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COM(2018) 241 final

2018/0114 (COD)

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**

(Text with EEA relevance)

{SWD(2018) 141 final} - {SWD(2018) 142 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### **Reasons for and objectives of the proposal**

The EU economy needs healthy and flourishing companies which can easily operate in the Single Market. Such companies play a crucial role in promoting economic growth, creating jobs and attracting investment in the European Union. They help to deliver greater economic as well as social value for society at large. To achieve this end, companies need to operate in a legal and administrative environment which is both conducive to growth and adapted to face the new economic and social challenges of a globalised and digital world, while pursuing also other legitimate public interests such as the protection of employees, creditors and minority shareholders and providing authorities with all necessary safeguards to combat fraud or abuse.

It is with this objective that the Commission is putting forward this proposal, together with the proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132<sup>1</sup> as regards the use of digital tools and processes in company law - a comprehensive set of measures for fair, enabling and modern company law rules in the EU.

The freedom of establishment plays a crucial role in the development of the Single Market as it allows corporate entities to pursue economic activities in other Member States on a stable basis. In order to foster the cross-border mobility of companies in the EU, it is essential to take into account their needs and characteristics. There are around 24 million companies in the EU, out of which approximately 80% are limited liability companies. Around 98-99% of limited liability companies are SMEs.

However, in practice the exercise of the freedom of establishment by companies remains difficult. One of the reasons for these difficulties is that company law is not sufficiently adapted to cross-border mobility in the EU: it does not offer companies optimal conditions in terms of a clear, predictable and suitable legal framework which could lead to enhanced economic activity, in particular for SMEs as recognised by the 2015 Single Market Strategy<sup>2</sup>.

Corporate restructurings and transformations such as cross-border conversions, mergers and divisions, are part of companies' life-cycle and represent a natural way for companies to grow, adapt to a changing environment and explore opportunities in new markets. At the same time, they also entail consequences for companies' stakeholders, in particular for employees, creditors and shareholders. Therefore, it is essential that the protection of stakeholders keeps pace with the ever-growing trans-nationalisation of the corporate world. However, today the legal uncertainty, partial inadequacy and also the lack of rules governing certain cross-border operations of companies means that there is no clear framework to ensure effective protection of these stakeholders. In this situation, the protection offered to stakeholders may therefore be ineffective or insufficient. The cross-border operations of

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<sup>1</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law OJ L 169, 30.6.2017, p. 46.

<sup>2</sup> Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: more opportunities for people and business, COM(2015) 550 final.

companies can also be facilitated by a legal environment that creates trust in the Single Market by providing for safeguards against abuse.

Therefore, it is important to unleash the potential of the Single Market by breaking down barriers to cross-border trade, facilitating access to markets, increasing confidence and stimulating competition while offering effective and proportionate protection to stakeholders. The objective of this proposal is two-fold: provide specific and comprehensive procedures for cross-border conversions, divisions and mergers to foster cross-border mobility in the EU while, at the same time, offering company stakeholders adequate protection in order to safeguard the fairness of the Single Market. Such action forms part of creating a deeper and fairer Single Market, which is one of the priorities of the current Commission.

### *Cross-border conversions*

A cross-border conversion offers an efficient solution for companies that wish to move to another Member State without losing their legal personality or having to re-negotiate their business contracts. A conversion is particularly attractive for small companies that do not have enough financial resources to search for expensive legal advice and conduct a cross-border merger.<sup>3</sup> This reasoning applies in particular to cross-border conversions against the background of the recent jurisprudence of the European Court of Justice. The Court of Justice of the European Union (ECJ) has considered that the freedom of establishment enshrined in Article 49 TFEU entails the right, for companies established in a Member State, to transfer their seat to another Member State through a cross-border conversion without losing their legal personality.<sup>4</sup>

In particular in its recent judgement *Polbud*<sup>5</sup> the ECJ confirmed the right of companies to carry out cross-border conversions on the basis of the freedom of establishment. The ECJ held that the freedom of establishment is applicable when the registered office alone, without the real head office, is transferred from one Member State to another if the Member State of new incorporation accepts the registration of a company even without the exercise of an economic activity there: in that case Article 49 TFEU does not require such an economic activity as a precondition for its applicability.<sup>6</sup> The ECJ also recalled that, in the absence of harmonisation, Member States are competent to decide the connecting factor of a company to its national order and thus apply their own incorporation requirements to incoming companies.<sup>7</sup> The ECJ further recalled its previous jurisprudence whereby the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse. In *Polbud*, it was ruled that a national rule

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<sup>3</sup> See also the European Added Value Assessment - Directive on the cross-border transfer of a company's registered office 14th Company Law Directive (European Parliament).

<sup>4</sup> *Cartesio*, C-210/06, EU:C:2008:723, paragraphs 109 to 112; *VALE*, C-378/10, EU:C:2012:440, paragraph 32.

<sup>5</sup> *Polbud – Wykonawstwo*, Case C-106/16, ECLI:EU:C:2017:804.

<sup>6</sup> *Polbud – Wykonawstwo*, Case C-106/16, ECLI:EU:C:2017:804., paragraphs. 33 et seq.

<sup>7</sup> *Polbud – Wykonawstwo*, Case C-106/16, ECLI:EU:C:2017:804, paragraph 40; *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraphs 19 to 21; *Cartesio*, C-210/06, EU:C:2008:723, paragraphs 109 to 112; *VALE*, C-378/10, EU:C:2012:440, paragraph 32.

which imposes the winding-up prerequisite of cross-border transfer of a company is an unjustified and disproportionate restriction and thus unlawful.<sup>8</sup>

The *Polbud* judgement clarified the context for cross-border conversions. But the ECJ, being a judiciary organ, may not create any procedure for making such conversions possible or set out the related substantive conditions. In the absence of EU harmonisation on cross-border conversions, national legislation may still set out rules for the procedure to be followed and for the protection of minority shareholders, creditors or workers or for the fight against tax-related or other abuses in case of cross-border company conversion. However, it is necessary to assess case-by-case whether such rules comply with EU law and, in particular, with the right of establishment. This leads to an unsatisfactory situation in terms of legal certainty, which negatively affects companies, stakeholders and Member States.

Currently, companies wishing to move their registered offices cross-border need to rely on Member States' laws. Such laws, where they exist, are often incompatible or difficult to combine with each other. Moreover, more than half of the Member States do not provide any specific rules allowing for cross-border conversions. SMEs are in particular negatively impacted since often they lack resources to perform cross-border procedures through costly and complicated alternative methods.

This also means that the protection of stakeholders such as employees, creditors or minority shareholders is often ineffective or insufficient due to the lack of, overlapping or contradictory rules. As regards employee protection, in the absence of harmonised safeguards for employee participation rights, companies might use a cross-border conversion and the lack of relevant safeguards for employee participation rights, when moving to another Member State, to lower the level of participation or abandon it. Furthermore, the absence of harmonised rules may also lead to increased use of letterbox companies for fraudulent purposes, allowing for instance, in most serious cases, organised crime organisations to hide and obscure the beneficial ownership of companies to launder proceeds of crime.

Therefore, the EU legislator needs to step in and provide for rules on cross-border conversion with adequate and proportionate safeguards for employees, creditors and shareholders to create a dynamic and fair Single Market. The European Parliament<sup>9</sup> has already made calls for it. In particular, it is important that workers or their representatives are involved in the procedure, in line with the 8<sup>th</sup> principle of the Pillar of European Social Rights: notably, they should be informed and consulted in good time on matters relevant to them in the context of companies' cross-border conversions. The mobility of companies must go hand in hand with the protection of national social and labour law prerogatives.

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<sup>8</sup> *Polbud – Wykonawstwo*, Case C-106/16, ECLI:EU:C:2017:804, paragraph 40; *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraphs 19 to 21; *Cartesio*, C-210/06, EU:C:2008:723, paragraphs 109 to 112; *VALE*, C-378/10, EU:C:2012:440, paragraph 32).

<sup>9</sup> European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI)), European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)). European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)).

In light of the foregoing considerations, the main objectives of the harmonised rules for cross-border conversions are two-fold:

- enabling companies, particularly micro and small, to convert cross-border in an orderly, efficient and effective manner;
- protecting the most affected stakeholders such as employees, creditors and shareholders in a suitable and proportionate manner.

The proposal would enable companies to convert cross-border by changing their legal form of one Member State into a similar legal form of another Member State. This should ensure that companies keep their legal personality throughout the process without the need to dissolve or liquidate in the departure Member State, and form a new entity in the destination Member State.

The objective is to provide a specific, structured and multi-layered procedure for cross-border conversions which ensures a scrutiny of the legality of the cross-border conversion firstly by the competent authority of the departure Member State and secondly by the destination Member State in the light of all relevant facts and information. A crucial element of the procedure is that it would prevent a cross-border conversion where it is determined that it constitutes an abuse, namely in cases where it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members.

The first step in the procedure would be the preparation of the draft terms of the cross-border conversion and two targeted reports addressed to shareholders and employees on the implications that the cross-border conversion will have. In addition, medium size and large companies would need to apply to the competent authority for the appointment of an independent expert examining the accuracy of the draft terms and reports prepared by the company. The written report of the independent expert would also provide the factual basis for the assessment to be carried out by the competent authority as regards inter alia the risk of an abuse referred to above. The report of the expert which will be disclosed cannot contain any confidential information provided by the company. The draft terms and reports would be made publicly available and could be commented upon by the affected stakeholders.

Thereafter, the company is to take a decision at the general meeting on whether to pursue the cross-border conversion. That decision, together with the relevant information and documents, would then be submitted to the competent national authority of the Member State of departure which is responsible to decide whether to issue a pre-conversion certificate or not. The scrutiny conducted by that authority would consist of two possible phases: during the first phase, which is limited to one month, the competent authority would examine whether the cross-border conversion is lawful. The authority would determine if all conditions for the cross-border conversion laid down in the Directive and in national law are fulfilled, including whether the company is solvent, the requisite majority of shareholders has approved the conversion at a general meeting and employees, minority shareholders and creditors are protected within the remit prescribed by the Directive. During this phase, the authority would also determine whether there is an artificial arrangement. If at the end of the 1-month period laid down for the first phase of investigation the authority has no objections, it would issue a pre-conversion certificate. If at the end of 1 month it is certain that the cross-border conversion is unlawful, it would refuse to grant a pre-conversion certificate. Alternatively, if at the end of the 1-month period it has serious concerns that the conversion may be unlawful, it would inform the company that it will carry out an in-depth examination as regards the existence of abuse as referred to above. The in-depth examination must be concluded and a final decision must be taken within two months.

If after such scrutiny, the pre-conversion certificate is issued, it would be transmitted without delay to the competent authority of the Member State of destination. Then, the Member State of destination would carry out a scrutiny as regards that part of the procedure which is governed by the law of the destination Member State. The competent authority of the destination Member State shall ensure that the converted company complies with provisions of its national law on the incorporation of companies (for example, whether the company has a real seat in its territory) and, where appropriate, that arrangements for employee participation have been determined lawfully. Once the legality check has been carried out, a company would be registered in the register of a Member State of destination and de-registered in the register of a Member State of departure. The conversion shall then become legally effective. All contacts between the registers should be done via the system of interconnection of business registers (BRIS).

### *Cross-border mergers*

A company may also wish to exercise their freedom of establishment and thereafter benefit from the opportunities offered by the Single Market by carrying out a cross-border merger. Companies may merge cross-border for various reasons including group reorganisations, cutting organisational costs as well as business-oriented considerations in order to enjoy greater returns to scale, consolidated branding, or other synergies between different business activities.

The introduction of the Cross-Border Merger Directive<sup>10</sup> laid down a harmonised procedure at EU level for limited liability companies. It led to a substantial increase in cross-border merger activity in the EU and EEA. The number of cross-border mergers rose by 173% between 2008 and 2012, which indicates that the procedure set up by the Directive substantially enhanced cross-border activity. Stakeholders (such as law firms, business registers and trade unions) interviewed for the 2013 study on the application of the Directive welcomed the new procedures, the procedural simplification and reported lower costs and shorter timeframes thanks to the harmonised framework.

However, despite the overall positive assessment, the evaluation<sup>11</sup> of the functioning of the Cross-Border Merger Directive identified certain problems which impede the full effectiveness and efficiency of the existing rules.

The 2015 Single Market Strategy<sup>12</sup> mentioned uncertainties over company law as one of the obstacles that SMEs complain about in the Single Market and announced that the Commission would "*examine the need to update the existing rules on cross-border mergers and the possibility to complement them with rules as regards cross-border divisions*".

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<sup>10</sup> Directive 2005/56/EU of the European Parliament and of the Council of 26 October 2005 (OJ L 310, 25.11.2005, p. 1); replaced and repealed on 19 July 2017 by 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).

<sup>11</sup> Annex 5 to the Impact Assessment accompanying this proposal.

<sup>12</sup> COM(2015) 550 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Upgrading the Single Market: more opportunities for people and business.

The European Parliament stressed the positive effects of the Directive which has facilitated cross-border mergers between limited liability companies in the European Union and reduced the associated costs and administrative procedures<sup>13</sup>. However, the European Parliament also noted the necessity to revise it in order to improve its functioning<sup>14</sup>.

The main identified obstacles concern the lack of harmonisation of substantive rules in particular for creditor protection and minority shareholder protection as well as the lack of fast track (i.e. simplified procedures for less "complex" mergers). In addition, it was observed that the cross-border merger procedure does not sufficiently integrate digital tools and processes (e.g. as regards submitting the documents to public authorities or sharing those between them). It has also been criticised that employees are not sufficiently informed about the details and implications of a cross-border merger. These inefficiencies were confirmed by stakeholders throughout the consultation process.

Concerning the protection of creditors and minority shareholders, the existing rules on cross-border mergers lay down minimum, mainly procedural rules and leave the substantive protection to national laws. Therefore, the differences between Member States laws persist. For example, the Directive only lays down that creditors shall be protected subject to national rules, without further specifications. Similarly, the Directive lays down some rules concerning shareholders in general (e.g. information via the draft merger terms, expert reports, voting during the general meetings) but leaves it to Member States to decide whether to introduce further protection for minority shareholders. As to the employee participation on board level, the existing rules set out a comprehensive framework. However, the rules do not require merging companies to provide any specific and comprehensive information about a cross-border merger to the employees. Currently, the situation of employees is only considered in a general manner in the management report addressed predominantly to shareholders.

As to simplified procedures, the current rules offer limited possibilities. For example, the rules allow waiving an independent expert report if all shareholders agree and do not require an expert report or the approval by the general meeting in case of a merger between a parent company and its wholly-owned subsidiary.

This proposal aims to address these shortcomings. It provides harmonised rules for protection of creditors and shareholders. The company would need to provide the envisaged protection of creditors and shareholders in the draft terms of the cross-border conversion. The creditors who would be dissatisfied with the protection offered, may apply to the appropriate administrative or judicial authority for adequate safeguards. Creditors of the merging companies should be presumed not to be prejudiced by a cross-border merger, if an independent expert assessed their situation and considered no prejudice or creditors were offered a right to payment, either against a third party guarantor, or against the company resulting from the merger.

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<sup>13</sup> European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI)).

<sup>14</sup> The Action Plan on Company Law and Corporate Governance (**COM/2012/0740 final**) also stressed that Cross-border Mergers Directive was a big step forward for cross-border mobility of companies in the EU and, at the same time, acknowledged that it might need to be adjusted to meet the changing needs of the single market.

Member States may still apply their laws concerning the protection of payment of taxes or social security contributions, if such rules are different to the protection offered by this proposal.

Shareholders who did not vote for the cross-border mergers or have no voting rights would have the right to exit the company (dispose of their shares) and receive the adequate compensation. Moreover, Member States should also ensure that shareholders of the merging companies who did not oppose the cross-border merger, but who considered that the proposed share-exchange ratio was inadequate may challenge that ratio set out in the common draft terms of the cross-border merger before a national court. In addition, the proposed rules ensure that employees will be duly informed about the implications of the planned cross-border merger on employees. The proposal also provides for use of digital tools and procedures throughout the cross-border merger procedure as well as for the exchange of the relevant information through the interconnection of business registers. Finally, where possible, the proposal introduces further possibilities for simplified procedures.

#### *Cross-border divisions*

A company may also wish to exercise their freedom of establishment by carrying out a cross-border division. In a similar manner to cross-border conversions and mergers, cross-border divisions offer a way for companies to change or simplify their organisational structure, adapt to changing market conditions and realise new business opportunities in another Member State. This was confirmed by respondents to the 2015 consultation on cross-border mergers and division<sup>15</sup>. However, the current situation concerning cross-border divisions across the EU Member States also provides a very fragmented picture.

There is no harmonised legal framework for cross-border divisions of companies, although divisions also play an important role in the economic environment of Member States.

The current EU legal framework provides rules only for cross-border mergers of companies, while cross-border divisions are subject to national rules if such rules exist. Today only less than half of the Member States have national rules on cross-border divisions of companies. In the absence of a reliable legal framework for cross-border divisions, companies have difficulties to access markets in other Member States and often need to find costly alternatives to direct procedures.

Different national requirements make it difficult to structure the cross-border operations and render it more complex and costly. Even when Member States allow companies to divide cross-border, the relevant national provisions are often divergent or even incompatible. In a number of Member States carrying out a direct cross-border division is not possible.

The legal uncertainty and lack or complexity of rules for cross-border mobility of companies also means that there is no clear framework to ensure effective protection of stakeholders. This may even lead to a situation whereby the freedom of establishment could be abused by some companies. Thus, it is crucial to create a legal framework that ensures a fair balance between the need to provide companies a favourable business environment in the EU and the need at the same time to protect legitimate interests of stakeholders.

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<sup>15</sup> [http://ec.europa.eu/internal\\_market/consultations/2014/cross-border-mergers-divisions/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm).



The 2015 Single Market Strategy<sup>16</sup> mentioned uncertainties over company law as one of the obstacles that SMEs complain about in the Single Market and announced that the Commission "examine the need to update the existing rules on cross-border mergers and the possibility to complement them with rules as regards cross-border divisions".

This part of the proposal aims to introduce a new legal framework regulating cross-border divisions. Its main objective is to address matters related to cross-border mobility by making it easier for any limited liability company to be able to divide cross-border.

The provisions relating to cross-border divisions are inspired by the existing framework of the cross-border merger directive as well as the existing rules for domestic divisions. The rules are adapted to cater for a situation where a company is split instead of where one or more companies transfer all their assets and liabilities to another company. At the same time, the objectives of the harmonised rules on cross-border divisions remain similar to cross-border conversions:

- enable companies to divide cross-border in an orderly, efficient and effective manner;
- protect the most affected stakeholders such as employees, creditors and shareholders in a suitable and proportionate manner.

Given the similar risks inherent to cross-border divisions as to cross-border conversions, the structured and multi-layered procedure as proposed for conversions would also be required for divisions. Such procedure would ensure the scrutiny of legality of the cross-border division by the competent authority of the company being divided and by the authorities of the recipient companies in the light of all relevant facts and information. As in conversions, a crucial element of the procedure would be preventing a cross-border division where it is determined that it constitutes an abuse, namely in cases where it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members.

Given the complexity of dealing with risks of abuse in a situation where a company being divided transfers assets and liabilities to existing companies in different Member States, it was decided to regulate a situation where new companies are created in a cross-border division and not to regulate at this stage the cross-border division by acquisition, i.e. the situation where a company transfers assets and liabilities to more than one existing company. In a domestic context (where such situations are addressed in the current rules), such a procedure involves the examination of the protection of interests of stakeholders in one Member State, whereas in the cross-border context, it could necessitate the involvement of many authorities from different Member States. Whether to also include cross-border divisions by acquisition into the scope of the directive could be evaluated once first experiences with the new rules on cross-border divisions have been gained.

Similarly to cross-border conversions, the first step in the procedure would be the preparation of the draft terms of the cross-border division and two targeted reports addressed to shareholders and employees on the implications that the cross-border division will have for them. In addition, medium size and big companies would need to apply to the competent

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<sup>16</sup> COM(2015) 550 final.

authority to appoint an independent expert examining the accuracy of the draft terms and reports prepared by the company. The written report of the independent expert would also provide the factual basis for the assessment to be carried out by the competent authority as regards inter alia the risk of an abuse as referred to above. The report of the expert which will be disclosed cannot contain any confidential information provided by the company. The draft terms and reports would be made publicly available and could be commented upon by the affected stakeholders.

Thereafter, the company being divided is to take a decision at the general meeting on whether to pursue the cross-border division. This decision, together with the relevant information and documents, would then be submitted to the competent authority of the Member State of the dividing company which is responsible to decide whether to issue a pre-division certificate or not. The scrutiny conducted by that authority would be divided into two phases: one being mandatory and the other one being optional. In the first phase, which is limited to one month, the competent authority would examine whether the cross-border division is lawful. The authority would determine if all conditions for the cross-border division laid down in the Directive and in national law are fulfilled, including whether the company is solvent, the requisite majority of shareholders has approved the cross-border division at a general meeting and employees, minority shareholders and creditors are protected within the remit prescribed by the Directive. It would also determine whether there is an artificial arrangement being created which is aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members. If at the end of a 1-month period, the authority has no objections, it would issue a pre-division certificate; if it is certain that the cross-border division is unlawful, it would adopt a decision refusing to grant a pre-division certificate; or if it has serious concerns that the division may be unlawful, it would inform the company being divided that it will carry out an in-depth investigation with a view to performing an in-depth examination as regards the existence of abuse as referred to above. The in-depth examination must be concluded and a final decision must be taken within two months from the start of the in-depth investigation.

If after such scrutiny, the pre-division certificate is issued, it would be transmitted without delay to the competent authorities of the Member States of the recipient companies. Then, the competent authorities would carry out a scrutiny as regards that part of the procedure which is governed by their respective laws. The competent authorities of the Member States of the recipient companies must ensure that the companies comply with provisions of their national laws on the incorporation of companies where appropriate (for example, whether the company has a real seat in its territory). They should also check whether the arrangements for employee participation have been determined lawfully. Once the legality check has been carried out, the division would be registered and recorded in all relevant business registers. All contacts between the registers should be done via the system of interconnection of business registers (BRIS).

### **Consistency with existing policy provisions in the policy area**

This proposal will complement and amend the existing rules on EU company law that are now codified in Directive (EU) 2017/1132. It aims to revise the existing rules on cross-border mergers and to provide a suitable and clear legal framework for companies to divide or to transfer their registered office cross-border. From a procedural perspective, the proposed rules are fully coherent with the existing rules aiming at facilitating cross-border activity by companies through cross-border mergers; from a substantive perspective the proposed rules are fully in line with the principle of freedom of establishment enshrined under Articles 49 – 55 TFEU as well as with the need for protection of employees, minority shareholders and creditors. Furthermore, the proposal is coherent with rules relating to cross-border mobility

that are laid down in Council Regulation (EC) No 2157/2001<sup>17</sup>. In addition, the proposed rules are consistent with the approach taken in EU rules on shareholders' rights laid down in Directive 2007/36/EC<sup>18</sup> and in applicable law rules in Regulation 2015/848 on insolvency proceedings<sup>19</sup>.

The use of digital tools, and, in particular, the exchange of company information concerning cross-border conversions, mergers and divisions between business registers through the system of interconnection of business registers (BRIS)<sup>20</sup> is fully in line with the objective of digitalising the company law procedures within the framework of the Digital Single Market and complementary with the digitalisation elements included in the proposal on digitalisation aimed at the promotion of digital tools and processes throughout a company's lifecycle.

The proposed rules are in line with and intended to be complementary to 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 undertakings and Community scale groups of undertakings for the purposes of informing and consulting employees (Recast), Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings, and 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. In particular, the rights of employees of the companies involved in a cross-border merger or division may also be protected in accordance with Directive 2001/23/EC. The proposed rules are intended to provide additional protection to employees, by providing more transparency and enhanced information to employees about the planned cross-border conversion, merger or division.

The proposal will further contribute to the cross-border mobility of companies by harmonising substantive and procedural aspects of creditor and minority shareholder protection and in turn further enhance cross-border activity by increasing legal certainty and thus reducing cost for companies due to expensive legal advice and the need to comply with unharmonised Member States' rules.

### **Consistency with other Union policies**

This initiative will contribute to the success of many Commission initiatives which aim to improve the functioning of the Single Market by making it deeper and fairer and to build a

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<sup>17</sup> Council Regulation (EC) No. 2157/2001 of the 8<sup>th</sup> October 2001 on the Statute for a European company (SE).

<sup>18</sup> Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

<sup>19</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

<sup>20</sup> Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers

digital Europe.<sup>21</sup> This initiative will also contribute to the Investment Plan for Europe, in particular the third pillar thereof which focusses on improving the business environment in Europe by removing regulatory barriers to investment both nationally and at EU level; it additionally contributes to the Capital Markets Union<sup>22</sup> by making the legal framework for companies clearer, more suitable and effective in order to incentivise investments in Europe.

At the same time, this initiative is also coherent with the objective of creating a deeper and fairer economic union and its European Pillar of Social Rights, in particular the 8<sup>th</sup> Principle, which sets out a number of key principles and rights to support fair and well-functioning labour markets and welfare systems.<sup>23</sup> In particular, by enhancing the transparency for relevant stakeholders including employees, the initiative will directly contribute to the principle stipulating that employees or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies.

This initiative is in line with the objective of creating a fair and efficient corporate tax system in the European Union<sup>24</sup>. The Council has adopted a number of measures to counteract corporate tax avoidance in recent years. Council Directive 2015/2376<sup>25</sup> provides for mandatory automatic exchange of information on advance tax rulings and advance pricing arrangements between Member States. Furthermore, Council Directive 2016/881<sup>26</sup> provides for mandatory automatic exchange of information of country-by-country reporting by multinational enterprises. Council Directive (EU) 2016/1164<sup>27</sup> lays down rules against tax avoidance practices that directly affect the functioning of the internal market, including provisions on exit tax to prevent companies from avoiding tax when re-locating assets. Political agreement within the Council was reached on 13 March 2018 on the Commission proposal<sup>28</sup> for a Directive on mandatory disclosure by intermediaries for tax planning schemes, which should be adopted shortly.

In particular increased cross-border accessibility to company related information will contribute to ensuring fair taxation where profits are generated. The safeguards against abuse of the conversion and division procedures to create artificial arrangements aimed at obtaining undue tax advantages will contribute to EU efforts to fight tax evasion and avoidance.

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<sup>21</sup> COM(2015) 550 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Upgrading the Single Market: more opportunities for people and business.

<sup>22</sup> COM(2015) 468 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union.

<sup>23</sup> C(2017) 2600 final. Commission recommendation establishing the European Pillar of social rights.

<sup>24</sup> COM (2015) 302 final. A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action.

<sup>25</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>26</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>27</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ L. 193, 19.7.2016, p. 1).

<sup>28</sup> COM(2017) 335 final

Through the inclusion of clearer and more harmonised rules aiming at protecting companies' shareholders and at enhancing the scrutiny of the legality of the cross-border conversion, this initiative also brings an additional step in the mitigating measures against the risks posed by organised crime organisations in the creation and business activities of legal entities, such as companies. These risks have been highlighted by the Commission in its Report on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, adopted on 26 June 2017<sup>29</sup>. In this report, the Commission has underlined the vulnerability of corporate structures, such as companies, to the risk of infiltration by organised crime organisations and terrorist groups. This initiative will complement the ambitious rules that are already in place under Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and under which corporate structures should disclose their beneficial owners to entities in charge of applying anti-money laundering and terrorist financing requirements<sup>30</sup>.

## 2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

### Legal basis

The proposal is based on Article 50 of the Treaty on the Functioning of the European Union (TFEU) which is the legal basis for the EU competence to act in the area of company law. In particular, Article 50(2) (f) provides for progressive abolition of restrictions on freedom of establishment and Article 50(2) (g) provides for coordination measures concerning the protection of interests of companies' members and other stakeholders.

### Subsidiarity (for non-exclusive competence)

There is clear added value to address the problems at EU level rather than through individual action by Member States. The main difficulties in carrying out **cross-border conversions and divisions** are due to divergent, conflicting or overlapping national procedural rules, and also on rules related to creditor, employee (including employee participation) and minority shareholders protection, lack of use of the interconnection of business registers. The main inefficiencies in the functioning of the **existing rules on cross-border mergers** are mainly caused by divergent, conflicting or overlapping national rules on creditor and minority shareholders protection, lack of use of the interconnection of business registers or other incoherencies or legal uncertainty caused by different Member States rules such as accounting rules. These challenges by their very nature require action at EU level. Member States acting individually could not satisfactorily remove the difficulties with respect to creating a more efficient functioning of the cross-border operations because national rules and procedures would need to be compatible in order to work in a cross-border situation and to enhance cross-border operations. Those barriers cannot be removed solely by relying on direct application of Article 49 TFEU, given that this would entail addressing them on a case-by-case basis through infringement procedures against the Member States concerned, and, since the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation.

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<sup>29</sup> COM(2017)340 final

<sup>30</sup> The beneficial ownership information should, in addition, be held in a national central register.

It appears, therefore, that without any action at EU level only non-harmonised national solutions would be available so that companies, in particular SMEs, would continue to face divergent national regimes making the effective exercise of the freedom of establishment more difficult without ensuring adequate protection of stakeholders and the resulting costs would in particular affect the companies but also the stakeholders, be it employees, creditors or minority shareholders.

Whereas the substantive levels of protection of employees, minority shareholders and creditors would still be set at national level, a procedural framework for their pursuit in case of cross-border operations would need to be set at EU level for the sake of legal certainty and the effectiveness of such protection.

In light of the above, the targeted EU intervention complies with the principle of subsidiarity.

### **Proportionality**

As regards the principle of proportionality, the proposed rules seem suitable to achieve the objectives of clear and suitable rules for companies and also providing protection to stakeholders as set out in the impact assessment. The impact assessment explains the cost and benefits of the options considered therein for companies, stakeholders and Member States by taking into account all necessary elements including societal benefits and political feasibility. For example, the proposed cross-border conversion procedure is estimated to result in a cost saving of EUR 12 000 – 19 000 per operation and companies operating in the internal market could in total save EUR 176 – 280 million over 5 years.

It appears that the proposed actions do not go beyond what is necessary to achieve the objectives and that the positive impacts of the proposed measures exceed the possible negative impacts (Section 6.3 of the impact assessment).

### **Choice of the instrument**

The legal basis for company law operations is Article 50 TFEU which requires the European Parliament and the Council to act by means of directives. Directive (EU) 2017/1132 governs company law at EU level. For reasons of cohesion and consistency of EU company law, the present proposal will amend and add to that Directive.

## **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

### **Ex-post evaluations/fitness checks of existing legislation**

The proposal introduces a new legal framework for a procedure of cross-border conversions and divisions of limited liabilities companies.

The ex-post evaluation<sup>31</sup> of the existing Cross Border Mergers Directive<sup>32</sup> was carried out against the evaluation criteria in line with 'Better regulation' requirements. Main inputs to the

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<sup>31</sup> Annex 5 to the Impact Assessment accompanying this proposal.

<sup>32</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1); the directive has now been

evaluation were the study on "*The Application of the Cross-Border Mergers Directive*" carried out by an external contractor for the Commission<sup>33</sup>, additional studies<sup>34</sup> and two public consultations (2015 and 2017) which collected the views of stakeholders about the functioning of the cross-border mergers.

The analysis resulted in an overall positive evaluation of the Cross-Border Merger Directive in terms of effectiveness, efficiency, relevance, coherence and EU added value. Overall, the Cross-Border Merger Directive has led to a significant increase in the cross-border merger activity, in line with its objective to facilitate cross-border mergers and increase the opportunities offered by the Internal Market.

However, despite the overall positive assessment, the evaluation identified certain problems which impede the full effectiveness and efficiency of the Directive. The main obstacles concern the lack of harmonisation of substantive rules in particular for creditor protection and minority shareholder protection as well as the lack of fast track (i.e. simplified) procedures in the Directive. Making more use of the interconnection of business registers could increase synergies and thus coherence with other company law legislation.

This proposal is coherent with the evaluation and aims to address the main shortcomings to the existing cross-border merger rules identified in it.

### **Stakeholder consultations**

The Commission has actively engaged with stakeholders and conducted comprehensive consultations throughout the impact assessment process. The consultation process consisted of online public consultation, stakeholder meetings including discussions with Member State experts, several studies. The information gathered through all these means fed into the proposal.

In 2012, the Commission carried out a public consultation in order to assess the key interests of stakeholders in regard to European company law and determine where the future priorities of EU company law should lie. 496 responses were received from a wide range of stakeholders, such as public authorities, trade unions, civil society, business federations, liberal professions, investors, universities, think tanks, consultants and individuals. The vast majority of the stakeholders focussed on improving the business environment and fostering cross-border mobility. Furthermore, emphasis was also put on enhancing the protection of creditors, shareholders and employees in cross-border situations as well as facilitating the creation of companies and fostering regulatory competition.

A more detailed online public consultation was launched in 2013 on the cross-border transfers of registered offices of companies aiming to acquire more in-depth information on the costs

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replaced by 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).

<sup>33</sup> Bech-Bruun/Lexidale, *Study on the application of the cross-border mergers directive* (September 2013) [http://ec.europa.eu/internal\\_market/company/docs/mergers/131007\\_study-cross-border-merger-directive\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf).

<sup>34</sup> Schmidt, *Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?* Study for the JURI Committee, June 2016. Reynolds/Scherrer/Truli, *Ex-post analysis of the EU framework in the area of cross-border mergers and divisions*, Study for the European Parliament, December 2016.

faced by companies transferring their registered offices abroad and on the range of benefits that could be brought by an EU action in this respect. In total 86 responses were received from public authorities, trade unions, civil society, companies, business organisations, individuals and universities, allowing for a broad representation of society. Replies have come from 20 EU Member States and also from outside the EU. It was found that the majority of respondents, who would consider the possibility of moving their company cross-border, would broadly welcome the introduction of a conversion procedure. They cited economic benefits, cost savings for the internal market and the broader possibilities for SMEs to transfer cross-border as reasons for answering in the affirmative. Moreover, it was a majority of 43% of respondents who considered that the CJEU jurisprudence did not provide enough clarity on the issue.

A further public consultation was launched in 2015 which focussed on cross-border mergers and cross-border divisions where 151 responses were received<sup>35</sup>. As regards cross-border divisions, the introduction of a new procedure was broadly welcomed by the respondents as the majority of the participants identified the protection of creditors, the protection of minority shareholders and the protection of employee rights as the main issues to be treated. Approximately 72% of respondents who expressed an opinion thought that harmonisation of legal requirements concerning cross-border divisions would help enterprises and facilitate cross-border activities by reducing the costs directly related with the cross-border division. Procedural issues as well as stakeholder protection were identified as key issues to address. Moreover, 68% of the respondents cited legal uncertainty due to the lack of EU rules as the main obstacle to completing a cross-border division and 51% of the respondents cited the duration and complexity of the current procedures as being highly problematic. Concerning cross-border mergers, 88% of the respondents were in favour of harmonisation of creditor protection – 75% of which favoured a full harmonisation approach. The vast majority of those felt that a guarantee was the best form of protection and that the date determining the beginning of the creditor protection period should be harmonised. Furthermore, in regards to minority shareholder protection, a majority of 66% were in favour of harmonisation with 71% of which in favour of harmonisation on a maximum basis. 70% of those in favour of full harmonisation felt that minority shareholders should be given an exit right against adequate cash compensation. Moreover, 62% of the respondents welcomed the introduction of a fast-track procedure.

The latest public consultation on company law was launched in 2017. It ran from 10<sup>th</sup> May 2017 to the 6<sup>th</sup> August 2017. There were 207 responses received. In the light of the upcoming initiative the Commission sought for answers for detailed questions about the shortcomings of the EU legal framework and areas which are considered a priority for the respondents.

The outcome of the consultation showed a broad support for cross-border conversions from Member States and stakeholders alike as approximately 85% of all respondents were of the opinion that there should be an EU instrument on this matter. In terms of stakeholder breakdowns, all of the public authorities agreed that the lack of procedural rules for

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<sup>35</sup> Schmidt, *Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?* Study for the JURI Committee, June 2016. Reynolds/Scherrer/Truli, *Ex-post analysis of the EU framework in the area of cross-border mergers and divisions*, Study for the European Parliament, December 2016.



conversions do indeed constitute obstacles to the internal market and that the EU should be addressing this issue. Several authorities submitted that they were more concerned with the issue of seat than they were with stakeholder protection mechanisms and said that they would support a conversion initiative to the extent that companies can only move their real seat for genuine business purposes rather than conclude transfers of letterbox companies for fraudulent purposes.

The business groups supported the introduction of a conversion procedure with similar percentage approvals as the public authorities. Approximately 44% of business groups considered this to be a top EU priority, 22% a priority and 22% a low priority. Trade unions and notaries were both moderately supportive of new procedural rules concerning conversions (74% and 79% deeming this a low EU priority respectively). Both the trade unions and the CNUE (representative body of notaries) were keen to stress that companies should only be allowed to transfer their registered office if it is accompanied by the transfer of their real seat with Trade Unions further stressing the need for a horizontal instrument for employee information, consultation and participation rights. Academics were also broadly in favour of the introduction of a conversion procedure. Some academics submitted that Member States should be able to determine their own requirements to be recognised under their law and indeed whether they require that the real seat be transferred. It was further submitted that digitalisation should be used as much as possible (i.e. for publication of information and for the company registries to communicate). Others suggested that a Member State should only be able to block a conversion in very exceptional circumstances on grounds of public interest.

As regards cross-border mergers, similarly to the 2015 public consultation, most stakeholders who replied to the 2017 consultation identified the same issues as problematic: the protection of creditors, the protection of minority shareholders and the protection of employee rights.

The majority of the national public authorities that responded to the 2017 consultation were of the opinion that there are problems with the existing cross-border merger rules and that those problems constitute obstacles to the Internal Market but to a varying degree. There was a mixed response as to the degree of priority to be given to an EU action to amend the existing rules. In respect of safeguards, all national public authorities which replied were of the opinion that creditor protection measures should be addressed, while 70% were of the opinion that minority shareholder protection measures should also be addressed. There were 80% that found it important to harmonise procedural as well material aspects of creditor protection and 50% that found it important for minority shareholders to be able to block the merger and oppose the share exchange.

Business organisations which replied to the 2017 consultation also broadly welcomed the need to amend the directive for cross-border mergers. Points raised by business organisations concerned simplification of rules (fast-track procedure), harmonised rules for creditor and minority shareholder protection, simplified employee protection rules and removing the requirement for merger procedures to be signed before public notaries as is the case in certain Member States.

Similarly, trade unions were also receptive to modification of the cross-border merger rules. However, they were primarily concerned with strengthening the employee protection by way of stronger information, consultation and participation rights. Conversely, notaries were overwhelmingly of the opinion that the existing directive functions very well and they do not see the need for any new EU measures in this area.

Concerning cross-border divisions, all of public authorities who responded to the consultation were in favour of new rules for cross-border divisions while 40% considered an initiative in this area to be top EU priority.

The business organisations were strongly in favour of new rules as 44% considered this to be a top priority and 26% viewed this as a priority. Notaries expressed moderate support for a new initiative. Trade unions were extremely sceptical regarding divisions due to risks for employees but submitted that should Member States decide favourably for divisions, the rules concerning information and consultation for employees would have to be strengthened.

As a general comment, it was submitted by the vast majority of the respondents who were in favour of a new procedure for cross-border divisions that the procedure should follow closely what is laid out in the existing Cross-border Mergers Directive.

Furthermore, the views of stakeholders were also collected during numerous meetings. The process of the consultation on the company law package within the Company Law Expert Group (CLEG) began in 2012. From 2012 – 2014, the CLEG meetings focussed on the 2012 Action Plan of Company Law and Corporate Governance while in 2015 and 2016 the meetings centred on elements of digitalisation. In 2017, three CLEG meetings took place where the relevant issues for the company law package (namely digitalisation, cross-border mergers, divisions and conversions) were concretely discussed. In these meetings the Commission called on the Member States' experts for their opinions on specific questions.

In 2017, the Commission invited to the CLEG meetings not only Member States' experts but also the stakeholders' representatives that emerged in the 2013, 2015 and 2017 public consultations. Stakeholders represented businesses, employees, legal professions. The stakeholders highlighted the need to facilitate cross-border operations, however, interests of companies' members, employees and creditors should be protected through adequate safeguards. Generally there is broad support for the initiative for cross-border conversions provided there are sufficient safeguards in place. As regards mergers, generally the Member State representatives showed support for the initiative, although they indicated that concrete solution required deeper discussions. While no stakeholder group was against the revision of the cross-border merger rules, the opinions differed as to the degree of priority of it. Concerning cross-border divisions, generally the Member States' representatives showed support for the initiative, although the particular solutions, especially originating from the different legal traditions, appeared to remain to be discussed. There was a general sentiment amongst all stakeholders with the exception of Trade Unions that a new procedure for cross-border divisions would be highly useful and should follow closely what is laid down in the existing Cross-border Mergers Directive.

In addition to the CLEG meetings, information from stakeholders were also gathered through bilateral meetings. In these meetings, the representatives of trade unions emphasised the importance of preservation of employee participation rights and that companies should only move for real purposes, thus avoiding that letterbox companies are created through cross-border operations. The representatives of business organisations showed a great support for the initiative on facilitating mobility of companies.

The proposal addresses the most important issues identified by stakeholders. However, given that stakeholders have different views as to the detail approach how the issues should be addressed, the proposal aims to strike a fair balance between these views.

## Collection and use of expertise

In order to assist to the work of the Commission, the Informal Company Law Expert Group (ICLEG) was established in May 2014 on issues of company law. The members of the expert Group were highly qualified and experienced academics and legal practitioners of company law from several Member States.

The Commission has also used the results of a study conducted in 2017 analysing specific questions on cross-border transfers of registered offices and cross-border divisions of companies. Furthermore, the Commission collected expert feedback at several conferences including a conference held in September 2017 in Tallinn, Estonia on 21st European Company Law and Corporate Governance Conference: Crossing Borders, Digitally and the Annual Conference on European Company Law and Corporate Governance that took place in Trier, Germany, in October 2017.

## Impact assessment

The Impact Assessment Report covering digitalisation, cross-border operations and conflict of law rules in company law, was examined by the Regulatory Scrutiny Board on 11 October 2017<sup>36</sup>. A negative opinion of the RSB was issued on 13 October 2017. The recommendations put forward were addressed in a revised version of the Impact Assessment submitted to the Board on 20 October 2017. The Board gave a positive opinion with reservations on 7 November 2017.

Concerning the **scope of application** which would determine which types of companies could benefit from the harmonised rules and procedures for cross-border conversions and divisions and modified rules on cross-border mergers, the Impact Assessment explained why the existing scope of application of the cross-border merger rules (i.e. limited liability companies) provides the most effective solution for all cross-border operations despite some calls to broaden it to cover partnerships and cooperatives. This is because the existing data shows a very limited use of the cross-border merger rules by entities other than limited liability companies. 66% of the acquiring companies and 70% of the merging companies involved in cross-border mergers were private limited liability companies, whereas 32% of acquiring companies and 28% of the merging companies involved in cross-border mergers were public limited liability companies<sup>37</sup>. In addition, extension of the scope would lead to potential practical difficulties related to EU company law and accounting rules which only apply to limited liability companies.

As to the **introduction of new procedural rules for cross-border conversions and divisions**, the Impact Assessment examined the option 0 (baseline scenario) of having no procedural rules for cross-border conversions and divisions against the option 1 which would introduce harmonised EU procedures to enable companies to carry-out direct cross-border conversions and divisions. The lack of procedural rules makes cross-border conversions and divisions extremely difficult, if not impossible. National cross-border conversion and division procedures exist only in a limited number of Member States and they are often not align with

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<sup>36</sup> Impact Assessment and Opinion of the Regulatory Scrutiny Board is available at: <http://ec.europa.eu/transparency/regdoc/?fuseaction=ia&year=&serviceId=10226&s=Search>

<sup>37</sup> Data relates to period 2008-2012, Bech-Bruun/Lexidale, 2013 p.80

each other. Companies must therefore rely on costly indirect procedures, the analogous application of the Cross-border Merger Directive and the CJEU jurisprudence where legal practitioners and business registers are aware of the case-law. By introducing new procedural rules for cross-border conversions and divisions, companies would be provided significant clarity and significantly reduce the costs for companies wishing to convert or divide cross-border. Moreover, it would provide clarity to national business registers to clearly distinguish the point in time to which a company can enter the business register in the destination Member State and be struck off the business register in the departure Member State which would avoid situations such as *Polbud*<sup>38</sup> arising.

As to the **protection of minority shareholders**, the Impact Assessment assessed the option 0 (baseline scenario) consisting of the existing rules on minority shareholders' protection against the options 1 and 2. Option 1 would provide harmonised rules across the Single Market. It would build on the rules for cross-border mergers, but in addition it would provide for harmonised rules. The preferred option 2 would provide for the same harmonised rules as option 1 but Member States would be able to provide for additional safeguards. This option would provide the most adapted protection of minority shareholders. While option 2 could potentially cause some compliance costs for companies, it would significantly reduce cost and burdens on companies in comparison to the baseline scenario and would provide for more legal certainty, less need for legal advice and thus offer cost savings for companies compared to the baseline scenario. The preferred option 2 provides the best balance between cost reduction, the high level of protection and the flexibility to Member States.

As to the **protection of creditors**, the Impact Assessment examined the option 0 (baseline scenario) of keeping the existing the cross-border mergers rules unchanged and no EU rules on creditor protection in cross-border conversions and divisions against the option 1 of providing harmonised rules to protect creditors and against option 2 that would provide for the same harmonised rules as option 1, but Member States would be able to provide for additional safeguards. The preferred option 2 would provide the best balance between cost reduction, a high level of protection and flexibility to Member States. Both options 1 and 2 would significantly reduce cost and burdens on companies in comparison to the baseline scenario, as the harmonised rules on creditor protection would provide for more legal certainty and less need for legal advice for any cross-border operation. Option 1 would offer the biggest savings for companies, while savings in option 2 might be smaller, since Member States could provide for additional safeguards which could be costly or burdensome for some companies (e.g. need to provide guarantees for all creditors). In terms of protection offered to creditors, option 2 would provide for more complete and targeted protection than option 1 due to the possibility granted to MS to assess the national specificities of creditor protection and to introduce more safeguards.

As to the **employee information, consultation and participation**, the Impact Assessment compared the option (base-line scenario) of applying the existing rules on the employee participation in the Cross-border Merger Directive against the option 1 that would apply the existing rules on the employee participation in boards from cross-border mergers to cross-border divisions and conversions and against option 2 that would consist of targeted amendments to existing cross-border mergers rules, while at the same time providing specific

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<sup>38</sup> Polbud – Wykonawstwo C-106/16

measures for the perceived higher risks for employees in cross-border divisions and conversions. The preferred option 2 is composed of several elements which as a combined effect aim to provide the necessary protection for employees. Safeguards would include for all cross-border operations a new special report prepared by the company's management to describe the impact of the cross-border merger on jobs and the situation of employees and a so called "anti-abuse" rule providing that during 3 years following the cross-border operation, if performing a subsequent cross-border or domestic operation, the company would not be able to undermine the system of employee participation. The rule is based on the existing cross-border mergers rules but would be adapted to cover not only subsequent domestic conversions, mergers or divisions but also other cross-border and domestic operations. This option would, in addition introduce specific rules as regards negotiations in case of cross-border divisions and conversions. The Impact Assessment analysed the costs and benefits of these targeted changes and concluded that the limited additional compliance costs for companies due to the possible preparation of the report would be outweighed by the increased protection of employees and the resulting societal benefits.

Finally, the Impact Assessment also examined the question of how to tackle risks of abuse, including a proliferation of "letter-box" companies for abusive purposes such as for avoiding labour standards or social security payments as well as aggressive tax planning. During the public consultations, certain stakeholders, in particular trade unions, called for a solution whereby the company carrying out cross-border conversion would need to transfer the registered office together with the head office to the destination Member State. However, the very recent Court decision in the Polbud case, which was delivered after the public consultations were closed, stipulates that the freedom of establishment applies to cases where only the registered office is moved cross-border. Therefore, such a solution could not be envisaged. The Impact Assessment thus examined the option 0 (baseline scenario) of having no harmonised rules against the option 1 which would introduce rules and procedures according to which Member States would need to assess on a case-by-case basis whether the cross-border conversion in question constitutes an artificial arrangement which aims at obtaining undue tax advantages or unduly prejudicing the rights of employees, minority shareholders or creditors. The preferred option 1 would directly contribute to the fight against circumvention of rules and thus against abusive or fraudulent use of letterbox companies. When compared to the baseline scenario, the option 1 would be a part of the procedure allowing companies to convert cross-border and therefore the additional compliance costs would not be specific to the assessment of the possible artificial arrangement. As to the Member States, they would need to transpose and implement those rules which incur some administrative and organisational costs. Option 1 would lead into enhanced stakeholder protection. Stakeholders would be able to provide their views throughout the procedure and ultimately be protected against circumvention of rules by fraudulent companies.

The Impact Assessment also analysed options related to conflict of laws rules. The preferred option in this respect was an instrument harmonising relevant rules, in particular as regards the connecting factor, on the basis of the place of incorporation of the company with further specific rules pointing to the law of the real seat and covering only companies established in the EU. However, given that the instances in which clarity is most needed, namely specific issues related to the law applicable to limited liability companies in cross-border situations, will be addressed in the proposed legislation on cross-border conversions, mergers and divisions, it was decided not to propose a specific legislative act on conflict-of-laws at this point in time.

## **Regulatory fitness and simplification**

The proposal is expected to deliver considerable simplification benefits to business in the Single Market by facilitating cross-border mobility of companies.

The creation of a comprehensive set of common rules regulating **cross-border conversions and divisions** will streamline and simplify procedures and reduce costs for business as regards the type and content of documents to be prepared, the different procedures and the related deadlines or other additional requirements. The proposed rules on employee participation and members' and creditors' protection rules will enhance legal certainty and predictability to these operations. The new common rules on cross-border divisions and conversions can be expected to bring savings of EUR 12 000 - EUR 37 000 (divisions) and EUR 12 000 – 19 000 (conversions) depending on the size of companies and Member States involved.

The proposed amendments to the existing EU legal framework **on cross-border mergers** will simplify the rules for cross-border mergers of companies and reduce costs and administrative burdens through new common and streamlined procedure. The proposed rules on members' and creditors' protection and disclosure rules will enhance legal certainty and predictability.

The cost reduction and simplifications will have a particularly positive impact on micro and small enterprises.

The information exchange foreseen in this proposal will be implemented through the existing system of the interconnection of central, commercial and companies registers (BRIS). Therefore, no specific IT developments are anticipated.

## **Fundamental rights**

The proposed rules of this initiative ensure the full respect of the rights and principles set out in the Charter of Fundamental Rights of the European Union and contribute to implementation of several of those rights. In particular, the main objective of this initiative is to facilitate the rights of establishment in any Member State, as prescribed by Article 15(2) of the Charter and ensuring the principle of non-discrimination on grounds of nationality (Article 21(2)). The initiative aims to reinforce the freedom to conduct a business in accordance with Union law and national laws and practices (Article 16). The right to property set out in Article 17 of the Charter is also strengthened by the initiative through the safeguards that are provided for shareholders. Although the initiative will provide rules for companies in the framework of company law, it will also contribute to the workers' right to information and consultation within the undertaking (Article 27 of the Charter) by providing more transparency for employees in case of cross-border operations of companies. The protection of personal data shall also be ensured in line with Article 8 of the Charter.

## **4. BUDGETARY IMPLICATIONS**

No major costs have been identified. The proposal would cause primarily costs for national administrations associated with the introduction of legislative rules at national level (preparation, consultation, adoption, adaptation of existing ones) as well as with the introduction of scrutiny procedures. As regards cross-border conversions and divisions, in Member States where there are no cross-border procedures, the impact would be bigger than in other Member States where such procedures exist and they would only need to be adapted. There is no impact on the EU budget.

## 5. OTHER ELEMENTS

### **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will assist the Member States to transpose the proposed rules and will monitor their implementation. In this context, the Commission will cooperate closely with national authorities e.g. the national company law experts in the Company Law Expert Group (CLEG). In that context, the Commission may provide assistance and guidance (e.g. by organising implementation workshops or providing advice on bilateral basis).

The monitoring would consist of analysing trends in cross-border operations activities of companies through the notifications of cross-border conversions, mergers and divisions via the system of interconnection of business registers (BRIS), through collection of costs for cross-border conversions as far as possible, and whether and to what extent stakeholders and stakeholder organisations indicate satisfaction with the protection of their rights in the relevant cross-border operations. The development of the case-law of the Court of Justice of the European Union in the area will also be monitored.

With a view to gathering the required stakeholder input, the Commission could send questionnaires to stakeholders or organise specific surveys.

An evaluation should be carried out in order to assess the impact of the proposed measures and verify if the objectives have been achieved. It would be carried out by the Commission on the basis of the information gathered during the monitoring exercise and additional input collected from the relevant stakeholders, as necessary. An evaluation report should be issued after enough experience is gained from the application of proposed.

The provision of information for monitoring and evaluation should not impose any unnecessary administrative burden on the stakeholders concerned.

### **Explanatory documents (for directives)**

The proposal is amendment to the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. To ensure the proper implementation of this complex directive, the explanatory document, e.g. in the form of correlation tables would be necessary.

### **Detailed explanation of the specific provisions of the proposal**

#### *Cross-border conversions*

Article 86a: this article describes the scope of the proposal which sets up an EU legal framework regulating the cross-border conversions of private and public limited liability companies.

Article 86b: this article contains definitions. The definition of the cross-border conversion is based on the jurisprudence of the Court of Justice and entails the change of a legal form of the company from the departure Member State into the legal form of the destination Member State.

Article 86c: this provision sets out the conditions under which cross-order conversions can be carried out, the verification of them and applicable law. In particular, it lays down the requirement that companies that are subject to insolvency or similar proceedings cannot carry out the cross-border conversion as regulated in this Directive. In addition, pursuant to the general principle that EU law cannot be invoked to justify abuse of rights as established in the ECJ's case law, a conversion cannot be authorised when it is determined, after examination of

the individual case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or unlawfully prejudicing the legal or contractual rights of employees, creditors or members.

Article 86d: the provision sets the minimum scope of information to be provided in the draft terms of the cross-border conversion which will be made publically available for every person interested for this operation. The draft terms will have to provide information regarding the change of company form, and regarding the company resulting from the conversion as well as the protection offered for the relevant stakeholders: in particular shareholders, creditors and employees. This article stresses the importance of draft terms but also increases as much as possible the ease in their compilation in that it offers companies a possibility to draft them, in addition to the official language or languages of the Member States concerned, also in the language most commonly used in business transactions; thereby the Member State may determine which language version is the decisive one in case of discrepancies.

Article 86e: this article sets out the requirement for preparing a report for shareholders explaining in detail the aim of the cross-border conversion, the company's plans and the safeguards for shareholders. The report shall in particular include the impact of the conversion on the activity of the company and its interests, on the interests of shareholders and the measures to protect them. The report should be also available to the employees. In line with the principle of proportionality, the report may be waived if all members of the company so agreed.

Article 86f: this article requires a report to be drawn by the company addressing issues essential for the employees of the company carrying out a cross-border conversion. This report shall explain the implications of the cross-border conversion for employees. It shall be made available to the representatives of the employees or to the employees themselves in case there are no such representatives. The provision further clarifies that the provision of the report is without prejudice to the applicable information and consultation proceeding already provided for in the acquis.

Article 86g: this article concerns the examination by an independent expert. The accuracy of the information provided in the draft terms of the cross-border conversion and in the reports of the management or administrative organ shall be subject to the assessment by an independent expert appointed by the competent authority. The report shall also include all relevant information about the company and intended cross-border conversion allowing the competent authority to assess inter alia whether the operation constitutes an artificial arrangement. The article further sets out the procedure, timeline and the competences of the independent expert, including the protection of confidential information. In line with the principle of proportionality, micro and small enterprises are exempted from the requirement of an independent expert report.

Article 86h: this article lays down for the rules for the disclosure of the draft terms of the cross-border conversion and the independent expert report which should be publicly available free of charge. At the same time, the disclosure will include a notice inviting members, creditors and employees of the company to submit comments. The disclosure requirements shall guarantee an immediate access to the draft terms for the protection of the relevant stakeholders. This article sets out the principle that the draft terms shall be disclosed in the business register as the most common point of reference for stakeholders. Member States may allow a company to disclose the draft terms on its website, but in that case the most important information will still be required to be disclosed in the business register. The article provides



for a possibility for Member States to preserve additional publication in the national gazette and charge fees for it. In order to facilitate the access to the disclosed information, the disclosed draft terms of cross-border conversion, the notice and the independent expert report must be accessible to the public free of charge. Fees charged for the disclosure may not go beyond the administrative cost of the service.

Article 86i: this article lays down the requirement of approval of the draft terms of cross-border conversion by the general meeting. A similar requirement exists in the case of cross-border mergers. Member States may set out the requirements for the qualified majority of the votes cast for the approval of the draft terms; however, the required majority requirements may not exceed the requirements applicable for cross-border mergers.

Article 86j: this article provides for safeguards for shareholders and establishes an exit right for those shareholders that oppose the cross-border conversions. This applies for either those who did not vote for the cross-border conversion or those that do not agree with the conversion but do not have voting rights. The company, remaining shareholders or third parties, upon the request of the members concerned, should acquire their shares in exchange for an adequate compensation. In case the shareholders consider that the cash compensation offered has been inadequately set, they are entitled to challenge its amount before the courts of the departure Member State.

Article 86k: this article provides for various safeguards for creditors. Member States may provide that the converting company should make a declaration as part of the draft terms of the cross-border conversion stating that the conversion will not affect the ability to satisfy the obligations towards third parties and that creditors will not be prejudiced.

Creditors will also have the right to apply to the competent administrative or judicial authority to grant them adequate protection. The authorities will apply the rebuttable presumption that the creditors are not prejudiced if an independent expert report concluded that there was no reasonable likelihood that the rights of creditors would be prejudiced or if the company offered a right to payment either against a third party guarantor or against the converted company for the original value of the claim in question on condition that it may be brought before the same jurisdiction as the original claim. The article also clarifies that the provisions on creditor protection shall be without prejudice to the application of national laws concerning the satisfaction or securing of payments owed to public bodies.

Article 86l: this article deals with the participation of employees in the company carrying out a conversion, where the protection of the rights of participation is put at risk by the operation. In principle, the company will have to follow the respective rules of the destination Member State, unless the national law of that Member State does not provide for the same level of the employees' participation in the company's management or supervisory organs. This article will also apply if the number of the employees exceeds four fifths of the threshold set out in the national law of the departure Member State triggering the employee participation right pursuant to Article 2 of Directive 2001/86/EC, or irrespective of the number of the employees the rules of employees' participation in the destination Member State do not provide for the same level of the participation. If this is the case, the company will have to enter into negotiations with the employees to determine their participation. The negotiations will be obligatory, and will have to result either in a bespoke arrangement regulating the involvement of employees or, in case no agreement is reached within 6 months, the standard rules of employees' participation as laid down in the Annex (in particular point (a) of Part 3) of Directive 2001/86/EC will apply. In accordance with Directive 2001/86/EC, the negotiations

have to start as soon as possible after the draft terms of the conversion are made publically available. The company will have to preserve at least for three years in substance the employees' participation rights in case of subsequent operations like mergers, divisions or conversion. The company will be obliged to communicate the outcome of the negotiations to its employees.

Articles 86m and 86n: these articles govern the assessment of the legality of cross-border conversions by the competent authority of a departure Member State. This Member State shall assess the completion of the cross-border conversion in respect to the procedure governed by the respective national law. The rules are based on the corresponding principles provided for in Regulation (EC) No 2157/2001 for the SE and in the rules related to cross-border mergers. The competent authority of the departure Member State shall conduct an assessment of the formal completion of the procedure by the company and additionally shall determine whether the intended conversion does not constitute an artificial arrangement as referred to above. In case the authority has serious concerns that the cross-border conversion may constitute an artificial arrangement, it may perform an in-depth assessment.

Article 86o lays down provisions related to review of the decisions taken by the national competent authority as regards the issuance or refusal to issue the pre-conversion certificate. It also deals with the availability of such decision through the interconnection system and the transmission of the pre-conversion certificate to the destination Member State by digital means of communication.

Article 86p governs the scrutiny of legality of the cross-border conversion by the destination Member State. The authority of that Member State checks in particular the incorporation requirements and the results of the negotiations on employee participation, where applicable.

Article 86q governs the arrangements to disclose the completion of the registration and the information which must be entered into the registers. The information on the registration should be exchanged between the registers automatically, so that the departure Member State would immediately be able to take actions for the striking off the company from its business register.

Article 86r stipulates that the cross-border conversion takes effect from the day of registration of the converted company in the destination Member State.

Article 86s: this provision describes the consequences of the cross-border conversion.

Article 86t: the provision stipulates that Member States should lay down rules on the liability of the independent expert.

Article 86u: the validity of the cross-border conversion cannot be challenged if the procedure for the cross-border conversion was respected.

### *Cross-border mergers*

Article 119 is amended to include into a definition of a cross-border merger as an operation between companies in which a company being acquired transfers all its assets and liabilities into the acquiring company without issuing new shares. Such an operation will fall under the scope of this Article, if the merging companies are owned by the same person or the

ownership structure in all merging companies remains identical after the completion of the operation.

Article 120 is extended to cover more situations where companies shall be excluded from the scope of application, for example where proceedings of winding-up, liquidation or insolvency have been instituted or suspension of payments is on-going.

Article 121 is amended by deleting references to protection of creditors and protection for minority shareholders because these will be harmonised under Articles 126a and 126b.

Article 122 is amended to specify that the common draft terms of cross-border merger shall also include the offer of cash compensation for members who did not vote for the merger as well as safeguards offered to creditors. Additionally, it provides for a language regime of the common draft terms of cross-border mergers

A new Article 122a is added which introduces rules on determination of the date from which the transactions of the merging companies will be treated for accounting purposes

The amended Article 123 provides, as a default rule, for the disclosure of the common draft terms in the business registers of the merging companies. Alternatively, Member States have a possibility to exempt companies from the disclosure obligation in the business registers, in case companies make the draft terms available on their websites and fulfil specific conditions in this regard. In the latter case, companies must disclose certain specific information in the business registers. Companies must, in principle, be able to submit the necessary information fully on-line without the need for physical presence before any national authority, unless there is a genuine suspicion of fraud. The access to such information must be free of charge. In addition, Member States may publish the common draft terms in the national gazette, in this case the national register shall submit the relevant information to the national gazette (once-only principle).

The amended Article 124 specifies that the report addressed to the members of the merging company shall explain the implications of the cross-border merger on the future business and the management's strategic plan as well as the implications of the cross-border merger for members. In addition, the report shall explain the share exchange ratio and describe any special valuation difficulties as well as remedies available to certain members. The report must also be available to the employees. The report may be waived if all members of the merging companies agree.

The new Article 124a sets out that each of the merging companies shall provide employees with a report that addresses the important issues for the employees in the context of the cross-border merger. The representatives of the employees or the employees themselves in cases where there are no representatives will have the right to express their opinion. The opinion must be submitted to shareholders and appended to the report.

The new Article 126a provides for safeguards for members. It establishes an exit right for those members that oppose the merger. This applies for either those who did not vote for the approval of the cross-border merger or those that do not agree with the merger but do not have voting rights. The company, remaining members, or third parties in agreement with the company must acquire the shares of the members exercising the exit right in exchange for adequate cash compensation. Since the existing rules on cross-border mergers already provide for the appointment of an independent expert (Article 125), this expert shall also review the adequacy of the cash compensation. If the members consider that the offered cash compensation has been inadequately set, they are entitled to demand for its recalculation by the national court. Members wishing to remain in the company have also right to challenge

the share-exchange ratio which shall be explained and justified in the report referred to in Article 124.

The new Article 126b provides for safeguards for creditors. First, Member States may require management or administrative organ of the merging company to make a declaration stating that they are not aware of any reason why the company resulting from the merger should not be able to meet its liabilities. Secondly, creditors who are dissatisfied with the protection offered to them in the draft terms of merger shall have the right to apply to the competent authority for adequate safeguards. However, the competent authority shall apply a rebuttable presumption that the creditors are not prejudiced by the cross-border merger if the company has offered a right to payment (against a third party guarantor or the company resulting from the merger) of the equivalent value to their original claim which may be brought before the same jurisdiction as the original claim, or if the independent expert report, which was disclosed to creditors, confirmed that the company would be able satisfy its creditors. The provisions on creditor protection shall be without prejudice to the application of national laws concerning the satisfaction or securing of payments owed to public bodies.

The modified Articles 127 and 128 stipulate that for the purposes of the pre-merger certificate and scrutiny of legality of the cross-border merger, companies shall be able to file any information and documents fully on-line. In addition, the Articles set out that the pre-merger certificates must be transmitted through the system of interconnection of registers (BRIS) to the Member State authority which will scrutinise the legality of the cross-border merger. It is further stipulated that the pre-merger certificate(s) must be accepted as a conclusive evidence of the proper completion of pre-merger acts and formalities. Member States, in case of genuine suspicion of fraud, shall be able to require physical presence before a competent authority.

Article 131 is amended by explaining that all the assets and liabilities of the company being acquired or of the merging companies include all their contracts, credits, rights and obligations.

Article 132 is amended by extending the simplified formalities to the situation in which the cross-border merger is carried out by companies where one person holds all shares. In addition, in cases where no general meeting is required in any of the merging companies, Article 132 lays down a specific reference date for the disclosure of the common draft terms of cross border merger and the reports of the management or administrative organ of the merging companies.

Article 133 paragraph 7 which stipulates that during 3 years following the cross-border merger, the company would not be able to perform a subsequent domestic merger which would result in undermining the system of employee participation is amended to cover all possible subsequent domestic operations (i.e. mergers, divisions and conversions) and not only domestic mergers. In addition, Article 133 is amended by adding an obligation for companies to communicate to their employees whether the company decides to apply standard rules or whether it decides to enter into negotiations with employees. In the latter case, the company shall inform the employees of the results of the negotiations.

A new Article 133a is added addressing Member States' rules on the civil liability of the independent expert.

## *Cross-border divisions*

Article 160a sets out the scope of the proposal which regulates the cross-border divisions of private and public limited liability companies.

Article 160b contains definitions. To ensure the consistency with the existing EU acquis in the company law area, the provisions of the cross-border divisions legal framework apply to the same companies as the provisions on cross-border conversions.

Article 160c sets further limitations for the application of this Chapter.

Article 160d sets out the conditions under which cross-order divisions can be carried out, the verification of them and applicable law. In particular, it lays down the requirement that companies that are subject to insolvency or similar proceedings cannot be the object of division as regulated in this Directive. In addition, pursuant to the general principle that EU law cannot be invoked to justify abuse of rights as established in the ECJ's case law, a cross-border division cannot be authorised when it is determined, after examination of each individual case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or unlawfully prejudicing the legal or contractual rights of employees, creditors or members.

Article 160e: the provision sets the minimum scope of information to be provided in the draft terms of the cross-border division which will be made publically available for every person interested in operation. The draft terms will have to provide information regarding the company being divided, the registered office, the allotment of shares in the recipient companies, share exchange ratio, allotment of assets and liabilities between recipient companies as well as and the protection offered for the relevant stakeholders: shareholders, creditors and employees. This article stresses the importance of draft terms but also increases as much as possible the ease in their compilation in that it offers companies a possibility to draft them, in addition to the official language or languages of the Member States concerned, also in the language most commonly used in business transactions; in such case, the Member State may determine which language version is the decisive one in case of discrepancies.

Article 160f sets out rules to determine the date from which the transactions of the company being divided will be treated for accounting purposes as being those of the recipient companies.

Article 160g: this article sets out the requirement for preparing a report for shareholders explaining in detail the aim of the division, the company's plans and the safeguards for shareholders. The report shall in particular include the impact of the division on the activity of the company and its interests, on the interests of shareholders and the measures to protect them. The report should be also available to the employees. In line with the principle of proportionality, the report may be waived if all members of the company so agreed.

Article 160h: this article requires a report to be drawn by the company addressing issues essential for the employees of the company carrying out a cross-border division. This report shall describe and assess the impact of the division for the terms of the employment agreements of the employees. It shall be made available to the representatives of the employees or to the employees themselves in case there are no such representatives. The provision further clarifies that the provision of the report is without prejudice to the applicable information and consultation proceeding already provided for in the acquis.

Article 160i concerns the examination by an independent expert. The accuracy of the information provided in the draft terms of the cross-border division and in the reports of the management or administrative organ shall be subject to the assessment by an independent expert report appointed by the competent authority. The report shall also include all relevant information about the company and intended division allowing the competent authority to assess inter alia whether the operation constitutes an artificial arrangement. The article further sets out the procedure, timeline and the competences of the independent expert, including the protection of confidential information.

In line with the principle of proportionality, micro and small enterprises are exempted from the requirement of an independent expert report.

Article 160j: this article lays down the rules for the disclosure of the draft terms of the cross-border division and the independent expert report which should be publicly available free of charge. At the same time, the disclosure will include a notice inviting members, creditors and employees of the company to submit comments. The disclosure requirements shall guarantee an immediate access to the draft terms for the protection of the relevant stakeholders. This Article sets out the principle that the draft terms shall be disclosed in the business register as the most common point of reference for stakeholders. Member States may allow a company to disclose the draft terms on its website, but in that case the most important information will still be required to be disclosed in the business register. The Article provides for a possibility for Member States to preserve additional publication in the national gazette and charge fees for it.

In order to facilitate the access to the disclosed information, the disclosed draft terms of cross-border division, the notice and the expert report must be accessible to the public free of charge. Fees charged for the disclosure may not go beyond the administrative cost of the service.

Article 160k: this article lays down the requirement of approval of the draft terms of cross-border division by the general meeting of a company being divided. A similar requirement exists in the case of cross-border mergers. Member States may set out the requirements for the qualified majority of the votes cast for the approval of the draft terms; however, the required majority requirements may not exceed the requirements applicable for cross-border mergers.

Article 160l provides for safeguards for shareholders and establishes an exit right for those shareholders that oppose the cross-border divisions. This applies for either those who did not vote for the cross-border division or those that do not agree with the division but do not have voting rights. The company, remaining shareholders or third parties must acquire the shares of the members exercising the exit right in exchange for adequate cash compensation. The independent expert shall review the adequacy of the cash compensation. If the shareholders consider that the offered cash compensation has been inadequately set, they are entitled to challenge its amount before the courts of the departure Member State. Members wishing to remain in the company have also right to challenge the share-exchange ratio which shall be explained and justified in the report referred to in Article 160g.

Article 160m provides for safeguards for creditors. Member States may provide that the company being divided should make a declaration as part of the draft terms of the cross-border division stating that the division will not affect the ability to satisfy the obligations towards third parties and that the creditors will not be prejudiced.

Creditors will also have the right to apply to the competent administrative or judicial authority to grant them adequate protection. The authorities will apply the rebuttable presumption that the creditors are not prejudiced if an independent expert report concluded that there was no reasonable likelihood that the rights of creditors would be prejudiced or if the company being divided offered a right to payment either against a third party guarantor or against the converted company for the original value of the claim in question on condition that it may be brought before the same jurisdiction as the original claim. The provisions on creditor protection shall be without prejudice to the application of national laws concerning the satisfaction or securing of payments owed to public bodies.

Article 160n deals with the participation of employees in the management or supervisory organs of the companies involved in the cross-border division, where existing participation rights in the company being divided are put at risk by the cross-border division. In principle, the employee participation in the recipient companies would have to follow the respective rules of Member States where these companies will be registered, unless the national laws of these Member States do not provide for the same level of the employees' participation in the company's administrative or supervisory organs as existing in the company being divided. This article will also apply, if the number of the employees exceeds 4/5 of the threshold set out in the national law of the Member State of the company being divided triggering the employee participation right pursuant to article 2 of Directive 2001/89/EC, or despite the number of the employees the rules of employees' participation in the Member States of recipient companies do not provide for the same level of the participation. If this is the case, the company will have to enter into negotiations with the employees to determine their participation in the recipient companies. The negotiations will be obligatory, and will have to result either with bespoke arrangements regulating the involvement of employees or, in case no agreement is reached within 6 months, the standard rules of employees' participation as laid down in the Annex (in particular Part 3 of Directive 2001/86/EC will apply). In accordance with Directive 2001/86/EC, the negotiations have to start as soon as possible after the draft terms of the cross-border division are made publically available. The recipient companies will have to preserve at least for three years in substance the employees' participation rights in case of subsequent operations like mergers, divisions or conversions. The company will be obliged to communicate the outcome of the negotiations to its employees.

Article 160o and 160p: these articles govern the assessment of the legality of the cross-border division by the competent authority of a Member State to which jurisdiction the company being divided is subject. This Member State shall assess the completion of the cross-border division in respect to the procedure governed by the respective national law. The rules are based on the corresponding principles provided for in Regulation (EC) No 2157/2001 for the SE and in the rules related to cross-border mergers. The competent authority of that Member State shall conduct an assessment of the formal completion of the procedure by the company and additionally shall determine whether the intended division does not constitute an artificial arrangement as referred to above.

In case the authority has serious concerns that the cross-border conversion may constitute an artificial arrangement, it should perform an in-depth assessment.

Article 160q lays down provisions related to review of the decisions taken by the national competent authority as regards the issuance or refusal to issue the pre-conversion certificate. It also deals with the availability of such decision through the interconnection system and the

transmission of the pre-conversion certificate to the destination Member State. These articles also mandate the use of digital communication between business registers in order to exchange decisions issued by the competent authorities.

Article 160r governs the scrutiny of legality of the cross-border division by each of the Member States concerned. The authorities of recipient companies check, in particular, the incorporation requirements and the results of the negotiations on employee participation, where applicable.

Article 160s sets out the arrangements concerning the registration of a division and information that must be made publically available. The information on the registration should be exchanged between the registers automatically via the system of interconnection of registers.

Article 160t: the law of the Member State of the company being divided determines the date on which the cross-border division takes effect.

Article 160u: this provision describes the consequences of the cross-border division.

Article 160v: the provision stipulates that Member States should lay down rules on the liability of the independent expert.

Article 160w: the validity of the cross-border division cannot be challenged if the procedure for the cross-border division was respected.

#### *Reporting and review*

Article 3: sets out the obligation for the Commission to evaluate this Directive, including an assessment of the feasibility of providing rules for types of cross-border divisions which are not covered by this Directive. Member States shall contribute to the report by providing relevant data.



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**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to 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,

Whereas:

- (1) The Directive (EU) 2017/1132 of the European Parliament and of the Council<sup>2</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.
- (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

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

<sup>2</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).

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 so define. Article 54 of the TFEU places the factor of the registered office, the central administration and the principal place of business of a company or firm at the same degree of connection. Therefore, as clarified in case-law,<sup>3</sup> where the Member State of new establishment, namely the destination Member State, requires only the transfer of the registered office as a connecting factor for the existence of a company under its national legislation, 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. The choice of the specific form of company in cross-border mergers, conversions and divisions or the choice of a Member State of establishment are inherent in the exercise of the freedom of establishment guaranteed by the TFEU as part of a Single Market.
- (4) These developments in the case-law have opened up new opportunities for companies and firms 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 (in particular the protection of workers), the protection of creditors and the protection of shareholders. Such objectives, in the absence of harmonised rules specifically regarding cross-border conversions, are pursued by Member States through a number of multifarious legal provisions and administrative practices. As a result, whereas companies are already able to merge cross-border, they experience a number of legal and practical difficulties when wishing to perform a cross-border conversion. Moreover, the national legislation of many Member States provides for the procedure of domestic conversions without offering an equivalent procedure for converting cross-border.
- (5) This 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 shareholders within the Single Market.
- (6) It is appropriate therefore to provide procedural and substantive rules on cross-border conversions which would contribute to the abolition of restrictions on freedom of establishment and provide at the same time adequate and proportionate protection for stakeholders such as employees, creditors and minority shareholders.
- (7) The right to convert an existing company formed in a Member State into a company governed by another Member State may in certain circumstances be used for abusive purposes such as for the circumvention of labour standards, social security payments, tax obligations, creditors', minority shareholders' rights or rules on employees

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<sup>3</sup> Judgment of the Court of Justice of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, ECLI:EU:C:2017:804, paragraph 29.

participation. In order to combat such possible abuses, a general principle of Union law, Member States are required to ensure that companies do not use the cross-border conversion procedure in order to create artificial arrangements aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members. In so far as it constitutes a derogation from a fundamental freedom, the fight against abuses must be interpreted strictly and be based on an individual assessment of all relevant circumstances. A procedural and substantive framework which describes the margin of discretion and allows for the diversity of approach by Member States whilst at the same time setting out the requirements to streamline the actions to be taken by national authorities to fight abuses in conformity with Union law should be laid down.

- (8) The carrying out of a cross-border conversion entails a change of legal form for a company without losing its legal personality. However, it should not lead to the circumvention of the requirements for incorporation in the destination Member State. Such conditions, including the requirements to have a head office in the destination Member State and those relating to the disqualification of directors, should be fully respected by the company. However, the application of such conditions by the destination Member State may not affect the continuity of the converted company's legal personality. A company may convert into any legal form which exists in the destination Member State, in accordance with Article 49 of the TFEU.
- (9) Given the complexity of cross-border conversions and the multitude of the interests concerned, it is appropriate to provide for an ex-ante control in order to create legal certainty. To that effect, a structured and multi-layered procedure should be set out whereby the competent authorities of both the departure and the destination Member State ensure that a decision on the approval of a cross-border conversion is taken in a fair, objective and non-discriminatory manner on the basis of all relevant elements and by taking into account all legitimate public interests, in particular, the protection of employees, members and creditors.
- (10) To allow all stakeholders' legitimate interests to be taken into account in the procedure governing a cross-border conversion, the company should disclose the draft terms of the cross-border conversion containing the most important information about the proposed cross-border conversion, including the envisaged new company form, the instrument of constitution and the proposed timetable for the conversion. Members, creditors and employees of the company carrying out the cross-border conversion should be notified in order that they can submit comments with regard to the proposed conversion.
- (11) In order to provide information to its members, the company carrying out the cross-border conversion should prepare a report. The report should explain and substantiate the legal and economic aspects of the proposed cross-border conversion, in particular the implications of the cross-border conversion for members with regard to the future business of the company and the management organ's strategic plan. It should also include potential remedies available to members, where they do not agree with the decision to carry out a cross-border conversion. This report should also be made available to the employees of the company carrying out cross-border conversion.
- (12) In order to provide information to its employees, the company carrying out the cross-border conversion should prepare a report explaining the implications of the proposed cross-border conversion for employees. The report should explain in particular the implications of the proposed cross-border conversion on the safeguarding of the jobs

of the employees, whether there would be any material change in the employment relationships and the locations of the companies' places of business and how each of these factors would relate to any subsidiaries of the company. This requirement should not however apply where the only employees of the company are in its administrative organ. The provision of the report should be without prejudice to the applicable information and consultation proceedings instituted at national level following the implementation of Directive 2002/14/EC of the European Parliament and of the Council<sup>4</sup> or Directive 2009/38/EC of the European Parliament and of the Council<sup>5</sup>.

- (13) In order to assess the accuracy of the information contained in the draft terms of conversion and in the reports addressed to the members and employees and to provide factual elements necessary to assess whether the proposed conversion constitutes an artificial arrangement, an independent expert report should be required to be prepared in order to assess the proposed cross-border conversion. In order to secure the independence of the expert, the expert should be appointed by the competent authority, following an application by the company. In this context, the expert report should present all relevant information to enable the competent authority in the departure Member State to take an informed decision as to whether or not to issue the pre-conversion certificate. To this end, the expert should be able to obtain all the relevant company information and documents and carry out all necessary investigations in order to gather all the evidence required. The expert should use information, in particular net turnover and profit or loss, number of employees and the composition of balance sheet collected by the company in view of the preparation of financial statements in accordance with Union law and the law of Member States. However, in order to protect any confidential information, including business secrets of the company, such information should not form part of the expert's final report which itself would be publically available.
- (14) With a view to avoiding disproportionate costs and burdens for smaller companies carrying out the cross-border conversion, micro and small enterprises, as defined in the Commission Recommendation 2003/361/EC<sup>6</sup>, should be exempted from the requirement to produce an independent expert report. However, these companies can resort to an independent expert report to prevent litigation costs with creditors.
- (15) On the basis of the draft terms of conversion and the reports, the general meeting of the members of the company should decide on whether or not to approve those draft terms. It is important that the majority requirement for such a vote should be sufficiently high in order to ensure that the decision to convert is a collective one. In

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<sup>4</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>5</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 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>6</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

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.

- (16) It is appropriate that those members who held voting rights and who did not vote to approve the draft terms of conversion and those members without voting rights, who could not present their position, should be afforded the right to exit the company. Those members should be able to leave the company and receive cash compensation for their shares equivalent to the value of their shares. Furthermore, they should have a right to challenge the calculation and adequacy of that cash compensation offered before a court.
- (17) The company carrying a cross-border conversion should also set out in the draft terms of conversion measures to ensure the protection of creditors. In addition, in order to strengthen the protection of creditors in the case of insolvency of the company following the cross-border conversion, Member States should be allowed to require the company to make a declaration of solvency stating that it is not aware of any reason why the converted company should not be able to meet its 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.
- (18) 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 of the cross-border conversion, creditors may apply to the competent judicial or administrative authority of the departure Member State for the adequate safeguards. In order to facilitate the assessment of prejudice, certain presumptions should be laid down whereby creditors would be deemed not to be prejudiced by a cross-border conversion, where the risk of loss to a creditor is remote. A presumption should arise where an independent expert report concludes that there is no reasonable likelihood that the creditors would be prejudiced or where creditors are offered a right to payment against the converted company or against a third party guarantee of equivalent value to the creditor's original claim and which can be brought in the same jurisdiction as the original claim. The creditor protection provided for in this Directive should be without prejudice to national laws of the Member State of departure concerning payment to public bodies, including taxation or social security contributions.
- (19) In order to ensure that employee participation is not unduly prejudiced as a result of the cross-border conversion, where the company carrying out the cross-border conversion is operating under an employee participation system in the departure Member State, the company 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 in the destination Member State. Moreover, in such a case, a bona fide negotiation between the company and its employees should take place, 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 conversion 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 three years.

- (20) In order to prevent the circumvention of employee participation rights by means of a cross-border conversion, the company carrying out a conversion which is registered in the Member State which provides for the employee participation rights, should not be able to perform a cross-border conversion 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.
- (21) To ensure a proper allocation of tasks among Member States and an efficient and effective ex-ante control of cross-border conversions, both the departure and the destination Member States should designate the appropriate competent authorities. In particular, the competent authorities of the departure Member States should have the power to issue a pre-conversion certificate without which the competent authorities in the destination Member State should not be able to complete the cross-border conversion procedure.
- (22) The issue of the pre-conversion certificate by the departure Member State should be scrutinised to ensure the legality of the cross-border conversion of the company. The competent authority of the departure Member State should decide on the issue of the pre-conversion certificate within one month of the application by the company, unless it has serious concerns as to the existence of an artificial arrangement aimed at obtaining undue tax advantages or unduly prejudicing the legal or contractual rights of employees, creditors or members. In such a case, the competent authority should carry out an in-depth assessment. However, this in-depth assessment should not be carried out systematically, but it should be conducted on a case-by-case basis, where there are serious concerns as to the existence of an artificial arrangement. For their assessment, competent authorities should take into account at least a number of factors laid down in this Directive which however should be only considered as indicative factors in the overall assessment and not be considered in isolation. In order not to burden companies with an overly lengthy procedure, this in-depth assessment should in any event be concluded within two months of informing the company that the in-depth assessment will be carried out.
- (23) After having received a pre-conversion certificate, and after verifying that the incorporation requirements in the destination Member State are fulfilled, the competent authorities of the destination Member State should register the company in the business register of that Member State. Only after this registration should the competent authority of the departure Member State strike the company off its own register. It should not be possible for the competent authority of the destination Member State to challenge the accuracy of the information provided by the pre-conversion certificate. 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.
- (24) In order to provide for the appropriate level of transparency and use of digital tools and processes, the decisions of competent authorities in the departure and destination Member States should be exchanged by means of the system of interconnection of business registers and should be made publically available.
- (25) The exercise of the freedom of establishment by a company includes also the possibility of a company merge cross-border. Directive 2017/1132 of the European

Parliament and of the Council provides, amongst other matters, for rules to enable the cross-border mergers of limited liability companies established in different Member States. These rules represent a significant milestone in improving the functioning of the Single Market for companies by enabling them to exercise the freedom of establishment through the mechanism of cross-border merger.

- (26) The evaluation of the implementation of the cross-border merger rules in Member States has shown that the number of cross-border mergers in the Union has significantly increased. However, this evaluation has also revealed certain shortcomings in relation specifically to creditor protection and shareholder protection as well as to the lack of simplified procedures which impede the full effectiveness and efficiency of those cross-border merger rules.
- (27) In its Communication entitled ‘Upgrading the Single Market: more opportunities for people and business’<sup>7</sup>, the Commission announced that it would assess the need to update the existing rules on cross-border mergers 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’<sup>8</sup>, the Commission announced an initiative to facilitate the implementation of cross-border mergers.
- (28) In order to further enhance the existing cross-border merger procedure, it is necessary to simplify those merger rules, where appropriate, whilst at the same time ensuring that stakeholders, and in particular employees, are adequately protected. Therefore, the existing cross-border merger rules should be modified in order to oblige the management or administrative organs of the merging companies to prepare separate reports detailing the legal and economic aspects of the cross-border merger for both members and for employees. The obligation on the management or administrative organ of the company to prepare the report for the members may however be waived, where those members are already informed about legal and economic aspects of the proposed merger. However, the report prepared for employees may only be waived where the merging companies and their subsidiaries do not have any employees other than those who form part of the management or administrative organ.
- (29) Furthermore, in order to enhance the protection afforded to the employees of the merging company or companies, employees or their representatives may provide their opinion on the company report setting out the implications of the cross-border merger for them. The provision of the report should be without prejudice to the applicable information and consultation proceedings instituted at national level following the implementation of Council Directive 2001/23/EC<sup>9</sup>, Directive 2002/14/EC or Directive 2009/38/EC.

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<sup>7</sup> COM(2015) 550 final of 28 October 2015.

<sup>8</sup> COM(2016) 710 final of 25 October 2016.

<sup>9</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).

- (30) Divergences in accounting rules may impede the operation of cross-border mergers and may lead to legal uncertainty where there is a difference in the date on which the acquired company's transactions become treated for accounting purposes as those of the company resulting from the merger between Member States. This may lead to a situation where, during a specific time, transactions related to the merging company are not reported at all or during that period there is a duplication of reporting obligations for that merging company in its original Member State as a separate accounting entity and in the Member State of the company resulting from the merger. Therefore, the accounting date should be determined according to clear rules and Member States should ensure that this date is treated, for accounting purposes, as the single definite date by the national laws of all parties to the merger.
- (31) The lack of harmonisation of safeguards for members or creditors has been identified an obstacle for cross-border mergers by different stakeholders. Members and creditors should be offered the same level of protection regardless of the Member States in which the merging companies are situated. This is without prejudice to the Member States' rules on protecting creditors or shareholders which are outside the scope of the harmonised measures, such as transparency requirements.
- (32) In order to ensure that members of the companies participating in the cross-border merger are treated equally, it is appropriate that members who held voting rights and who did not vote to approve the common draft terms of merger or those members without voting rights, who could not present their position, should be afforded the right to exit the company. Those members should be able to leave the company and receive cash compensation for their shares equivalent to the value of their shares. Furthermore, they should have a right to challenge the calculation and adequacy of that cash compensation offered before a court.
- (33) Following a cross-border merger, the former creditors of the merging companies may see their claims diminish in value where the liabilities of the acquiring company exceed its assets or where the merging 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 merger process and leads to uncertainty both for the companies involved and for their creditors in relation to the recovery or satisfaction of their claim.
- (34) Companies involved in a cross-border merger should propose adequate measures to protect their creditors in the common draft terms of merger. In addition, in order to strengthen the protection of those creditors in case of insolvency following the cross-border merger, Member States should be allowed to require the merging companies to make a declaration of solvency stating that they are not aware of any reason why the company resulting from the merger should not be able to meet its 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 statement. 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 inaccurate or misleading declarations, including effective and proportionate sanctions and liabilities in compliance with Union law.
- (35) 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 common draft terms of the cross-border merger, creditors who are prejudiced by the cross-border merger may apply to the competent administrative or judicial authority of each Member State of



the merging companies for the safeguards they consider adequate. In order to facilitate the assessment of prejudice, certain presumptions should be laid down whereby creditors would be deemed not to be prejudiced by a cross-border merger, where the risk of loss to a creditor is remote. A presumption should arise where an independent expert concludes that there is no reasonable likelihood that the creditors would be prejudiced or where creditors are offered a right to payment against the merged company or against a third party guarantee of equivalent value to the creditor's original claim and which can be brought in the same jurisdiction as the original claim.

- (36) The existing Union law does not provide for a legal framework for cross-border divisions of companies and firms, since Directive (EU) 2017/1132 only provides rules in Chapter III for domestic divisions of public limited companies.
- (37) The European Parliament has called upon the Commission to adopt harmonised rules on cross-border divisions. This 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.
- (38) This directive lays down rules on cross-border divisions, both for partial and full divisions, but only through the formation of new companies. However, 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 fraud and the circumvention of those rules.
- (39) In case of a cross-border division involving newly formed recipient companies, those recipient companies, which are governed by the laws of Member States other than those of the Member State of the company being divided, should be required to comply with the incorporation requirements of those Member States. Such conditions include those related to the disqualification of directors.
- (40) The right of companies to carry out a cross-border division may in certain circumstances be used for abusive purposes such as for the circumvention of labour standards, social security payments, tax obligations, creditors' or members' rights or rules on employees participation. In order to combat such abuses, as a general principle of Union law, Member States are required to ensure that companies do not use the cross-border division procedure in order to create artificial arrangements aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members. In so far as it constitutes a derogation from a fundamental freedom, the fight against abuses must be interpreted strictly and must be based on an individual assessment of all relevant circumstances. A procedural and substantive framework which describes the margin of discretion and allows for the diversity of approaches by Member States whilst at the same time setting out the requirements to streamline the actions to be taken by national authorities to fight abuses in conformity with Union law should be laid down.
- (41) Given the complexity of cross-border divisions and the multitude of the interests concerned, it is appropriate to provide for an ex-ante control in order to create legal certainty. To that effect, a structured and multi-layered procedure should be set out whereby both the competent authorities of the Member State of the company being divided and of the Member State of the recipient companies ensure that a decision on the approval of a cross-border division is taken in a fair, objective and non-

discriminatory manner on the basis of all relevant elements and by taking into account all legitimate public interests, in particular the protection of employees, shareholders and creditors.

- (42) To allow all stakeholders' legitimate interests to be taken into account, the company being divided should disclose the draft terms of the division containing the most important information about the proposed cross-border division, including the envisaged the exchange ratio of securities or shares, the instruments of constitution of the recipient companies and the proposed timetable for the cross-border division. Members, creditors and employees of the company carrying out the cross-border division should be notified that they can submit comments with regard to the division.
- (43) In order to provide information to its members, the company being divided should prepare a report. The report should explain and substantiate the legal and economic aspects of the proposed cross-border division, in particular explaining the implications of the cross-border division for members with regard to the future business of the company and the management organs' strategic plan. It should also include explanations about the exchange ratio, where applicable, the criteria to determine the allocation of shares and potential remedies available to members, where they do not agree with the decision to carry out a cross-border division.
- (44) In order to provide information its employees, the company being divided should prepare a report explaining the implications of the proposed cross-border division for employees. The report should explain in particular the implications of the proposed cross-border division on the safeguarding of the jobs of the employees, whether there would be any material change in the conditions of employment and the locations of the companies' places of business, and how each of these factors would relate to any subsidiaries of the company. The provision of the report should be without prejudice to the applicable information and consultation proceedings instituted at national level following the implementation of Directives [2001/23/EC](#), [2002/14/EC](#) or [2009/38/EC](#).
- (45) In order to ensure the accuracy of the information contained in the draft terms of division and in the reports addressed to the members and employees and to provide factual elements necessary to assess whether the proposed division constitutes an artificial arrangement which could not be authorised, an independent expert report to assess the division plan should be required to be prepared. In order to secure the independence of the expert, the expert should be appointed by the competent authority, following an application by the company. In this context, the expert report should present all relevant information to enable the competent authority of the Member State of the company being divided to take an informed decision as to whether or not to issue the pre-division certificate To this end, the expert should be able to obtain all the relevant company information and documents and carry out all necessary investigations in order to gather all the evidence required. The expert should use information, in particular net turnover and profit or loss, number of employees and the composition of balance sheet collected by the company in view of the preparation of financial statements in accordance with Union law and the law of Member States. However, in order to protect any confidential information, including business secrets of the company, such information should not form part of the expert's final report which itself would be publically available.
- (46) With a view to avoiding disproportionate costs and burdens for smaller companies carrying out cross-border division, micro and small enterprises as defined in the

Commission Recommendation 2003/361/EC of 6 May 2003 should be exempted from the requirement to have produce an independent expert.

- (47) On the basis of the draft terms of the cross-border division and the reports, the general meeting of the members of the company being divided, should decide on whether or not to approve those draft terms. It is important that, the majority requirement for such a vote should be sufficiently high in order to ensure that the decision to divide is a collective one.
- (48) It is appropriate that members who held voting rights and who did not vote to approve the draft terms of the cross-border division and those members without voting rights, who could not present their position, should be afforded the right to exit the company. Those members should be able to leave the company and receive cash compensation for their shares equivalent to the value of their shares. Furthermore, they should have a right to challenge the calculation and adequacy of that cash compensation offered and also the share exchange ratio where they wish to remain members of any of the recipient companies before a court. As part of those proceedings, the court should be able to order any company involved in the cross-border division either to pay additional cash compensation or to issue additional shares.
- (49) The company being divided should propose in the draft terms adequate means to protect creditors in view of the cross-border division. In addition, in order to strengthen the protection of creditors in case of insolvency following the cross-border division, Member States should be allowed to require the company to make a declaration stating that it is not aware of any reason why the converted company should not be able to meet its liabilities. Member States should be able to make management organ personally liable for the accuracy of the statement. Since legal traditions vary among Member States with regard to solvency declarations and their possible consequences, it should be up to Member States to draw appropriate consequences of false or misleading declarations, including sanctions and liabilities in compliance with Union law.
- (50) 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 of the cross-border division, creditors who are prejudiced by the cross-border division may apply to the competent judicial or administrative authority of the Member State of the company being divided for the safeguards they consider adequate. In order to facilitate the assessment of prejudice, certain presumptions should be laid down whereby creditors would be deemed not to be prejudiced by a cross-border division where the risk of loss to a creditor is remote. A presumption should arise where an independent expert report concludes that there is no reasonable likelihood that the creditors would be prejudiced or where creditors are offered a right to payment against the company resulting from the division or against a third party guarantee of equivalent value to the creditor's original claim and which can be brought in the same jurisdiction as the original claim. The creditor protection provided for in this Directive should be without prejudice to national laws of the Member State of the company being divided concerning payment to public bodies, including taxation or social security contributions.
- (51) To ensure the proper allocation of tasks among Member States and an efficient and effective ex-ante control of cross-border divisions, the competent authority of the Member State of the company being divided should have the power to issue a pre-

division certificate without which the authorities of the Member States of the recipient companies should not be able to complete the cross-border-division procedure.

- (52) The issue of the pre-division certificate by the Member State of the company being divided should be scrutinised to ensure the legality of the cross-border division. The competent authority should decide whether to issue a pre-division certificate within one month of the application by the company has been submitted, unless it has serious concerns as to the existence of an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members. In such a case, the competent authority should carry out an in-depth assessment. However, this in-depth assessment should not be carried out systematically but it should be conducted on a case-by-case basis where there are serious concerns as to the existence of an artificial arrangement. For their assessment, competent authorities should take into account at least a number of factors laid down in this Directive which however should be only considered as indicative factors in the overall assessment and not be considered in isolation. In order not to burden companies with an overly lengthy procedure, this in-depth assessment should in any event be concluded within two months informing the company that the in-depth assessment will be carried out.
- (53) After having received a pre-division certificate, and after verifying that the incorporation requirements of the Member State of the recipient company or companies are fulfilled, the authorities of the Member States of the recipient companies should register the companies in the business registers of that Member State. Only after this registration should the competent authority of the Member State of the company being divided strike the company off its own register. The accuracy of the information provided by the pre-division certificate cannot be challenged by the competent authorities of the Member States of the recipient companies.
- (54) As a consequence of the cross-border division, the assets and liabilities of the company being divided shall 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 shall become members of the recipient companies or remain members of the company being divided or shall become members of both.
- (55) In order to ensure that employee participation is not unduly prejudiced as a result of the cross-border division where the company carrying out the cross-border division is operating under an employee participation system, the companies resulting from the division should be obliged to take a legal form allowing for the exercise of participation, including through the presence of representatives of the employees in the appropriate management or supervisory organs of the companies. Moreover, in such a case, a bona fide negotiation between the company and its employees should take place, 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 division 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 conversions, mergers or divisions within 3 years.

- (56) In order to prevent the circumvention of the employee participation rights by means of a cross-border division, the company carrying out a division which is registered in the Member State which provides for the employee participation rights, should not be able to perform a cross-border division 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.
- (57) To guarantee the employees' rights other than rights of participation, Directive 2009/38/EC, Council Directive 98/59/EC<sup>10</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.
- (58) 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.
- (59) This Directive does not affect the provisions of Directive (EU) 2015/849 of the European Parliament and the Council<sup>11</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.
- (60) 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 Treaty on European Union. 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.
- (61) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (62) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>12</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

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<sup>10</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).

<sup>11</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.

<sup>12</sup> OJ C 369, 17.12.2011, p. 14.

instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

- (63) The Commission should carry out an evaluation of this Directive. 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>13</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.
- (64) 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.
- (65) 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 24, point (e) is replaced by the following:

"(e) the detailed list of data to be transmitted for the purpose of exchange information between registers, as referred to in Articles 20, 34, 86h, 86o, 86p, 86q, 123, 127, 128, 130, 160j, 160q, 160r and 160s";

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

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

- (3) 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

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<sup>13</sup> OJ L123, 12.5. 2016, p. 1.

administration or principal place of business within the Union into a company governed by the law of another Member State.

2. Member States shall take the necessary measures to establish a procedure for cross-border conversion referred to in paragraph 1.
3. Member States may decide not to apply this Chapter to cross-border conversions involving a cooperative society even in the case where the latter would fall within the definition of a 'limited liability company' as laid down in Article 86a(1).
4. 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.

#### *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;
- (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 a company of a destination Member State 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;
- (5) 'register' means the central, commercial or companies register referred to in Article 16(1);
- (6) 'converted company' means the newly formed company in the destination Member State from the date upon which the cross-border conversion takes effect.

#### *Article 86c* **Conditions relating to cross-border conversions**

1. Member States shall ensure that where a company intends to carry out a cross-border conversion, the departure and destination Member States verify that the cross-border conversion complies with the conditions laid down in paragraph 2.
2. A company shall not be entitled to carry out a cross border conversion in any of the following circumstances:
  - (a) proceedings have been instituted for the winding-up, liquidation, or insolvency of that company;

- (b) the company is subject to preventive restructuring proceedings initiated because of the likelihood of insolvency;
  - (c) the suspension of payments is on-going;
  - (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(\*);
  - (e) preventive measures have been taken by the national authorities to avoid the initiation of proceedings referred to in points (a), (b) or (d).
3. Member States shall ensure that the competent authority of the departure Member State shall not authorise the cross-border conversion where it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members.
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 conversion***

1. The management or administrative organ of the company which intends to carry out a cross-border conversion 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:
- (a) the legal form, name and registered office of the company in the departure Member State;
  - (b) the legal form, name and location of its registered office proposed for the company resulting from the cross-border conversion in the destination Member State;
  - (c) the instrument or instruments of the constitution of a company in the destination Member State;
  - (d) the proposed 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) details of the safeguards offered to the creditors;
  - (g) the date from which the transactions of the company formed and registered in the departure Member State will be treated for accounting purposes as being those of the converted company;
  - (h) any special advantages granted to members of the administrative, management, supervisory or controlling organ of the converted company;



- (i) details of the offer of cash compensation for the members opposing the cross-border conversion 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 and on the possible options for such arrangements.
2. In addition to the official languages of the departure and destination Member States, Member States shall allow the company carrying out the cross-border conversion to use a language customary in the sphere of international business and finance in order to draw up the draft terms of a cross-border conversion and all other related documents. Member States shall specify which language will prevail in the case of discrepancies identified between the different linguistic versions of those documents.

#### *Article 86e*

##### ***Report of the management or administrative organ to the members***

1. The management or administrative organ of the company carrying out the cross-border conversion shall draw up a report explaining and justifying the legal and economic aspects of the cross-border conversion.
2. The report referred to in paragraph 1, shall in particular explain the following :
  - (a) the implications of the cross-border conversion on the future business of the company and on the management's strategic plan;
  - (b) the implications of the cross-border conversion for members;
  - (c) the rights and remedies available to members opposing the conversion in accordance with Article 86j.
3. The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the members not less than two months before the date of the general meeting referred to in Article 86i. That report shall also be made similarly available to the representatives of the employees of the company carrying out the cross-border conversion or, where there are no such representatives, to the employees themselves.
4. However, that report shall not be required where all the members of the company carrying out the cross-border conversion have agreed to waive this requirement.

#### *Article 86f*

##### ***Report of the management or administrative organ to the employees***

1. The management or administrative organ of the company carrying out the cross-border conversion shall draw up a report explaining the implications of the cross-border conversion for employees.
2. The report referred to in paragraph 1, shall in particular explain the following:
  - (a) the implications of the cross-border conversion on the future business of the company and on the management's strategic plan;
  - (b) the implications of the cross-border conversion on the safeguarding of employment relationships;

- (c) any material changes in the conditions of employment and in the location of the company's places of business;
  - (d) whether the factors set out in points (a), (b) and (c) also relate to any subsidiaries of the company.
3. The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the representatives of the employees of the company carrying out the cross-border conversion or, where there are no such representatives, to the employees themselves not less than two months before the date of the general meeting referred to in Article 86i. That report shall also be made similarly available to the members of the company carrying out the cross-border conversion.
  4. Where the management or administrative organ of the company carrying out the cross-border conversion receives, in good time, an opinion 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.
  5. However, where a company carrying out the cross-border conversion and its subsidiaries, if any, have no employees other than those who form part of the management or administrative organ, the report referred to in paragraph 1 shall not be required.
  6. Paragraphs 1 to 6 are without prejudice to the applicable information and consultation rights and proceedings instituted at national level following the transposition of Directives 2002/14/EC or 2009/38/EC.

#### *Article 86g*

#### ***Examination by an independent expert***

1. Member States shall ensure that the company carrying out the cross-border conversion applies not less than two months before the date of the general meeting referred to in Article 86i to the competent authority designated in accordance with Article 86m(1), to appoint an expert to examine and assess the draft terms of the cross-border conversion and the reports referred to in Articles 86e and 86f, subject to the proviso set out in paragraph 6 of this Article.

The application for the appointment of an expert shall be accompanied by the following:

- (a) the draft terms of the cross-border conversion referred to in Article 86d;
  - (b) the reports referred to in Articles 86e and 86f.
2. The competent authority shall appoint an independent expert within five working days from the application referred to in paragraph 1 and the receipt of the draft terms and reports. The expert shall be independent from the company carrying out the cross-border conversion and may be a natural or a legal person depending upon the law of the departure Member State. Member States shall take into account, in assessing the independence of the expert, the framework established in Articles 22 and 22b of Directive 2006/43/EC.
  3. The expert shall draw up a written report providing at least:
    - (a) a detailed assessment of the accuracy of the reports and information submitted by the company carrying out the cross-border conversion;

- (b) a description of all factual elements necessary for the competent authority, designated in accordance with Article 86m(1), to carry out an in-depth assessment to determine whether the intended cross-border conversion constitutes an artificial arrangement in accordance with Article 86n, including at a minimum the following: the characteristics of the establishment in the destination Member State, including the intent, 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, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the converted company in the destination Member State and the departure Member State.
4. Member States shall ensure that the independent expert shall be entitled to obtain, from the company carrying out the cross-border conversion, all relevant information and documents and to carry out all necessary investigations to verify all elements of the draft terms or management reports. The expert shall also be entitled to receive comments and opinions from the representatives of the employees of the company, or, where there are no such representatives, from the employees themselves and also from the creditors and members of the company.
5. Member States shall ensure that information submitted to the independent expert can only be used for the purpose of drafting their report and that confidential information, including business secrets, shall not be disclosed. Where appropriate, the expert may submit a separate document containing any such confidential information to the competent authority, designated in accordance with Article 86m(1) and that separate document shall only be made available to the company carrying out the cross-border conversion and not be disclosed to any other party.
6. Member States shall exempt 'micro' and 'small enterprises' as defined in [Commission Recommendation 2003/361/EC](#) (\*\*) from the provisions of this Article.

*Article 86h*  
**Disclosure**

1. Member States shall ensure that a departure Member State discloses and makes publically available in the register, at least one month before the date of the general meeting which is to decide thereon, the following documents:
- (a) the draft terms of the cross-border conversion;
  - (b) the independent expert report referred to in Article 86g, where applicable;
  - (c) a notice informing the members, creditors and employees of the company carrying out the cross-border conversion that they may submit, before the date of the general meeting, comments concerning the documents referred to in points (a) and (b) of the first subparagraph to the company and to the competent authority designated in accordance with Article 86m(1).

The documents referred to in the first subparagraph shall also be accessible by means of the system referred to in Article 22.

2. Member States may exempt the company carrying out a cross-border conversion 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

which is to decide on the draft terms of conversion 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 intending to carry out the cross-border conversion discloses the draft terms of the cross-border conversion in accordance with paragraph 2, it shall submit at least one month before the date of the general meeting which is to decide thereon to the register of the departure Member State, the following information:
  - (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 carrying out the cross-border conversion, and the entry 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 draft terms of the cross-border conversion, the notice and the expert report referred 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 to appear in person before any competent authority in the departure Member State.

However, Member States may, in cases of genuine suspicion of fraud based on reasonable grounds, require a physical presence before a competent authority.

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. 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 in paragraph 1 is accessible by the public free of charge. Member States shall further ensure that any fees charged to the company carrying out the cross-border conversion 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 administrative costs of providing the service.

#### *Article 86i*

#### ***Approval by the general meeting***

1. After taking note of the reports referred to in Articles 86e, 86f and 86g, where applicable, the general meeting of the company carrying out the conversion shall decide, by means of a resolution, whether to approve the draft terms of the cross-

border conversion. The company shall inform the competent authority designated in accordance with Article 86m(1) of the decision of the general meeting.

2. The general meeting of the company carrying out the conversion 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 any amendment to the draft terms of the cross-border conversion 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. In any event the voting threshold shall not be higher than that provided for in national law for the approval of cross-border mergers.
4. The general meeting shall also decide whether the cross-border conversion would necessitate amendments to the instruments of constitution of the company carrying out the conversion.
5. Member States shall ensure that the approval of the cross-border conversion by the general meeting cannot be challenged solely on the ground that the cash compensation referred to in Article 86j has been inadequately set.

#### *Article 86j*

#### ***Protection of members***

1. Member States shall ensure that the following members of a company carrying cross-border conversion have the right to dispose of their shareholdings under the conditions laid down in paragraphs 2 to 6:
  - (a) the members holding shares with voting rights and who did not vote for the approval of the draft terms of the cross-border conversion;
  - (b) the members holding shares without voting rights.
2. Member States shall ensure that the members referred to in paragraph 1, may dispose of their shareholdings, in consideration of adequate cash compensation paid, once the cross-border conversion has taken effect in accordance with Article 86r, to one or more of the following:
  - (a) the company carrying out the cross-border conversion;
  - (b) the remaining members of that company;
  - (c) third parties in agreement with the company carrying out the conversion.
3. Member States shall ensure that a company carrying out a cross-border conversion makes an offer of adequate compensation in the draft terms of the cross-border conversion as specified in the Article 86d(1)(i) to the members, referred to in paragraph 1 of this Article, who wish to exercise their right to dispose of their shareholdings. Member States shall also establish the period for the acceptance of the offer, which shall not in any event exceed one month after the general meeting referred to in Article 86i. Member States shall further ensure that the company is able to accept an offer communicated electronically to an address provided by the company for that purpose.

However, the acquisition by the company carrying out a cross-border conversion of its own shares shall be without prejudice to national rules governing the acquisition by a company of its own shareholdings.

4. Member States shall ensure that the offer of cash compensation is conditional upon the cross-border conversion taking effect in accordance with Article 86r. Member States shall further establish the period within which the cash compensation is to be paid, which shall not in any event exceed one month after the cross-border conversion takes effect.
5. Member States shall provide that any member who has accepted the offer of cash compensation referred to in paragraph 3 but who considers that the compensation has not been adequately set, is entitled to demand the recalculation of the cash compensation offered before a national court within one month of the acceptance of the offer.
6. Member States shall ensure that the law of the departure Member State governs the rights referred to in paragraphs 1 to 5 and that the courts of that Member State shall have jurisdiction. Any member who has accepted the offer of cash compensation to acquire its shares shall be entitled to institute or to be a party to proceedings referred to in paragraph 5.

#### *Article 86k*

#### ***Protection of creditors***

1. Member States may require that the management or administrative organ of the company carrying out the cross-border conversion provides a declaration accurately reflecting the financial status of the company as part of the draft terms of cross-border conversion referred to in Article 86d. 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 made no earlier than one month before the draft terms of the cross-border conversion are disclosed in accordance with Article 86h.
2. Member States shall ensure that creditors who are dissatisfied with the protection of their interests provided for in the draft terms of the cross-border conversion, as provided for in Article 86d(f), may apply to the appropriate administrative or judicial authority for adequate safeguards within one month of the disclosure referred to in Article 86h.
3. The creditors of the company carrying out the cross-border conversion shall be presumed not to be prejudiced by a cross-border conversion in either of the following circumstances:
  - (a) where the company discloses together with the draft terms of conversion an independent expert report, which concluded that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced. The independent expert should be appointed or approved by the competent authority and shall fulfil the requirements laid down in Article 86g(2);
  - (b) where creditors are offered a right to payment, either against a third party guarantor, or against the company resulting from the cross-border conversion of at least equivalent value to their original claim, which may be brought in the same jurisdiction as their original claim, and which is of a credit quality at least commensurate with the creditor's original claim immediately after the completion of the conversion.

4. Paragraphs 1, 2 and 3 are without prejudice to the application of national laws of the departure Member State concerning the satisfaction of or securing payments due to public bodies.

#### *Article 86l*

#### ***Employee participation***

1. Without prejudice to paragraph 2, the company resulting from the cross-border conversion 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 company resulting from the conversion 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), (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 indent of the first subparagraph of Article 3(4), the second subparagraph of Article 3(4), Article 3(5), the third subparagraph of Article 3(6) 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) the first subparagraph of Article 7(1);
  - (f) Articles 8, 9, 10 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 carrying out the conversion 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 default 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 company carrying out the conversion is operating under an employee participation system, that company 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 three 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 the outcome of the negotiations concerning employee participation without undue delay.

#### *Article 86m*

#### ***Pre-conversion certificate***

1. Member States shall designate the 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 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.
2. Member States shall ensure that the application to obtain a pre-conversion certificate by the company carrying out the cross-border conversion is accompanied by the following:
  - (a) the draft terms of conversion referred to in Article 86d;
  - (b) the reports referred to in Articles 86e, 86f and 86g, as appropriate;



- (c) information on the resolution of the general meeting to approve the conversion referred to in Article 86i.

The draft terms and reports submitted under Article 86g do not have to be re-submitted to the competent authority.

3. Member States shall ensure that the application referred to in paragraph 2, 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.

However, in cases of genuine suspicion of fraud based on reasonable grounds Member States may require a physical presence before a competent authority where relevant information and documents are required to be submitted.

4. In respect of compliance with the rules concerning employee participation as laid down in Article 86l, the departure Member State shall verify that the draft terms of 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 of legality referred to in paragraph 1, the competent authority, shall examine the following:

- (a) the documents and information referred to in paragraph 2;
- (b) all comments and opinions submitted by interested parties in accordance with Article 86h(1);
- (c) an indication by the company that the procedure referred to in Article 86l(3) and (4) has started, where relevant.

6. 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.

7. Member States shall ensure that the assessment by the competent authority is carried out within one month of the date of receipt of the information concerning the approval of the conversion by the general meeting of the company. It shall have one of the following outcomes:

- (a) where the competent authority determines that the cross-border conversion falls within the scope of the national provisions transposing this Directive, that it 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 the competent authority determines that the cross-border conversion does not fall within the scope of the national provisions transposing this Directive, the competent authority shall not issue the pre-conversion certificate and shall inform the company of the reasons for its decision. The same shall apply to the situations in which the competent authority determines that the cross-border conversion does not meet all the relevant conditions or that not all necessary procedures and formalities have been completed and the company, after being invited to take the necessary steps, has failed to do so;
- (c) where the competent authority has serious concerns that the cross-border conversion constitutes an artificial arrangement referred to in Article 86c(3), it

may decide to carry out an in-depth assessment in accordance with Article 86n and shall inform the company about its decision to conduct such an assessment and of the subsequent outcome.

#### *Article 86n*

##### ***In-depth assessment***

1. Member States shall ensure in order to assess whether the cross-border conversion constitutes an artificial arrangement within the meaning of Article 86c(3), that the competent authority of the departure Member State carries out an in-depth assessment of all relevant facts and circumstances and shall take into account at a minimum the following: the characteristics of the establishment in the destination Member State, including the intent, 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, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the converted company in the destination Member State and the departure Member State.

Those elements may be only considered as indicative factors in the overall assessment and therefore shall not be considered in isolation.

2. Member States shall ensure that where the competent authority referred to in paragraph 1 decides to carry out an in-depth assessment, it is able to hear the company and all parties that have submitted observations pursuant Article 86h(1)(c) in accordance with national law. The competent authorities referred to in paragraph 1 may also hear any other interested third parties in accordance with national law. The competent authority shall take its final decision regarding the issue of the pre-conversion certificate within two months from the start of the in-depth assessment.

#### *Article 86o*

##### ***Review and transmission of the pre-conversion certificate***

1. Member States shall ensure that, where the competent authority of the departure Member State is not a court, the decision of the competent authority to issue or to refuse to issue a pre-conversion certificate, is subject to judicial review in accordance with national law. In addition, Member States shall ensure that a pre-conversion certificate shall not be effective before the expiry of a certain period to allow parties to bring an action before the competent court and to obtain, where appropriate, interim measures.
2. Member States shall ensure that the decision to issue the pre-conversion certificate is sent to the authorities referred to in Article 86m(1) and that the decisions to issue or refuse to issue a pre-conversion certificate are available through the system of interconnection of registers set up in accordance with Article 22.

#### *Article 86p*

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

1. Member States shall designate an 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 the conversion complies with all the relevant conditions and the proper completion of all procedures and formalities in the destination Member State.

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 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 to appear in person before the competent authority referred to in paragraph 1.

However, in cases of genuine suspicion of fraud based on reasonable grounds, Member States may require a physical presence before a competent authority of a Member State where relevant information and documents are required to be submitted.

4. The competent authority referred to in paragraph 1 shall, without delay, confirm receipt of the pre-conversion certificate referred to in Article 86m and the other information and documents required by the law of the destination Member State. It shall issue a decision to 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 paragraph 4 shall be accepted by the competent authority, referred to in paragraph 1, as conclusive evidence of 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) the entry number in the register of the converted company as a result of a cross-border conversion;
  - (b) the date of registration of the converted company in the destination Member State;
  - (c) the date of striking off or removal of the company carrying out the cross-border conversion from the register in the departure Member State;

- (d) the registration numbers in the departure Member State of the company carrying out the conversion and 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 converted company has been registered. Member States shall also ensure that the registration of the company carrying out the conversion be removed immediately upon receipt of that notification but not before.

#### *Article 86r*

#### ***Date on which the cross-border conversion takes effect***

The cross-border conversion shall take effect from the date of registration of the converted company in the destination Member State, following the scrutiny of legality and approval referred to in Article 86p.

#### *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 have the following consequences:
- (a) all the assets and liabilities of the company carrying out the cross-border conversion including all contracts, credits, rights and obligations shall be transferred to and shall continue with the converted company
  - (b) the members of the company which carried out the conversion shall become members of the converted company, unless they exercise the exit right referred to in Article 86j(2);
  - (c) the rights and obligations of the company carrying out the cross-border conversion arising from contracts of employment or from employment relationships and existing at the date on which the cross-border conversion takes effect shall, by reason of that cross-border conversion taking effect, be transferred to the company resulting from the cross-border conversion on the date on which the cross-border conversion takes effect.
  - (d) the place of the registered office of the converted company in the departure Member State may be relied upon until such time as the company carrying out the conversion has been struck off from the register in the departure Member State, unless it may be proven that a third party knew, or ought to have known, of the registered office in the destination Member State.
2. Any activity of the converted company carried out after the date of registration in the destination Member State and before the company carrying out the conversion has been struck off from the register in the departure Member State shall be treated as the activity of the converted company.
3. The converted company shall be liable for any losses arising from any differences in national legal systems of the Member States of departure and destination, where any contracting party or counterparty of the company carrying out the conversion had not been informed of the cross-border conversion by that company prior to concluding that contract.

*Article 86t*  
***Liability of the independent experts***

Member States shall lay down rules governing at least the civil liability of the independent experts responsible for drawing up the reports referred to in Articles 86g and 86k(2)(a), including in respect of any misconduct on their part in the performance of their duties.

*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.

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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).
- (\*\*) Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).";
- (4) 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.";
- (5) Article 120, paragraph 4 is replaced by the following :
- "4. Member States shall ensure that this Chapter does not apply to the company or companies where:
- (a) proceedings have been instituted for the winding-up, liquidation, or insolvency of that company or companies;
- (b) the company is subject to preventive restructuring proceedings initiated because of the likelihood of insolvency;
- (c) the suspension of payments is on-going;
- (d) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU;
- (e) preventive measures have been taken by the national authorities to avoid the initiation of proceedings referred to in points (a), (b) or (d).";
- (6) 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.";
- (7) Article 122 is amended as follows:
- (a) point (i) is replaced by the following:
 

"(i) the instrument or instruments of constitution 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 members opposing the cross-border merger in accordance with Article 126a;

(n) details of the safeguards offered to creditors.";
  - (c) the following second subparagraph is added:
 

"In addition to the official language of each Member State of the merging companies, Member States shall allow the merging companies to use a language customary in the sphere of international business and finance to draw up the common draft terms of a cross-border merger and all other related documents. Member States shall specify which language will prevail in the case of discrepancies identified between the different linguistic versions of those documents.";
- (8) the following Article 122a is inserted:

*"Article 122a*  
*Accounting date*

1. Where the company resulting from the cross-border merger prepares financial annual statements in accordance with the international accounting standards provided for in Regulation (EC) No 1606/2002 of the European Parliament and of the Council(\*), the date from which the transactions of the merging companies shall be treated as those of the company resulting from the cross-border merger shall be determined in accordance with those accounting standards.

Notwithstanding the first subparagraph, the accounting date provided in the common draft terms of the cross-border merger, shall be the date on which the cross-border merger takes effect, as referred to in Article 129, unless the merging companies determine another date in order to facilitate the merger process. In that case the accounting date shall comply with the following requirements:

- (a) it may not be earlier than the date of the balance sheet of the last annual financial statements drawn up and published by any of the merging companies;
- (b) it shall enable the company resulting from the cross-border merger to draw up its annual financial statements, including the effects of the merger, in accordance with Union law and the law of Member States as at the balance sheet date immediately after the date upon which the cross-border merger takes effect.

2. Member States shall ensure that the date referred to in paragraph 1, is treated for accounting purposes as being the date from which the transactions of the merging companies will be treated as being those of the company resulting from the cross-border merger by the national laws of all merging companies.
3. Member States shall ensure that for the recognition and valuation of assets and liabilities in the financial statements to be transferred pursuant to the cross-border merger by acquisition, the accounting regime of the acquiring company shall be used as a common basis by all of the merging companies from the date specified in paragraph 1.

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(\*) Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).";

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

*"Article 123  
Disclosure*

1. Member States shall ensure that the common draft terms of the cross-border merger are disclosed and made publically available in their respective national registers, referred to in Article 16, at least one month before the date of the general meeting which is to decide thereon. Those common draft terms shall also be accessible by means of the system referred to in Article 22.
2. Member States may exempt merging companies from the requirement referred to in paragraph 1 where, for a continuous period beginning at least one month before the date fixed for the general meeting which is to decide on the common draft terms of the cross-border merger and ending not earlier than the conclusion of that meeting, those companies make the common draft terms of cross-border merger available on their websites free of charge.

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, the following information shall be disclosed at least one month before the date of the general meeting which is to decide thereon in the respective national registers referred to in Article 16:
  - (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 entry 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 and complete information on the arrangements referred to in point (c) may be obtained 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 to appear in person before any competent authority in any of the Member States concerned.
- However, Member States may, in cases of genuine suspicion of fraud based on reasonable grounds, require a physical presence before a competent authority.
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. In that instance, Member States shall ensure that the registers referred to in Article 16 transmit the relevant information to the national gazette.
7. Member States shall ensure that the disclosed common draft terms of the cross-border merger and the information referred to in paragraph 3 is accessible to the public free of charge. Member States shall further ensure that any fees charged to the merging companies by the registers for the disclosure referred to in paragraph 1 and 3 and, where applicable, for the publication referred to in paragraph 6 shall not exceed the administrative costs of providing the service.

#### *Article 124*

##### *Report of the management or administrative organ to the members*

1. The management or administrative organ of each of the merging companies shall draw up a report explaining and justifying the legal and economic aspects of the cross-border merger .
2. The report referred to in paragraph 1, shall in particular explain the following:
- (a) the implications of the cross-border merger on the future business of the company resulting from the merger and on the management's strategic plan;
  - (b) an explanation and justification of the share exchange ratio;
  - (c) a description of any special valuation difficulties which have arisen;
  - (d) the implications of the cross-border merger for members;
  - (e) the rights and remedies available to members opposing the merger in accordance with Article 126a.
3. The report shall be made available, at least electronically, to the members of each of the merging companies not less than one month before the date of the general meeting referred to in Article 126. The report shall also be made similarly available to the representatives of the employees of each of the merging companies, or where there are no such representatives, to the employees themselves. However, where the approval of the merger is not required by 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.

4. However, the report referred to in paragraph 1, shall not be required where all the members of the merging companies have agreed to waive this requirement.";
- (10) the following Article 124a is inserted:

*"Article 124a*

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

1. The management or administrative organ of each of the merging companies shall draw up a report explaining the implications of the cross-border merger for employees.
2. The report referred to in paragraph 1, shall in particular explain the following:
  - (a) the implications of the cross-border merger on the future business of the company and on the management's strategic plan;
  - (b) the implications of the cross-border merger on the safeguarding of the employment relationships;
  - (c) any material changes in the conditions of employment and in the locations of the companies' places of business;
  - (d) whether the factors set out in points (a), (b) and (c) also relate to any subsidiaries of the merging companies.
3. The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, 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 one month before the date of the general meeting referred to in Article 126. The report shall also be made similarly available to the members of each of the merging companies.

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

4. Where the management or administrative organ of one or more of the merging companies receives, in good time, an opinion 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 the report.
5. However, where the merging companies and their subsidiaries, if any, have no employees, other than those who form part of the management or administrative organ, the report referred in paragraph 1 shall not be required to be drawn up.
6. The submission of the report is without prejudice to the applicable information and consultation rights and proceedings instituted at national level following the implementation of Directives [2001/23/EC](#), [2002/14/EC](#) or [2009/38/EC](#).";

- (11) in Article 125(1), the following second subparagraph is added:

"Member States shall take into account, in assessing the independence of the expert, the framework established in Articles 22 and 22b of Directive [2006/43/EC](#).";

(12) Article 126 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. After taking note of the reports referred to in Articles 124, 124a and 125, as appropriate, 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.";

(b) the following paragraph 4 is added:

"4. Member States shall ensure that the resolution to approve a cross-border merger referred to in paragraph 1, cannot be challenged before the competent authority 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;
- (c) the total value of the shareholdings allocated to a member is not equivalent to the value of the shares held by that member in the company being merged.";

(13) the following Articles 126a and 126b are inserted:

*"Article 126a*  
***Protection of members***

1. Member States shall ensure that the following members of the merging companies have the right to dispose of their shareholding under the conditions laid down in paragraphs 2 to 6;
  - (a) the members holding shares with voting rights and who did not vote for the approval of the common draft terms of the cross-border merger;
  - (b) the members holding shares without voting rights.
2. Member States shall ensure that the members referred to in paragraph 1 of this Article, may dispose of their shareholdings in consideration of adequate cash compensation, paid, once the cross-border merger has taken effect in accordance with Article 129, to one or more of the following:
  - (a) the merging companies concerned;
  - (b) the remaining members of the merging companies concerned;
  - (c) third parties in agreement with the merging companies concerned.
3. Member States shall ensure that each of the merging companies makes an offer of adequate cash compensation in the common draft terms of the cross-border merger, as specified in Article 122(1)(m), to those members referred to in paragraph 1 of this Article who wish to exercise their right to dispose of their shareholdings. Member States shall also establish the period for the acceptance of the offer, which shall not in any event exceed one month after the general meeting referred to in Article 126 or, in cases where the approval of the general meeting is not required, within two months after the disclosure of the common draft terms of merger referred to in Article 123. Member States shall further ensure that the merging companies are able

to accept an offer communicated electronically to an address provided by those companies for that purpose.

However, the acquisition by the merging companies of its own shares shall be without prejudice to national rules governing the acquisition by a company of its own shareholdings.

4. Member States shall ensure that the offer of cash compensation is conditional upon the cross-border merger taking effect in accordance with Article 129. Member States shall further establish the period within which the cash compensation is to be paid, which shall not in any event exceed one month after the cross-border merger takes effect.
5. The independent expert appointed pursuant to Article 125 shall review the adequacy of the cash compensation. The expert shall have regard to any market price of those shares in the merging companies prior to the announcement of the merger proposal and to the value of the company excluding the effect of the proposed merger as determined according to generally accepted valuation methods.
6. Member States shall ensure that any member who has accepted the offer of cash compensation referred to in paragraph 3, but who considers that the cash compensation has not been adequately set, is entitled to demand the recalculation of the cash compensation offered before a national court within one month of the acceptance of the offer.
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 courts of that Member State shall have jurisdiction. Any member, who has accepted the offer of cash compensation to acquire its shares, shall be entitled to institute or to be a party to proceedings referred to in paragraph 6.
8. Member States shall also ensure that members of the merging companies who did not oppose the cross-border merger, but who consider that the share-exchange ratio is inadequate may challenge that share-exchange ratio, set out in the common draft terms of the cross-border merger referred to Article 122, before a national court within one month after the cross-border merger takes effect.
9. Member States shall ensure that where a national court finds that a share-exchange ratio has not been adequately set, the court has the power to order the company resulting from the cross-border merger to pay compensation to those members who successfully challenged the ratio. This compensation shall consist of an additional cash payment calculated on the basis of an adequate ratio applicable to the exchange of securities or shares as determined by the court. Upon request by any of these members or by the merging companies, the national court shall be empowered to order the company resulting from the cross-border merger to provide additional shares instead of the cash payment.
10. Member States shall ensure that the law applicable to the company resulting from the cross-border merger governs the obligation to pay additional cash compensation or to provide additional shares.

*Article 126b*  
***Protection of creditors***

1. Member States may require that the management or administrative organ of the merging company provides a declaration accurately reflecting the financial status of the company as part of the common draft terms of cross-border merger referred to in Article 122. 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 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 made no earlier than one month before the common draft terms of the cross-border merger are disclosed in accordance with Article 123.
  2. Member States shall ensure that creditors of the merging companies who are dissatisfied with the protection of their interests as provided for in the common draft terms of the cross-border merger, as provided for in Article 122(1)(n), may apply to the appropriate administrative or judicial authority for adequate safeguards within one month of the disclosure referred to in Article 123.
  3. The creditors of the merging companies shall be presumed not to be prejudiced by a cross-border merger in either of the following circumstances:
    - (a) where the merging companies disclose together with the draft terms of cross-border merger, an independent expert report, which concluded that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced. The independent expert should be appointed or approved by the competent authority and shall fulfil the requirements laid down in Article 125(1).
    - (b) where creditors are offered a right to payment, either against a third party guarantor, or against the company resulting from the merger of at least equivalent value to their original claim, which may be brought in the same jurisdiction as was their original claim, and which is of a credit quality at least commensurate with the creditor's original claim immediately after the completion of the merger.
  4. Paragraphs 1, 2 and 3 are without prejudice to the application of national laws of the Member State of the merging companies concerning the satisfaction of or securing payments due to public bodies.";
- (14) Article 127 is amended as follows:
- (a) in paragraph, 1, the following subparagraphs are added:

"Member States shall ensure that the application for obtaining a pre-merger certificate by the merging companies 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.

However, in cases of genuine suspicion of fraud based on reasonable grounds Member States may require a physical presence before a competent authority where relevant information and documents are required to be submitted.";
  - (b) in paragraph 2, the following subparagraph is added:

"Member States shall ensure that the certificate is sent to the authorities referred in Article 128(1) by means of the system of interconnection of registers in accordance with Article 22.";

(c) paragraph 3 is deleted;

(15) Article 128 is amended as follows:

(a) paragraph 2 is replaced by the following:

"2. For the purpose of paragraph 1 of this Article, each merging company shall submit to the authority referred to in that paragraph the common draft terms of cross-border merger, approved by the general meeting referred to in Article 126.";

(b) the following paragraphs 3 and 4 are added:

"3. Each Member State shall ensure that the application for the completion of the procedure, 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 to appear in person before any competent authority.

However, Member States may take measures in cases of genuine suspicion of fraud based on reasonable grounds which could require a physical presence before a competent authority of a Member State in which the relevant information and documents are required to be submitted.

4. The pre-merger certificate or certificates referred to in Article 127(2) shall be accepted by a competent authority of a Member State of a company resulting from the cross-border merger as conclusive evidence of the proper completion of the pre-merger acts and formalities in the respective Member State or Member States. The certificate shall be shared by the competent authority or authorities of the merging companies with the competent authority of the Member State of the company resulting from the merger through the system of interconnection of registers in accordance with Article 22.";

(16) Article 131 is amended as follows:

(a) in paragraph 1, point (a) is 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) in paragraph 2, point (a) is 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;"

(17) 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.";

(18) Article 133 is amended as follows:

(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 mergers, divisions or conversions for a period of three 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 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 the outcome of the negotiations without undue delay.";

(19) 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 Articles 125 and 126b(2)(a), including in respect of misconduct on their part in the performance of their duties.";

(20) In Title II, the following Chapter IV is added:

**"CHAPTER IV**

**Cross-border divisions of limited liability companies**

*Article 160a*  
***Scope***

1. 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 companies involved in the division are governed by the laws of different Member States ('cross-border division').

2. Member States shall take the necessary measures to establish a procedure for cross-border division referred to in paragraph 1.

#### *Article 160b*

##### ***Definitions***

For the purposes of this Chapter:

- (1) 'limited liability company', hereinafter referred to as 'company', means a company as defined in Annex II ;
- (2) 'company being divided' means a company which in a process of the cross-border division whereby it transfers all its assets and liabilities to one or more companies, or in case of a partial division it transfers part of its assets and liabilities to one or more companies;
- (3) 'division' means an operation whereby either:
  - (a) a company being divided, which has been wound up 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').

#### *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.
2. Member States may decide not to apply this Chapter to cross-border divisions involving a cooperative society even in the cases where the latter would fall within the definition of 'limited liability company' as laid down in Article 160b(1).
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.

#### *Article 160d*

##### ***Conditions relating to cross-border divisions***

1. Member States shall ensure that where a company intends to carry out a cross-border division, the Member State of the company being divided and of the recipient company or companies verify that the cross-border division complies with the conditions laid down in paragraph 2.
2. A company shall not be entitled to carry out a cross-border division in any of the following circumstances:
  - (a) proceedings have been instituted for the winding-up, liquidation, or insolvency of that company;
  - (b) the company is subject to preventive restructuring proceedings initiated because of the likelihood of insolvency;
  - (c) the suspension of payments is on-going;
  - (d) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU;
  - (e) the preventive measures have been taken by the national authorities to avoid the initiation of proceedings referred to in points (a), (b) or (d).
3. The Member State of the company being divided shall ensure that the competent authority shall not authorise the division when it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members.
4. 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***

1. The management or administrative organ of the company being divided shall draw up the draft terms of cross-border division. The draft terms of cross-border division shall include at least the following:
  - (a) the legal form, name and registered office 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 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) details of any special advantages granted to members of the administrative, management, supervisory or controlling organ 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;
- (j) any special advantages granted to the experts who examine the draft terms of cross-border division;
- (k) the instruments of constitution 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 and on the possible options for such arrangements;
- (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 opposing the cross-border division in accordance with Article 160l;
- (r) details of the safeguards offered to creditors.

2. Member States shall ensure that where an asset of the company being divided is not explicitly allocated under the draft terms of cross-border division and where the interpretation of these terms does not make a decision on its allocation possible, the asset or the consideration therefor is allocated to all the recipient companies or, in the case of a partial division, 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.
3. Member States shall also ensure that where a liability of the company being divided is not explicitly allocated under the draft terms of cross-border division the liability is allocated to 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. Similarly, any joint and several liability shall be limited to the value of the net assets allocated to each company at the date of the division.
4. In addition to the official languages of the Member States of the recipient companies and the one being divided, Member States shall allow the company to use a language customary in the sphere of international business and finance in order to draw up the draft terms of cross-border division and all other related documents. Member States shall specify which language will prevail in case of discrepancies among different linguistic versions of those documents.

*Article 160f*  
**Accounting date**

1. The management or administrative organ of the company being divided shall be entitled to determine the accounting date or dates in the draft terms of the cross-border division, in order to facilitate the division process.

The accounting date provided in the draft terms of the cross-border division shall be the date on which the cross-border division takes effect, as referred to in Article 160t unless the company determines other dates in order to facilitate the division process.

In that case each accounting date shall comply with the following requirements:

- (a) it may not be earlier than the date of the balance sheet of the last annual financial statements drawn up and published by the company being divided;
- (b) in respect of each recipient company, it may not be earlier than the date on which the recipient company was formed;
- (c) the dates referred to in points (a) and (b) shall enable the recipient companies, and in case of partial division the company being divided, to draw up their respective annual financial statements including the effects of the division, in accordance with Union law and the law of Member States as at the respective balance sheet date of the companies involved in the division immediately after the date upon which the cross-border division takes effect.

For the purposes of points (a) and (b), the determination of the accounting date may have regard to the accounting regime in use by a recipient company.

2. Member States shall ensure that the dates referred to in paragraph 1 are treated for accounting purposes as being the dates from which the transactions transferred by the company being divided will be treated as being those of each recipient company, by their national laws of all companies resulting from the cross-border division.

3. Member States shall ensure that for the recognition and valuation of assets and liabilities in the financial statements to be transferred pursuant to the cross-border division, the accounting regimes of the recipient companies shall be used from the respective dates specified in paragraph 1.

#### *Article 160g*

##### ***Report of the management or administrative organ to the members***

1. The management or administrative organ of the company being divided shall draw up a report explaining and justifying the legal and economic aspects of the cross-border division.
2. The report referred to in paragraph 1, shall in particular explain the following:
  - (a) the implications of the cross-border division on the future business of the recipient companies and, in the case of a partial division, also of the company being divided and on the managements' strategic plan;
  - (b) an explanation and justification of the share exchange ratio, where applicable;
  - (c) a description of any special valuation difficulties which have arisen;
  - (d) the implications of the cross-border division for members;
  - (e) the rights and remedies available to members opposing the cross-border division in accordance with Article 160l.
3. The report referred to in paragraph 1 of this Article shall be made available, at least electronically, to the members of the company being divided not less than two months before the date of the general meeting referred to in Article 160k. That report shall also be made similarly available to the representatives of the employees of the company being divided or, where there are no such representatives, to the employees themselves.
4. However, the report referred to in paragraph 1, shall not be required where all the members of the company being divided have agreed to waive this document.

#### *Article 160h*

##### ***Report of the management or administrative organ to the employees***

1. The management or administrative organ of the company being divided shall draw up a report explaining the implications of the cross-border division for employees.
2. The report referred to in paragraph 1 shall in particular explain the following:
  - (a) the implications of the cross-border division on the future business of the recipient companies and, in the case of a partial division, also of the company being divided and on the management's strategic plan;
  - (b) the implications of the cross-border division on the safeguarding of the employment relationships;
  - (c) any material change in the conditions of employment and the locations of the companies' places of business;
  - (d) whether the factors set out in points (a), (b) and (c) also relate to any subsidiaries of the company being divided.

3. The report referred to in paragraph 1 shall be made available, at least electronically, 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 two months before the date of the general meeting referred to in Article 160k. The report shall also be made similarly available to the members of the company being divided.
4. Where the management or administrative organ of the company being divided receives, in good time, an opinion 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.
5. However, where the company being divided and all of their subsidiaries, if any, have no employees, other than those who form part of the management or administrative organ, the report referred to in paragraph 1, shall not be required.
6. Paragraphs 1 to 5 are without prejudice to the applicable information and consultation rights and proceedings instituted at national level following the implementation of Directives 2001/23/EC, 2002/14/EC or 2009/38/EC.

#### *Article 160i*

#### ***Examination by an independent expert***

1. Member States shall ensure that the company being divided applies to the competent authority, designated in accordance with Article 160o(1), not less than two months before the date of the general meeting referred to in Article 160k, to appoint an expert to examine and assess the draft terms of cross-border division and the reports referred to in Articles 160g and 160h, subject to the proviso set out in paragraph 6 of this Article.

The application for the appointment of an expert shall be accompanied by the following

- (a) the draft terms of division referred to in Article 160e;
  - (b) the reports referred to in Articles 160g and 160h.
2. The competent authority shall appoint an independent expert within five working days of the application referred to in paragraph 1 and the receipt of the draft terms and reports. The expert shall be independent from the company being divided and may be a natural or a legal person depending upon the law of the Member State concerned. Member States shall take into account, in assessing the independence of the expert, the framework established in Articles 22 and 22b of Directive 2006/43/EC.
  3. The expert shall draw up a written report providing at least:
    - (a) an indication of the method or methods used to determine the share exchange ratio proposed;
    - (b) a statement as to whether the method or methods referred to in point (a) are adequate;
    - (c) a calculation of the values arrived at by using the methods referred to in point (a) and giving an opinion on the relative importance attributed to such methods in arriving at the value proposed;
    - (d) an assessment of whether the share exchange ratio is fair and reasonable;

- (e) a detailed assessment of the accuracy of the reports and information submitted by the company;
  - (f) a description of all factual elements necessary for the competent authority designated in accordance with Article 160o(1), to carry out an in-depth assessment to determine whether the intended cross-border division constitutes an artificial arrangement in accordance with Article 160p, at a minimum the following: the characteristics of the establishments in the Member States concerned of the recipient companies, including the intent, 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, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the company being divided in the Member States of the recipient companies.
4. Member States shall ensure that the independent expert shall be entitled to obtain from the company being divided all relevant information and documents and to carry out all necessary investigations to verify all elements of the draft terms or management reports. The independent expert shall also be entitled to receive comments and opinions from the representatives of the employees of the company, or, where there are no such representatives, employees themselves and also from the creditors and members of the company.
  5. Member States shall ensure that information submitted to the independent expert can only be used for the purpose of drafting the report and that confidential information, including business secrets, shall not be disclosed. Where appropriate, the expert may submit a separate document containing confidential information to the competent authority designated in accordance with Article 160o(1) and that separate document shall only be made available to the company being divided and not be disclosed to any third party.
  6. Member States shall exempt micro and small enterprises as defined in [Commission Recommendation 2003/361/EC \(\\*\\*\)](#) from the provisions of this Article.

*Article 160j*  
**Disclosure**

1. Member States shall ensure that the Member States of the company being divided discloses and makes publicly available in the register, at least one month before the date of the general meeting thereon, the following documents:
  - (a) the draft terms of the cross-border division;
  - (b) the independent expert report referred to in Article 160i, where applicable;
  - (c) a notice informing the members, creditors and employees of the company being divided that they may submit, before the date of the general meeting comments concerning the documents referred to in points (a) and (b) of the first subparagraph to the company and to the competent authority designated in accordance with Article 160o(1).

The documents referred to in the first subparagraph 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 which is to decide on the draft terms of division 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 which is to decide thereon, to the register, the following information:
  - (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 entry 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 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 to appear in person before any competent authority in the Member State concerned.

However, Member States may in cases of genuine suspicion of fraud based on reasonable grounds, require a physical presence before a competent authority.

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. In that instance, Member States shall ensure that the register transmits the relevant information to the national gazettes.
6. Member States shall ensure that the documentation referred in paragraph 1 is accessible by the public free of charge. Member States shall ensure that any fees charged to the company being divided by the registers for the disclosure referred to in paragraph 1 and 3 and, where applicable, for the publication referred to in paragraph 5 shall not exceed the administrative costs of providing the service.

*Article 160k*  
***Approval by the general meeting***

1. After taking note of the reports referred to in Articles 160g, 160h and 160i, where applicable, 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. The company shall inform the competent authority designated in accordance with Article 160o(1) of the decision of the general meeting.

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 any amendment to the draft terms of the cross-border division 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. In any event the voting threshold shall not be higher than that provided for in national law for the approval of cross-border mergers.
4. The general meeting shall also decide whether the cross-border division would necessitate amendments to the instruments of constitution of the company being divided.
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 has been inadequately set;
  - (b) the cash compensation referred to in Article 160l has been inadequately set;
  - (c) the total value of the shareholdings allocated to a member is not equivalent to the value of the shares held by that member in the company being divided.

#### *Article 160l*

#### ***Protection of members***

1. Member States shall ensure that the following members of a company being divided have the right to dispose of their shareholdings under the conditions laid down in paragraphs 2 to 6:
  - (a) the members holding shares with voting rights and, who did not vote for the approval of the draft terms of the cross-border division;
  - (b) the members holding shares without voting rights.
2. Member States shall ensure that the members referred to in paragraph 1, may dispose of their shareholdings, in consideration of adequate cash compensation paid, once the cross-border division has taken effect in accordance with Article 160t, by one or more of the following:
  - (a) the company being divided;
  - (b) the remaining members of that company;
  - (c) third parties, in agreement with the company being divided.
3. Member States shall ensure that a company being divided makes an offer of adequate cash compensation in the draft terms of the cross-border division as specified in Article 160e(1)(q) to the members, referred to in paragraph 1 of this Article, who wish to exercise their right to dispose of their shareholdings. Member States shall also establish the period for the acceptance of the offer which shall not in any event exceed one month after the general meeting referred to in Article 160k. Member States shall further ensure that a company is able to accept an offer communicated electronically to an address provided by the company for that purpose.

However, the acquisition by the company of its own shares provided for in paragraph 1 shall be without prejudice to national rules governing the acquisition by a company of its own shareholdings.

4. Member States shall ensure, that the offer of the cash compensation is conditional upon the cross-border division taking effect in accordance with Article 160t. Member States shall further establish the period within which the cash compensation is paid, which shall not exceed one month after the cross-border division takes effect.
5. Member States shall provide that any member who has accepted the offer of cash compensation referred to in paragraph 3, but who considers that the compensation has not been adequately set, is entitled to demand the recalculation of the cash compensation offered before a national court within one month of the acceptance of the offer.
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 courts of that Member State shall have jurisdiction. Any member, who has accepted the offer to acquire its shares, shall be entitled to institute or to be a party to proceedings referred to in paragraph 5.
7. Member States shall also ensure that members of the company being divided who did not oppose the cross-border division, but consider that the share-exchange ratio is inadequate may challenge that share-exchange ratio set out in the draft terms of the cross-border division before a national court within one month after the cross-border division takes effect.
8. Member States shall ensure that where a national court finds that a share-exchange ratio has not been adequately set, the court has the power to order the recipient company to pay compensation to those members who successfully challenged the ratio. This compensation shall consist of an additional cash payment calculated on the basis of an adequate ratio applicable to the exchange of securities or shares as determined by the court. Upon request by any of these members, the national court shall be empowered to order the recipient company to provide additional shares instead of the cash payment.
9. Member States shall ensure that the law applicable to the company resulting from the cross-border division shall govern the obligation to pay additional cash compensation or to provide additional shares.

*Article 160m*  
***Protection of creditors***

1. Member States may require that the management or administrative organ of the company being divided provides a declaration accurately reflecting the financial status of the company as a part of the draft terms of cross-border division referred to in Article 160e. 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 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 made no earlier than one month before



the draft terms of the cross-border division are disclosed in accordance with Article 160j.

2. Member States shall ensure that creditors, who are dissatisfied with the protection of their interests provided for in the draft terms of the cross-border division, as provided for in Article 160e, may apply to the appropriate administrative or judicial authority for adequate safeguards within one month of the disclosure referred to in Article 160j.
3. The creditors of the company being divided shall be presumed not to be prejudiced by a cross-border division in either of the following circumstances:
  - (a) where the company discloses together with the draft terms of conversion an independent expert report which concluded that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced. The independent expert should be appointed or approved by the competent authority and shall fulfil the requirements laid down in Article 160i(2);
  - (b) where creditors are offered a right to payment, either against a third party guarantor, or against the recipient companies, or in case of a partial division against the recipient company and a company being divided, of at least equivalent value to their original claim, which may be brought in the same jurisdiction as their original claim, and which is of a credit quality at least commensurate with the creditor's original claim immediately after the completion of the division.
4. Where a creditor of the company to be divided whose claim is transferred to a recipient company does not obtain satisfaction from that recipient company, the other recipient companies, and in the case of a partial division the company being divided, shall be jointly and severally liable with the recipient companies 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. Paragraphs 1 to 4 are without prejudice to the application of national laws of the Member State of the dividing company concerning the satisfaction of or securing payments to public bodies.

#### *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 indent of the first subparagraph of Article 3(4), the second subparagraph of Article 3(4), Article 3(5), Article 3(6) third indent 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) the first subparagraph of Article 7(1);
  - (f) Articles 8, 9, 10 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 default 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 company resulting from the cross-border division 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 three 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 the outcome of the negotiations concerning employee participation without undue delay.

*Article 160o*  
***Pre-division certificate***

1. Member States shall designate the national authority competent 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.
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 reports referred to in Articles 160g, 160h and 160i, as appropriate;
  - (c) information on the resolution of the general meeting to approve the division referred to in Article 160k.

The draft terms and reports submitted under Article 160i do not have to be re-submitted to the competent authority.

3. Member States shall ensure that the application referred to in paragraph 2, including submission of any company 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.

However, in cases of genuine suspicion of fraud based on reasonable grounds, Member States may require a physical presence before a competent authority where relevant information and documents are required to be submitted.

4. In respect of compliance with the rules concerning employee participation as laid down in Article 160n, 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 of legality referred to in paragraph 1 the competent authority shall examine the following information:
  - (a) the documents and information referred to in paragraph 2;
  - (b) all comments submitted by interested parties in accordance with Article 160j(1);
  - (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 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.
7. Member States shall ensure that the assessment by the competent authority is carried out within one month of the receipt of the 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 the competent authority determines that the cross-border division falls within the scope of the national provisions transposing this Directive, that it complies with all the relevant conditions and all necessary procedures and formalities have been completed, the competent authority shall issue the pre-division certificate;
  - (b) where the competent authority determines that the cross-border division does not fall within the scope of the national provisions transposing this Directive it shall not issue the pre-division certificate and shall inform the company of the reasons of its decision. The same shall apply to the situations in which the competent authority determines that the cross-border division does not meet all the relevant conditions or that not all necessary procedures and formalities have been completed and the company, after being invited to take the necessary steps, has failed to do so;
  - (c) where the competent authority has serious concerns that the cross-border division constitutes an artificial arrangement referred to in Article 160d(3), it may decide to carry out an in-depth assessment in accordance with Article 160p and shall inform the company about its decision to conduct such an assessment and the subsequent outcome.

*Article 160p*

***In-depth assessment***

1. Member States shall ensure in order to assess whether the cross-border division constitutes an artificial arrangement within the meaning of Article 160d(3) of this Directive, the competent authority of the company being divided shall carry out an in-depth assessment of all relevant facts and circumstances and shall take into account at a minimum the following: the characteristics of the establishment in the Member States concerned, including the intent, 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, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the company being

divided in the Member State of that company and Member States of recipient companies.

Those elements may be only considered as indicative factors in the overall assessment and therefore shall not be considered in isolation.

2. Member States shall ensure that where the competent authority referred to in paragraph 1 of this Article decides to carry out an in-depth assessment, it is able to hear the company and all parties that have submitted observations pursuant Article 160j(1) in accordance with national law. The competent authorities referred to in paragraph 1 may also hear any other interested third parties in accordance with national law. The competent authority shall take its final decision regarding the issue of the pre-division certificate within two months from the start of the in-depth assessment.

#### *Article 160q*

##### ***Review and transmission of the pre-division certificate***

1. Member States shall ensure that, where the competent authority is not a court, the decision of the competent authority to issue or to refuse to issue a pre-division certificate is subject to judicial review in accordance with national law. In addition, Member States shall ensure that a pre-division certificate shall not be effective before the expiry of a certain period to allow parties to bring an action before the competent court and to obtain, if appropriate, interim measures.
2. Member States shall ensure that the decision to issue the pre-division certificate is sent to the authorities referred to in Article 160r(1) and the decisions to issue or refuse to issue the pre-division certificate are available through the system of interconnection of registers set up in accordance with Article 22.

#### *Article 160r*

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

1. Member States shall designate an authority competent to scrutinise the legality of the cross-border divisions 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 it complies with all the relevant conditions and all the procedures 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 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, each recipient company shall submit to the authority referred to in that paragraph, 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 any of the recipient companies which includes 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.

However, in cases of genuine suspicion of fraud based on reasonable grounds, Member States may require a physical presence before a competent authority of a Member State where relevant information and documents are required be submitted.

4. The competent authority referred to in paragraph 1 of this Article shall, without delay, confirm receipt of the pre-division certificate referred to in Article 160o and the other information and documents, required by the laws of the Member States of the recipient companies. It shall issue a decision to 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 paragraph 4, shall be accepted by any competent authority, referred to in paragraph 1 of this Article, as conclusive evidence 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 each of the Member States governing the recipient companies, and in case of a partial division the recipient companies and the company being divided, shall determine, with respect to the territory of that State, the arrangements to disclose the completion of the cross-border division in the register referred to in Article 16.
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) the entry number in the register of the recipient company as a result of a cross-border division;
  - (b) the dates of registration of the recipient companies;
  - (c) in case of a full division, the date of striking off from the register in the Member State of the company being divided;
  - (d) where appropriate, the registration numbers in the Member State of the company being divided and the Member States 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 take effect immediately upon the receipt of that notification.

#### *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, 160p and 160r has been carried out and after having received all notifications referred to in Article 160s(3).

***Consequences of the cross-border division***

1. A full cross-border division carried out in compliance with the national provisions transposing this Directive, shall, 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 and shall continue with 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 cross-border division, unless they exercise the exit right referred to in Article 160l(2);
  - (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 shall, by reason of that cross-border division taking effect, be transferred to the respective recipient company or companies on the date on which the cross-border division takes effect;
  - (d) the company being divided shall cease to exist;
  - (e) the place of the registered office of the company being divided may be relied upon by third parties until such time as the company carrying out the division has been struck off from the register in the departure Member State, unless it may be proven that a third party knew, or ought to have known, of the registered office in the Member States of the recipient companies.
2. Any activity of the company being divided carried out after the date of registration in the Member States of the recipient companies and before the company carrying out the division has been struck off from the register in that Member State shall be treated as the activity of the company being divided.

The company being divided shall be liable for any losses arising from any differences in national legal systems of the Member States of the company being divided and of the recipient companies, where any contracting party or counterparty of the company carrying out the division had not been informed of the cross-border division by that company prior to concluding that contract.
3. A partial cross-border division carried out in compliance with the national provisions transposing this Directive, shall have the following consequences:
  - (a) all the assets and liabilities of the company being divided including contracts, credits, rights and obligations shall be transferred to and shall continue with the recipient companies and shall be retained by the company being divided in accordance with the allocation specified in the draft terms of cross-border division;
  - (b) the members of the company being divided shall become members of the recipient 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;

- (c) the recipient companies and the company being divided shall respect the terms of the employment relationships of the company being divided which existed at the date of the division.
4. Where, in the case of a either a full or a partial cross-border division, 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 160v*

***Liability of the independent experts***

Member States shall lay down rules governing at least the civil liability of the independent experts responsible for drawing up the report referred to in Articles 160i and 160m(2)(a), including in respect of any misconduct on their part in the performance of their duties.

*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."

*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 24 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 five years after [OP please insert the date of the end of the transposition period of this Directive], carry out an evaluation of this Directive and present a Report on the findings to the European Parliament, the Council and the European Economic and Social Committee 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.



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.

*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 Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*