Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (Text with EEA relevance)

TITLE II

[F3CONVERSIONS, MERGERS AND DIVISIONS OF LIMITED LIABILITY COMPANIES]

CHAPTER II

Cross-border mergers of limited liability companies

Article 118

General provisions

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

Article 119

Definitions

For the purposes of this Chapter:

(1) 'limited liability company', hereinafter referred to as 'company', means:

(a) a company of a type listed in Annex II; or

(b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and that is subject, under the national law governing it, to conditions concerning guarantees such as are provided for by Section 2 of Chapter II of Title I and Section 1 of Chapter III of Title I for the protection of the interests of members and others;

(2) 'merger' means an operation whereby:

(a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or

(b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new

company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or

(c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital**[**F1.**][**F2; or**]**

(d) **[**F2one 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 securities and shares in the same proportion in all merging companies.**]**

Textual Amendments

F1 Deleted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 120

Further provisions concerning scope

1 Notwithstanding Article 119(2), this Chapter shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in Article 119(2)(a) and (b) to exceed 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger.

2 Member States may decide not to apply this Chapter to cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of a limited liability company as laid down in Article 119(1).

3 This Chapter shall not apply to cross-border mergers 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.

[F34 Member States shall ensure that this Chapter does not apply to companies in either of the following circumstances:

a the company is in liquidation and has begun to distribute assets to its members;

b the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU.**]**

[F25 Member States may decide not to apply this Chapter to companies which are:

a the subject of insolvency proceedings or subject to preventive restructuring frameworks;

b the subject of liquidation proceedings other than those referred to in point (a) of paragraph 4, or

c the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

F3 Substituted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 121

Conditions relating to cross-border mergers

1 Save as otherwise provided in this Chapter,

[F1a cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States;**]**

b a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable.

[F32 The provisions and formalities referred to in point (b) of paragraph 1 of this Article 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.**]**

Textual Amendments

F1 Deleted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 122

Common draft terms of cross-border mergers

The management or administrative organ of each of the merging companies shall draw up the common draft terms of a cross-border merger. The common draft terms of a cross-border merger shall include at least the following particulars:

(a) **[**F3for each of the merging companies, its legal form and name, and the location of its registered office, and the legal form and name proposed for the company resulting from the cross-border merger and the proposed location of its registered office;

(b) the ratio applicable to the exchange of securities or shares representing the company 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 company resulting from the cross-border merger;

(d) the likely repercussions of the cross-border merger on employment;

(e) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

(f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;

(g) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;

(h) **[**F3any special advantages granted to members of the administrative, management, supervisory or controlling bodies of the merging companies;

(i) the instrument of constitution of the company resulting from the cross-border merger, where applicable, and the statutes if they are contained in a separate instrument;**]**

(j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 133;

(k) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;

(l) dates of the merging companies' accounts used to establish the conditions of the cross-border merger**[**F3;**]**

(m) **[**F2details of the offer of cash compensation for members in accordance with Article 126a;

(n) any safeguards offered to creditors, such as guarantees or pledges.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

[F3 Article 123

Disclosure

1 Member States shall ensure that the following documents are disclosed by the company and made publicly available in the register of the Member State of each of the merging companies, at least one month before the date of the general meeting referred to in Article 126:

a the common draft terms of the cross-border merger; and

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

Member States may require that the independent expert report be disclosed and made publicly available in the register.

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

The documents disclosed in accordance with this paragraph shall also be accessible through the system of interconnection of registers.

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

However, Member States shall not subject that exemption to any requirements or constraints other than those which are necessary to ensure the security of the website and the authenticity of the documents, and which are proportionate to achieving those objectives.

3 Where merging companies make the common draft terms of the cross-border merger available in accordance with paragraph 2 of this Article, they shall submit to their respective register, at least one month before the date of the general meeting referred to in Article 126, the following information:

a for each of the merging companies its legal form and name and the location of its registered office and the legal form and name proposed for any newly created company and the proposed location of its registered office;

b the register in which the documents referred to in Article 14 are filed in respect of each of the merging companies, and the registration number of the respective company 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; and

d details of the website from which the common draft terms of the cross-border merger, the notice referred to in paragraph 1, the independent expert report and complete information on the arrangements referred to in point (c) of this paragraph may be obtained online and free of charge.

The register of the Member State of each of the merging companies shall make publicly available the information referred to in points (a) to (d) of the first subparagraph.

4 Member States shall ensure that the requirements referred to in paragraphs 1 and 3 can be fulfilled fully online without the necessity for the applicants to appear in person before any competent authority in the Member States of the merging companies, in accordance with the relevant provisions of Chapter III of Title I.

5 Where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the disclosure referred to in paragraphs 1, 2 and 3 of this Article shall be made at least one month before the date of the general meeting of the other merging company or companies.

6 Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3 of this Article, that the common draft terms of the cross-border merger, or the information referred to in paragraph 3 of this Article, be published in their national gazette or through a central electronic platform in accordance with Article 16(3). In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette or to a central electronic platform.

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

Member States shall further ensure that any fees charged to the company by the registers for the disclosure referred to in paragraphs 1 and 3 and, where applicable, for the publication referred to in paragraph 6 do not exceed the recovery of the cost of providing such services.

Article 124

Report of the administrative or management body for members and employees

1 The administrative or management body of each of the merging companies shall draw up a report for members and employees explaining and justifying the legal and economic aspects of the cross-border merger, as well as explaining the implications of the cross-border merger for employees.

It shall, in particular, explain the implications of the cross-border merger for the future business of the company.

2 The report shall also include a section for members and a section for employees.

The company may decide either to draw up one report containing those two sections or to draw up separate reports for members and employees, respectively, containing the relevant section.

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

a the cash compensation and the method used to determine the cash compensation;

b the share exchange ratio and the method or methods used to arrive at the share exchange ratio, where applicable;

c the implications of the cross-border merger for members;

d the rights and remedies available to members in accordance with Article 126a.

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

5 The section of the report for employees shall, in particular, explain the following:

a the implications of the cross-border merger for employment relationships, as well as, where applicable, any measures for safeguarding those relationships;

b any material changes to the applicable conditions of employment or to the location of the company's places of business;

c how the factors set out in points (a) and (b) affect any subsidiaries of the company.

6 The report or reports shall be made available in any case electronically, together with the common draft terms of the cross-border merger, if available, to the members and to the representatives of the employees of each of the merging companies or, where there are no such representatives, to the employees themselves, not less than six weeks before the date of the general meeting referred to in Article 126.

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

7 Where the administrative or management body of the merging company receives an opinion on the information referred to in paragraphs 1 and 5 in good time from the representatives of the 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.

8 The section of the report for employees shall not be required where a merging company and its subsidiaries, if any, have no employees other than those who form part of the administrative or management body.

9 Where the section of the report for members referred to in paragraph 3 is waived in accordance with paragraph 4 and the section for employees referred to in paragraph 5 is not required under paragraph 8, the report shall not be required.

10 Paragraphs 1 to 9 of this Article shall be without prejudice to the applicable information and consultation rights and procedures provided for at national level following the transposition of Directives 2002/14/EC and 2009/38/EC.**]**

Article 125

Independent expert report

1 An independent expert report intended for members and made available not less than one month before the date of the general meeting referred to in Article 126 shall be drawn up for each merging company. Depending on the law of each Member State, such experts may be natural persons or legal persons.

[[F2]However, where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available at least one month before the date of the general meeting of the other merging company or companies.**]**

2 As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts, appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the cross-border merger or approved by such an authority, may

examine the common draft terms of cross-border merger and draw up a single written report to all the members.

[[F3]3 The report referred to in paragraph 1 shall in any case include the expert's opinion as to whether the cash compensation and the share exchange ratio are adequate. When assessing the cash compensation, the expert shall consider any market price of the shares in the merging companies prior to the announcement of the merger proposal or the value of the companies excluding the effect of the proposed merger, as determined in accordance with generally accepted valuation methods. The report shall at least:

a indicate the method or methods used to determine the cash compensation proposed;

b indicate the method or methods used to arrive at the share exchange ratio proposed;

c state whether the method or methods used are adequate for the assessment of the cash compensation and the share exchange ratio, indicate the value arrived at using such methods and give an opinion on the relative importance attributed to those methods in arriving at the value decided on, and in the event that different methods are used in the merging companies, state also whether the use of different methods was justified; and

d describe any special valuation difficulties which have arisen.

The expert shall be entitled to obtain from the merging companies all information necessary for the discharge of the duties of the expert.**]**

4 Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed.

[[F2]Member States may exclude single-member companies from the application of this Article.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 126

Approval by the general meeting

[[F3]1 After taking note of the reports referred to in Articles 124 and 125, where applicable, employees' opinions submitted in accordance with Article 124 and comments submitted in accordance with Article 123, the general meeting of each of the merging companies shall decide, by means of a resolution, whether to approve the common draft terms of the cross-border merger and whether to adapt the instrument of constitution, and the statutes if they are contained in a separate instrument.**]**

2 The general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

3 The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company if the conditions laid down in Article 94 are fulfilled.

[F2 4 Member States shall ensure that the approval of the cross-border merger by the general meeting cannot be challenged solely on the following grounds:

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

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

c the information given with regard to the share exchange ratio referred to in point (a) or the cash compensation referred to in point (b) did not comply with the legal requirements.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

[F2 Article 126a

Protection of members

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

Member States may also provide for other members of the merging companies to have the right referred to in the first subparagraph.

Member States may require that express opposition to the common draft terms of the cross-border merger, the intention of members to exercise their right to dispose of their shares, or both, be appropriately documented, at the latest at the general meeting referred to in Article 126. Member States may allow the recording of opposition to the common draft terms of the cross-border merger to be considered proper documentation of a negative vote.

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

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

4 Member States shall ensure that any members who have declared their decision to exercise the right to dispose of their shares, but who consider that the cash compensation offered by the merging company concerned has not been adequately set, are entitled to claim additional cash compensation before the competent authority or body mandated under national law. Member States shall establish a time limit for the claim for additional cash compensation.

Member States may provide that the final decision to provide additional cash compensation is valid for all members of the merging company concerned who have declared their decision to exercise the right to dispose of their shares in accordance with paragraph 2.

5 Member States shall ensure that the law of the Member State to which a merging company is subject governs the rights referred to in paragraphs 1 to 4 and that the exclusive competence to resolve any disputes relating to those rights lies within the jurisdiction of that Member State.

6 Member States shall ensure that members of the merging companies who did not have or did not exercise the right to dispose of their shares, but who consider that the share exchange ratio set out in the common draft terms of the cross-border merger is inadequate, may dispute that ratio and claim a cash payment. Proceedings in that regard shall be initiated before the competent authority or body mandated under the law of the Member State to which the relevant merging company is subject, within the time limit laid down in that national law and such proceedings shall not prevent the registration of the cross-border merger. The decision shall be binding on the company resulting from the cross-border merger.

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

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

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 126b

Protection of creditors

1 Member States shall provide for an adequate system of protection of the interests of creditors whose claims antedate the disclosure of the common draft terms of the cross#border merger and have not fallen due at the time of such disclosure.

Member States shall ensure that creditors who are dissatisfied with the safeguards offered in the common draft terms of the cross-border merger, as provided for in point (n) of Article 122, may apply, within three months of the disclosure of the common draft terms of the cross-border merger referred to in Article 123, to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly demonstrate that, due to the cross-border merger, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the merging companies.

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

2 Member States may require that the administrative or management body of each of the merging companies provides a declaration that accurately reflects its current financial status

at a date no earlier than one month before the disclosure of that declaration. The declaration shall state that, on the basis of the information available to the administrative or management body of the merging companies at the date of that declaration, and after having made reasonable enquiries, that administrative or management body is unaware of any reason why the company resulting from the merger would be unable to meet its liabilities when those liabilities fall due. The declaration shall be disclosed together with the common draft terms of the cross-border merger in accordance with Article 123.

3 Paragraphs 1 and 2 shall be without prejudice to the application of the laws of the Member States of the merging companies concerning the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies.

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 126c

Employee information and consultation

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

2 Notwithstanding point (b) of Article 123(1) and Article 124(7), Member States shall ensure that employees' rights to information and consultation are respected, at least before the common draft terms of the cross-border merger or the report referred to in Article 124 are decided upon, whichever is earlier, in such a way that a reasoned response is given to the employees before the general meeting referred to in Article 126.

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

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

[F3 Article 127

Pre-merger certificate

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

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

2 Member States shall ensure that the application to obtain a pre-merger certificate by the merging company is accompanied by the following:

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

b the report and the appended opinion, if any, referred to in Article 124, as well as the report referred to in Article 125, where they are available;

c any comments submitted in accordance with Article 123(1); and

d information on the approval by the general meeting referred to in Article 126.

3 Member States may require that the application to obtain a pre-merger certificate by the merging company is accompanied by additional information, such as, in particular:

a the number of employees at the time of the drawing up of the common draft terms of the cross-border merger;

b the existence of subsidiaries and their respective geographical location;

c information regarding the satisfaction of obligations due to public bodies by the merging company.

For the purposes of this paragraph, competent authorities may request such information, if not provided by the merging company, from other relevant authorities.

4 Member States shall ensure that the application referred to in paragraphs 2 and 3, including the submission of any information and documents, may be completed fully online without the necessity for the applicants to appear in person before the competent authority, in accordance with the relevant provisions of Chapter III of Title I.

5 In respect of compliance with the rules concerning employee participation as laid down in Article 133, the competent authority in the Member State of the merging company shall verify that the common draft terms of the cross-border merger include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.

6 As part of the scrutiny referred to in paragraph 1, the competent authority shall examine the following:

a all documents and information submitted to the competent authority in accordance with paragraphs 2 and 3;

b an indication by the merging companies that the procedure referred to in Article 133(3) and (4) has started, where relevant.

7 Member States shall ensure that the scrutiny referred to in paragraph 1 is carried out within three months of the date of receipt of the documents and information concerning the approval of the cross-border merger by the general meeting of the merging company. That scrutiny shall have one of the following outcomes:

a where it is determined that the cross-border merger complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the competent authority shall issue the pre-merger certificate;

b where it is determined that the cross-border merger does not comply with all the relevant conditions or that not all necessary procedures and formalities have been completed, the competent authority shall not issue the pre-merger certificate and shall inform the company of the reasons for its decision; in that case, the competent authority may give the company the opportunity to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.

8 Member States shall ensure that the competent authority does not issue the pre#merger certificate where it is determined in compliance with national law that a cross-border merger is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.

9 Where the competent authority, during the scrutiny referred to in paragraph 1, has serious doubts indicating that the cross-border merger is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, it shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware, in the course of the scrutiny referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.

10 Where it is necessary for the purposes of the assessment under paragraphs 8 and 9 to take into account additional information or to perform additional investigative activities, the period of three months provided for in paragraph 7 may be extended by a maximum of three months.

11 Where, due to the complexity of the cross-border procedure, it is not possible to carry out the assessment within the deadlines provided for in paragraphs 7 and 10, Member States shall ensure that the applicant is notified of the reasons for any delay before the expiry of those deadlines.

12 Member States shall ensure that the competent authority may consult other relevant authorities with competence in the different fields concerned by the cross-border merger, including those of the Member State of the company resulting from the merger, and obtain from those authorities and from the merging company information and documents necessary to scrutinise the legality of the cross-border merger, within the procedural framework laid down in national law. For the purposes of the assessment, the competent authority may have recourse to an independent expert.**]**

[F2 Article 127a

Transmission of the pre-merger certificate

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

Member States shall also ensure that the pre-merger certificate is available through the system of interconnection of registers.

2 Access to the pre-merger certificate shall be free of charge for the authorities referred to in Article 128(1) and for the registers.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 128

Scrutiny of the legality of the cross-border merger

1 Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 133.

[F3 2 For the purposes of paragraph 1 of this Article, each merging company shall submit to the authority referred to in paragraph 1 of this Article the common draft terms of the cross-border merger approved by the general meeting referred to in Article 126 or, in the event that the approval by the general meeting is not required in accordance with Article 132(3), the common draft terms of the cross-border merger approved by each merging company in accordance with national law.**]**

[F2 3 Each Member State shall ensure that any application for the purposes of paragraph 1, by any of the merging companies, including the submission of any information and documents, may be completed fully online without the necessity for the applicants to appear in person before the authority referred to in paragraph 1, in accordance with the relevant provisions of Chapter III of Title I.

4 The authority referred to in paragraph 1 shall approve the cross-border merger as soon as it has determined that all relevant conditions have been fulfilled.

5 The pre-merger certificate shall be accepted by the authority referred to in paragraph 1 as conclusively attesting to the proper completion of the applicable pre-merger procedures and formalities in its respective Member State, without which the cross-border merger cannot be approved.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 129

Date on which the cross-border merger takes effect

The law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect. That date shall be after the scrutiny referred to in Article 128 has been carried out.

[F3 Article 130

Registration

1 The laws of the Member States of the merging companies and of the company resulting from the merger shall determine, with regard to their respective territories, the arrangements, in accordance with Article 16, for disclosing the completion of the cross-border merger in their registers.

2 Member States shall ensure that at least the following information is entered in their registers:

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

b in the register of the Member State of the company resulting from the merger, the date of registration of the company resulting from the merger;

c in the register of the Member State of each merging company, that the striking off or removal of the merging company from the register is the result of a cross-border merger;

d in the register of the Member State of each merging company, the date of striking off or removal of the merging company from the register;

e in the registers of the Member States of each merging company and of the Member State of the company resulting from the merger, respectively, the registration number, name and legal form of each merging company and of the company resulting from the merger.

The registers shall make the information referred to in the first subparagraph publicly available and accessible through the system of interconnection of registers.

3 Member States shall ensure that the register in the Member State of the company resulting from the cross-border merger notifies the register in the Member State of each of the merging companies, through the system of interconnection of registers, that the cross-border merger has taken effect. Member States shall also ensure that the registration of the merging company is struck off or removed from the register immediately upon receipt of that notification.**]**

Article 131

Consequences of a cross-border merger

[F3 1 A cross-border merger carried out as laid down in subpoints (a), (c) and (d) of point (2) of Article 119 shall, from the date referred to in Article 129, have the following consequences:

a all the assets and liabilities of the company being acquired, including all contracts, credits, rights and obligations, shall be transferred to the acquiring company;

b the members of the company being acquired shall become members of the acquiring company, unless they have disposed of their shares as referred to in Article 126a(1);

c the company being acquired shall cease to exist.**]**

2 A cross-border merger carried out as laid down in subpoint (b) of point 2 Article 119 shall, from the date referred to in Article 129, have the following consequences:

[[F3]a all the assets and liabilities of the merging companies, including all contracts, credits, rights and obligations, shall be transferred to the new company;

b the members of the merging companies shall become members of the new company, unless they have disposed of their shares as referred to in Article 126a(1);**]**

c the merging companies shall cease to exist.

3 Where, in the case of a cross-border merger of companies covered by this Chapter, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger.

4 The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect.

5 No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

a by the acquiring company itself or through a person acting in his or her own name but on its behalf;

b by the company being acquired itself or through a person acting in his or her own name but on its behalf.

Article 132

Simplified formalities

[[F3]1 Where a cross-border merger by acquisition is carried out either by 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 company or 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.**]**

2 Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company or companies being acquired so requires, in accordance with Chapter I of Title II.

[[F2]3 Where the laws of the Member States of all of the merging companies provide for the exemption from the approval by the 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 Article 123(1) to (3) respectively and the reports referred to in Articles 124 and 125, shall be made available at least one month before the decision on the merger is taken by the company in accordance with national law.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 133

Employee participation

1 Without prejudice to paragraph 2, the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office.

[[F3]2 However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply where at least one of the merging companies has, in the six months prior to the disclosure of the common draft terms of the cross-border merger, an average number of employees equivalent to four fifths of the applicable threshold, as laid down in the law of the Member State to whose jurisdiction the merging company is subject, for triggering the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not:**]**

a provide for at least the same level of employee participation as operated in the relevant merging companies, 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 cross-border merger 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 company resulting from the cross-border merger has its registered office.

3 In the cases referred to in paragraph 2, the participation of employees in the company resulting from the cross-border merger 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, 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) and (3), the first indent of the first subparagraph of Article 3(4), the second subparagraph of Article 3(4) and Article 3(5) and (7);

b Article 4(1), Article 4(2)(a), (g) and (h) and Article 4(3);

c Article 5;

d Article 6;

e Article 7(1), point (b) of the first subparagraph of Article 7(2), the second subparagraph of Article 7(2) and Article 7(3). However, for the purposes of this Chapter, the percentages required by point (b) of the first subparagraph of Article 7(2) of Directive 2001/86/EC for the application of the standard rules contained in Part 3 of the Annex to that Directive shall be raised from 25 to 33 1/3 %;

f Articles 8, 10 and 12;

g Article 13(4);

h point (b) of Part 3 of the Annex.

4 When regulating the principles and procedures referred to in paragraph 3, Member States:

[[F3]a shall confer on the relevant bodies of the merging companies, in the event that at least one of the merging companies is operating under an employee participation system within the meaning of point (k) of Article 2 of Directive 2001/86/EC, the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in point (b) of Part 3 of the Annex to that Directive, as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration;**]**

b 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, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the Member State where the registered office of the company resulting from the cross-border merger will be situated;

c 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 company resulting from the cross-border merger. However, if in one of the merging companies 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.

5 The extension of participation rights to employees of the company resulting from the cross-border merger 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 at least one of the merging companies is operating under an employee participation system and the company resulting from the cross-border merger is to be governed by such a system in accordance with the rules referred to in paragraph 2, that company shall be obliged to take a legal form allowing for the exercise of participation rights.

[[F3]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 conversion, merger or division, be it cross-border or domestic, for a period of four years after the cross-border merger has taken effect, by applying *mutatis mutandis* the rules laid down in paragraphs 1 to 6.**]**

[[F2]8 A company shall communicate to its employees or their representatives whether it chooses to apply standard rules for participation referred to in point (h) of paragraph 3 or whether it enters into negotiations within the special negotiating body. In the latter case, the company

shall communicate to its employees or their representatives the outcome of the negotiations without undue delay.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

[F2 Article 133a

Independent experts

1 Member States shall lay down rules governing at least the civil liability of the independent expert responsible for drawing up the report referred to in Article 125.

2 Member States shall have rules in place to ensure that:

a the expert, or the legal person on whose behalf the expert is operating, is independent from and has no conflict of interest with the company applying for the pre-merger certificate; and

b the expert's opinion is impartial and objective, and is given with a view to providing assistance to the competent authority in accordance with the independence and impartiality requirements under the law and professional standards to which the expert is subject.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).

Article 134

Validity

A cross-border merger which has taken effect as provided for in Article 129 may not be declared null and void.

[F2The first paragraph does not affect Member States' powers, inter alia, in relation to criminal law, the prevention and combatting of terrorist financing, social law, taxation and law enforcement, to impose measures and penalties, under national law, after the date on which the cross-border merger took effect.**]**

Textual Amendments

F2 Inserted by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance).