at the same time, offering adequate protection to company stakeholders in order to safeguard the fairness of the Single Market. At this point, only mergers are covered by EU law for cross-border operations. The jurisprudence *Polbud* from October 2017 reaffirmed the absolute nature of the freedom of establishment and confirmed the limited scope of possible derogations on the grounds of public order. The aim of this proposal is to reinstate a predictable framework, legal certainty and create common standards of procedures for assessing cross-border operations in the EU. Main elements of the proposal that required technical work are the alignment and consistency between the three types of the cross-border operations; the protection of members and employees; as well as the protection of creditors, in particular the applicable law and jurisdiction.

## II. STATE OF PLAY

3. The Working Party on Company Law examined the proposal at seventeen occasions during the Bulgarian, Austrian and Romanian Presidencies.
4. The European Parliament adopted the JURI Committee report during the Plenary on 15 January 2019. The Rapporteur Ms REGNER (S&D/AT) was granted a mandate to start negotiations with the Council on this basis.
5. The Permanent Representative Committee gave a mandate to the Presidency to start negotiations with the European Parliament on 30 January 2019 on the basis of the Annex to doc. 5401/2019.

6. The first trilogue took place on 31 January 2019. The second trilogue took place on 5 February 2019. This Committee was debriefed on 8 February 2019. A third trilogue took place on 18 February 2019. This Committee was debriefed on 20 February. On the basis of the revised mandate granted by this Committee on 1 March 2019 (doc. 6909 + ADD 1), a fourth trilogue took place on 5 March and this Committee was debriefed on 8 March.
7. An agreement *ad referendum* between the co-legislators was reached at the fifth trilogue on 11-13 March 2019. The final compromise solution reached during the Trilogue was discussed in the Working Party Company Law (Attachés) on 15 March 2019 and this Committee was debriefed on 20 March.
8. The compromise text agreed with the European Parliament is presented in the Annex to this Note. Considering the divergences in the departing positions of the co-legislators and the main elements of the mandate revised by this Committee, the Presidency considers that it represents an overall balanced compromise package with a view to a rapid agreement on this important file. It is supported by the Commission.

### III. MAIN ISSUES/ LATEST ELEMENTS OF THE COMPROMISE PROPOSAL

9. Employee participation (Articles 86l, 133, 160n, recital (30)): This point was a key issue for the European Parliament, as discussed in this Committee for the revised mandate on 1 March 2019. Having in mind the openness of the European Parliament towards many important topics for the Council, the Presidency checked in an ongoing manner with delegations the margins for flexibility on this topic considering the overall package that could be reached. A majority of delegations could support the Presidency towards finding a compromise on this in exchange for other concessions. Therefore the Presidency considers that the concession made on accepting in all three cross-border operations (mergers, divisions and conversions) a threshold of 4/5 of employees and 4 years while preserving all the other elements on this topic constitutes a balanced approach in view of the overall package.
10. On the issues of scope, creditors and members which were sensitive for delegations, the revised mandate could be kept.

11. Safeguards against abuse/artificial arrangements (art.86m (8), art.127 (8), art.160o (8), recitals 7 and 22): On Article 86 m, the last version circulated to Company Law Attachés on 12 March that most delegations could support could be agreed upon. There are no references in the operative part to artificial arrangement nor to genuine economic activity. A light language in recital 22 has been agreed *ad referendum* as compatible with Council's perspective. Safeguarding of stakeholders' rights against a fraudulent use of mobility was a key issue for the European Parliament. However, the European Parliament could in the end subscribe to the Council's view that the freedom of movement could be jeopardized by non-proportionate restrictions, if these hindered or discouraged not only fraudulent, but also legitimate operations.
12. Ex-post evaluation of the validity of the operation (art. 86 u): In line with their previous position, the European Parliament wanted a two-year period for competent authority to be able to sanction operations that would be considered "artificial". It is now a more simple provision that refers to national law that could be accepted by the European Parliament.
13. Another sensitive point for both co-legislators was the reference to " country by country report elements " in the operative part. It could be agreed upon that this Directive was not the appropriate instrument.

#### IV. CONCLUSION

The Permanent Representatives Committee is invited to give its approval to the compromise text set out in the Annex to this Note and to mandate the Presidency to inform the European Parliament that, should Parliament adopt the text of the proposal in the exact form as set out in the Annex - subject to legal-linguistic revision - at a forthcoming plenary meeting, the Council would adopt the proposed Directive thus amended.

**DIRECTIVE (EU) 2019/...**  
**OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of ...**

**amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,  
the Treaty on the Functioning of the European Union, and in particular Article 50 (1) and (2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure<sup>2</sup>,

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> Position of the European Parliament of ... (not yet published in the Official Journal) and decision of the Council of ... .

Whereas:

- (1) The Directive (EU) 2017/1132 of the European Parliament and of the Council<sup>3</sup> regulates cross-border mergers of limited liability companies. These rules represent a significant milestone in improving the functioning of the Single Market for companies and firms and to exercise the freedom of establishment. However, evaluation of these rules shows that there is a need for modifications in cross-border merger rules. Furthermore, it is appropriate to provide for rules regulating cross-border conversions and divisions, *since Directive (EU) 2017/1132 only provides rules for domestic divisions of public limited liability companies.*

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<sup>3</sup> 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).

- (2) Freedom of establishment is one of the fundamental principles of Union law. Under the second paragraph of Article 49 of the Treaty on the Functioning of the European Union (‘TFEU’), when read in conjunction with Article 54 of the TFEU, the freedom of establishment for companies or firms includes, inter alia, the right to form and manage such companies or firms under the conditions laid down by the legislation of the Member State of establishment. This has been interpreted by the Court of Justice of the European Union as encompassing the right of a company or firm formed in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law of another Member State, provided that the conditions laid down by the legislation of that other Member State are satisfied and, in particular, that the test adopted by the latter Member State to determine the connection of a company or firm to its national legal order is satisfied.

- (3) In the absence of harmonisation of Union law, the definition of the connecting factor that determines the national law applicable to a company or firm falls, in accordance with Article 54 of the TFEU, within the competence of each Member State to define. Article 54 of the TFEU places the **connecting factors** of the registered office, the central administration and the principal place of business of a company or firm at **equal footing**. Therefore, as clarified in case-law<sup>1</sup>, the fact that only the registered office (and not the central administration or principal place of business) is transferred does not as such exclude the applicability of the freedom of establishment under Article 49 of the TFEU.
- (4) These developments in the case-law have opened up new opportunities for companies in the Single Market in order to foster economic growth, effective competition and productivity. At the same time, the objective of a Single Market without internal borders for companies must also be reconciled with other objectives of European integration such as social protection *as set out in Article 3 TEU and Article 9 TFEU as well as promotion of social dialogue as set out in Articles 151 and 152 TFEU. The right of companies to convert, merge and divide across borders should go hand in hand and should be properly balanced with the protection of employees, creditors and members.*



- (5) *The lack of a legal framework on cross-border conversions and divisions* leads to legal fragmentation and legal uncertainty, and thus to barriers to the exercise of the freedom of establishment. It also leads to a suboptimal protection of employees, creditors and minority *members* within the Single Market.
- (6) *The European Parliament has called upon the Commission to adopt harmonised* rules on cross-border conversions *and divisions. A harmonised legal framework would further* contribute to the *removal* of restrictions on *the* freedom of establishment *whilst* at the same time *providing* adequate ■-protection for stakeholders such as employees, creditors and *members*.
- (7) *This Directive should be without prejudice to Member States' powers to provide strengthened protection for employees, in accordance with the existing social acquis.*

- (8) The carrying out of a cross-border conversion entails a change of *the* legal form for a company without losing its legal personality. ***However, neither a cross-border conversion nor a cross-border merger or division*** should lead to the circumvention of the requirements for incorporation in the Member State ***in which the company is to be registered after the operation***. Such conditions, including the requirements to have *the* head office in the destination Member State and those relating to the disqualification of directors, should be fully respected by the company. However, ***in case of cross-border conversions***, the application of such conditions by the destination Member State may not affect the continuity of the converted company's legal personality.
- (9) ***This Directive should not apply to companies in liquidation where the distribution of assets has begun. In addition, Member States may decide also to exclude companies subject to other liquidation proceedings. Member States should also be able to choose not to apply this Directive to companies subject to insolvency proceedings, as defined by the national law, or to preventive restructuring frameworks, as defined by the national law, no matter whether such proceedings are part of a national insolvency framework or regulated outside of it, and to companies subject to crisis prevention measures in the meaning of Directive 2014/59/EU of the European Parliament and of the Council<sup>4</sup>.***

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<sup>4</sup> ***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).***

*This Directive should be without prejudice to the Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures.*

- (10) Given the complexity of cross-border conversions, *mergers and divisions (hereinafter referred to as cross-border operations)* and the multitude of the interests concerned, it is appropriate to provide for *a scrutiny of the legality of the cross-border operation before it takes effect* in order to create legal certainty. To that effect, ■ the competent authorities of ■ the Member *States involved should* ensure that a decision on the approval of a cross-border *operation* is taken in a fair, objective and non-discriminatory manner on the basis of all relevant elements *required by national and EU law*.

- (11) To allow all stakeholders' legitimate interests to be taken into account in the procedure governing a cross-border *operation*, the company should *draw up and* disclose the draft terms of the *proposed operation* containing the most important information about *it*. *The administrative or management body should, where provided for in national law and/or in accordance with national practice, include board level employee representatives in the decision on the draft terms of a cross-border operation. Such information should at least include* the envisaged *legal form of the company or companies*, the instrument of constitution, *where applicable, the statutes*, the proposed *indicative* timetable for the *operation and details of the safeguards offered to members and* creditors. *A notice should be disclosed in the business register informing the members, creditors and representatives of the* employees of the company, *or, where there are no such representatives, the employees themselves* that they *may* submit comments with regard to the proposed *operation*. *Member States may also decide that the independent expert report is disclosed.*

(12) In order to provide information to its members *and employees*, the company carrying out the cross-border *operation* should prepare a report *for them*. The report should explain and *justify the legal and economic* aspects of the proposed cross-border *operation and* the implications of the *proposed* cross-border *operation* for *employees*. *In particular, the report should explain implications of the cross-border operation* with regard to the future business of the company *including its subsidiaries*. *Concerning members, the report should, in particular, include potential remedies available to them, especially information about their exit right. As to the employees, the report should also explain, in particular, the implications of the proposed cross-border operation on the employment situation., In particular it should explain whether there would be any material change in the employment conditions laid down by law, collective agreements and transnational company agreements and in the locations of the companies' places of business, such as the location of the head office, as well as information on the management body and, where applicable, staff, equipment, premises and assets before and after the cross-border operation and the likely changes to the organisation of work, the wages, the place of specific posts and the expected consequences for the employees occupying such posts, as well as the company level social dialogue including, where applicable, board level employee representation. It should also explain how those changes would affect any subsidiaries of the company. This requirement should not however apply where the only employees of the company are in its administrative organ. Furthermore, in order to enhance the protection afforded to the employees, employees or their representatives should be able to provide their opinion on the report setting out the implications of the cross-border operation for them.* The provision of the report *and the possibility to provide an opinion* should be without prejudice to the applicable information and consultation proceedings instituted at national level *including those* following the implementation of Directive 2002/14/EC of the European Parliament and of the Council<sup>5</sup> or Directive 2009/38/EC of the European Parliament and of the Council<sup>6</sup>. *The report or reports, in case*

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<sup>5</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

<sup>6</sup> Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale

*they are established separately, should be available to the members and to the representatives of the employees of the company carrying out the cross-border conversion or, where there are no such representatives, the employees themselves.*

- (13) *The draft terms of the cross-border operation, the offer of cash compensation by the company to those members who wish to exit the company and, where applicable, the share-exchange ratio including the amount of a possible complementary cash payment included in the draft terms should be examined by an expert who is independent from the company. With regard to the independence of the expert, Member States should take into account the principles laid down in Articles 22 and 22b of Directive 2006/43/EC of the European Parliament and of the Council<sup>7</sup>.*
- (14) *The information disclosed by the company should be comprehensive and make it possible for stakeholders to assess the implications of the intended cross-border operation. However, companies should not be obliged to disclose confidential information, the disclosure of which would be prejudicial to their business position in accordance with national or Union law. Such non-disclosure should not undermine the other requirements under this Directive.*
- (15) On the basis of the draft terms and the reports, the general meeting of the members of the company *or companies* should decide on whether or not to approve those draft terms *and the necessary amendments to the instruments of constitution, including the statutes*. It is important that the majority requirement for such a vote should be sufficiently high in order to ensure that the decision is *based on a solid majority*. In addition, members should also have the right to vote on any arrangements concerning employee participation, if they have reserved that right during the general meeting.

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undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ L 122, 16.5.2009, p. 28).

<sup>7</sup> *Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L 157, 9.6.2006, p. 87).*

**(16) *As a consequence of a cross-border operation, members often face a situation whereby the law applicable to their rights would change, because they would become members in a company governed by the law of a Member State other than the law applicable to the company before the operation. Therefore, Member States should, at least, offer the right to exit the company and receive a cash compensation for their shares equivalent to their value for members holding shares with voting rights and who voted against the approval of the draft terms. However, Member States may decide to offer this right also to other members, for example for members holding shares without voting rights or members who, as a result of a cross-border division, would acquire shares in the company in different proportions than what they held before the operation or to members for whom there was no change of applicable law but for whom certain rights have changed due to the operation. This Directive should not affect national rules on validity of contracts for the sale and transfer of shares in companies nor special legal form requirements. For example, Member States should be able require a notarial deed or a confirmation of signatures.***

- (17) *Companies should be able to estimate, to the extent possible, the costs related to the cross-border operation. Members should therefore be required to declare to the company, whether they exercise the right to dispose of their shares. This should be without prejudice to any formal requirements set up by national law. Members could also be required to indicate together with the declaration or within a specific time limit, whether they intend to challenge the offered cash compensation and demand additional cash compensation.*
- (18) *The calculation of the offer of cash compensation should be based on generally accepted valuation methods. Members should have a right to challenge the calculation and question the adequacy of the cash compensation before a competent administrative or judicial authority or a body mandated under national law including arbitral tribunals. Member States should be able to provide that members who have exercised the right to dispose of the shares are entitled to join the proceedings and Member States should be able to establish time limits for doing it in national law.*



- (19) *In case of a cross-border merger or division, members who did not have or did not exercise an exit right should, however, have a right to challenge the share exchange ratio. When assessing the adequacy of the share-exchange ratio, the competent administrative or judicial authority or a body mandated under national law should also take into account the amount of a possible complementary cash payment included in the draft terms.*
- (20) ■ In addition, in order to *protect* the ■ creditors *against* the *risk* of insolvency of the company following the cross-border *operation*, Member States should be allowed to require the company *or companies* to make a declaration of solvency stating that *they are* not aware of any reason why the *company or companies resulting from the cross-border operation* should not be able to meet *their* liabilities. In those circumstances, Member States should be able to make the members of the management organ personally liable for the accuracy of that declaration. As legal traditions vary amongst Member States with regard to the use of solvency declarations and their possible consequences, it should be up to Member States to draw appropriate consequences for providing inaccurate or misleading declarations, including effective and proportionate sanctions and liabilities in compliance with Union law.

- (21) In order to guarantee the appropriate protection of creditors in cases where they are not satisfied with the protection offered by the company in the draft terms *and where they may not have found a satisfactory solution with the company*, creditors, *who have notified the company beforehand*, may apply *for safeguards* to the competent ■ authority. *When assessing these safeguards*, the *appropriate authority* should *take into account whether the creditor's claim* against the ■ company or ■ a third party *is of at least equivalent value and of a commensurate credit quality as before the cross-border operation and whether the claim may* be brought in the same jurisdiction ■ .

(22) *Member States should ensure adequate protection for those creditors, who entered into a relationship with the company before the company had made public its intention to carry out a cross-border operation. In addition to the general rules set out in the Brussels Ia Regulation, Member States should therefore provide that such creditors should have the choice of filing a claim in the departure Member States for a period of two years after the disclosure of the draft terms of the cross-border conversion. After the draft terms have been disclosed, creditors should be able to take into account the potential impact of the change of jurisdiction and applicable law as a result of the cross-border operation. Creditors of a company to be protected could also be active and former employees with occupational vested pension rights and persons receiving occupational pension benefits. Also, the two year protection measure envisaged by this directive with respect to the jurisdiction to which creditors whose claims antedate the disclosure of the draft-terms of the cross-border conversion may apply, shall be without prejudice to national law determining the statute of limitations of claims.*

- (23) *It is important to ensure that the rights of employees to be informed and consulted in the context cross-border operations are fully respected. The information and consultation of employees in the context of cross-border operations should be carried out in accordance with the legal framework set out by the Directive 2002/14/EC, where applicable for Community-scale undertakings or Community-scale groups of undertakings, in accordance with Directive 2009/38/EC, and Council Directive 2001/23/EC<sup>8</sup>, where the cross-border merger or cross-border division is considered as transfer of undertaking within the meaning of that Directive. This Directive does not affect Directive 2009/38/EC, Council Directive 98/59/EC, Directive 2001/23/EC, and Directive 2002/14/EC. However, given that this Directive lays down a harmonised procedure for cross-border operations, it is appropriate to specify in particular the time frame within which the information and consultation of employees related to the cross-border operation should take place.*
- (24) *Employees' representatives provided for by national law and/or in accordance with national practice, where applicable, should include also relevant bodies established in accordance with EU law, if any, such as European Works Council established in accordance with Directive 2009/38/EC and the representative body established in accordance with Council Directive 2001/86/EC<sup>9</sup>.*

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<sup>8</sup> *Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).*

<sup>9</sup> *Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ L 294, 10.11.2001, p. 22).*

- (25) *Member States should ensure that employee’s representatives, when carrying out their functions, enjoy adequate protection and guarantees in accordance with Article 7 of Directive 2002/14/EC to enable them to perform properly the duties which have been assigned to them.*
- (26) *In order to conduct an analysis of the report, the company carrying out the cross-border operation should provide the employee representatives with resources necessary as to enable them to apply the rights arising from this Directive in an appropriate manner.*
- (27) In order to ensure that employee participation is not unduly prejudiced as a result of the cross-border *operation*, where the company carrying out the cross-border *operation has implemented* an employee participation system **■**, the company *or companies resulting from the cross-border operation* should be obliged to take a legal form allowing for the exercise of such participation, including through the presence of representatives of the employees in the appropriate management or supervisory organ of the company *or companies*. Moreover, in such a case, *where* a bona fide negotiation between the company and its employees *takes* place, *it should be carried out* along the lines of the procedure provided for in Directive 2001/86/EC, with a view to finding an amicable solution reconciling the right of the company to carry out a cross-border *operation* with the employees' rights of participation. As a result of those negotiations, either a bespoke and agreed solution or, in the absence of an agreement, the application of standard rules as set out in the Annex to Directive 2001/86/EC should apply, *mutatis mutandis*. In order to protect either the agreed solution or the application of those standard rules, the company should not be able to remove the participation rights through carrying out subsequent domestic or cross-border conversion, merger or division within *four* years.

- (28) In order to prevent the circumvention of employee participation rights by means of a cross-border **operation**, the company **or companies** carrying out **the cross-border operation and** registered in the Member State which provides for the employee participation rights, should not be able to perform a cross-border **operation** without first entering into negotiations with its employees or their representatives when the average number of employees employed by that company is equivalent to four fifths of the national threshold for triggering such employee participation.
- (29) ***The involvement of all stakeholders, in particular employees, contributes to a long-term and sustainable approach by companies across the Single Market. In this regard, safeguarding and promoting employees' participation rights in companies' board, in particular when companies move or restructure cross-border, plays an important role. Therefore, the successful completion of negotiations on participation rights in the context of cross-border operations is essential and should be encouraged.***
- (30) To ensure a proper allocation of tasks among Member States and an efficient and effective ex-ante control of cross-border **operations**, the competent authorities of the ■ Member States **of the company or companies carrying out the cross-border operation** should have the power to issue a pre-conversion, **pre-merger or pre-division** certificate (**herein referred to as 'pre-operation certificate'**). **Without such a certificate** the competent authorities **of the Member States of the converted company or of the company or companies resulting from the cross-border operation** should not be able to complete the cross-border **operation procedures**.

- (31) *In order to issue the pre-operation certificate, the Member States of the company or companies carrying out the cross-border operation should designate, in accordance with national law, an authority or several authorities competent to scrutinise the legality of the operation. The competent authority or authorities may comprise: courts, notaries or other authorities, a tax authority or financial service authority. If there is more than one competent authority, the company should be able to apply for the pre-operation certificate to one single competent authority, as designated by the Member States, which should co-ordinate with the other competent authorities. The competent authority or authorities should assess the compliance with all relevant conditions and the proper completion of all procedures and formalities in that Member State and should decide whether to issue a pre-operation certificate within three months of the application by the company, unless it has serious doubts that the cross-border operation is set up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law, or for criminal purposes and the examination requires the consideration of additional information or performing additional investigative activities.*
- (32) *In certain circumstances, the right of companies to carry out a cross-border operation could be used for abusive or fraudulent purposes such as for the circumvention of the rights of employees, social security payments or tax obligations or for criminal purposes. In particular, it is important to counteract ‘shell’ or ‘front’ companies set up for the purpose of evading, circumventing or infringing national and/or Union law. Where in the course of the scrutiny of legality, the competent authority has become aware, including through consultation of relevant authorities, that the cross-border operation is set up for abusive or fraudulent purposes, leading or aimed to lead to the evasion or circumvention of national or EU law, or for criminal purposes, it should not authorise the operation. The relevant procedure, including any detailed assessment, should be carried out in accordance with national law. In such case the competent authority may extend the assessment up to a maximum of further three months.*

(33) *Where the competent authority has serious doubts that the cross-border operation is set up for abusive or fraudulent purposes, the assessment should consider all relevant facts and circumstances, and should take into account, where relevant, at a minimum, indicative factors relating to the characteristics of the establishment in the Member State in which the company or companies are to be registered after the cross-border operation, including the intent of the operation, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, equipment, beneficial owners of the company, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due, the number of employees posted in the year prior to the conversion within the meanings of Regulation (EC) No 883/2004 of the European Parliament and of the Council<sup>10</sup> and Directive 96/71/EC of the European Parliament and of the Council<sup>11</sup>, and the number of employees working simultaneously in more than one Member State within the meaning of Regulation (EC) No 883/2004 and the commercial risks assumed by the company or companies before and after the cross-border operation. The assessment should also take into account the relevant facts and circumstances related to employee participation rights, in particular as regards negotiations on such rights where those were triggered by the four fifths of the applicable national threshold. All these elements should only be considered as indicative factors in the overall assessment and therefore should not be regarded in isolation. The competent authority may consider it as an indication of absence of circumstances leading to abuse or fraud if the cross-border operation results in having the place of the effective management and/or the economic activity of the company in the Member State, where the company or companies are to be registered after the cross-border operation.*

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<sup>10</sup> *Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).*

<sup>11</sup> *Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services( OJ L 18, 21.1.1997, p. 1).*



- (34) *The competent authority should also be able to obtain from the company carrying out the cross-border operation, or from other competent authorities, including those from the destination Member State, all relevant information and documents with the view to carry out the control of legality within the procedural framework laid down in national law. Member States should be able to stipulate which are the possible consequences on the issuance on the pre-operation certificate of the procedures initiated by members and creditors in accordance with this Directive.*
- (35) *In the assessment of the application submitted by the company in order to obtain a pre-operation certificate the competent authority can have recourse to an independent expert. Member States should lay down rules to ensure that the expert or the legal person on whose behalf the expert is operating is independent from the company applying for the pre-operation certificate. The expert or experts should be appointed by the competent authority, and should have no past or current link with the company concerned which might affect his/her/its independence.*
- (36) *In order to ensure that the company carrying out the cross-border operation does not prejudice its creditors, the competent authority should be able to check, in particular, whether the company has fulfilled its obligations towards public creditors or whether any open obligations are sufficiently secured. In particular, the competent authority should also be able to check whether the company is subject to any on-going court proceedings concerning for example infringement of social, labour or environmental law, which as an outcome may establish further obligations on the company, including towards citizens and private entities.*

- (37) *Member States should provide for procedural safeguards in line with the general principles of access to justice, including for the possibility to review the decisions of the competent authorities in the proceedings concerning cross-border operations, the possibility to delay the effectiveness of the certificate to allow parties to bring an action before the competent court and the possibility to obtain, where appropriate, interim measures.*
- (38) After having received a pre-*operation* certificate, and after verifying that the *legal* requirements of the █ Member State *in which the company is to be registered after the operation* are fulfilled, *including the check whether the transaction constitutes a circumvention of national or EU law*, the competent authorities █ should register the company in the business register of that Member State. Only after this registration should the competent authority of the *former* Member State *of the company or companies carrying out the cross-border operation* strike the company off its own register. It should not be possible for the competent *authorities* of the █ Member State *in which the company is to be registered after the cross-border operation* to challenge the █ information provided by the pre-*operation* certificate. █

- (39) *Member States should ensure that the completion of certain procedural steps, namely, the disclosure of the draft terms, the application for pre-conversion, pre-merger or pre-division certificate (herein referred to as ‘pre-operation certificate’) as well as the submission of any information and documents for the scrutiny of the legality of the cross-border conversion, merger or division by the destination Member State, may be completed online in their entirety without the necessity for the applicants to appear in person before any competent authority in the Member States. The rules on the use of digital tools and processes in company law including the relevant safeguards should apply as appropriate. The competent authority should be able to receive the application for the pre-conversion certificate, including submission of any information and documents, online, unless exceptionally technically impossible for the authority.*
- (40) *In order to cut costs and reduce the length of the procedures and administrative burden for companies, Member States should apply the ‘once-only’ principle in the area of company law, which entails that companies are not asked to submit the same information to public authorities more than once. For example, companies should not have to submit the same information both to the national register and to the national gazette.*
- (41) *As a consequence of the cross-border conversion, the converted company should retain its legal personality, its assets and liabilities and all rights and obligations, including rights and obligations arising from contracts, acts or omissions. In particular, company should respect the rights and obligations arising from contracts of employment or from employment relationships including the terms and conditions agreed in any collective agreements.*

- (42) In order to provide for the appropriate level of transparency and use of digital tools and processes, *the pre-operation certificates issued by the competent authorities in different Member States should be shared* by means of the system of interconnection of business registers and should be made publically available. *In accordance with the general principle underlying this Directive, such exchange of information should always be free of charge.*
- (43) *To enhance the transparency about the cross-border operations, it is important that the registers of the Member States involved contain necessary information from the other register or registers about the companies involved in the cross-border operation in order to be able to track the history of those companies. In particular, the file in the register of the company where it was registered prior to the cross-border operation should contain the new registration number of the company attributed to it after the cross-border operation. Similarly, the file in the register of the company where it was registered after the cross-border operation should contain the initial registration number of the company attributed to it prior to the cross-border operation.*
- █ (44) *As regards the existing rules on cross-border mergers, the Commission announced in its Communication entitled ‘Upgrading the Single Market: more opportunities for people and business’ █ that it would assess the need to update those rules █ in order to make it easier for SMEs to choose their preferred business strategy and to better adapt to changes in market conditions, whilst at the same time not weakening the existing employment protection. In its Communication entitled ‘Commission Work Programme 2017 Delivering a Europe that protects, empowers and defends’, the Commission announced an initiative to facilitate the implementation of cross-border mergers.*
- █

- (45) The lack of harmonisation of safeguards for members ■ has been identified *as* an obstacle for cross-border *operations*. *Companies and members face a wide variety of different forms of protection leading to complexity and legal uncertainty*. Members ■ should, *therefore*, be offered the same *minimum* level of protection regardless of the Member *State* in which the *company is* situated. *Member States may therefore maintain or introduce additional protection rules for members, unless they are in conflict with those provided by this Directive or with the freedom of establishment. Members' individual rights to information remain unaffected*.
- (46) Following a cross-border *operation*, the former creditors of the *company or* companies *carrying out that operation* may see their claims *affected* where the ■-company which is liable for the debt is thereafter governed by the law of another Member State. Currently, creditor protection rules vary across Member States which adds significant complexity to the cross-border *operation* process and leads to uncertainty both for the companies involved and for their creditors in relation to the recovery or satisfaction of their claim.

■

- (47) *Besides the new rules on conversions this Directive* lays down rules on cross-border divisions, both for partial and full divisions, but only through the formation of new companies. *This Directive* does not provide a harmonised framework for cross-border divisions in which a company transfers assets and liabilities to more than one existing company as these instances had been viewed as being very complex, requiring the involvement of competent authorities from several Member States and entailing additional risks in terms of *the circumvention of national and EU rules. The possibility to form a company through a division by separation as provided for in this Directive offers companies a new harmonised procedure in the Single Market, however, companies should be free to directly set up subsidiaries in other Member States.*
- (48) *As a consequence of the cross-border merger, the assets and liabilities and all rights and obligations, including rights and obligations arising from contracts, acts or omissions should be transferred to the acquiring company or to the new company and the members of the merging companies, who do not exercise the exit-right, should become members of the acquiring or the new company respectively. In particular, the acquiring or the new company should respect the rights and obligations arising from contracts of employment or from employment relationships including the terms and conditions agreed in any collective agreements.*

(49) As a consequence of the cross-border division, the assets and liabilities ***and all rights and obligations, including rights and obligations arising from contracts, acts or omissions*** of the company being divided ***should*** be transferred to the recipient companies in accordance with the allocation specified in the draft terms of division and the members of the company being divided ***who do not exercise the exit-right should*** become members of the recipient companies or remain members of the company being divided or ***should*** become members of both. ***In particular, the recipient companies should respect the rights and obligations arising from contracts of employment or from employment relationships including the terms and conditions agreed in any collective agreements.***

■ (50) ***In order to ensure legal certainty, it should not be possible to declare a cross-border operation which has taken effect in accordance with the procedure laid down in this Directive null and void. This should be without prejudice to Member States' powers, inter alia, in the field of criminal law, terrorist financing, social law, taxation and law enforcement in accordance with national laws, in particular in case the competent or other relevant authorities establish, in particular through new substantive information, after the cross-border operation took effect, that the cross-border operation was set up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law or criminal purposes. In this context, the competent authorities could also assess whether the applicable national threshold for employee participation of the Member State of the company carrying out the cross-border operation was met or exceeded in the subsequent years following the cross-border operation.***

- (51) *Any cross-border operation should be without prejudice to the liability for tax obligations related to the company's or companies' activity before that operation.*
- (52) To guarantee the employees' rights other than rights of participation, Directive 2009/38/EC, Council Directive 98/59/EC<sup>12</sup>, Directive 2001/23/EC, and Directive 2002/14/EC, are not affected by this Directive. National laws should also apply to matters outside the scope of this Directive such as tax or social security.
- (53) The provisions of this Directive do not affect the legal or administrative provisions, including the enforcement of tax rules in cross-border conversions, mergers and divisions, of national law relating to the taxes of Member States, or its territorial and administrative subdivisions.

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<sup>12</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 1).



(54) *This Directive is without prejudice to Council Directive (EU) 2016/1164<sup>13</sup> laying down rules against tax avoidance practices that directly affect the functioning of the internal market, Council Directive 2009/133/EC<sup>14</sup> on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, Council Directive (EU) 2015/2376<sup>15</sup> as regards mandatory automatic exchange of information on advance tax rulings and advance pricing arrangements between Member States, Council Directive (EU) 2016/881<sup>16</sup> on mandatory automatic exchange of information in the field of taxation and Council Directive (EU) 2018/822<sup>17</sup> as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.*

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<sup>13</sup> OJ L 193, 19.7.2016, p. 1).

<sup>14</sup> Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ L 310, 25.11.2009, p. 34).  
<sup>15</sup> Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18.12.2015, p. 1).

<sup>16</sup> Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3.6.2016, p. 8).

<sup>17</sup> Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ L 139, 5.6.2018, p. 1).

- (55) This Directive does not affect the provisions of Directive (EU) 2015/849 of the European Parliament and the Council<sup>18</sup> addressing risks of money laundering and terrorist financing, in particular the obligations related to carrying out the appropriate customer due diligence measures on a risk-sensitive basis and to identifying and registering the beneficial owner of any newly created entity in the Member State of its incorporation.
- (56) *The Directive does not affect Union legislation and national rules made or introduced pursuant to such Union legislation regulating transparency and rights of shareholders in listed companies.*
- (57) *This Directive does not affect Union legislation regulating credit intermediaries and other financial undertakings and national rules made or introduced pursuant to such Union legislation.*
- (58) Since the objectives of this Directive, to facilitate and regulate cross-border conversions, mergers and divisions cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the *TFEU*. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.
- (59) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

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<sup>18</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance) (OJ L 141, 5.6.2015, p. 73).

- (60) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>19</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (61) The Commission should carry out an evaluation of this Directive *including an evaluation of the implementation of employee information, consultation and participation in the context of the cross-border operations. The evaluation should, in particular, aim to assess those cross-border operations where the negotiations on employee participation were triggered by the 4/5 of the applicable threshold and to see whether those companies, after the cross-border operation, met or exceeded the applicable threshold for employee participation of the Member State of the company which carried out the cross-border operation*. Pursuant to paragraph 22 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016<sup>20</sup> that evaluation should be based on the five criteria of efficiency, effectiveness, relevance, coherence and value added and should provide the basis for impact assessments of possible further measures.

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<sup>19</sup> OJ C 369, 17.12.2011, p. 14.

<sup>20</sup> OJ L 123, 12.5.2016, p. 1.

- (62) Information should be collected in order to assess the performance of the legislation against the objectives it pursues and in order to inform an evaluation of the legislation in accordance with paragraph 22 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016.
- (63) Directive (EU) 2017/1132 should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1  
Amendments to Directive (EU) 2017/1132

Directive (EU) 2017/1132 is amended as follows:

**(1) in Article 18 paragraph 3 the following point (aa) is inserted:**

***"(aa) the documents and information referred to in Article 86h, 86o, 86q, 123, 127a, 160j, 160q, 160s;"***

**(2) Article 24 is amended as follows:**

**(a) point (e) is replaced by the following:**

***"(e) the detailed list of data to be transmitted for the purpose of exchange of information between registers and for the purpose of disclosure, as referred to in Articles 20, 34, 86o, 86p, 86q, 127a, 128, 130, 160q, 160r and 160s;"***

**(b) At the end of the article , the following sentence is added:**

***"The Commission shall adopt the implementing acts pursuant to point e) by 18 months after the day of entry into force at the latest.";***

(3) the title of Title II is replaced by the following:

"CONVERSIONS, MERGERS AND DIVISIONS OF LIMITED LIABILITY COMPANIES";

(4) in Title II, the following Chapter -I is inserted:

"CHAPTER -I

Cross-border conversions

Article 86a

Scope

1. This Chapter shall apply to the conversion of a limited liability company formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Union into a *limited liability* company governed by the law of another Member State (*hereinafter referred to as 'cross-border conversion'*).

■

## Article 86b

### Definitions

For the purposes of this Chapter

- (1) 'limited liability company' hereinafter referred to as "company", means a company of a type listed in Annex II ***carrying out a cross-border conversion***;
- (2) 'cross-border conversion' means an operation whereby a company, without being dissolved, 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 and ***listed in Annex II and*** transfers at least its registered office into the destination Member State whilst retaining its legal personality;
- (3) 'departure Member State' means a Member State in which a company is registered in its legal form prior to the cross-border conversion;
- (4) 'destination Member State' means a Member State in which a company shall be registered as a result of the cross-border conversion;
- (6) 'converted company' means the **■** company ***formed*** in the destination Member State ***as a result of the process of*** the cross-border conversion **■** .

Article 86c

*Further provisions concerning the scope*

1. *This Chapter shall not apply to cross-border conversions involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, 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.*
2. *Member States shall ensure that this Chapter does not apply* in any of the following circumstances:
  - (a) *the company is in liquidation and has begun to distribute assets to its shareholders;*

■



(b) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council(\*).

2a. *Member States may decide not to apply this Chapter to companies subject to:*

(a) *insolvency proceedings or preventive restructuring frameworks;*

(aa) *liquidation proceedings other than those referred to in paragraph 2, or*

(b) *crisis prevention measures in the meaning of Article 2 paragraph 1 point (101) of Directive 2014/59/EU of the European Parliament and of the Council.*

4. The national law of the departure Member State shall govern that part of the procedures and formalities to be complied with in connection with the cross-border conversion in order to obtain the pre-conversion certificate, and the national law of the destination Member State shall govern that part of the procedures and formalities to be complied with following receipt of the pre-conversion certificate, in compliance with Union law.

Article 86d

Draft terms of cross-border *conversions*

1. The management or administrative organ of the company ■ shall draw up the draft terms of a cross-border conversion. The draft terms of a cross-border conversion shall include at least the following *particulars*:
  - (a) the legal form, name and *location of its* registered office of the company in the departure Member State;
  - (b) the legal form, name and location of its registered office proposed for the *converted* company ■ in the destination Member State;
  - (c) the instrument ■ of constitution, *where applicable, and the statutes if they are contained in a separate instrument*, of a company in the destination Member State;
  - (d) the proposed *indicative* timetable for the cross-border conversion;
  - (e) the rights conferred by the converted company on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;

- (f) ■ safeguards, *such as guarantees or pledges, where* offered to ■ creditors;
- (h) any special advantages granted to members of the administrative, management, supervisory or controlling *organs* of the ■ company;
- (ha) if any incentive or subsidies were received by the company in the departure Member State in the last 5 years;*
- (i) details of the offer of cash compensation for the members ■ in accordance with Article 86j;
- (j) the likely repercussions of the cross-border conversion on employment;
- (k) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the converted company are determined pursuant to Article 86l ■ .

■

Report of the management or administrative organ to the members *and the employees*

1. The management or administrative organ of the company ■ shall draw up a report *to members and employees* explaining and justifying the legal and economic aspects of the cross-border conversion *as well as explaining the implications of the cross-border conversion for employees*.
2. The report referred to in paragraph 1, shall, in particular, explain the *implications of the cross-border conversion on the future business of the company*:  
  
*It shall also include a section for members and a section for employees.*
3. *The section of the report for members shall in particular explain the following:*
  - (aa) *an explanation of the cash compensation and of the method used to arrive at it;*
  - (b) the implications of the cross-border conversion for members;

- (c) the rights and remedies available to members ■ in accordance with Article 86j.
- 3a. *The section of the report for members shall not be required where all the members of the company have agreed to waive this requirement. Member States may exclude single member companies from the provisions of this Article.***
- 4. *The section of the report for employees shall in particular explain the following:***
- (ca) *the implications of the cross-border conversion for employment relationships, as well as, where applicable, any measure in order to safeguard them;***
- (cb) *any material changes in the applicable conditions of employment, and in the location of the company's places of business;***
- (d) *how the factors set out in points (ca) and (cb) affect also any subsidiaries of the company.***

- 4aa. Where the management or administrative organ of the company receives, in good time, an opinion on the parts of the report referred to in paragraphs 1, 2 and 4 from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to that report.*
- 4a. The section to employees shall not be required, where a company and its subsidiaries, if any, have no employees other than those who form part of the management or administrative organ.*
- 5. The company may decide whether to draw up one report containing the two sections referred to in paragraphs 3 and 4 or whether to draw up separate reports to members and employees respectively.*
- 6. The report referred to in paragraph 1 or the reports referred to in paragraph 5 shall be made available in any case electronically, together with the draft terms of the cross-border conversion, if available, to the members and to the representatives of the employees of the company ■ or, where there are no such representatives, to the employees themselves, not less than 6 weeks before the date of the general meeting referred to in Article 86i.*

8. *Where the section for members referred to in paragraph 3 is waived in accordance with paragraph 3 and the section for employees referred to in paragraph 4 is not required in accordance with paragraph 4a, the report referred to paragraph 1 is not required.*
  
9. *Paragraphs 1 to 8 of this Article shall be without prejudice to the applicable information and consultation rights and proceedings instituted at national level following the transposition of Directives 2002/14/EC and 2009/38/EC.*

Article 86g

***Independent expert report***

1. Member States shall ensure that ***an independent expert examines the draft terms of the cross-border conversion and draws up a report intended for members which is made available to them*** not less than ***one month*** before the date of the general meeting referred to in Article 86i **■**. ***Depending on the law of Member States, the expert may be a natural person or a legal person.***
  
- 3. ***The report referred to in paragraph 1 shall in any case include the expert's opinion whether the cash compensation is adequate. With regard to the cash compensation referred to in Article 86d point (i), the expert shall consider any market price of those shares in the company prior to the announcement of the conversion proposal or to the value of the company excluding the effect of the proposed conversion as determined according to generally accepted valuation methods. The report shall*** at least:
  - (a) ***indicate the method used to arrive at the cash compensation proposed;***



- (b) *state whether such method is adequate for the assessment of the cash compensation and indicate the value arrived at using that method and give an opinion on the relative importance attributed to that method in arriving at the value decided on;*
- (c) *describe any special valuation difficulties which have arisen.*

█ *The expert shall be entitled to secure from the company all the necessary information for the discharge of his/her duties.*

- 4. *Neither an examination of the draft terms of cross-border conversion by an independent expert nor an expert report shall be required if all the members of the company have so agreed. Member States may exclude single member companies from the provisions of this Article.*

█

Article 86h

Disclosure

1. Member States shall ensure that *the following documents are disclosed* and *made* publically available in the register *of the departure Member State*, at least one month before the date of the general meeting *referred to in Article 86i*:
  - (a) the draft terms of the cross-border conversion;
  - (b) notice informing the members, creditors and *representatives of the* employees of the company, *or, where there are no such representatives, the employees themselves* that they may submit *to the company, at the latest 5 working days* before the date of the general meeting, comments concerning *the draft terms of the cross-border conversion*.

*Member States may require that the independent expert report, if drafted in accordance with Article 86g, is disclosed and made publically available in the register.*

*Member States shall ensure that the company is able to exclude confidential information from the disclosure of the independent expert report.*

The documents *disclosed in accordance with this paragraph* shall also be accessible by means of the system referred to in Article 22.

2. Member States may exempt the company ■ from the disclosure requirement referred to in paragraph 1 where, for a continuous period beginning at least one month before the date fixed for the general meeting *referred to in Article 86i* and ending not earlier than the conclusion of that meeting, it makes the documents referred *to* in paragraph 1, available on its website free of charge to the public.

However, Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of *the* documents unless and only to the extent that they are proportionate in order to achieve those objectives.

3. Where the company ■ discloses the draft terms of the cross-border conversion in accordance with paragraph 2 *of this Article*, it shall submit at least one month before the date of the general meeting *referred to in Article 86i* to the register of the departure Member State, the following information *which has to be disclosed*:

- (a) the legal form, name and registered office of the company in the departure Member State as well as those proposed for the converted company in the destination Member State;
  - (b) the register in which the documents referred to in Article 14 are filed in respect of the company, ■ and the *registration* number in that register;
  - (c) an indication of the arrangements made for the exercise of the rights of creditors, employees and members;
  - (d) details of the website where *the* draft terms of the cross-border conversion, the notice and the expert report referred *to* in paragraph 1 and complete information on the arrangements referred to in point (c) of this paragraph may be obtained online and free of charge.
4. Member States shall ensure that the requirements referred to in paragraphs 1 and 3 can be completed online in their entirety without the necessity for the applicants to appear in person before any competent authority in the departure Member State, *in* compliance with the relevant provisions of Chapter III of Title I.

5. Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3, that the draft terms of the cross-border conversion, or the information referred to in paragraph 3 is published in their national gazette *or through a central electronic platform in accordance with Article 16 paragraph 3*. In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette.
6. Member States shall ensure that the documentation referred to in paragraph 1 *or the information referred to in paragraph 3* is accessible by the public free of charge *through the system of interconnection of registers*.

Member States shall further ensure that any fees charged to the company **■** by the registers for the disclosure referred to in paragraphs 1 and 3 and, where applicable, for the publication referred to in paragraph 5 shall not exceed the *recovery of* costs of providing *such services*.

## Article 86i

### Approval by the general meeting

1. After taking note of the reports referred to in Articles 86e, █ and 86g, where applicable, ***and the employees' opinions submitted in accordance with Article 86e and comments submitted in accordance with 86h***, the general meeting of the company █ shall decide, by means of a resolution, whether to approve the draft terms of the cross-border conversion ***and whether to adapt the instrument of constitution, and the statutes if they are contained in a separate instrument.***
2. The general meeting of the company █ may reserve the right to make implementation of the cross-border conversion conditional on express ratification by it of the arrangements referred to in Article 86l.
3. Member States shall ensure that the approval of █ the draft terms of the cross-border conversion ***or any amendment thereof*** requires a majority of not less than two thirds but not more than 90 % of the votes attached either to the shares or to the subscribed capital represented ***at the meeting.*** In any event the voting threshold shall not be higher than that provided for in national law for the approval of cross-border mergers.

- 3a. *Where a clause of the draft terms of the cross border conversion or any amendment of the instrument of constitution of the converting company leads to an increase of the economic obligations of a shareholder towards the company or third parties, Member States may provide in such specific circumstances that this clause or the amendment of the instrument of constitution shall be approved by the shareholder concerned, provided that this shareholder is unable to exercise the rights laid down in Article 86j.*
4. Member States shall ensure that the approval of the cross-border conversion by the general meeting cannot be challenged solely on the *following grounds*:
- (a) the cash compensation referred to in Article **86d (i)** has been inadequately set;  
*or*
  - (b) *the information given on point (a) did not comply with the legal requirements.*

## Article 86j

### Protection of members

1. Member States shall ensure that **at least** the ■ members of a company **who voted against the approval of the draft-terms of the** cross-border conversion have the right to dispose of their **shares, in consideration for adequate cash compensation**, under the conditions laid down in paragraphs 2 to 6.

*Member States may provide such a right also to other members of the company.*

*Member States may require that the explicit opposition to the draft terms of the cross-border conversion and/or the members' intention to exercise their right to dispose of their shares shall be appropriately documented at the latest at the general meeting referred to in Article 86i. Member States may allow to consider the recording of the objection to the draft terms of the cross-border conversion as proper documentation of a negative vote.*

- 2a. Member States shall **establish the period within which** the members ■ referred to in paragraph 1 **have to declare to the company their decision** to exercise **the** right to dispose of their **shares. That period shall not exceed one month after the general meeting referred to in Article 86i. Member States shall ensure that the company provides an electronic address for receiving this declaration electronically.**



3. Member States shall *further establish the period within which the cash compensation specified in the draft terms of cross-border conversion is to be paid. This period may not end later than two months after the cross-border conversion takes effect according to Article 86r.*
- 3a. Member States shall *ensure* that any member who has *declared the decision to exercise the right to dispose of the shares* but who considers that the compensation *offered by the company* has not been adequately set, is entitled to demand *additional cash compensation before a competent authorities or bodies mandated under national law. Member States shall establish a time limit for the demand relating to additional cash compensation.*

*Member States may provide that the final decision providing an additional cash compensation is valid for those members who have declared the decision to exercise the right to dispose of their shares according to paragraph 2a.*

6. Member States shall ensure that the law of the departure Member State governs the rights referred to in paragraphs 1 to 4 and that the exclusive competence to resolve any disputes relating to those rights lies within the departure Member State.

#### Article 86k

##### Protection of creditors

2. ***Member States shall provide for an adequate system of protection of the interest of creditors, whose claims antedate the disclosure of the draft terms of the cross-border conversion and have not fallen due at the time of such disclosure.*** Member States shall ensure that creditors who are dissatisfied with the *safeguards offered* in the draft terms of the cross-border conversion, as provided for in Article 86d (1) *point* (f), may apply ***within three months of the disclosure of the draft terms of cross-border conversion referred to in Article 86h*** to the appropriate administrative or judicial authority for adequate safeguards ***provided that they can credibly demonstrate that due to the cross-border conversion the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company. Member States shall ensure that the safeguards are dependent on the cross-border conversion taking effect in accordance with Article 86r.***

3. Member States may require that the management or administrative organ of the company ■ provides a declaration accurately reflecting the *current* financial status of the company *at the date of the declaration, which shall not be earlier than one month before its disclosure*. The declaration shall declare that, on the basis of the information available to the management or administrative organ of the company at the date of the declaration, and after having made reasonable enquiries, they are unaware of any reason why the company should, after the conversion takes effect, be unable to meet the liabilities when those liabilities fall due. The declaration shall be *disclosed together with* the draft terms of the cross-border conversion ■ in accordance with Article 86h.
- 3a. Paragraphs ■ 2 and 3 are without prejudice to the application of national laws of the departure Member State concerning the satisfaction of *payments* or securing payments *or non-pecuniary obligations* due to public bodies.

4. *Member States shall ensure that creditors whose claims antedate the disclosure of the draft terms of the cross-border conversion are able to institute proceedings against the company also in the departure Member State within two years from the date the conversion has taken effect, without prejudice to the rules on jurisdiction arising from national or EU law or from a contractual agreement. The possibility to institute such proceedings shall be in addition to other rules on choice of jurisdiction applicable pursuant to Union law*

#### *Article 86ka*

##### *Employee's information and consultation*

1. *Member States shall ensure that employees' rights to information and consultation are respected in relation to the cross-border conversion and are exercised in accordance with the legal framework set out by the Directive 2002/14/EC and, where applicable for Community-scale undertakings or Community-scale groups of undertakings, in accordance with Directive 2009/38/EC. Member States may decide to apply information and consultation rights to other companies than those referred to in Article 3 paragraph 1 of the Directive 2002/14/EC.*

2. *Notwithstanding Article 86e(4aa) and Article 86h(1)(b), Member States shall ensure that rights of employees to information and consultation are respected, at least before the draft terms of the cross-border conversion or the report referred to in Article 86e, are decided, whichever is earlier in such a way that a reasoned response is given to the employees before the general meeting referred to in Article 86i.*
3. *Without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation in accordance with Article 4 of Directive 2002/14/EC.*

## Article 86l

### Employee participation

1. Without prejudice to paragraph 2, the *converted* company ■ shall be subject to the rules in force concerning employee participation, if any, in the destination Member State.
2. However, the rules in force concerning employee participation, if any, in the destination Member State shall not apply, where the company carrying out the conversion has, in the six months prior to the publication of the draft terms of the cross-border conversion as referred to in Article 86d of this Directive, an average number of employees equivalent to four fifths of the applicable threshold, laid down in the law of the departure Member State, which triggers the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC, or where the national law of the destination Member State does not:
  - (a) provide for at least the same level of employee participation as operated in the company prior to the conversion, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation; or

- (b) provide for employees of establishments of the *converted* company ■ that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the destination Member State.
3. In the cases referred to in paragraph 2 of this Article, the participation of employees in the converted company and their involvement in the definition of such rights shall be regulated by the Member States, *mutatis mutandis* and subject to paragraphs 4 to 7 of this Article, in accordance with the principles and procedures laid down in Article 12(2) ■ and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:
- (a) Article 3(1), (2)(a)(i), 2(b) and (3), the first *two sentences of* Article 3(4), ■ Article 3(5) and Article 3(7);
  - (b) Article 4(1), Article 4(2)(a), (g) and (h), Article 4(3) and Article 4(4);
  - (c) Article 5;
  - (d) Article 6;
  - (e) ■ Article 7 *paragraph 1 except the second indent of (b)*;

- (f) Articles 8, **10**, *11* and 12;
  - (g) point (a) of Part 3 of the Annex.
4. When regulating the principles and procedures referred to in paragraph 3, Member States:
- (a) shall confer on the special negotiating body the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the destination Member State;
  - (b) may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding such rules, decide to limit the proportion of employee representatives in the administrative organ of the converted company. However, if in the company **1** employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third;



- (c) shall ensure that the rules on employee participation that applied prior to the cross-border conversion continue to apply until the date of application of any subsequently agreed rules or in the absence of agreed rules until the application of *standard* rules in accordance with point (a) of Part 3 of the Annex.
5. The extension of participation rights to employees of the converted company employed in other Member States, referred to in point (b) of paragraph 2, shall not entail any obligation for Member States which choose to do so to take those employees into account when calculating the size of workforce thresholds giving rise to participation rights under national law.
6. Where the *converted* company ■ is *to be governed by* an employee participation system, *in accordance with the rules referred to in paragraph 2, it* shall be obliged to take a legal form allowing for the exercise of participation rights.

7. Where the converted company is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of any subsequent cross-border or domestic merger, division or conversion for a period of **four** years after the cross-border conversion has taken effect, by applying *mutatis mutandis* the rules laid down in paragraphs 1 to 6.
8. A company shall communicate to its employees **or their representatives** the outcome of the negotiations concerning employee participation without undue delay.

#### Article 86m

##### Pre-conversion certificate

1. Member States shall designate the **court, notary or other authority or authorities** competent ("**the competent authority**"), to scrutinise the legality of the cross-border conversion as regards that part of the procedure which is governed by the law of the departure Member State and to issue a pre-conversion certificate attesting compliance with all the relevant conditions and the proper completion of all procedures and formalities in the departure Member State.

*Such completion of procedures and formalities may comprise the satisfaction of payments, or securing payments or non-pecuniary obligations due to public bodies or the compliance with special sectorial requirements, including securing payments or obligations arising from ongoing proceedings.*

2. Member States shall ensure that the application to obtain a pre-conversion certificate by the company ■ is accompanied by the following:
  - (a) the draft terms of conversion referred to in Article 86d;
  - (b) *the report and the appended opinion, if any, referred to in Article 86e, as well as the report referred to in Article 86g, where they are available;*
  - (ba) *any comments submitted in accordance with Article 86h (1);*
  - (c) information on the *approval by* the general meeting ■ referred to in Article 86i.
- 2a. *Member States may require that the application to obtain a pre-conversion certificate is accompanied by additional information, such as, in particular:*
  - (a) *on the number of employees at the time of the drawing up of the draft terms of the conversion;*

*(b) on subsidiaries and their respective geographic allocation;*

*(c) regarding the fulfilment of obligations due to public bodies by the company;*

*For the purpose of this paragraph, competent authorities may request this information, if not provided, from other relevant authorities.*

3. Member States shall ensure that the application referred to in paragraphs 2 *and 2a*, including submission of any information and documents, may be completed online in its entirety without the necessity to appear in person before the competent authority referred to in paragraph 1, *in compliance with the relevant provisions of Chapter III of Title I.*
4. In respect of compliance with the rules concerning employee participation as laid down in Article 861, the *competent authority in the* departure Member State shall verify that the draft terms of *the* cross-border conversion referred to in paragraph 2 of this Article, include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.

5. As part of the assessment ■ referred to in paragraph 1, the competent authority, shall examine the following:
- (a) *all* documents and information *submitted to the authority in accordance with* paragraphs 2 *and* 2a;
  - (b) an indication by the company that the procedure referred to in Article 861(3) and (4) has started, where relevant.
6. Member States shall ensure that the assessment *referred to in paragraph 1* is carried out within *three months* of the date of receipt of the *documents and* information concerning the approval of the *cross-border* conversion by the general meeting of the company. It shall have one of the following outcomes:
- (a) where *it is determined* that the cross-border conversion ■ complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the competent authority shall issue the pre-conversion certificate;

- (b) where *it is determined that* the cross-border conversion does not *comply with all the relevant conditions or that not all necessary procedures and/or formalities have been completed*, the competent authority shall not issue the pre-conversion certificate and shall inform the company of the reasons for its decision. *In that case, the competent authority may give the company the possibility to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.*
7. *Member States shall ensure that the competent authority shall not issue the pre-conversion certificate, if it is determined in compliance with national law that a cross-border conversion is set-up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law, or for criminal purposes.*

8. *If the competent authority, through the scrutiny of legality referred to in paragraph 1, has serious doubts that the cross-border conversion is set up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law, or for criminal purposes, it shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which, the competent authority has become aware, in the course of the scrutiny of legality referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.*
9. *Where it is necessary for the assessment under paragraph 7 to take into account additional information or performing additional investigative activities, the period of three months as provided in paragraph 6 may be extended for a maximum of further 3 months.*
10. *Where due to the complexity of the cross border procedure it is not possible to carry out the assessment within the deadlines as provided in this article, Member States shall ensure that the applicant is notified of the reasons for any delay before the expiry of the original deadline.*

- 11. Member States shall ensure that competent authorities designated in accordance with paragraph 1 may consult other relevant authorities with competence in the different fields concerned by the cross-border conversion, including those from the destination Member State and obtain from these authorities as well as from the company, information and documents necessary to carry out the control of legality, within the procedural framework laid down in national law. In the assessment the competent authority may have recourse to an independent expert.**

Article 86o

**■** Transmission of the pre-conversion certificate

2. Member States shall ensure that the **■** pre-conversion certificate is *shared with* the authorities referred to in Article **86p (1)** through the system of interconnection of registers set up in accordance with Article 22.

***Member States shall also ensure that the pre-conversion certificate is available through the system of interconnection of registers set up in accordance with Article 22.***



3. *The access to the information referred to in paragraph 2 shall be free of charge for the competent authorities referred to in Article 86p (1) and registers.*

Article 86p

Scrutiny of the legality of the cross-border conversion by the destination Member State

1. Member States shall designate *the court, notary or other* authority competent to scrutinise the legality of the cross-border conversion as regards that part of the procedure which is governed by the law of the destination Member State and to approve the cross-border conversion where **■** all the relevant conditions **■** and formalities in the destination Member State *have been properly completed*.

The competent authority of the destination Member State shall in particular ensure that the proposed converted company complies with provisions of national law on the incorporation *and registration* of companies and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 86l.

2. For the purpose of paragraph 1, the company carrying out the cross-border conversion shall submit to the authority, referred to in paragraph 1, the draft terms of the cross-border conversion approved by the general meeting referred to in Article 86i.
3. Each Member State shall ensure that the application referred to in paragraph 1, by the company carrying out the cross-border conversion, which includes the submission of any information and documents, may be completed online in its entirety without the necessity for the applicants to appear in person before the competent authority *in compliance with the relevant provisions of Chapter III of Title I*.
4. The competent authority referred to in paragraph 1 shall **■** approve the cross-border conversion as soon as it has completed its assessment of the relevant conditions.
5. The pre-conversion certificate referred to in *Article 86o (2)* shall be accepted by the competent authority, referred to in paragraph 1, as *conclusively attesting to* the proper completion of the procedures and formalities under the national law of the departure Member State without which the cross-border conversion cannot be approved.

## Article 86q

### Registration

1. The law of the departure and destination Member States shall determine, with respect to the territory of those States, the arrangements to disclose the completion of the cross-border conversion in the register.
2. Member States shall ensure that at least the following information shall be entered in their registers, which are made publically available and accessible by means of the system referred to in Article 22:
  - (a) *in the* ■ register of the *destination Member State – that the registration of the converted company is* a result of a cross-border conversion;
  - (b) *in the register of the* destination Member State – *the date of registration of the converted company*;
  - (ca) *in the register of the departure Member State – that the* striking off or removal of the company *from the register is the result of a* cross-border conversion ■ ;

- (c) in the *register of the* departure Member State – *the date of striking off or removal* of the company *from register*;
  - (d) *in the registers of the departure and the destination Member States respectively – the registration number, name and legal form of the company in the departure Member State and the registration number, name and legal form* of the converted company in the destination Member State.
3. Member States shall ensure that the registry in the destination Member State notifies the registry in the departure Member State by means of the system referred to in Article 22, that the *cross-border conversion* has *taken effect*. Member States shall also ensure that the registration of the company *is* removed immediately upon receipt of that notification ■ .

Article 86r

Date on which the cross-border conversion takes effect

The *law of the destination Member State shall determine the date on which the* cross-border conversion *takes effect* ■ . *That date shall be after* the scrutiny ■ referred to in Article 86p *has been carried out*.

## Article 86s

### Consequences of the cross-border conversion

1. A cross-border conversion, carried out in compliance with the national provisions transposing this Directive, shall ***by reason of the cross-border conversion taking effect and from the date referred to in Article 86r*** have the following consequences:
  - (a) all the assets and liabilities of the company ■ including all contracts, credits, rights and obligations shall ■ continue with the converted company;
  - (b) the members of the company ■ shall ***continue to be*** members of the converted company, unless they exercise the exit right referred to in Article 86j(1);
  - (c) the rights and obligations of the company ■ arising from contracts of employment or from employment relationships and existing at the date on which the cross-border conversion takes effect shall, ***continue with the converted*** company ■ .

Article 86t

Liability of the independent experts

Member States shall lay down rules governing at least the civil liability of the independent *expert* responsible for drawing up the *report* referred to in *Article 86g* **■** .

*Member States shall have rules in place to ensure that the expert or the legal person on whose behalf the expert is operating, is independent and has no conflict of interest from the company applying for the pre-conversion certificate and that the expert's opinion is impartial, objective, and given with a view to providing assistance to the competent authority in compliance with the independence and impartiality requirements under the applicable law or professional standards to which the expert is subject.*

## Article 86u

### Validity

A cross-border conversion which has taken effect in compliance with the procedures transposing this Directive may not be declared null and void.

***This does not affect Member States' powers, inter alia, in the field of criminal law, terrorist financing, social law, taxation and law enforcement, to impose measures and penalties, in accordance with national laws, after the date on which the cross-border conversion took effect.***

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(\*) 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).”;

(5) in Article 119, point (2) is amended as follows:

(a) at the end of point (c) the following is added "; or";

(b) the following point (d) is added:

"(d) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, without the issue of any new shares by the acquiring company, provided that one person holds directly or indirectly all the shares in the merging companies or the members of the merging companies hold their shares in the same proportion in all merging companies.";

(6) *Article 120 is amended as follows:*

*(-aa) the title is replaced by the following:*

Article 120

Further provisions concerning the scope



(-a) Article 120, paragraph 4 is replaced by the following:

"4. Member States shall ensure that this Chapter does not apply *in any of the following circumstances:*

(a) *the company or companies are in liquidation, and have begun to distribute assets to their shareholders;*

(d) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU *of the European Parliament and of the Council;*

(f) *the following paragraph 4a is added:*

"4a. *Member States may decide not to apply this Chapter to companies subject to:*

(a) *insolvency proceedings or preventive restructuring frameworks"*

(aa) *liquidation proceedings other than those referred to in paragraph 4 point a, or*

***(b) crisis prevention measures in the meaning of Article 2 paragraph 1 point (101) of Directive 2014/59/EU of the European Parliament and of the Council.***

(7) Article 121 is amended as follows:

- (a) in paragraph 1, point (a) is deleted;
- (b) paragraph 2 is replaced by the following:

"2. The provisions and formalities referred to in the point (b) of paragraph 1 shall, in particular, include those concerning the decision-making process relating to the merger and the protection of employees as regards rights other than those governed by Article 133.";

(8) Article 122 is amended as follows:

***(aa) points (a) and (b) are replaced by the following:***

"(a) the ***legal*** form, name and ***location of*** registered office of the merging companies and those proposed for the company resulting from the cross-border merger;

- (b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment *where appropriate*;"
- (-a) point (h) is replaced by the following:
- "(h) any special advantages granted ■ to members of the administrative, management, supervisory or controlling organs of the merging companies;"
- (a) point (i) is replaced by the following:
- (i) the instrument or instruments of constitution, *where applicable, and the statutes if they are contained in a separate instrument*, of the company resulting from the cross-border merger";
- (b) following points (m) and (n) are added:
- "(m) details of the offer of cash compensation for *the* members ■ in accordance with Article 126a;
- (n) ■ safeguards, *such as guarantees or pledges, where* offered to creditors.";

(9) Articles 123 and 124 are replaced by the following:

"Article 123

Disclosure

1. Member States shall ensure that the ***following documents*** are disclosed and made publically available in **■** registers ***of Member State of each of the merging companies***, at least one month before the date of the general meeting ***referred to in Article 126***:

(a) the common draft terms of the cross-border merger;

(b) a notice informing the members, creditors and ***representatives of the employees of the merging company, or, where there are no such representatives, the employees themselves***, that they may submit to the respective company, at the latest 5 working days before the date of the general meeting, comments concerning the common draft terms of the cross-border merger.

***Member States may require that*** the independent expert report, if drafted in accordance with Article 125, is ***disclosed and made publically available in the register***.

***Member States shall ensure that the company is able to exclude confidential information from the disclosure of the independent expert report.***

***The documents disclosed in accordance with this paragraph shall also be accessible by means of the system referred to in Article 22.***

2. Member States may exempt merging companies from the disclosure requirement referred to in paragraph 1 where, for a continuous period beginning at least one month before the date fixed for the general meeting ***referred to in Article 126*** and ending not earlier than the conclusion of that meeting, those companies make the ***documents referred to in paragraph 1***, available on their websites free of charge ***to the public.***

However, Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents unless and only to the extent that they are proportionate in order to achieve those objectives.

3. Where merging companies disclose the common draft terms of the cross-border merger in accordance with paragraph 2 of this Article, *they* shall **submit** at least one month before the date of the general meeting *referred to in Article 126 to the* respective national registers ***the following information which has to be disclosed:***
- (a) the legal form, name and registered office of each of the merging companies and the legal form, name and registered office proposed for any newly created company;
  - (b) the register in which the documents referred to in Article 14 are filed in respect of each of the merging companies and the ***registration*** number in that register;
  - (c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors, employees and members;
  - (d) details of the website where the common draft terms of the cross-border merger, ***the notice and the expert report referred to in paragraph 1*** and complete information on the arrangements referred to in point (c) ***of this paragraph*** may be obtained ***online and*** free of charge.

4. Member States shall ensure that the requirements referred to in paragraphs 1 and 3 can be completed online in their entirety without the necessity for the applicants to appear in person before any competent authority in **■** the *Member States of the merging companies, in compliance with the relevant provisions of Chapter III of Title I.*
5. Where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the disclosure referred to in paragraphs 1, 2 and 3 of this Article shall be made at least one month before the date of the general meeting of the other merging company or companies.
6. Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3, that the common draft terms of the cross-border merger, or the information referred to in paragraph 3 is published in their national gazette *or through a central electronic platform in accordance with Article 16 paragraph 3.* In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette.

7. Member States shall ensure that the documentation referred to in paragraph 1 *or the information referred to in paragraph 3* is accessible by the public free of charge *through the system of interconnection of registers*.

Member States shall further ensure that any fees charged to the company by the registers for the disclosure referred to in paragraphs 1 and 3 and, where applicable, for the publication referred to in paragraph 5 shall not exceed the *recovery of* costs of providing *such services*.

#### Article 124

Report of the ■ administrative *or management body* to the members *and employees*

1. The management or administrative organ of each of the merging companies shall draw up a report *to members and employees* explaining and justifying the legal and economic aspects of the cross-border merger *as well as explaining the implications of the cross-border merger for employees*.
2. The report referred to in paragraph 1, shall, in particular, explain the *implications of the cross-border merger on the future business of the company*

*It shall also include a section for members and a section for employees.*



**3. *The section of the report for members shall in particular explain the following:***

**(aa) *an explanation of the cash compensation and of the method used to arrive at it;***

**(b) *an explanation of the share exchange ratio and of the method or methods used to arrive at it, where applicable;***

**(c) *the***

**(d) *the implications of the cross-border merger for members;***

**(e) *the rights and remedies available to members* ■ *in accordance with Article 126a.***

**3a. *The section of the report for members shall not be required where all the members of the company have agreed to waive this requirement. Member States may exclude single member companies from the provisions of this Article.***

- 4. The section of the report for employees shall in particular explain the following:**
- (ca) the implications of the cross-border merger for employment relationships, as well as, where applicable, any measure in order to safeguard them;**
  - (cb) any material changes in the applicable conditions of employment, and in the location of the company's places of business;**
  - (d) how the factors set out in points (ca) and (cb) affect also any subsidiaries of the company.**
- 4aa. Where the management or administrative organ of the merging company receives, in good time, an opinion on the parts of the report referred to in paragraphs 1, 2 and 4 from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to that report.**
- 4a. The section to employees shall not be required, where a merging company and its subsidiaries, if any, have no employees other than those who form part of the management or administrative organ.**

5. *Each merging company may decide whether to draw up one report containing the two sections referred to in paragraphs 3 and 4 or whether to draw up separate reports to members and employees respectively*
6. The report referred to in paragraph 1 or the reports referred to in paragraph 5 shall be made available in any case electronically, *together with the common draft terms of the cross-border merger, if available*, to the members *and* to the representatives of the employees of each of the merging companies or, where there are no such representatives, to the employees themselves, *not less than 6 weeks before the date of the general meeting referred to in Article 126.*

However, where the approval of the merger is not required by *the* general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available, at least *6 weeks* before the date of the general meeting of the other merging company or companies.

8. *Where the section for members referred to in paragraph 3 is waived in accordance with paragraph 3 and the section for employees referred to in paragraph 4 is not required in accordance with paragraph 4a, the report referred to paragraph 1 is not required.*

**9. Paragraphs 1 to 8 shall be without prejudice to the applicable information and consultation rights and proceedings instituted at national level following the transposition of Directives 2002/14/EC and 2009/38/EC.**

(10) Article 125 is amended as follows :

(a) in paragraph (1), the following second subparagraph is added:

***"However, where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available, at least one month before the date of the general meeting of the other merging company or companies."***

(b) *paragraph 3 is replaced by the following:*

- "3. The **■** report *referred to in paragraph 1* shall *in any case* include *the experts' opinion whether the cash compensation and the share exchange ratio are adequate. With regard to the cash compensation referred to in Article 122point(m), the experts shall consider any market price of those shares in the merging companies prior to the announcement of the merger proposal or to the value of the companies excluding the effect of the proposed merger as determined according to generally accepted valuation methods. Their statement* ~~The reports shall at least:~~
- (a) *indicate the method or methods used to arrive at the cash compensation proposed;*
  - (b) *indicate the method or methods used to arrive at the share exchange ratio proposed;*

- (c) *state whether the method or methods used are adequate for the assessment of the cash compensation and the share exchange ratio and indicate the value arrived at using each such methods and give an opinion on the relative importance attributed to such methods in arriving at the value decided on; and in case different methods are used in the merging companies, also whether the use of different methods was justified;*
- (d) *describe any special valuation difficulties which have arisen.*

The experts shall be entitled to secure from *the merging companies all the necessary information for the discharge of his their duties.*

- (c) in paragraph 4, the following sentence is added:

*"Member States may exclude single member companies from the provisions of this Article."*

(11) Article 126 is amended as follows:

***Article 126***

***Approval by the general meeting***

(a) paragraph 1 is replaced by the following:

"1. After taking note of the reports referred to in Articles 124, ■ and 125, ***where applicable, and the employees' opinions submitted in accordance with Article 124 and comments submitted in accordance with 123***, the general meeting of each of the merging companies shall decide, by means of a resolution, on the approval of the common draft terms of the cross-border merger ***and whether to adapt the instrument of constitution, and the statutes if they are contained in a separate document.***";

(b) the following paragraph 4 is added:

"4. Member States shall ensure that the ***approval of the*** cross-border merger ***by the general meeting*** cannot be challenged ■ solely on the following grounds:

(a) the share exchange ratio referred to in Article 122(b) has been inadequately set;

(b) the cash compensation referred to in Article 122(m) has been inadequately set;

(d) *the information given on points (a) or (b) did not comply with the legal requirements.*

(12) the following Articles ■ are inserted:

"Article 126a

Protection of members

1. Member States shall ensure that *at least* the ■ members of the merging companies *who voted against the approval of the common draft-terms of the cross-border merger* have the right to dispose of their *shares, in consideration for adequate cash compensation*, under the conditions laid down in paragraphs 2 to 6 *provided that as a result of the merger they would acquire shares in the company resulting from the merger which would be governed by the law of a Member State other than the Member State of the respective merging company.*



*Member States may provide such a right also to other members of the merging companies.*

*Member States may require that the explicit opposition to the common draft terms of the cross-border merger and/or the members' intention to exercise their right to dispose of their shares shall be appropriately documented at the latest at the general meeting referred to in Article 126. Member States may allow to consider the recording of the objection to the common draft terms of the cross-border merger as proper documentation of a negative vote.*

- 2a. Member States shall establish the period within which the members referred to in paragraph 1 have to declare to the merging company concerned their decision to exercise the right to dispose of their shares. That period shall not exceed one month after the general meeting referred to in Article 126. Member States shall ensure that the merging companies provide an electronic address for receiving this declaration electronically.*

**3. Member States shall further establish the period within which the cash compensation specified in the common draft terms of cross-border merger is to be paid. This period may not end later than two months after the cross-border merger takes effect according to Article 129.**

**3a Member States shall ensure that any member who has declared the decision to exercise the right to dispose of the shares but who considers that the cash compensation offered by the merging company concerned has not been adequately set, is entitled to demand additional cash compensation before competent authorities or bodies mandated under national law. Member States shall establish a time limit for the demand relating to additional cash compensation.**

**Member States may provide that the final decision providing an additional cash compensation is valid for those members of the merging company concerned who have declared the decision to exercise the right to dispose of their shares according to paragraph 2a .**

- 7 Member States shall ensure that the national law of the Member State to which a merging company is subject, governs the rights referred to in paragraphs 1 to 6 and that the *exclusive competence to resolve any disputes relating to those rights lies within the Member State concerned*.
- 8 Member States shall **■** ensure that members of the merging companies who did not *have or did not exercise the right to dispose of their shares*, but who consider that the share-exchange ratio is inadequate may challenge that **■** ratio, set out in the common draft terms of the cross-border merger **■** *and demand cash payment. That proceeding shall be initiated before ~~the~~ competent authorities or bodies mandated under national law of the Member State to which the respective merging company is subject, within the time limit laid down in the national law of that Member State and shall not prevent the registration of the cross-border merger. The decision shall be binding on the company resulting from the cross-border merger.*

*Member States may also provide that the share exchange ratio as established in the decision is valid for those members of the merging company concerned who did not have or did not exercise the right to dispose of their shares.*

**8a** *Member States may also provide that the company resulting from the cross-border merger can provide for shares or other compensation instead of a cash payment.*

Article 126b

Protection of creditors

**2.** *Member States shall provide for an adequate system of protection of the interest of creditors, whose claims antedate the disclosure of the common draft terms of the cross-border merger and have not fallen due at the time of such disclosure.*

*Member States shall ensure that the creditors who are dissatisfied with the safeguards offered in the common draft terms of the cross-border merger, as provided for in Article 122 point (m), may apply within three months of the disclosure of the common draft terms of cross-border merger referred to in Article 123 to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the cross-border merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the merging companies.*

*Member States shall ensure that the safeguards are dependent on the cross-border merger taking effect in accordance with Article 129.*

3. Member States may require that the management or administrative organ of the merging *companies* provides a declaration accurately reflecting the *current* financial status of *these companies at the date of the declaration, which shall not be earlier than one month before its disclosure*. The declaration shall declare that, on the basis of the information available to the management or administrative organ of the *merging companies* at the date of that declaration, and having made reasonable enquiries, they are unaware of any reason why the company resulting from the merger would be unable to meet the liabilities when those liabilities fall due. The declaration shall be *disclosed together with* the common draft terms of the cross-border merger **■** in accordance with Article 123.
4. Paragraphs **■** 2 and 3 are without prejudice to the application of national laws of the Member State of the merging companies concerning the satisfaction of **payments** or securing payments *or non-pecuniary obligations* due to public bodies."

*Article 126c*

*Employees' information and consultation*

- 1. Member States shall ensure that employees' rights to information and consultation are respected in relation to the cross-border merger and are exercised in accordance with the legal framework set out by the Directive 2002/14/EC and Directive 2001/23/EC where the cross-border merger is considered as transfer of undertaking within the meaning of Directive 2001/23/EC and, where applicable for Community-scale undertakings or Community-scale groups of undertakings, in accordance with Directive 2009/38/EC. Member States may decide to apply information and consultation rights to other companies than those referred to in Article 3 paragraph 1 of the Directive 2002/14/EC.*
- 2. Notwithstanding Article 124(4aa) and Article 123(1)(b), Member States shall ensure that rights of employees to information and consultation are respected, at least before the common draft terms of the cross-border merger or the report referred to in Article 124, are decided, whichever is earlier in such a way that a reasoned response is given to the employees before the general meeting referred to in Article 126.*

3. *Without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation in accordance with Article 4 of Directive 2002/14/EC."*

(13) Article 127 is *replaced by the following*:

"Article 127

Pre-merger certificate

1. *Member States* shall designate the court, notary or other authority *or authorities* competent ("*the competent authority*"), to scrutinise the legality of the cross-border merger as regards that part of the procedure which *is governed by the law of the Member State of the merging company and to issue a pre-merger certificate attesting compliance with all the relevant conditions and the proper completion of all procedures and formalities in the Member State of the merging company.*

*Such completion of procedures and formalities may comprise the satisfaction of payments, or securing payments or non-pecuniary obligations due to public bodies or the compliance with special sectorial requirements, including securing payments or obligations arising from ongoing proceedings.*

2. *Member States shall ensure that the application to obtain a pre-merger certificate by the company is accompanied by the following:*
  - (a) *the draft terms of merger referred to in Article 122;*
  - (b) *the report and the appended opinion, if any, referred to in Article 124, as well as the report referred to in Article 125, where they are available;*
  - (ba) *any comments submitted in accordance with Article 123 (1);*
  - (c) *information on the approval by the general meeting referred to in Article 126.*
- 2a. *Member States may require that the application to obtain a pre-merger certificate is accompanied by additional information, such as, in particular:*



- (a) on the number of employees at the time of the drawing up of the common draft terms of the merger;*
- (b) on subsidiaries and their respective geographic allocation;*
- (c) regarding the fulfilment of obligations due to public bodies by the company;*

*For the purpose of this paragraph, competent authorities may request this information, if not provided, from other relevant authorities.*

- 3. Member States shall ensure that the application referred to in paragraph 2 and 2a, including submission of any information and documents, may be completed online in its entirety without the necessity to appear in person before the competent authority referred to in paragraph 1, in compliance with the relevant provisions of Chapter III of Title I.*

4. *In respect of compliance with the rules concerning employee participation as laid down in Article 133, the competent authority in the Member State of the merging company shall verify that the common draft terms of cross-border merger, referred to in paragraph 2 of this Article, include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.*
5. *As part of the assessment referred to in paragraph 1, the competent authority, shall examine the following:*
  - (a) *all documents and information submitted to the authority in accordance with paragraph 2 and 2a;*
  - (c) *an indication by the merging companies that the procedure referred to in Article 133(3) and (4) has started, where relevant.*
6. *Member States shall ensure that the assessment referred to in paragraph 1 is carried out within three months of the date of receipt of the documents and information concerning the approval of the cross-border merger by the general meeting of the company. It shall have one of the following outcomes:*

- (a) *where it is determined that the cross-border merger complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the competent authority shall issue the pre-merger certificate;*
- (b) *where it is determined that the cross-border merger does not comply with all the relevant conditions or that not all necessary procedures and/or formalities have been completed, the competent authority shall not issue the pre-merger certificate and shall inform the company of the reasons for its decision. In that case, the competent authority may give the company the possibility to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.*
7. *Member States shall ensure that the competent authority shall not issue the pre-merger certificate, if it is determined in compliance with national law that a cross-border merger is set-up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law, or for criminal purposes.*

8. *If the competent authority, through the scrutiny of legality referred to in paragraph 1, has serious doubts that the cross-border merger is set up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law, or for criminal purposes, it shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which, the competent authority has become aware, in the course of the scrutiny of legality referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.*
9. *Where it is necessary for the assessment under paragraph 7 to take into account additional information or performing additional investigative activities, the period of three months as provided in paragraph 6 may be extended for a maximum of further 3 months.*

- 10. Where due to the complexity of the cross border procedure it is not possible to carry out the assessment within the deadlines as provided in this article, Member States shall ensure that the applicant is notified of the reasons for any delay before the expiry of the original deadline.*
- 11. Member States shall ensure that competent authorities designated in accordance with paragraph 1 may consult other relevant authorities with competence in the different fields concerned by the cross-border merger, including those from the Member State of the company resulting from the merger and obtain from these authorities as well as from the company, information and documents necessary to carry out the control of legality, within the procedural framework laid down in national law. In the assessment the competent authority may have recourse to an independent expert."*

*(14) The following Article is inserted:*

"Article 127a

Transmission of the pre-merger certificate

1. *Member States shall ensure that the pre-merger certificate is shared with the authorities referred to in Article 128(1) through the system of interconnection of registers set up in accordance with Article 22.*

*Member States shall also ensure that the pre-merger certificate is available through the system of interconnection of registers set up in accordance with Article 22.*

2. *The access to the information referred to in paragraph 1 shall be free of charge for the competent authorities referred to in Article 128(1) and registers."*

(15) Article 128 is amended as follows:

- (a) paragraph 2 is replaced by the following:

"2. For the purpose of paragraph 1 ■ , each merging company shall submit to the authority referred to in ■ paragraph 1 the common draft terms of cross-border merger, approved by the general meeting referred to in Article 126 *or, in case the approval of the general meeting is not required in accordance with Article 132 paragraph 3, the draft terms of the cross-border merger approved by each merging company in accordance with national law.*"

- (b) the following paragraphs 3, 3a and 4 are added:
3. Each Member State shall ensure that the application referred to in paragraph 1, by any of the merging companies, which includes the submission of any information and documents, may be completed online in its entirety without the necessity for the applicants to appear in person before the competent authority *referred to in paragraph 1 in compliance with the relevant provisions of Chapter III of Title I.*
  - 3a. *The competent authority referred to in paragraph 1 shall approve the cross-border merger as soon as it has completed its assessment of the relevant conditions.*
  4. The pre-merger certificate or certificates referred to in Article 127a(1) shall be accepted by a competent authority of a Member State of a company resulting from the cross-border merger, as *conclusively attesting to* the proper completion of the pre-merger *procedures* and formalities in the respective Member State or Member States **■** .";

**(16) Article 130 is amended as follows:**

**(a) paragraph 1 is replaced by the following:**

**"1. The law of the Member States of the merging companies and of the company resulting from the merger shall determine, with respect to the territory of that State, the arrangements, in accordance with Article 16, to disclose the completion of the cross-border merger in the public register in which each of the companies is required to file documents."**

**(b) paragraph 1a is inserted:**

**"1a. Member States shall ensure that at least the following information shall be entered in their registers, which are made publically available and accessible by means of the system referred to in Article 22:**

**(a) in the register of the Member State of the company resulting from the merger - that the registration of the company resulting from the merger is a result of a cross-border merger;**



- (b) in the register of the Member State of the company resulting from the merger - the date of registration of the company resulting from the merger*
- (c) in the register of the Member State of each merging company - the date of striking off or removal of the company from the register*
- (d) in the register of the Member State of each merging company - that the striking off or removal of the company is a result of a cross-border merger;*
- (e) in the registers of the Member States of each merging company and the company resulting from the merger respectively - the registration numbers, names and legal form of each merging company and of the company resulting from the merger."*

(17) Article 131 is amended as follows:

*(aa)* ■ paragraph 1 *is replaced by* the following:

"1. A cross-border merger carried out as laid down in subpoints (a), (c) **and (d)** of point (2) of Article 119 shall, from the date referred to in Article 129, have the following consequences:

(a) in paragraph 1, points (a) and (b) are replaced by the following:

(a) all the assets and liabilities of the company being acquired **herein including all contracts, credits, rights and obligations** shall be transferred to **and shall continue with** the acquiring company;"

(b) the members of the company being acquired shall become members of the acquiring company, **unless they exercise the exit right referred to in Article 126a(1)**;

(b) in paragraph 2, **points (a) and (b) are** replaced by the following:

"(a) all the assets and liabilities of the merging companies **herein including all contracts, credits, rights and obligations** shall be transferred to **and shall continue with** the new company;"

- (b) the members of the merging companies shall become members of the new company, *unless they exercise the exit right referred to in Article 126a (1);*";

(18) Article 132 is amended as follows:

- (a) paragraph 1 is replaced by the following:

"1. Where a cross-border merger by acquisition is carried out by either a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired or by a person who holds directly or indirectly all the shares in the acquiring company and in the companies being acquired and the acquiring company does not allot any shares under the merger:

- points (b), (c), (e) and (m) of Article 122 , Article 125, and point (b) of Article 131(1) shall not apply;
- Article 124 and Article 126(1) shall not apply to the company or companies being acquired.";

(b) the following paragraph 3 is added:

"3. Where the laws of Member States of all of the merging companies provide for the exemption from the approval by general meeting in accordance with Article 126(3) and paragraph 1 of this Article, the common draft terms of cross-border merger or the information referred to in paragraphs 1 to 3 of Article 123 respectively and the reports referred to in Articles 124 and 124a, shall be made available at least one month before the decision on the merger is taken by the company in accordance with the national law.";

(19) Article 133 is amended as follows:

*(aa) paragraph 2 is replaced by the following:*

**2. *However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply, where at least one of the merging companies, in the six months prior to the publication of the draft terms of the cross-border merger as referred to in Article 123, an average number of employees equivalent to four fifths of the applicable threshold, laid down in the law of the Member State to whose jurisdiction the merging company is subject, which triggers the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not:***

*(ac) paragraph 4 point (a) is replaced by the following:*

*(a) shall confer on the relevant organs of the merging companies, in case at least one of the merging companies is operating under an employee participation system within the meaning of point (k) of Article 2 of Directive 2001/86/EC, the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in point (h) of paragraph 3, as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration;*

*(a) paragraph 7 is replaced by the following:*

*"7. Where the company resulting from the cross-border merger is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of any subsequent cross-border or domestic merger, division or conversion for a period of four years after the cross-border merger has taken effect, by applying mutatis mutandis the rules laid down in paragraphs 1 to 6.";*

(b) the following paragraph 8 is added:

***"8. A company shall communicate to its employees or their representatives whether it chooses to apply standard rules for participation referred to in point (h) of paragraph 3 or whether it enters into negotiations within the special negotiating body. In the latter case the company shall communicate to its employees or their representatives the outcome of the negotiations without undue delay."***

(20) the following Article 133a is inserted:

"Article 133a

Liability of independent experts

Member States shall lay down rules governing the civil liability of the independent experts responsible for drawing up the report referred to in *Article 125*.

***Member States shall have rules in place to ensure that the expert or the legal person on whose behalf the expert is operating, is independent and has no conflict of interest from the company applying for the pre-merger certificate and that the expert's opinion is impartial, objective, and given with a view to providing assistance to the competent authority in compliance with the independence and impartiality requirements under the applicable law or professional standards to which the expert is subject. "***

(21) *in Article 134, the following paragraph is added:*

*"This does not affect Member States' powers, inter alia, in the field of criminal law, terrorist financing, social law, taxation and law enforcement, to impose measures and penalties, in accordance with national laws, after the date on which the cross-border conversion took effect."*

(22) in Title II, the following Chapter IV is added:

"CHAPTER IV

Cross-border divisions of limited liability companies

Article 160a

Scope

This Chapter shall apply to the cross-border division of a limited liability company, formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Union provided that at least two of the *limited liability* companies involved in the division are governed by the laws of different Member States (*hereinafter referred to as* "cross-border division").

## Article 160b

### Definitions

For the purposes of this Chapter:

- (1) ‘limited liability company’, hereinafter referred to as ‘company’, means a company *of a type* listed in Annex II;
- (2) ‘company being divided’ means a company which in a process of the cross-border division *in case of a full division* transfers all its assets and liabilities to *two* or more companies, or in case of a partial division *or division by separation* transfers part of its assets and liabilities to one or more companies;
- (3) ‘division’ means an operation whereby either:
  - (a) a company being divided, *on being dissolved* without going into liquidation, transfers all its assets and liabilities to two or more newly formed companies (‘the recipient companies’), in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies and, if any, a cash payment not exceeding 10 % of the nominal value of those securities or shares or, where they have no nominal value, a cash payment not exceeding 10% of the accounting par value of their securities or shares (‘full division’);



- (b) a company being divided transfers part of its assets and liabilities to one or more newly formed companies ('the recipient companies'), in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies or in the company being divided or in both the recipient companies and in the company being divided, and if any a cash payment not exceeding 10 % of the nominal value of those securities or shares, or in the absence of a nominal value, a cash payment not exceeding 10 % of the accounting par value of their securities or shares ('partial division').
- (c) *a company being divided transfers part of its assets and liabilities to one or more newly formed companies ('the recipient companies'), in exchange for the issue of securities or shares in the recipient companies to the company being divided ('division by separation').*

#### Article 160c

##### Further provisions concerning the scope

1. Notwithstanding Article 160b(3), this Chapter shall also apply to cross-border divisions where the national law of at least one of the Member States concerned allows the cash payment referred to in points (a) and (b) of Article 160b(3) to exceed 10 % of the nominal value or, in the absence of a nominal value, 10% of the accounting par value of the securities or shares representing the capital of the recipient companies.
3. This Chapter shall not apply to cross-border divisions involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, 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.
4. *Member States shall ensure that this Chapter does not apply in any of the following circumstances:*

- (a) *the company being divided is in liquidation and has begun to distribute assets to its shareholders;*
- (b) *the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council.*

5. *Member States may decide not to apply this Chapter to companies subject to:*
- (a) insolvency proceedings or preventive restructuring frameworks*
  - (aa) liquidation proceedings other than those referred to in paragraph 4 point a,  
or*
  - (b) crisis prevention measures in the meaning of Article 2 paragraph 1 point  
(101) of Directive 2014/59/EU of the European Parliament and of the  
Council.*
6. *The national law of the Member State of the company being divided shall govern the part of the procedures and formalities to be complied with in connection with the cross-border division in order to obtain the pre-division certificate, and the national laws of the Member States of the recipient companies shall govern the part of the procedure and the formalities to be complied with following receipt of the pre-division certificate in compliance with Union law.*

Article 160e

Draft terms of cross-border divisions

The management or administrative organ of the company being divided shall draw up the draft terms of *a* cross-border division. The draft terms of cross-border division shall include at least the following *particulars*:

- (a) the legal form, name and *location of the* registered office *of the company being divided and those* proposed for the new company or companies resulting from the cross-border division;
- (b) the ratio applicable to the exchange of securities or shares representing the companies' capital and the amount of any cash payment, where appropriate;
- (c) the terms for the allotment of securities or shares representing the capital of the recipient companies or, of the company being divided;
- (d) the proposed *indicative* timetable for the cross-border division;
- (e) the likely repercussions of the cross-border division on employment;

- (f) the date from which the holding of securities or shares representing the companies' capital will entitle the holders to share in profits and any special conditions affecting that entitlement;
- (g) the date or dates from which the transactions of the company being divided will be treated for accounting purposes as being those of the recipient companies;
- (h) ■ any special advantages granted to members of the administrative, management, supervisory or controlling *organs* of the company being divided;
- (i) the rights conferred by the recipient companies on members of the company being divided enjoying special rights or on holders of securities other than shares representing the divided company capital, or the measures proposed concerning them;

- (k) the instruments of constitution, *where applicable, and the statutes if they are contained in a separate instrument*, of the recipient companies and any changes to the instrument of constitution of the company being divided in case of a partial division;
- (l) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the recipient companies are determined pursuant to Article 160n ■ ;
- (m) the precise description of the assets and liabilities of the company being divided and a statement of how these assets and liabilities are to be allocated between the recipient companies, or retained by the company being divided in the case of a partial division, including provision for the treatment of assets or liabilities not explicitly allocated in the draft terms of cross-border division, such as assets or liabilities which are unknown on the date on which the draft terms of cross-border division are drawn up;
- (n) information on the evaluation of the assets and liabilities which are allocated to each company involved in a cross-border division;

- (o) the date of the accounts of the company being divided, which is used to establish the conditions of the cross-border division;
- (p) where appropriate the allocation to the members of the company being divided of shares and securities in the recipient companies or in the company being divided or in the combination of the recipient company and company being divided and the criterion upon which such allocation is based;
- (q) details of the offer of cash compensation for the members ■ in accordance with Article 160l;
- (r) ■ safeguards, *such as guarantees or pledges, where* offered to creditors.

Article 160g

Report of the management or administrative organ to the members *and the employees*

1. The management or administrative organ of the company being divided shall draw up a report *to members and employees* explaining and justifying the legal and economic aspects of the cross-border division *as well as explaining the implications of the cross-border division for employees*.
2. The report referred to in paragraph 1, shall, in particular, explain the *implications of the cross-border division on the future business of the companies*.

*It shall also include a section for members and a section for employees.*

3. *The section of the report for members shall in particular explain the following:*
  - (aa) an explanation *of the cash compensation and of the method used to arrive at it*;
  - (b) *an explanation* of the share exchange ratio *and of the method used to arrive at it*, where applicable;
  - (d) the implications of the cross-border division for members;
  - (e) the rights and remedies available to members ■ in accordance with Article 160l.
- 3a. *The section of the report for members shall not be required where all the members of the company have agreed to waive this requirement. Member States may exclude single member companies from the provisions of this Article.*



4. *The section of the report for employees shall in particular explain the following:*
- (ca) the implications of the cross-border division for employment relationships, as well as, where applicable, any measure in order to safeguard them;*
  - (cb) any material changes in the applicable conditions of employment, and in the location of the company's places of business;*
  - (d) how the factors set out in points (ca) and (cb) affect also any subsidiaries of the company.*
- 4aa. *Where the management or administrative organ of the company being divided receives, in good time, an opinion on the parts of the report referred to in paragraphs 1, 2 and 4 from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to that report.*
- 4a. *The section to employees shall not be required, where a company and its subsidiaries, if any, have no employees other than those who form part of the management or administrative organ.*
5. *The company may decide whether to draw up one report containing the two sections referred to in paragraphs 3 and 4 or whether to draw up separate reports to members and employees respectively.*

6. The report referred to in paragraph 1 *or the reports referred to in paragraph 5* shall be made available *in any case* electronically, *together with the draft terms of the cross-border division, if available*, to the members *and* to the representatives of the employees of the company being divided or, where there are no such representatives, to the employees themselves, *not less than 6 weeks before the date of the general meeting referred to in Article 160k*.
8. *Where the section for members referred to in paragraph 3 is waived in accordance with paragraph 3 and the section for employees referred to in paragraph 4 is not required in accordance with paragraph 4a, the report referred to paragraph 1 is not required.*
9. *Paragraphs 1 to 8 of this Article shall be without prejudice to the applicable information and consultation rights and proceedings instituted at national level following the transposition of Directives 2002/14/EC and 2009/38/EC*

***Independent expert report***

1. Member States shall ensure that ***an independent expert examines the-draft terms of the cross-border division and-draws up a report intended for members which is made available to them*** not less than ***one month*** before the date of the general meeting referred to in Article 160k, **■** the draft terms of cross-border division and **■** .  
***Depending on the law of Member States, the experts may be a natural person or a legal person.***
  
2. ***The report referred to in paragraph 1 shall in any case include the expert's opinion whether the cash compensation and the share exchange ratio are adequate. With regard to the cash compensation referred to in Article 160e point(q),the expert shall consider any market price of those shares in the company being divided prior to the announcement of the division proposal or to the value of the company excluding the effect of the proposed division as determined according to generally accepted valuation methods. The report shall at least:***

- (a) indicate the method used to arrive at the cash compensation proposed;*
- (b) indicate the method used to arrive at the share exchange ratio proposed;*
- (c) state whether such method is adequate for the assessment of the cash compensation and share exchange ratio and indicate the value arrived at using such methods and give an opinion on the relative importance attributed to that methods in arriving at the value decided on;*
- (d) describe any special valuation difficulties which have arisen.*

**█** *The expert shall be entitled to secure from the company being divided all the necessary information for the discharge of his/her duties.*

- 3. Neither an examination of the draft terms of cross-border division by an independent expert nor an expert report shall be required if all the members of the company being divided have so agreed. Member States may exclude single member companies from the provisions of this Article.*

Article 160j

Disclosure

1. Member States shall ensure that the *following documents are disclosed and made publicly available in the register of the Member State of the company being divided, at least one month before the date of the general meeting referred to in Article 160k:*
  - (a) the draft terms of the cross-border division;
  - (b) a notice informing the members, creditors and *representatives of the employees of the company being divided or, where there are no such representatives, the employees themselves*, that they may submit *to the company, at the latest five working days* before the date of the general meeting, comments concerning the *draft terms* of the *cross-border division*.

*Member States may require that the independent expert report, if drafted in accordance with Article 160i, is disclosed and made publically available in the register.*

***Member States shall ensure that the company is able to exclude confidential information from the disclosure of the independent expert report.***

The documents ***disclosed*** in ***accordance with this paragraph*** shall be also accessible by means of the system referred to in Article 22.

2. Member States may exempt the company being divided from the disclosure requirement referred to in paragraph 1 where, for a continuous period beginning at least one month before the date fixed for the general meeting ***referred to in Article 160k*** and ending not earlier than the conclusion of that meeting, it makes the documents referred in paragraph 1, available on its website free of charge to the public.

However, Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of those documents unless and only to the extent that they are proportionate in order to achieve those objectives.

3. Where the company being divided discloses the draft terms of the cross-border division in accordance with paragraph 2 of this Article, it shall submit, at least one month before the date of the general meeting *referred to in Article 160k*, to the register, the following information *which has to be disclosed*:
- (a) the legal form, name and registered office of the company being divided and the legal form, name and registered office proposed for any newly created company resulting from the cross-border division;
  - (b) the register in which the documents referred to in Article 14 are filed in respect of the company being divided and the *registration* number in that register;
  - (c) an indication of the arrangements made for the exercise of the rights of creditors, employees and members;
  - (d) details of the website where the draft terms of the cross-border division, the notice and the expert report referred *to* in paragraph 1 and complete information on the arrangements referred to in point (c) of this paragraph may be obtained online and free of charge.

4. Member States shall ensure that the requirements referred to in paragraphs 1 and 3 can be completed online in their entirety without the necessity for the applicants to appear in person before any competent authority in the Member State concerned, ***in compliance with the relevant provisions of Chapter III of Title I.***
5. Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3, that the draft terms of the cross-border division, or the information referred to in paragraph 3 is published in their national gazette ***or through a central electronic platform in accordance with Article 16 paragraph 3.*** In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette.
6. Member States shall ensure that the documentation referred ***to*** in paragraph 1 ***or the information referred to in paragraph 3*** is accessible by the public free of charge ***through the system of interconnection of registers.***



Member States shall *further* ensure that any fees charged to the company ■ by the registers for the disclosure referred to in *paragraphs* 1 and 3 and, where applicable, for the publication referred to in paragraph 5 shall not exceed the *recovery of* costs of providing *such services*.

#### Article 160k

##### Approval by the general meeting

1. After taking note of the reports referred to in Articles 160g, ■ and 160i, where applicable, *and the employees' opinions submitted in accordance with Article 160g and comments submitted in accordance with 160j*, the general meeting of the company being divided shall decide by means of a resolution, whether to approve the draft terms of cross-border division *and whether to adapt the instrument of constitution, and the statutes if they are contained in a separate instrument*.
2. The general meeting may reserve the right to make implementation of the cross-border division conditional on express ratification by it of the arrangements referred to in Article 160n.

3. Member States shall ensure that the approval of **■** the draft terms of the cross-border division *or any amendment thereof* requires a majority of not less than two thirds but not more than 90 % of the votes attached either to the shares or to the subscribed capital represented *at the meeting*. In any event the voting threshold shall not be higher than that provided for in national law for the approval of cross-border mergers.
- 3a** *Where a clause of the draft terms of the cross border division or any amendment to the instrument of constitution of the company being divided leads to an increase of the economic obligations of a shareholder towards the company or third parties, Member States may provide in such specific circumstances that this clause or the amendment of the instrument of constitution of the company being divided shall be approved by the shareholder concerned, provided that this shareholder is unable to exercise the rights laid down in Article 160I.*

5. Member States shall ensure that the approval of the cross-border division by the general meeting cannot be challenged solely on the following grounds:
- (a) the share exchange ratio referred to in Article 160e **(b)** has been inadequately set;
  - (b) the cash compensation referred to in Article **160e (q)** has been inadequately set;
  - (c) ***the information given on points (a) or (b) did not comply with the legal requirements.***

Article 1601

Protection of members

1. Member States shall ensure that *at least* the ■ members *who voted against* the approval of the draft terms of the cross-border division of a company being divided have the right to dispose of their *shares in consideration for adequate cash compensation* under the conditions laid down in paragraphs 2 to 6 *provided that, as a result of the division, they would acquire shares in the recipient companies which would be governed by the law of a Member State other than the company being divided.*

*Member States may provide such a right also to other members of the company being divided.*

*Member States may require that the explicit opposition to the draft terms of the cross-border division and/or the members' intention to exercise their right to dispose of their shares shall be appropriately documented at the latest at the general meeting referred to in Article 160k. Member States may allow to consider the recording of the objection to the draft terms of the cross-border division as proper documentation of a negative vote.*

- 2a** *Member States shall establish the period within which the members referred to in paragraph 1 have to declare to the company being divided their decision to exercise the right to dispose of the shares. That period shall not exceed one month after the general meeting referred to in Article 160k. Member States shall ensure that a company being divided provides an electronic address for receiving this declaration electronically.*
- 3.** *Member States shall further establish the period within which the cash compensation specified in the draft terms of cross-border division is to be paid. This period may not end later than two months after the cross-border division takes effect according to Article 160t.*

**3a. Member States shall ensure that any member who has declared the decision to exercise the right to dispose of the shares but who considers that the cash compensation offered by the merging company concerned has not been adequately set, is entitled to demand additional cash compensation before competent authorities or bodies mandated under national law. Member States shall establish a time limit for the demand relating to additional cash compensation.**

**Member States may provide that the final decision providing an additional cash compensation is valid for those members of the merging company concerned who have declared the decision to exercise the right to dispose of their shares according to paragraph 2a.**

**6 Member States shall ensure that the national law of the Member State of a company being divided governs the rights referred to in paragraphs 1 to 5 and that the exclusive competence to resolve any disputes relating to those rights lies within the Member State of the company being divided.**

7. Member States shall ensure that members of the company being divided who did not *have or did not exercise* the right to dispose of their shares, but consider that the share-exchange ratio is inadequate may challenge that ratio set out in the draft terms of the cross-border division *and demand cash payment. That proceeding shall be initiated before ~~the~~ competent authorities or bodies mandated under national law of the company being divided, within the time limit laid down in the national law of that Member State and shall not prevent the registration of the cross-border division. The decision shall be binding on the recipient companies and, in case of a partial division, also on the company being divided.*
8. *Member States may also provide that the recipient company concerned and, in case of a partial division, also the company being divided, can provide for shares or other compensation instead of a cash payment.*

2. *Member States shall provide for an adequate system of protection of the interest of creditors, whose claims antedate the disclosure of the draft terms of the cross-border division and have not fallen due at the time of such disclosure. Member States shall ensure that creditors who are dissatisfied with the safeguards offered in the draft terms of the cross-border division, as provided for in Article 160e point (r), may apply within three months of the disclosure of the draft terms of cross-border division referred to in Article 160j to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the cross-border division the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.*

*Member States shall ensure that the safeguards are dependent on the cross-border division taking effect in accordance with Article 160t.*



4. Where a creditor of the company to be divided **■** does not obtain satisfaction from *the company whom the liability is allocated to*, the other recipient companies, and in the case of a partial division *or a division by separation*, the company being divided, shall be jointly and severally liable with the *company whom the liability is allocated to* for that obligation. However, the maximum amount of joint and several liability of any company involved in the division shall be limited to the value, at the date on which the division takes effect, of the net assets allocated to that company.
  
5. Member States may require that the management or administrative organ of the company being divided provides a declaration accurately reflecting the *current* financial status of the company *at the date of the declaration, which shall not be earlier than one month before its disclosure*. The declaration shall declare that, on the basis of the information available to the management or administrative organ of the company *being divided* at the date of the declaration, and after having made reasonable enquiries, they are unaware of any reason why any recipient company and, in the case of a partial division, the company being divided, should, after the division takes effect, be unable to meet the liabilities allocated to them under the draft terms of the cross-border division when those liabilities fall due. The declaration shall be *disclosed together with* the draft terms of the cross-border division **■** in accordance with Article 160j.

6. Paragraphs 2 to 5 are without prejudice to the application of national laws of the Member State of the dividing company concerning the satisfaction of *payments* or securing payments *or non-pecuniary obligations* to public bodies.

Article 160ma

Employees' information and consultation

1. *Member States shall ensure that employees' rights to information and consultation are respected in relation to the cross-border division and are exercised in accordance with the legal framework set out by the Directive 2002/14/EC and Directive 2001/23/EC where the cross-border division is considered as transfer of undertaking within the meaning of Directive 2001/23/EC and, where applicable for Community-scale undertakings or Community-scale groups of undertakings, in accordance with Directive 2009/38/EC. Member States may decide to apply information and consultation rights to other companies than those referred to in Article 3 paragraph 1 of the Directive 2002/14/EC.*

2. *Notwithstanding Article 160g(4aa) and Article 160j(1)(b), Member States shall ensure that rights of employees to information and consultation are respected, at least before the draft terms of the cross-border division or the report referred to in Article 160g, are decided, whichever is earlier in such a way that a reasoned response is given to the employees before the general meeting referred to in Article 160k.*
3. *Without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation in accordance with Article 4 of Directive 2002/14/EC.*

## Article 160n

### Employee participation

1. Without prejudice to paragraph 2, each recipient company shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office.
2. However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border division has its registered office shall not apply, where the company being divided, in the six months prior to the publication of the draft terms of the cross-border division as referred to in Article 160e of this Directive, has an average number of employees equivalent to four fifths of the applicable threshold, laid down in the law of the Member State of the company being divided, which triggers the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC, or where the national law applicable to each of the recipient companies does not:

- (a) provide for at least the same level of employee participation as operated in the company being divided prior to the division, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation; or
  - (b) provide for employees of establishments of the recipient companies that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the recipient company has its registered office.
3. In the cases referred to in paragraph 2, the participation of employees in the companies resulting from the cross-border division and their involvement in the definition of such rights shall be regulated by the Member States, *mutatis mutandis* and subject to paragraphs 4 to 7 of this Article, in accordance with the principles and procedures laid down in Article 12(2), ~~(3)~~ and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:

- (a) Article 3(1), (2)(a)(i), 2(b) and (3), the first *two sentences* of Article 3(4), Article 3(5 **■** ) and Article 3(7);
  - (b) Article 4(1), Article 4(2)(a), (g) and (h), Article 4(3) and Article 4(4);
  - (c) Article 5;
  - (d) Article 6;
  - (e) **■** Article 7 *paragraph 1 except the second indent of (b)*;
  - (f) Articles 8, **■** 10, *11* and 12;
  - (g) point (a) of part 3 of the Annex.
4. When regulating the principles and procedures referred to in paragraph 3, Member States:

- (a) shall confer on the special negotiating body the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the Member States of each of the recipient companies;
- (b) may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding such rules, decide to limit the proportion of employee representatives in the administrative organ of the recipient companies. However, if in the company being divided the employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third;
- (c) shall ensure that the rules on participation that applied prior to the cross-border division continue to apply until the date of application of any subsequently agreed rules or in the absence of agreed rules until the application of *standard* rules in accordance with point (a) of Part 3 of the Annex.

5. The extension of participation rights to employees of the recipient companies employed in other Member States, referred to in point (b) of paragraph 2, shall not entail any obligation for Member States which choose to do so to take those employees into account when calculating the size of workforce thresholds giving rise to participation rights under national law.
6. Where any of the recipient companies is to be governed by an employee participation system in accordance with the rules referred to in paragraph 2, those companies shall be obliged to take a legal form allowing for the exercise of participation rights.
7. Where the *recipient* company ■ is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of any subsequent cross-border or domestic merger, division or conversion for a period of *four* years after the cross-border division has taken effect, by applying, *mutatis mutandis*, the rules laid down in paragraphs 1 to 6.
8. A company shall communicate to its employees *or their representatives* the outcome of the negotiations concerning employee participation without undue delay.



Article 160o

Pre-division certificate

1. Member States shall designate the *court, notary or other authority or authorities* competent ("*the competent authority*") to scrutinise the legality of the cross-border divisions as regards the part of the procedure which is governed by the law of the Member State of the company being divided, and to issue a pre-division certificate attesting compliance with all relevant conditions, and the proper completion of all procedures and formalities in that Member State.  
Such completion of procedures and formalities may comprise the satisfaction of payments, or securing payments or non-pecuniary obligations due to public bodies or the compliance with special sectorial requirements, including securing payments or obligations arising from ongoing proceedings.
2. Member States shall ensure that the application for obtaining the pre-division certificate by the company being divided is accompanied by the following:

- (a) the draft terms of division referred to in Article 160e;
- (b) the *report and the appended opinion, if any*, referred to in Article 160g, ~~160h~~ *and as well as the report referred to in Article 160i, where they are available;*
- (ba) any comments submitted in accordance with Article 160j (1);*
- (c) information on the *approval by* the general meeting █ referred to in Article 160k.

**2a. Member States may require that the application to obtain a pre-division certificate is accompanied by additional information, such as, in particular:**

- (a) on the number of employees at the time of the drawing up of the draft terms of the division;*
- (b) on subsidiaries and their respective geographic allocation;*
- (c) regarding the fulfilment of obligations due to public bodies by the company;*

***For the purpose of this paragraph, competent authorities may request this information, if not provided, from other relevant authorities.***

3. Member States shall ensure that the application referred to in paragraph 2 *and 2a*, including submission of any information and documents, may be completed online in its entirety without the necessity to appear in person before the competent authority referred to in paragraph 1, *in compliance with the relevant provisions of Chapter III of Title I*.
4. In respect of compliance with the rules concerning employee participation as laid down in Article 160n, the *competent authority in the* Member State of the company being divided shall verify that the draft terms of cross-border division referred to in Article 160e include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.
5. As part of the assessment **■** referred to in paragraph 1 the competent authority shall examine the following information:
  - (a) *all* documents and information *submitted to the authority* in accordance with paragraph 2 *and 2a*;
  - (c) an indication by the company that the procedure referred to in Article 160n(3) and (4) has started, where relevant.

- 6 Member States shall ensure that the assessment referred to in paragraph 1 is carried out within *three months* of the *date of* receipt of *the documents and* information concerning the approval of the cross-border division by the general meeting of the company. It shall have one of the following outcomes:
- (a) where *it is determined* that the cross-border division **■** complies with *all* the relevant conditions and *that* all necessary procedures and formalities have been completed, the competent authority shall issue the pre-division certificate;
  - (b) where *it is determined* that the cross-border division does not *comply with all* the relevant conditions or that not all necessary procedures *and/or* formalities have been completed, *the competent authority shall not issue the pre-division certificate and shall inform the company of the reasons for its decision. In that case, the competent authority may give the company the possibility to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.*

7. *Member States shall ensure that the competent authority shall not issue the pre-division certificate, if it is determined in compliance with national law that a cross-border division is set-up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law, or for criminal purposes.*
8. *If the competent authority, through the scrutiny of legality referred to in paragraph 1, has serious doubts that the cross-border division is set up for abusive or fraudulent purposes leading or aimed to lead to evasion or circumvention of national or EU law, or for criminal purposes, it shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which, the competent authority has become aware, in the course of the scrutiny of legality referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.*

9. *Where it is necessary for the assessment under paragraph 7 to take into account additional information or performing additional investigative activities, the period of three months as provided in paragraph 6 may be extended for a maximum of further 3 months.*
10. *Where due to the complexity of the cross border procedure it is not possible to carry out the assessment within the deadlines as provided in this article, Member States shall ensure that the applicant is notified of the reasons for any delay before the expiry of the original deadline.*
11. *Member States shall ensure that competent authorities designated in accordance with paragraph 1 may consult other relevant authorities with competence in the different fields concerned by the cross-border division, including those from the Member State of the recipient companies and obtain from these authorities as well as from the company, information and documents necessary to carry out the control of legality, within the procedural framework laid down in national law. In the assessment the competent authority may have recourse to an independent expert.*

Article 160q

■ Transmission of the pre-division certificate

2. *Member States shall ensure that the pre-division certificate is shared with the authorities referred to in Article 160r(1) through the system of interconnection of registers set up in accordance with Article 22.*

*Member States shall also ensure that the pre-division certificate is available through the system of interconnection of registers set up in accordance with Article 22.*

3. *The access to the information referred to in paragraph 2 shall be free of charge for the competent authorities referred to in Article 160r(1) and registers.*

## Article 160r

### Scrutiny of the legality of the cross-border division

1. Member States shall designate *the court, notary or other* authority competent to scrutinise the legality of the cross-border *division* as regards that part of the procedure which concerns the completion of the cross-border division governed by the law of the Member States of the recipient companies and to approve the cross-border division where **■** all the relevant conditions **■** and formalities in that Member State have been properly completed.

The competent authority or authorities shall in particular ensure that the proposed recipient companies comply with provisions of national law on the incorporation *and registration* of companies and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 160n.

2. For the purpose of paragraph 1, *the company being divided* shall submit to *each* authority referred to in **■** paragraph *1*, the draft terms of the cross-border division approved by the general meeting referred to in Article 160k.



3. Each Member State shall ensure that the application referred to in paragraph 1, by ***the company carrying out the cross-border division***, which includes ***the*** submission of any information and documents, may be completed online in its entirety without the necessity ***for the applicants*** to appear in person before the competent authority referred to in paragraph 1 ***in compliance with the relevant provisions of Chapter III of Title I***.
4. The competent authority referred to in paragraph 1 of this Article shall **■** approve the cross-border division as soon as it has completed its assessment of the relevant conditions.
5. The pre-division certificate, referred to in ***Article 160q(2)***, shall be accepted by any competent authority, referred to in paragraph 1 of this Article, as ***conclusively attesting*** of the proper completion of the pre-division procedures and formalities in the Member State of the company being divided without which the cross-border division cannot be approved.

## Article 160s

### Registration

1. The law of ■ the Member States *of the company being divided and* the recipient companies, ■ shall determine, with respect to the territory of that State, the arrangements, *in accordance with Article 16*, to disclose the completion of the cross-border division in the register ■ .
2. Member States shall ensure that at least the following information shall be entered in their registers, which are made publically available and accessible by means of the system referred to in Article 22:
  - (a) *in the* ■ register of the *Member States of the recipient companies – that the registration of the recipient* company *is* a result of a cross-border division;
  - (b) *in the register of the Member State of the recipient companies* – the dates of registration of the recipient companies;
  - (c) *in the register of the Member State of the company being divided* – in case of a full division, the date of striking off from the register ■ ;

- █ (ca) in █ the *register of the* Member State of the company being divided – *that the striking off or removal of the company is a result of a cross-border division;*
- (d) *in the registers of the Member States of the company being divided and of the recipient companies respectively the registration numbers, name and legal form of the company being divided and of the recipient companies.*
3. Member States shall ensure that the registers in the Member States of the recipient companies notify the registry in the Member State of the company being divided, by means of the system referred to in Article 22, that the recipient companies have been registered. In the case of a full division, the striking off of the company being divided from the register shall *be effected* immediately upon the receipt of *all those notifications.*
- 3a. *Member States shall ensure that the register in the Member States of the company being divided notifies the registers in the Member States of the recipient companies by means of the system referred to in Article 22, that the cross-border division has taken effect.*

## Article 160t

### Date on which the cross-border division takes effect

The law of the Member State of the company being divided shall determine the date on which the cross-border division takes effect. The date shall be after the scrutiny referred to in Articles 160o, █ and 160r has been carried out and after having received all notifications referred to in Article 160s(3).

## Article 160u

### Consequences of the cross-border division

1. A full cross-border division carried out in compliance with the national provisions transposing this Directive ***shall, by reason of the cross-border division taking effect and from the date referred to in Article 160t***, have the following consequences:
  - (a) all the assets and liabilities of the company being divided, including all contracts, credits, rights and obligations shall be transferred to █ the recipient companies in accordance with the allocation specified in the draft terms of the cross-border division;

- (b) the members of the company being divided shall become members of the recipient companies in accordance with the allocation of shares specified in the draft terms of *the* cross-border division, unless they exercise the exit right referred to in Article 160l(I);
  - (c) the rights and obligations of the company being divided arising from the contracts of employment or from employment *relationships* and existing at the date on which *the* cross-border division takes effect shall be transferred to the recipient companies;
  - (d) the company being divided shall cease to exist.
3. A partial cross-border division carried out in compliance with the national provisions transposing this Directive shall, *by reason of the cross-border division taking effect and from the date referred to in Article 160t*, have the following consequences:
- (a) *part of* the assets and liabilities of the company being divided including contracts, credits, rights and obligations shall be transferred to ■ the recipient *company or* companies and *the remaining part* shall *continue with* the company being divided in accordance with the allocation specified in the draft terms of cross-border division;

- (b) *at least some of* the members of the company being divided shall become members of the recipient *company or* companies and at least some of the members shall remain in the company being divided or shall become members of both in accordance with the allocation of shares specified in the draft terms of cross-border division, *unless they exercise the exit right referred to in Article 160l(1)*;
  - (c) the *rights and obligations of* the company being divided *arising from the contracts of employment or from employment relationship and existing at the date on which cross-border division takes effect, allocated to the recipient company or companies in accordance with the draft* terms of cross-border division shall be transferred to the respective recipient company or companies.
- 3a. *A cross-border division by separation carried out in compliance with the national provisions transposing this Directive, shall, by reason of the cross-border division taking effect and from the date referred to in Article 160t, have the following consequences:*

- (a) the part of the assets and liabilities of the company being divided including contracts, credits, rights and obligations is transferred to the recipient company or companies and the remaining part shall continue with the company being divided in accordance with the allocation specified in the draft terms of cross-border division;*
- (aa) the shares of the recipient company or companies are allocated to the company being divided.*
- (b) the rights and obligations of the company being divided arising from the contracts of employment or from employment relationship and existing at the date on which cross-border division takes effect, allocated to the recipient company or companies in accordance with the draft terms of cross-border division shall be transferred to the respective recipient company or companies.*

- 3b. Member States shall ensure that where an asset or a liability of the company being divided is not explicitly allocated under the draft terms of cross-border division as referred to in Article 160e point (m) and where the interpretation of these terms does not make a decision on its allocation possible, the asset, the consideration therefore or the liability is allocated to all the recipient companies or, in the case of a partial division or a division by separation, to all the recipient companies and the company being divided in proportion to the share of the net assets allocated to each of those companies under the draft terms of cross-border division. In any event, Article 160m (4) applies.**
4. Where, in the case of a **■** cross-border division **covered by this chapter**, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the company being divided becomes effective as against third parties, those formalities shall be carried out by the company being divided or by the recipient companies, as appropriate.
5. Member States shall ensure that shares in a recipient company may not be exchanged for shares in the company being divided which are either held by the company itself or through a person acting in his or her own name but on behalf of the company.



Article 160ua

Simplified formalities

*Where a division is carried out as a ‘division by separation’ as referred to in Article 160b (3) point (c) then Article 160e points b, c, f, i, p and q and Articles 160g, 160i and 160l shall not apply.*

Article 160v

Liability of the independent experts

Member States shall lay down rules governing at least the civil liability of the independent *expert* responsible for drawing up the report referred to in *Article 160i*.

*Member States shall have rules in place to ensure that the expert or the legal person on whose behalf the expert is operating, is independent and has no conflict of interest from the company applying for the pre-division certificate and that the expert's opinion is impartial, objective, and given with a view to providing assistance to the competent authority in compliance with the independence and impartiality requirements under the applicable law or professional standards to which the expert is subject.*

Article 160w

Validity

A cross-border division which has taken effect in compliance with the procedures transposing this Directive may not be declared null and void."

*This does not affect Member States' powers, inter alia, in the field of criminal law, terrorist financing, social law, taxation and law enforcement, to impose measures and penalties, in accordance with national laws, after the date on which the cross-border division took effect."*

#### *Article 1a*

##### *Penalties*

*Members States shall lay down the rules on measures and penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. Such rules may include criminal penalties for serious infringements.*

*The measures and penalties provided for shall be effective, proportionate and dissuasive.*

Article 2  
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive ... [*OP set the date= the last day of the month of 36 months after entry into force*] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### Article 3

#### Reporting and review

1. The Commission shall, no later than **four** years after ... [OP please insert the date of the end of the transposition period of this Directive], carry out an evaluation of this Directive, ***including an evaluation of the implementation of employee information, consultation and participation in the context of the cross-border operations, including assessment of the rules on the proportion of employee representatives in the administrative organ of the company resulting from the cross-border operation, and of the effectiveness of the safeguards regarding negotiations of employee participation rights taking into consideration the dynamic nature of companies growing cross-border*** and present a Report to the European Parliament, the Council and the European Economic and Social Committee ***on the findings, in particular considering the possible need of introducing a harmonised framework on board level employee representation in Union law,*** accompanied, where appropriate, by a legislative proposal.

Member States shall provide the Commission with the information necessary for the preparation of that report in particular by providing data on the number of cross-border conversions, mergers and divisions, their duration and related costs, ***data on the cases where a pre-conversion certificate was refused as well as statistical aggregated data on number of negotiations on employee participation rights in cross-border operations, and by providing data on the functioning and effects of jurisdiction rules applicable in cross-border operations.***

2. The report shall in particular evaluate the procedures referred to in Chapter -I of Title II and Chapter IV of Title II, notably in terms of their duration and costs.
3. The report shall include an assessment of the feasibility of providing rules for types of cross-border divisions which are not covered by this Directive, ***including in particular cross-border division by acquisition.***

Article 4

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at ...,

*For the European Parliament*

*For the Council*

*The President*

*The President*