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 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.