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

MERGERS AND DIVISIONS OF LIMITED LIABILITY COMPANIES

CHAPTER I

Mergers of public limited liability companies

Section 1

General provisions on mergers

Article 87

General provisions

1 The coordination measures laid down by this Chapter shall apply to the laws, regulations and administrative provisions of the Member States relating to the types of company listed in Annex I.

2 Member States need not apply this Chapter to cooperatives incorporated as one of the types of company listed in Annex I. In so far as the laws of the Member States make use of this option, they shall require such companies to include the word 'cooperative' in all the documents referred to in Article 26.

3 Member States need not apply this Chapter in cases where the company or companies which are being acquired or will cease to exist are the subject of bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies, judicial arrangements, compositions and analogous proceedings.

4 Member States shall ensure that this Chapter does not apply to the company or companies which are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU.

Article 88

Rules governing mergers by acquisition and mergers by formation of a new company

Member States shall, as regards companies governed by their national laws, make provision for rules governing mergers by the acquisition of one or more companies by another company and merger by the formation of a new company.

Article 89

Definition of a 'merger by acquisition'

1 For the purposes of this Chapter, 'merger by acquisition' shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.

2 A Member State's laws may provide that merger by acquisition may also be effected where one or more of the companies being acquired is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

Article 90

Definition of a 'merger by the formation of a new company'

1 For the purposes of this Chapter, 'merger by the formation of a new company' shall mean the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.

2 A Member State's laws may provide that merger by the formation of a new company may also be effected where one or more of the companies which are ceasing to exist is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.

Section 2

Merger by acquisition

Article 91

Draft terms of merger

1 The administrative or management bodies of the merging companies shall draw up draft terms of merger in writing.

2 Draft terms of merger shall specify at least:

a the type, name and registered office of each of the merging companies;

b the share exchange ratio and the amount of any cash payment;

c the terms relating to the allotment of shares in the acquiring company;

d the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;

e the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company;

f the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;

g any special advantage granted to the experts referred to in Article 96(1) and members of the merging companies' administrative, management, supervisory or controlling bodies.

Article 92

Publication of the draft terms of merger

Draft terms of merger shall be published in the manner prescribed by the laws of the Member States in accordance with Article 16, for each of the merging companies, at least one month before the date fixed for the general meeting which is to decide thereon.

Any of the merging companies shall be exempt from the publication requirement laid down in Article 16 if, 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 merger and ending not earlier than the conclusion of that meeting, it makes the draft terms of such merger available on its website free of charge for the public. 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, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph of this Article, Member States may require that publication be effected via the central electronic platform referred to in Article 16(5). Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the date fixed for the general meeting. That reference shall include the date of publication of the draft terms of merger on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging of companies of a specific fee for publication, laid down in the third and fourth paragraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.

Article 93

Approval by the general meeting of each of the merging companies

1 A merger shall require at least the approval of the general meeting of each of the merging companies. The laws of the Member States shall provide that this approval decision shall require a majority of not less than two thirds of the votes attached either to the shares or to the subscribed capital represented.

The laws of a Member State may, however, provide that a simple majority of the votes specified in the first subparagraph shall be sufficient when at least half of the subscribed capital is represented. Moreover, where appropriate, the rules governing alterations to the memorandum and articles of association shall apply.

2 Where there is more than one class of shares, the decision concerning a merger shall be subject to a separate vote by at least each class of shareholders whose rights are affected by the transaction.

3 The decision shall cover both the approval of the draft terms of merger and any alterations to the memorandum and articles of association necessitated by the merger.

Article 94

Derogation from the requirement of approval by the general meeting of the acquiring company

The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company where the following conditions are fulfilled:

(a) the publication provided for in Article 92 is effected, for the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which is to decide on the draft terms of merger;

(b) at least one month before the date specified in point (a), all shareholders of the acquiring company are entitled to inspect the documents specified in Article 97(1) at the registered office of the acquiring company;

(c) one or more shareholders of the acquiring company holding a minimum percentage of the subscribed capital is entitled to require that a general meeting of the acquiring company be called to decide whether to approve the merger; this minimum percentage may not be fixed at more than 5 %. Member States may, however, provide for the exclusion of non-voting shares from this calculation.

For the purposes of point (b) of the first paragraph, Article 97(2), (3) and (4) shall apply.

Article 95

Detailed written report and information on a merger

1 The administrative or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio.

That report shall also describe any special valuation difficulties which have arisen.

2 The administrative or management bodies of each of the companies involved shall inform the general meeting of their company, and the administrative or management bodies of the other companies involved, so that the latter may inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of merger and the date of the general meetings which are to decide on the draft terms of merger.

3 Member States may provide that the report referred to in paragraph 1 and/or the information referred to in paragraph 2 shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.

Article 96

Examination of the draft terms of merger by experts

1 One or more experts, acting on behalf of each of the merging companies but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of merger and draw up a written report to the shareholders. However, the laws of the Member States may provide for the appointment of one or more independent experts for all the merging companies, if such appointment is made by a judicial or administrative authority at the joint request of those companies. Such experts may, depending on the laws of each Member State, be natural or legal persons or companies or firms.

2 In the report referred to in paragraph 1, the experts shall in any case state whether in their opinion the share exchange ratio is fair and reasonable. Their statement shall at least:

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

b state whether such method or methods are adequate in the case in question, indicate the values arrived at using each such methods and give an opinion on the relative importance attributed to such methods in arriving at the value decided on.

The report shall also describe any special valuation difficulties which have arisen.

3 Each expert shall be entitled to obtain from the merging companies all relevant information and documents and to carry out all necessary investigations.

4 Neither an examination of the draft terms of merger nor an expert report shall be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.

Article 97

Availability of documents for inspection by shareholders

1 All shareholders shall be entitled to inspect at least the following documents at the registered office at least one month before the date fixed for the general meeting which is to decide on the draft terms of merger:

a the draft terms of merger;

b the annual accounts and annual reports of the merging companies for the preceding three financial years;

c where applicable, an accounting statement drawn up on a date which shall not be earlier than the first day of the third month preceding the date of the draft terms of merger, if

the latest annual accounts relate to a financial year which ended more than six months before that date;

d where applicable, the reports of the administrative or management bodies of the merging companies provided for in Article 95;

e where applicable, the report referred to in Article 96(1).

For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report in accordance with Article 5 of Directive 2004/109/EC and makes it available to shareholders in accordance with this paragraph. Furthermore, Member States may provide that an accounting statement shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.

2 The accounting statement provided for in point (c) of the first subparagraph of paragraph 1 shall be drawn up using the same methods and the same layout as the last annual balance sheet.

However, the laws of a Member State may provide that:

a it is not necessary to take a fresh physical inventory;

b the valuations shown in the last balance sheet are to be altered only to reflect entries in the books of account; the following shall nevertheless be taken into account:

— interim depreciation and provisions,

— material changes in actual value not shown in the books.

3 Every shareholder shall be entitled to obtain, on request and free of charge, full or, if so desired, partial copies of the documents referred to in paragraph 1.

Where a shareholder has consented to the use by the company of electronic means for conveying information, such copies may be provided by electronic mail.

4 A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, 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 merger and ending not earlier than the conclusion of that meeting, it makes them available on its website. 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 and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

Paragraph 3 shall not apply if the website gives shareholders the possibility, throughout the period referred to in the first subparagraph of this paragraph, of downloading and printing the documents referred to in paragraph 1. However, in that case Member States may provide that the company is to make those documents available at its registered office for consultation by the shareholders.

Member States may require companies to maintain the information on their website for a specific period after the general meeting. Member States may determine the consequences of temporary disruption of access to the website caused by technical or other factors.

Article 98

Protection of employees' rights

Protection of the rights of the employees of each of the merging companies shall be regulated in accordance with Directive 2001/23/EC.

Article 99

Protection of the interests of creditors of the merging companies

1 The laws of the Member States shall provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.

2 For the purposes of paragraph 1, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.

3 Such protection may be different for the creditors of the acquiring company and for those of the company being acquired.

Article 100

Protection of the interests of debenture holders of the merging companies

Without prejudice to the rules governing the collective exercise of their rights, Article 99 shall apply to the debenture holders of the merging companies, except where the merger has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

Article 101

Protection of holders of securities, other than shares, to which special rights are attached

Holders of securities, other than shares, to which special rights are attached shall be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired, unless the alteration of those rights has been approved by a meeting of the holders of such securities, if such a meeting is provided for under national laws, or by the holders of those securities individually, or unless the holders are entitled to have their securities repurchased by the acquiring company.

Article 102

Drawing up and certification of documents in due legal form

1 Where the laws of a Member State do not provide for judicial or administrative preventive supervision of the legality of mergers, or where such supervision does not extend to all the legal acts required for a merger, the minutes of the general meetings which decide on the merger and, where appropriate, the merger contract subsequent to such general meetings shall be drawn up and certified in due legal form. In cases where the merger need not be approved by the general meetings of all the merging companies, the draft terms of merger shall be drawn up and certified in due legal form.

2 The notary or the authority competent to draw up and certify the document in due legal form shall check and certify the existence and validity of the legal acts and formalities required of the company for which that notary or authority is acting and of the draft terms of merger.

Article 103

Date on which a merger takes effect

The laws of the Member States shall determine the date on which a merger takes effect.

Article 104

Publication formalities

1 A merger shall be publicised in the manner prescribed by the laws of each Member State, in accordance with Article 16, in respect of each of the merging companies.

2 The acquiring company may itself carry out the publication formalities relating to the company or companies being acquired.

Article 105

Consequences of a merger

1 A merger shall have the following consequences *ipso jure* and simultaneously:

a the transfer, both as between the company being acquired and the acquiring company and, as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;

b the shareholders of the company being acquired become shareholders of the acquiring company; and

c the company being acquired ceases to exist.

2 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 own name but on its behalf; or

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

3 The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights and obligations by the acquired company to be effective as against third parties. The acquiring company may carry out such formalities itself; however, the laws of the Member States may permit the company being acquired to continue to carry out such formalities for a limited period which may not, save in exceptional cases, be fixed at more than six months from the date on which the merger takes effect.

Article 106

Civil liability of members of the administrative or management bodies of the company being acquired

The laws of the Member States shall at least lay down rules governing the civil liability, towards the shareholders of the company being acquired, of the members of the administrative or management bodies of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the merger.

Article 107

Civil liability of the experts responsible for drawing up the expert report on behalf of the company being acquired

The laws of the Member States shall at least lay down rules governing the civil liability, towards the shareholders of the company being acquired, of the experts responsible for drawing up on behalf of that company the report referred to in Article 96(1), in respect of misconduct on the part of those experts in the performance of their duties.

Article 108

Conditions for nullity of a merger

1 The laws of the Member States may lay down nullity rules for mergers in accordance with the following conditions only:

a nullity is to be ordered in a court judgment;

b mergers which have taken effect pursuant to Article 103 may be declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;

c nullification proceedings may not be initiated more than six months after the date on which the merger becomes effective as against the person alleging nullity or where the situation has been rectified;

d where it is possible to remedy a defect liable to render a merger void, the competent court is to grant the companies involved a period of time within which to rectify the situation;

e a judgment declaring a merger void is to be published in the manner prescribed by the laws of each Member State in accordance with Article 16;

f where the laws of a Member State permit a third party to challenge such a judgment, that party may only do so within six months of publication of the judgment in the manner prescribed by Section 1 of Chapter III of Title I;

g a judgment declaring a merger void does not of itself affect the validity of obligations owed by or in relation to the acquiring company which arose before the judgment was published and after the date on which the merger takes effect; and

h companies which have been parties to a merger are jointly and severally liable in respect of the obligations of the acquiring company referred to in point (g).

2 By way of derogation from point (a) of paragraph 1, the laws of a Member State may also provide for the nullity of a merger to be ordered by an administrative authority if an appeal against such a decision lies to a court. Point (b) and points (d) to (h) of paragraph 1shall apply by analogy to the administrative authority. Such nullification proceedings may not be initiated more than six months after the date on which the merger takes effect.

3 The laws of the Member States on the nullity of a merger pronounced following any supervision other than judicial or administrative preventive supervision of legality shall not be affected.

Section 3

Merger by formation of a new company

Article 109

Merger by formation of a new company

1 Articles 91, 92, 93 and 95 to 108 shall apply, without prejudice to Articles 11 and 12, to merger by formation of a new company. For this purpose, ‘merging companies’ and ‘company being acquired’ shall mean the companies which will cease to exist, and ‘acquiring company’ shall mean the new company.

Article 91(2)(a) shall also apply to the new company.

2 The draft terms of merger and, if they are contained in a separate document, the memorandum or draft memorandum of association and the articles or draft articles of association of the new company shall be approved at a general meeting of each of the companies that will cease to exist.

Section 4

Acquisition of one company by another which holds 90 % or more of its shares

Article 110

Transfer of all assets and liabilities by one or more companies to another company which is the holder of all their shares

Member States shall make provision, in respect of companies governed by their laws, for the operation whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company which is the holder of all their shares and other securities conferring the right to vote at general meetings. Such operations shall be regulated by the provisions of Section 2 of this Chapter. However, Member States shall not impose the requirements set out in points

(b), (c) and (d) of Article 91(2), Articles 95 and 96, points (d) and (e) of Article 97(1), point (b) of Article 105(1) and Articles 106 and 107.

Article 111

Exemption from the requirement of approval by the general meeting

Member States shall not apply Article 93 to the operations referred to in Article 110 if the following conditions are fulfilled:

(a) the publication provided for in Article 92 is effected, as regards each company involved in the operation, at least one month before the operation takes effect;

(b) at least one month before the operation takes effect, all shareholders of the acquiring company are entitled to inspect the documents referred to in points (a), (b) and (c) of Article 97(1) at the company's registered office;

(c) point (c) of the first paragraph of Article 94 applies.

For the purposes of point (b) of the first paragraph of this Article, Article 97(2), (3) and (4) shall apply.

Article 112

Shares held by or on behalf of the acquiring company

The Member States may apply Articles 110 and 111 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if all the shares and other securities specified in Article 110 of the company or companies being acquired are held by the acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

Article 113

Merger by acquisition by a company which holds 90 % or more of the shares of a company being acquired

Where a 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, Member States shall not require approval of the merger by the general meeting of the acquiring company if the following conditions are fulfilled:

(a) the publication provided for in Article 92 is effected, as regards the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which is to decide on the draft terms of merger;

(b) at least one month before the date specified in point (a), all shareholders of the acquiring company are entitled to inspect the documents specified in points (a) and (b) and, where applicable, points (c), (d) and (e) of Article 97(1) at the company's registered office;

(c) point (c) of the first paragraph of Article 94 applies.

For the purposes of point (b) of the first paragraph of this Article, Article 97(2), (3) and (4) shall apply.

Article 114

Exemption from requirements applicable to mergers by acquisition

Member States shall not impose the requirements set out in Articles 95, 96 and 97 in the case of a merger within the meaning of Article 113 if the following conditions are fulfilled:

(a) the minority shareholders of the company being acquired are entitled to have their shares acquired by the acquiring company;

(b) if they exercise that right, they are entitled to receive consideration corresponding to the value of their shares;

(c) in the event of disagreement regarding such consideration, it is possible for the value of the consideration to be determined by a court or by an administrative authority designated by the Member State for that purpose.

A Member State need not apply the first paragraph if the laws of that Member State entitle the acquiring company, without a previous public takeover offer, to require all the holders of the remaining securities of the company or companies to be acquired, to sell those securities to it prior to the merger at a fair price.

Article 115

Transfer of all assets and liabilities by one or more companies to another company which is the holder of 90 % or more of their shares

The Member States may apply Articles 113 and 114 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if 90 % or more, but not all, of the shares and other securities referred to in Article 113 of the company or companies being acquired are held by that acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

Section 5

Other operations treated as mergers

Article 116

Mergers with cash payment exceeding 10 %

Where in the case of one of the operations referred to in Article 88 the laws of a Member State permit a cash payment to exceed 10 %, Sections 2 and 3 of this Chapter and Articles 113, 114 and 115 shall apply.

Article 117

Mergers without all of the transferring companies ceasing to exist

Where the laws of a Member State permit one of the operations referred to in Articles 88, 110 and 116, without all of the transferring companies thereby ceasing to exist, Section 2, except for point (c) of Article 105(1), and Section 3 or 4 of this Chapter shall apply as appropriate.

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.

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.

4 Member States shall ensure that this Chapter does not apply to the company or companies that are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU.

Article 121

Conditions relating to cross-border mergers

1 Save as otherwise provided in this Chapter,

a 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.

2 The provisions and formalities referred to in point (b) of paragraph 1 shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 133. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt

provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.

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) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;

(b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;

(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) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;

(i) the statutes of the company resulting from the cross-border merger;

(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.

Article 123

Publication

1 The common draft terms of the cross-border merger shall be published in the manner prescribed by the laws of each Member State in accordance with Article 16 for each of the merging companies at least one month before the date of the general meeting which is to decide thereon.

Any of the merging companies shall be exempt from the publication requirement laid down in Article 16 if, 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, it makes the common draft terms of such merger available on its website free of charge for the public. 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 and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second subparagraph, Member States may require that publication be effected via the central electronic platform referred to in Article 16(5). Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the date fixed for the general meeting. That reference shall include the date of publication of the common draft terms of cross-border merger on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging of companies of a specific fee for publication, laid down in the third and fourth subparagraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.

2 For each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, the following particulars shall be published in the national gazette of that Member State:

a the type, name and registered office of every merging company;

b the register in which the documents referred to in Article 16(3) are filed in respect of each merging company, and the number of the entry in that register;

c an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging

companies and the address at which complete information on those arrangements may be obtained free of charge.

Article 124

Report of the management or administrative organ

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

The report shall be made available to the members and to the representatives of the employees 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.

Where the management or administrative organ of any of the merging companies receives, in good time, an opinion from the representatives of their employees, as provided for under national law, that opinion shall be appended to the report.

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.

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.

3 The expert report shall include at least the particulars provided for in Article 96(2). The experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

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.

Article 126

Approval by the general meeting

1 After taking note of the reports referred to in Articles 124 and 125, the general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger.

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.

Article 127

Pre-merger certificate

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 each merging company subject to its national law.

2 In each Member State concerned the authority referred to in paragraph 1 shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

3 If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the cross-border merger in accordance with Article 126(1), the possibility for the members of that merging company to have recourse to such procedure, to be initiated before the court having jurisdiction over that merging company. In such cases, the authority referred to in paragraph 1 may issue the certificate referred to in paragraph 2 even if such procedure has commenced. The certificate shall, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members.

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.

2 For the purpose of paragraph 1, each merging company shall submit to the authority referred to in paragraph 1 the certificate referred to in Article 127(2) within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting referred to in Article 126.

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.

Article 130

Registration

The law of each of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements, in accordance with Article 16, for publicising the completion of the cross-border merger in the public register in which each of the companies is required to file documents.

The registry for the registration of the company resulting from the cross-border merger shall notify, through the system of interconnection of registers established in accordance with Article 22(2) and without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, and not before.

Article 131

Consequences of a cross-border merger

1 A cross-border merger carried out as laid down in subpoints (a) and (c) 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 shall be transferred to the acquiring company;

b the members of the company being acquired shall become members of the acquiring company;

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:

a all the assets and liabilities of the merging companies shall be transferred to the new company;

b the members of the merging companies shall become members of the new company;

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

1 Where a cross-border merger by acquisition is carried out 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:

— Article 122(b), (c) and (e), Article 125 and Article 131(1)(b) shall not apply,

— 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.

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.

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 publication of the draft terms of the cross-border merger as referred to in Article 123, an average number of employees that exceeds 500 and is operating under an employee participation system 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:

a shall confer on the relevant organs of the merging companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in point (h) of paragraph 3, as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration;

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.

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 subsequent domestic mergers for a period of three years after the cross-border merger has taken effect, by applying *mutatis mutandis* the rules laid down in this Article.

Article 134

Validity

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

CHAPTER III

Divisions of public limited liability companies

Section 1

General provisions

Article 135

General provisions on division operations

1 Where Member States permit the types of companies listed in Annex I coming under their laws to carry out division operations by acquisition as defined in Article 136, they shall make those operations subject to Section 2 of this Chapter.

2 Where Member States permit the types of companies referred to in paragraph 1 to carry out division operations by the formation of new companies as defined in Article 155, they shall make those operations subject to Section 3 of this Chapter.

3 Where Member States permit the types of companies referred to in paragraph 1 to carry out operations, whereby a division by acquisition as defined in Article 136(1) is combined with a division by the formation of one or more new companies as defined in Article 155(1), they shall make those operations subject to Section 2 of this Chapter and Article 156.

4 Article 87(2), (3) and (4) shall apply.

Section 2

Division by acquisition

Article 136

Definition of a 'division by acquisition'

1 For the purposes of this Chapter, 'division by acquisition' shall mean the operation whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division (hereinafter referred to as 'recipient companies') and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.

2 Article 89(2) shall apply.

3 In so far as this Chapter refers to provisions of Chapter I of Title II, the term 'merging companies' shall mean 'the companies involved in a division', the term 'company being acquired' shall mean 'the company being divided', the term 'acquiring company' shall mean 'each of the recipient companies' and the term 'draft terms of merger' shall mean 'draft terms of division'.

Article 137

Draft terms of division

1 The administrative or management bodies of the companies involved in a division shall draw up draft terms of division in writing.

2 Draft terms of division shall specify at least:

a the type, name and registered office of each of the companies involved in the division;

b the share exchange ratio and the amount of any cash payment;

c the terms relating to the allotment of shares in the recipient companies;

d the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;

e the date from which the transactions of the company being divided shall be treated for accounting purposes as being those of one or other of the recipient companies;

f the rights conferred by the recipient companies on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;

g any special advantage granted to the experts referred to in Article 142(1) and members of the administrative, management, supervisory or controlling bodies of the companies involved in the division;

h the precise description and allocation of the assets and liabilities to be transferred to each of the recipient companies;

i the allocation to the shareholders of the company being divided of shares in the recipient companies and the criterion upon which such allocation is based.

3 Where an asset is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible, the asset or the

consideration therefor shall be allocated to all the recipient companies in proportion to the share of the net assets allocated to each of those companies under the draft terms of division.

Where a liability is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible, each of the recipient companies shall be jointly and severally liable for it. Member States may provide that such joint and several liability be limited to the net assets allocated to each company.

Article 138

Publication of the draft terms of division

Draft terms of division shall be published in the manner prescribed by the laws of each Member State in accordance with Article 16 for each of the companies involved in a division, at least one month before the date of the general meeting which is to decide thereon.

Any of the companies involved in the division shall be exempt from the publication requirement laid down in Article 16 if, 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 draft terms of division available on its website free of charge for the public. 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 and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph, Member States may require that publication be effected via the central electronic platform referred to in Article 16(5). Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on that central electronic platform at least one month before the date fixed for the general meeting. That reference shall include the date of publication of the draft terms of division on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth paragraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.

Article 139

Approval by the general meeting of each company involved in a division

1 A division shall require at least the approval of a general meeting of each company involved in the division. Article 93 shall apply with regard to the majority required for such decisions, their scope and the need for separate votes.

2 Where shares in the recipient companies are allocated to the shareholders of the company being divided otherwise than in proportion to their rights in the capital of that company, Member States may provide that the minority shareholders of that company may exercise the right to have their shares purchased. In such case, they shall be entitled to receive consideration corresponding to the value of their shares. In the event of a dispute concerning such consideration, it shall be possible for the consideration to be determined by a court.

Article 140

Derogation from the requirement of approval by the general meeting of a recipient company

The laws of a Member State need not require approval of a division by a general meeting of a recipient company if the following conditions are fulfilled:

(a) the publication provided for in Article 138 is effected, for each recipient company, at least one month before the date fixed for the general meeting of the company being divided which is to decide on the draft terms of division;

(b) at least one month before the date specified in point (a), all shareholders of each recipient company are entitled to inspect the documents specified in Article 143(1) at the registered office of that company;

(c) one or more shareholders of any recipient company holding a minimum percentage of the subscribed capital is entitled to require that a general meeting of such recipient company be called to decide whether to approve the division. Such minimum percentage may not be fixed at more than 5 %. Member States may, however, provide for the exclusion of non-voting shares from this calculation.

For the purposes of point (b) of the first paragraph, Article 143(2), (3) and (4) shall apply.

Article 141

Detailed written report and information on a division

1 The administration or management bodies of each of the companies involved in the division shall draw up a detailed written report explaining the draft terms of division and setting out the legal and economic grounds for them, in particular the share exchange ratio and the criterion determining the allocation of shares.

2 The report shall also describe any special valuation difficulties which have arisen.

Where applicable, it shall disclose the preparation of the report on the consideration other than in cash referred to in Article 70(2) for recipient companies and the register where that report must be lodged.

3 The administrative or management bodies of a company being divided shall inform the general meeting of that company and the administrative or management bodies of the recipient companies so that they can inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of division and the date of the general meeting of the company being divided which is to decide on the draft terms of division.

Article 142

Examination of the draft terms of division by experts

1 One or more experts acting on behalf of each of the companies involved in the division but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of division and draw up a written report to the shareholders. However, the laws of a Member State may provide for the appointment of one or more independent experts for all of the companies involved in a division if such appointment is made by a judicial or administrative authority at the joint request of those companies. Such experts may, depending on the laws of each Member State, be natural or legal persons or companies or firms.

2 Article 96(2) and (3) shall apply.

Article 143

Availability of documents for inspection by shareholders

1 All shareholders shall be entitled to inspect at least the following documents at the registered office at least one month before the date of the general meeting which is to decide on the draft terms of division:

a the draft terms of division;

b the annual accounts and annual reports of the companies involved in the division for the preceding three financial years;

c where applicable, an accounting statement drawn up as at a date which shall not be earlier than the first day of the third month preceding the date of the draft terms of division, if the latest annual accounts relate to a financial year which ended more than six months before that date;

d where applicable, the reports of the administrative or management bodies of the companies involved in the division provided for in Article 141(1);

e where applicable, the reports provided for in Article 142.

For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report in accordance with Article 5 of Directive 2004/109/EC and makes it available to shareholders in accordance with this paragraph.

2 The accounting statement provided for in point (c) of paragraph 1 shall be drawn up using the same methods and the same layout as the last annual balance sheet.

However, the laws of a Member State may provide that:

a it shall not be necessary to take a fresh physical inventory;

b the valuations shown in the last balance sheet shall be altered only to reflect entries in the books of account; the following shall nevertheless be taken into account:

(i) interim depreciation and provisions,

(ii) material changes in actual value not shown in the books.

3 Every shareholder shall be entitled to obtain, on request and free of charge, full or, if so desired, partial copies of the documents referred to in paragraph 1.

Where a shareholder has consented to the use by the company of electronic means for conveying information, such copies may be provided by electronic mail.

4 A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, 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 them available on its website. Member States shall not subject that exemption to requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

Paragraph 3 shall not apply if the website gives shareholders the possibility, throughout the period referred to in the first subparagraph of this paragraph, of downloading and printing the documents referred to in paragraph 1. However, in that case Member States may provide that the company is to make those documents available at its registered office for consultation by the shareholders.

Member States may require companies to maintain the information on their website for a specific period after the general meeting. Member States may determine the consequences of temporary disruption of access to the website caused by technical or other factors.

Article 144

Simplified formalities

1 Neither an examination of the draft terms of division nor an expert report as provided for in Article 142(1) shall be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the division have so agreed.

2 Member States may permit the non-application of Article 141 and points (c) and (d) of Article 143(1) if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the division have so agreed.

Article 145

Protection of employees' rights

Protection of the rights of the employees of each of the companies involved in a division shall be regulated in accordance with Directive 2001/23/EC.

Article 146

Protection of the interests of creditors of companies involved in a division; joint and several liability of the recipient companies

1 The laws of Member States shall provide for an adequate system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication.

2 For the purpose of paragraph 1, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the company being divided, and that of the company to which the obligation is to be transferred in accordance with the draft terms of division, make such protection necessary, and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the division the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.

3 In so far as a creditor of the company to which the obligation has been transferred in accordance with the draft terms of division has not obtained satisfaction, the recipient companies shall be jointly and severally liable for that obligation. Member States may limit that liability to the net assets allocated to each of those companies other than the one to which the obligation has been transferred. However, they need not apply this paragraph where the division operation is subject to the supervision of a judicial authority in accordance with Article 157 and a majority in number representing three-quarters in value of the creditors or any class of creditors of the company being divided have agreed to forego such joint and several liability at a meeting held pursuant to point (c) of Article 157(l).

4 Article 99(3) shall apply.

5 Without prejudice to the rules governing the collective exercise of their rights, paragraphs 1 to 4 shall apply to the debenture holders of the companies involved in the division except where the division has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

6 Member States may provide that the recipient companies shall be jointly and severally liable for the obligations of the company being divided. In such case they need not apply paragraphs 1 to 5.

7 Where a Member State combines the system of creditor protection set out in paragraphs 1 to 5 with the joint and several liability of the recipient companies as referred to in paragraph 6, it may limit such joint and several liability to the net assets allocated to each of those companies.

Article 147

Protection of holders of securities, other than shares, to which special rights are attached

Holders of securities, other than shares, to which special rights are attached, shall be given rights in the recipient companies against which such securities may be invoked in accordance with the draft terms of division, at least equivalent to the rights they possessed in the company being divided, unless the alteration of those rights has been approved by a meeting of the holders of such securities, if such a meeting is provided for under national laws, or by the holders of those securities individually, or unless the holders are entitled to have their securities repurchased.

Article 148

Drawing up and certification of documents in due legal form

Where the laws of a Member State do not provide for judicial or administrative preventive supervision of the legality of divisions or where such supervision does not extend to all the legal acts required for a division, Article 102 shall apply.

Article 149

Date on which a division takes effect

The laws of Member States shall determine the date on which a division takes effect.

Article 150

Publication formalities

1 A division shall be published in the manner prescribed by the laws of each Member State in accordance with Article 16 in respect of each of the companies involved in a division.

2 Any recipient company may itself carry out the publication formalities relating to the company being divided.

Article 151

Consequences of a division

1 A division shall have the following consequences *ipso jure* and simultaneously:

a the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided; such transfer shall take effect with the assets and liabilities being divided in accordance with the allocation laid down in the draft terms of division or in Article 137(3);

b the shareholders of the company being divided become shareholders of one or more of the recipient companies in accordance with the allocation laid down in the draft terms of division;

c the company being divided ceases to exist.

2 No shares in a recipient company shall be exchanged for shares held in the company being divided either:

a by that recipient company itself or by a person acting in his own name but on its behalf; or

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

3 The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights and obligations by a company being divided to be effective as against third parties. The recipient company or companies to which such assets, rights or obligations are transferred in accordance with the draft terms of division or with Article 137(3) may carry out those formalities themselves; however, the laws of Member States may permit a company being divided to continue to carry out those formalities for a limited period which may not, save in exceptional circumstances, be fixed at more than six months from the date on which the division takes effect.

Article 152

Civil liability of members of the administrative or management bodies of a company being divided

The laws of Member States shall at least lay down rules governing the civil liability of members of the administrative or management bodies of a company being divided towards the shareholders of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the division and the civil liability of the experts responsible for drawing up for that company the report provided for in Article 142 in respect of misconduct on the part of those experts in the performance of their duties.

Article 153

Conditions for nullity of a division

1 The laws of Member States may lay down nullity rules for divisions in accordance with the following conditions only:

a nullity must be ordered in a court judgment;

b divisions which have taken effect pursuant to Article 149 are declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;

c nullification proceedings are not initiated more than six months after the date on which the division becomes effective as against the person alleging nullity or if the situation has been rectified;

d where it is possible to remedy a defect liable to render a division void, the competent court grants the companies involved a period of time within which to rectify the situation;

e a judgment declaring a division void is published in the manner prescribed by the laws of each Member State in accordance with Article 16;

f where the laws of a Member State permit a third party to challenge such a judgment, he does so only within six months of publication of the judgment in the manner prescribed by Chapter III of Title I;

g a judgment declaring a division void does not of itself affect the validity of obligations owed by or in relation to the recipient companies which arose before the judgment was published and after the date referred to in Article 149;

h each of the recipient companies is liable for its obligations arising after the date on which the division took effect and before the date on which the decision pronouncing the nullity of the division was published. The company being divided shall also be liable for such obligations; Member States may provide that this liability be limited to the share of net assets transferred to the recipient company on whose account such obligations arose.

2 By way of derogation from point (a) of paragraph 1 of this Article, the laws of a Member State may also provide for the nullity of a division to be ordered by an administrative authority if an appeal against such a decision lies to a court. Point (b) and points (d) to (h) of paragraph 1 of this Article shall apply by analogy to the administrative authority. Such nullification proceedings may not be initiated more than six months after the date referred to in Article 149.

3 The foregoing shall not affect the laws of the Member States on the nullity of a division pronounced following any supervision of legality.

Article 154

Exemption from the requirement of approval by the general meeting of the company being divided

Without prejudice to Article 140, Member States shall not require approval of the division by the general meeting of the company being divided if the recipient companies together hold all the shares of the company being divided and all other securities conferring the right to vote at general meetings of the company being divided, and the following conditions are fulfilled:

(a) each of the companies involved in the operation carries out the publication provided for in Article 138 at least one month before the operation takes effect;

(b) at least one month before the operation takes effect, all shareholders of companies involved in the operation are entitled to inspect the documents specified in Article 143(1), at their company's registered office;

(c) where a general meeting of the company being divided, required for the approval of the division, is not summoned, the information provided for in Article 141(3) covers any material change in the asset and liabilities after the date of preparation of the draft terms of division.

For the purposes of point (b) of the first paragraph, Article 143(2), (3) and (4) and Article 144 shall apply.

Section 3

Division by the formation of new companies

Article 155

Definition of a 'division by the formation of new companies'

1 For the purposes of this Chapter, 'division by the formation of new companies' means the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly-formed company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies, and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.

2 Article 90(2) shall apply.

Article 156

Application of rules on divisions by acquisition

1 Articles 137, 138, 139, and 141, Article 142(1) and (2) and Articles 143 to 153 shall apply, without prejudice to Articles 11 and 12, to division by the formation of new companies. For this purpose, the term 'companies involved in a division' shall refer to the company being divided and the term 'recipient companies' shall refer to each of the new companies.

2 In addition to the information specified in Article 137(2), the draft terms of division shall indicate the form, name and registered office of each of the new companies.

3 The draft terms of division and, if they are contained in a separate document, the memorandum or draft memorandum of association and the articles or draft articles of association of each of the new companies shall be approved at a general meeting of the company being divided.

4 Member States shall not impose the requirements set out in Articles 141 and 142 and in points (c), (d) and (e) of Article 143(1) where the shares in each of the new companies are allocated to the shareholders of the company being divided in proportion to their rights in the capital of that company.

Section 4

Divisions under the supervision of a judicial authority

Article 157

Divisions under the supervision of a judicial authority

1 Member States may apply paragraph 2 where division operations are subject to the supervision of a judicial authority having the power:

a to call a general meeting of the shareholders of the company being divided in order to decide upon the division;

b to ensure that the shareholders of each of the companies involved in a division have received or can obtain at least the documents referred to in Article 143 in time to examine them before the date of the general meeting of their company called to decide upon the division. Where a Member State makes use of the option provided for in Article 140, the period shall be long enough for the shareholders of the recipient companies to be able to exercise the rights conferred on them by that Article;

c to call any meeting of creditors of each of the companies involved in a division in order to decide upon the division;

d to ensure that the creditors of each of the companies involved in a division have received or can obtain at least the draft terms of division in time to examine them before the date referred to in point (b);

e to approve the draft terms of division.

2 Where the judicial authority establishes that the conditions referred to in points (b) and (d) of paragraph 1 have been fulfilled and that no prejudice would be caused to shareholders or creditors, it may relieve the companies involved in the division from applying:

a Article 138, on condition that the adequate system of protection of the interest of the creditors referred to in Article 146(1) covers all claims regardless of their date;

b the conditions referred to in points (a) and (b) of Article 140 where a Member State makes use of the option provided for in Article 140;

c Article 143, as regards the period and the manner prescribed for the inspection of the documents referred to therein.

Section 5

Other operations treated as divisions

Article 158

Divisions with cash payment exceeding 10 %

Where, in the case of one of the operations specified in Article 135, the laws of a Member State permit the cash payment to exceed 10 %, Sections 2, 3 and 4 of this Chapter shall apply.

Article 159

Divisions without the company being divided ceasing to exist

Where the laws of a Member State permit one of the operations specified in Article 135 without the company being divided ceasing to exist, Sections 2, 3 and 4 of this Chapter shall apply, except for point (c) of Article 151(1).

Section 6

Application arrangements

Article 160

Transitional provisions

Member States need not apply Articles 146 and 147 as regards the holders of convertible debentures and other securities convertible into shares if, at the time when the provisions referred to in Article 26(1) or (2) of Directive 82/891/EEC came into force, the position of those holders in the event of a division had previously been determined by the conditions of issue.