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.