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Cross-Border Mergers in Europe

VOLUME I

General Editor

Dirk Van Gerven

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Cross-Border Mergers in Europe

This discussion of the Cross-border Merger Directive and its implementing legislation in each Member State of the European Union and the European Economic Area provides companies and their advisors with useful insight into the legal framework applicable to, and the tax treatment of, cross-border mergers throughout the European Economic Area. Analysis of the Community rules laid down in the Cross-border Merger Directive and the Community rules on the tax treatment of cross-border mergers is complemented by chapters on the implementing legislation in each Member State, prepared in accordance with a common format and contributed by a practitioner from each state. Annexes contain the Cross-border Merger Directive (Annex I), the Parent–Subsidiary Directive (Annex II) and a list of the implementing legislation in each Member State (Annex III).

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Preface

The Cross-border Merger Directive is the next logical step in creating a unified European market within which companies based in the European Union will be able to do business across borders without restriction. Indeed, the Cross-border Merger Directive sets out procedural rules to permit and facilitate the merger of companies situated in different Member States of the European Union and the European Economic Area. It is a useful addition to the Third Council Directive (78/855/EEC) of 9 October 1978, which governs mergers of public limited liability companies situated in the same Member State.

The Cross-border Merger Directive defines the consequences of, and the procedure for, a cross-border merger. The main consequence is that all assets and liabilities of the acquired company are transferred by operation of law to the acquiring company. The Directive sets forth procedural rules for three types of mergers, i.e. the absorption of one or more companies into a surviving company, the merger of two of more companies into a newly formed company, and the merger of a wholly owned subsidiary into its parent company, for which a simplified procedure applies. With respect to procedural aspects, the Cross-border Merger Directive refers to a large extent to the Third Council Directive, which sets forth procedural rules for purely domestic mergers, i.e. between companies situated in the same Member State. Since the Third Council Directive has been implemented in all Member States, implementation of the Cross-border Merger Directive has been greatly facilitated.

It will be difficult to carry out a cross-border merger if the tax treatment of the merger is uncertain. In this respect, the Parent–Subsidiary Directive of 23 July 1990 on the common system of taxation applicable to mergers between parent companies and their subsidiaries in different Member States (as amended by Council Directive 2005/19/EC of 17 February 2005) provides for tax neutrality in the event of such a cross-border merger and is therefore a necessary complement to the Cross-border Merger Directive. Unfortunately, the application of this directive is limited to the European Union; in other words, it does not apply to the member countries of the European Economic Area (i.e. Norway, Liechtenstein and Iceland).

The Cross-border Merger Directive is intended to allow small and medium-sized companies to engage in cross-border cooperation by merging to form a company governed by the national law of a particular Member State (i.e. a national corporate form). In the Community legislature's view, the cross-border merger is an alternative to the formation of a European company (SE), which is intended to be used by larger companies. The latter can merge by first setting up an SE, which by definition is subject to uniform rules throughout the European Economic Area, set forth in a regulation which is directly applicable in all Member States. Of course, the reality is often very different, and practice indicates that several SEs have been formed by small companies that wish to benefit from the SE's European aura, while large companies tend to avoid the SE due to the difficult and lengthy procedures with respect to employee information and participation. A cross-border merger carried out in accordance with the Cross-border Merger Directive need not comply with these procedures if employee participation does not exist in any of the participating companies.

A book providing a comprehensive analysis of the European legal framework on cross-border mergers and the implementing legislation in each Member State of the European Union and the European Economic Area is a useful tool for those seeking to foster cooperation between companies from different Member States. This book will also be helpful to their advisers involved in preparing a cross-border merger. There are two volumes. Part one of the first volume explains the Community rules laid down in the Cross-border Merger Directive and the European tax rules applicable to cross-border mergers. The second part focuses on the implementing legislation of the Cross-border Merger Directive in each Member State. Volume I contains reports from fourteen Member States. The remaining reports will be published in the second volume.

Finally, I would like to thank the contributors to this book, esteemed practitioners from law firms throughout Europe, all of whom are well positioned to discuss the rules applicable in their respective countries. My thanks also go out to those whose names are not mentioned in the reports but whose work was essential to the success of this project, namely Katherine Raab and Bianca Porcelli as well as many others at NautaDutilh.

Dirk Van Gerven
Brussels, 17 February 2009

PART I

EC rules on cross-border mergers

1

Community rules applicable to cross-border mergers

DIRK VAN GERVEN
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I Introduction

1 Purpose

1. Mergers between companies situated in different Member States are difficult. In certain jurisdictions, it is unclear whether a cross-border merger is even possible, especially if the company created through the merger will have its registered or head office in another state.

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (the 'Cross-border Merger Directive' or the 'Dir.')[1] is intended to facilitate this type of merger by providing procedural rules. A copy of the Directive can be found in Annex I of this book.

The Cross-border Merger Directive does not affect the applicable provisions of national law. Thus, each company taking part in a cross-border merger remains subject to the provisions and formalities of national law which would apply in the case of a purely domestic merger.[2] However, these national rules should be largely harmonised thanks to transposition of the Third Council Directive (78/855/EEC) of 9 October 1978 concerning mergers of public limited liability companies (the 'Domestic Merger Directive').[3]

2 History

2. The Cross-border Merger Directive is based on a proposal by the European Commission of 18 November 2003 for a directive on cross-border mergers of companies with share capital.[4] In its Explanatory Memorandum, the Commission explains that European companies have been requesting for some time a legal instrument which will enable them to carry out cross-border mergers.

A first proposal for a directive facilitating cross-border mergers was adopted by the Commission on 14 December 1984.[5] This proposal was subsequently discussed in the European Parliament but the issue of employee participation in the decision-making process of the companies participating in the merger proved to be problematic. A report was prepared and presented to the European Parliament on 21 October 1987, but the Parliament was never able to reach an agreement on it. The adoption of a statutory framework for employee information and participation in the establishment of a European company ('SE') finally allowed the deadlock with respect to employee participation in

1 *Official Journal* L 310 of 26 October 2005.
2 Third recital to the Cross-border Merger Directive.
3 *Official Journal* L 295 of 20 October 1978.
4 COM (2003) 703 final.
5 *Official Journal* C 23 of 25 January 1985.

cross-border mergers to be broken by referring to the rules applicable to the formation of an SE by merger.[6]

The Economic and Social Committee formulated its opinion on the proposed directive on cross-border mergers on 28 April 2004.[7] Based on a report of its Committee on Legal Affairs of 25 April 2005,[8] the European Parliament approved certain amendments to the proposal on 10 May 2005 and sent the amended proposal back to the European Commission for finalisation.[9] The Commission accepted several of these amendments and incorporated them into the final draft of the Directive.

II Application

3. The deadline for transposition of the Cross-border Merger Directive into national law by the Member States was 15 December 2007 (Art. 19 Dir.).

Most Member States were late in enacting implementing legislation, and some have yet to do so. Currently, all Member States have transposed the Cross-border Merger Directive.

The Cross-border Merger Directive applies to the member countries of the European Economic Area (EEA), i.e. the EU Member States plus Norway, Iceland and Liechtenstein.[10] Therefore, all references in this report to the European Union or its Member States should be construed to include these three EEA countries as well, unless specified otherwise.

III Scope

1 General

4. The Cross-border Merger Directive applies to cross-border mergers of limited liability companies formed in accordance with the law of an EU or EEA Member State and which have their registered office, central administration or principal place of business in the European Economic Area. A merger is considered cross-border if at least two of the participating companies are governed by the laws of different Member States (Art. 1 Dir.). Consequently, the Directive does not apply to mergers between companies from the same

6 Art. 16 Dir.; see the Opinion of 28 April 2004 of the Economic and Social Committee, no 3.3.2; for a discussion of the rules applicable to the SE, see P. François and J. Hick, ‘Employee Involvement: Rights and Obligations’ in *The European Company*, D. Van Gerven and P. Storm (eds.), Cambridge University Press, vol. I, 2006, 77 *et seq*.

7 *Official Journal* C 117 of 30 April 2004.

8 A6–0089/2005 final.

9 *Official Journal* C 92 of 20 April 2006.

10 Further to the EEA Joint Committee’s Decision of 22 September 2006, amending Annex XXII (Company Law) to the EEA Agreement (*Official Journal* L 333 of 30 November 2006).

Member State. Nor does it apply to a cross-border merger between a company established in the EEA and one governed by the laws of a non-EEA country.

In general, a company's central administration is considered to be its head office for purposes of applying the so-called real seat (*siège réel*) theory, which holds that a legal entity is governed by the law of the country where its head office is located. The terms 'head office' and 'central administration' are used interchangeably in the Community regulations and directives on company law,[11] in accordance with the European Court of Justice's case law. [12] The reference to the principal place of business being in the European Economic Area therefore seems redundant.

5. The Cross-border Merger Directive is intended to regulate mergers between all limited liability companies, regardless of their corporate form. The scope of the Cross-border Merger Directive is broader than that of the Domestic Merger Directive, which sets forth uniform rules for purely domestic mergers of public limited liability companies. When implementing the Domestic Merger Directive, several Member States extended the scope of the rules set forth therein to other corporate forms.

Limited liability companies include the companies listed in Article 1 of the First Company Law Directive (68/151/EEC) of 9 March 1968 (Art. 2(1)(a) Dir.).[13] A list of qualifying companies in each Member State can be found in Annex II of this book.

Limited liability companies also include companies with share capital and legal personality which possess separate assets that serve to cover their liabilities and which are furthermore subject to guarantees provided for by national law, such as those described in the First Company Law Directive to protect the interests of shareholders and others (Art. 2(1)(b) Dir.).[14] This extension covers all companies with share capital whose partners or shareholders may be held liable only up to the value of their subscriptions or contributions, as represented by their shareholdings, provided these companies are subject to the provisions of national law implementing the First Company Law Directive. In other words, the term 'limited liability company' includes not only companies that take the corporate forms mentioned in Article 1 of the First Company Law Directive but also other companies, to the extent the rules set forth in the

11 In Regulation No 2137/85 of 25 July 1985 on the European economic interest grouping, the term 'head office' is defined as the place of central administration (Art. 4). The English-language version of Regulation No 2157/2001 of 8 October 2001 on the European company uses the term 'head office' (Art. 2), while the term '*administration centrale*' is used in the French version. The term head office is also used in Regulation No 1435/2003 of 22 July 2003 on the European Cooperative Society (Art. 2).

12 ECJ, *Daily Mail*, 27 September 1988, *ECR*, 1988, 5483.

13 *Official Journal* L 65 of 14 March 1968.

14 The English version refers to the protection of 'members'. The French version refers to '*associés*' and the German version to '*Gesellschafter*', i.e. shareholders or partners, which is a better term to designate the holders of shares in such a company.

First Company Law Directive apply to these companies. These rules pertain to publication requirements, the validity of undertakings by a company in formation, the (un)enforceability of restrictions in the articles of association and the declaration of nullity of a company by the courts. It seems that the Cross-border Merger Directive is intended to apply to all companies with limited liability which are subject to a similar legal framework throughout the European Economic Area that provides sufficient protection for third parties when dealing with such companies.

The ultimate goal is indeed to extend the Cross-border Merger Directive to all small and medium-sized enterprises ('SMEs') that are not interested in forming an SE.[15] In the Community legislature's view, the SE is a form reserved for larger companies, which should be encouraged to create an SE when consolidating. The reality is, of course, more complex in that some SMEs may wish to set up an SE while larger companies may prefer merging rather than forming an SE.

The Member States may extend their rules of national law implementing the Cross-border Merger Directive to other corporate forms, such as companies with unlimited liability. However, in this case, these companies will only be entitled to benefit from the merger *ipso jure* if the national law of the Member States where the other companies participating in the merger are established so allows.

6. The Cross-border Merger Directive is intended to authorise cross-border mergers without liquidation and the automatic transfer of assets and liabilities to the surviving or newly formed company.

Only companies that qualify as limited liability companies, as defined above, and that merge in accordance with the conditions and requirements of the Cross-border Merger Directive can benefit from the above rule. Furthermore, as explained below, such companies will only be entitled to apply the Cross-border Merger Directive if they are permitted to merge by national law (see no 13 of this chapter).

2 Excluded companies and mergers

7. A Member State may decide not to apply the Cross-border Merger Directive to cross-border mergers involving a cooperative, even if that cooperative qualifies as a limited liability company as described above (Art. 3(2) Dir.). In this case, the cooperative shall still be entitled to participate in a merger to form a European cooperative society in accordance with the rules laid down in Council Regulation No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society ('SCE').[16]

15 Explanatory Memorandum to the proposal for a directive, p. 3; Opinion of 28 April 2004 of the Economic and Social Committee, no 3.2.

16 *Official Journal* L 207 of 18 August 2003. A corrigendum has been published in the *Official Journal* (L 049 of 17 February 2007). For a discussion of the rules applicable to the SCE, see D. Van Gerven, 'Provisions of Community Law Applicable to the European Cooperative

The Cross-border Merger Directive does not define cooperatives. In its communication of 23 February 2004 on cooperative societies in Europe, the European Commission defined cooperatives as entities which

> [o]perate in the interests of their members, who are at the same time users, and (…) not managed in the interests of outside investors. Profits are received by members in proportion to their businesses with the co-operative, and reserves and assets are commonly held, non-distributable and dedicated to the common interests of members. Because personal links among members are in principle strong and important, new membership is subject to approval while voting rights are not necessarily proportional to shareholdings (one man one vote). Resignation entitles the member to repayment of his part and implies reduction of the capital.[17]

The significance of characterisation as a cooperative varies greatly from one Member State to another. In some countries, cooperatives operate as professional associations, providing services solely to their members, while in others they have evolved into commercial companies that present an alternative to other corporate forms.

8. The Cross-border Merger Directive does not apply to cross-border mergers which involve a company whose corporate purpose is the collective investment of capital invested by the public and which operates on the principle of risk-spreading and whose units may be, at the holder's request, purchased or redeemed, directly or indirectly, out of that company's assets (Art. 3(3) Dir.). In this respect, actions taken by the company to ensure that the market value of its units does not vary significantly from its net asset value shall be regarded as a repurchase or redemption.

Such companies are governed by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended.

9. Finally, the Cross-border Merger Directive does not apply to mergers to create a European company (SE) or a European cooperative society (SCE).[18] In this case, the merger will be governed by the rules laid down either in Council Regulation No 2157/2001 of 8 October 2001 (the 'SE Regulation')[19] or in Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (the 'SCE Regulation').[20]

Society' in *The European Cooperative Society*, D. Van Gerven and P. Storm (eds.), Cambridge University Press, 2010, to be published.

17 See also the recitals to of Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (*Official Journal* L 207 of 18 August 2003).

18 Art. 18 of the SE Regulation and Art. 20 of the SCE Regulation.

19 *Official Journal* L 294 of 10 November 2001.

20 For a discussion of the formation of an SE by merger, see D. Van Gerven and P. Storm (eds.), *The European Company*, Cambridge University Press, vol. I, 2006, and vol. II, 2008. For a

IV Definition of a merger and conditions

1 Definition

10. The Cross-border Merger Directive distinguishes three types of mergers: (i) a merger whereby one participating company absorbs the other participating companies; (ii) a merger whereby all participating companies cease to exist and a new company is formed; and (iii) a merger of a subsidiary into its parent company (Art. 2(2) Dir.). The latter type of merger can be realised by means of a simplified procedure in which no new shares must be issued by the parent company (see nos 39 and 40 of this chapter).

11. With respect to the first two types of mergers, the Cross-border Merger Directive regulates mergers whereby all the assets and liabilities of the participating companies are transferred to the surviving company in return for the issuance to shareholders of securities or shares representing the capital of the surviving company and a cash payment which may not exceed 10 per cent of the nominal value of the shares or, in the absence thereof, the accounting par value of the securities or shares (Art. 2(2)(a) and (b) Dir.). The term 'accounting par value' is not defined and must be determined in accordance with national law but, in general, should equal the amount obtained by dividing the share capital by the number of shares.

The reference to securities and shares representing capital is liable to cause confusion. It appears from the French version of the Cross-border Merger Directive[21] that the Community legislature considers both to represent capital. The term 'securities' (*titres*) seems to refer to freely transferable financial instruments, while 'shares' (*parts sociales*) are identified by the shareholder's name in a register or otherwise.

If the cash payment exceeds 10 per cent of the nominal value or, in the absence thereof, the accounting par value of the securities or shares representing capital, the merger can only benefit from the rules set forth in the Cross-border Merger Directive if at least one of the Member States concerned allows such a cash payment (Art. 3(1) Dir.). In this case, the merger will not benefit from the tax neutrality provided for by Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers (as amended by Directive 2005/19/EC of 17 February 2005).[22]

12. In all types of mergers covered by the Cross-border Merger Directive, the assets and liabilities will be considered transferred on the date of dissolution without liquidation of the company. This seems to imply that a company which

discussion of the formation of an SCE by merger, see Van Gerven and Storm, *The European Cooperative Society*.

21 The French version refers to '*titres ou de parts représentatifs du capital social*', which confirms that both securities and shares represent capital.

22 See Chapter 3 of this book.

has already been dissolved and is in liquidation cannot participate in a cross-border merger. This is an important difference compared to domestic mergers. Indeed, the Third Council Directive of 9 October 1978 concerning mergers of public limited liability companies explicitly authorises the Member States to permit companies in liquidation to participate in a domestic merger, provided the company has not yet begun to distribute its assets to shareholders.[23]

2 Conditions

13. Cross-border mergers governed by the Cross-border Merger Directive are subject to the applicable provisions of national law on mergers, unless the Directive provides otherwise. This fact is very significant.

Firstly, a cross-border merger in accordance with the Cross-border Merger Directive is only possible between companies that are entitled to merge under applicable national law (Art. 4(1)(a) Dir.).

Secondly, the companies participating in the merger must comply with the provisions and formalities of national law to which they are subject (Art. 4(1)(b) Dir.), including those relating to the decision-making process for a merger and, taking into account the cross-border nature of the merger, the protection of creditors, debenture holders, the holders of securities or shares and employees (Art. 4(2) Dir.). In this respect, national law may not introduce restrictions on freedom of establishment or on the free movement of capital unless these are justified in light of the European Court of Justice's case law, in particular by requirements in the general interest, and are necessary for, and proportionate to, achieving these requirements.[24]

The foregoing also implies that special legislation applicable to specific types of activities must be observed, such as Community and national legislation regulating credit intermediaries and other financial undertakings.[25]

In order to determine which national rules apply to each merging company, the Cross-border Merger Directive refers to the law to which the company is subject. In this way, the Directive avoids taking a position on the question of whether a company is governed by the law of the country where its registered office is located or of the country where its head office or principal place of business is situated. The head office is the place where the company is effectively managed and controlled, the place where its central management and administration are located.[26] Consequently, the law to which a company is subject will depend on national conflict-of-law rules. It is thus possible for a company to be subject to and governed by two sets of laws, i.e. if it has its registered office in a Member State which refers to the incorporation theory to

23 Arts. 3(2) and 4(2) Domestic Merger Directive.
24 Third recital to the Cross-border Merger Directive.
25 *Ibid.*, tenth recital.
26 ECJ, 27 September 1988, *ECR*, 1988, 5483.

determine the applicable law and its principal place of business in a Member State which applies the head office theory.

14. The Member States can adopt legislation designed to ensure appropriate protection for minority shareholders who oppose a cross-border merger (Art. 4(2) Dir.; see no 28 of this chapter).

3 Opposition by national authorities

15. The national rules of a Member State that allows its national authorities to oppose a domestic merger on grounds of public interest will also apply to cross-border mergers if at least one of the merging companies is subject to the law of that Member State (Art. 4(1)(b) Dir.). The concept of 'public interest' should be interpreted in accordance with applicable national law.

The national authorities can also oppose the formation of an SE or SCE by merger on grounds of public interest.[27] However, the national authorities cannot oppose a cross-border merger on grounds of public interest to the extent the merger is subject to scrutiny as a concentration under the EC Merger Regulation.[28] In this case, the European competition authorities will be competent, and the rules contained in the EC Merger Regulation will apply. Indeed, characterisation as a cross-border merger governed by the Cross-border Merger Directive is without prejudice to application of the rules on the control of concentrations set forth in the EC Merger Regulation and in national competition law.[29]

V Consequences of a merger

16. As a result of a cross-border merger governed by the Cross-border Merger Directive, the disappearing companies will be dissolved but not liquidated (Art. 2(2)(a) and (b) Dir.). Indeed, the assets and liabilities of these companies will be transferred without liquidation to the surviving company in the state in which they are located. This will occur by operation of law on this date. National law cannot provide otherwise.

In the event of a parent–subsidiary merger, all assets and liabilities of the subsidiary will be transferred without liquidation to the parent company holding all of its securities or shares representing capital. The subsidiary will then be dissolved but not liquidated (Art. 2(2)(c) Dir.).

The above-mentioned provisions regarding the consequences of a cross-border merger refer only to mergers between limited liability companies with

27 Art. 19 SE Regulation and Art. 21 SCE Regulation.

28 Art. 4(1)(b) of the Directive in conjunction with Art. 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (*Official Journal* L 24 of 29 January 2004).

29 Ninth recital to the Cross-border Merger Directive.

a maximum cash payment, if any, of 10 per cent of the nominal value of the shares issued on the occasion of the merger. Nonetheless, the provisions of the Cross-border Merger Directive shall apply to mergers with a cash payment in excess of this amount if the national law of at least one Member State concerned allows the payment in question (see no 8 of this chapter). Consequently, such a merger will have the same legal consequences as explained herein.

17. Once the merger is complete, the surviving company will be the sole owner of all assets and liabilities of the merged companies. The other companies that took part in the merger shall cease to exist by operation of law (*ipso jure*) (Art. 14(1)(c) and (2)(c) Dir.).

All assets and liabilities of the company that ceases to exist will be transferred by operation of law to the acquiring or newly formed company (Art. 14(1)(a) and (2)(a) Dir.) upon the entry into force of the cross-border merger (see no 34 of this chapter). If national law requires the completion of specific formalities before the transfer of certain assets, rights and obligations can take effect against third parties, the company resulting from the merger must complete these formalities (Art. 14(3) Dir.).

All rights and obligations of the merging companies arising from contracts of employment or from employment relationships existing on the effective date of the merger shall be transferred to the company resulting from the merger on that date (Art. 14(4) Dir.).

The shareholders of the merging companies shall become shareholders of the company resulting from the merger (Art. 14(1)(b) and (2)(b) Dir.) and shall receive shares in the surviving or newly formed company. However, no shares shall be exchanged for shares in the merging companies which ceased to exist held by the acquiring company itself or by the company being acquired and ceasing to exist. The same applies to persons acting in their own name but on behalf of a merging company (Art. 14(5) Dir.). This rule does not apply to shares in the acquiring company held by a merging company, which shall be transferred to the acquiring company, in which case the rules on acquisition of own shares will apply.[30]

VI Merger procedure

1 General remarks

18. The merger procedure shall be governed by the national law of the Member States where the merging companies have their registered or head offices, unless the Cross-border Merger Directive provides otherwise (Art. 4 Dir.). The national rules applicable to mergers between limited liability companies

30 These rules are an implementation of Art. 22 of the Second Company Law Directive of 13 December 1976 (*Official Journal* L 26 of 31 January 1977).

have been harmonised, to a great extent, due to transposition of the Domestic Merger Directive.

2 Common draft terms of cross-border merger

19. The management or administrative organ of each participating company must prepare common draft terms of cross-border merger (Art. 5 Dir.). This is a single document prepared jointly by all companies involved in the merger.[31] It must include at least the following information:

(i) the corporate form, name and registered office of each merging company and of the company resulting from the merger and, where applicable, information on the proposed place of administration or the principal place of business of the latter company;[32]
(ii) the ratio for the exchange of securities and shares representing capital and the amount of any cash payment; the reference to securities and shares should be interpreted to refer to both types of instruments representing capital (see no 8 of this chapter);
(iii) the terms for the allocation of securities or shares representing the capital of the company resulting from the merger;
(iv) the likely repercussions of the merger on employment;
(v) the date as from which the holders of such securities or shares representing capital will be entitled to share in the profits and any special conditions affecting this entitlement;
(vi) the date as from which the transactions of the merging companies shall be treated for accounting purposes as those of the company resulting from the cross-border merger;
(vii) the rights conferred by the company resulting from the merger on shareholders enjoying special rights or on the holders of securities other than shares representing capital or the measures proposed concerning them;
(viii) 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;
(ix) the (draft) articles of association ('statutes') of the company resulting from the merger or, in the event of a merger by absorption, the amended articles;
(x) where appropriate, information on the procedures by which arrangements for the involvement of employees in defining their rights to participate in the company resulting from the merger shall be determined pursuant to Article 16 of the Cross-border Merger Directive (see nos 41 and 42 of this chapter);

31 *Ibid.*, fourth recital.
32 *Ibid.*, eleventh recital.

(xi) information on the valuation of the assets and liabilities transferred to the company resulting from the merger; and
(xii) the (closing) dates of the merging companies' accounts used to establish the conditions of the cross-border merger; these need not be the annual accounts and can be interim accounts.

The merging companies are entitled to include additional information in the common draft terms of cross-border merger.[33]

20. The common draft terms of cross-border merger must be rendered public in the manner specified by the provisions of national law implementing the First Company Law Directive (Art. 6(1) Dir.). In accordance with this directive, publication must be accomplished by filing the terms with the appropriate commercial or companies register and by publication in the official gazette of the Member State in question of the terms in full or by extract or of a mention that they are available at the register. The publication in the official gazette may be replaced with equally effective means, which shall entail at least the use of a system whereby the information disclosed can be accessed in chronological order through a central electronic platform.[34] Each merging company shall ensure publication in its Member State, i.e. the state where that company is situated and to whose law it is subject. Interested third parties should be able to consult the register and obtain a copy of the common draft terms of cross-border merger in return for the payment of a fee.

The common draft terms of cross-border merger must be rendered public in the manner described above no later than one month before the date of the general meeting scheduled to vote on the merger (Art. 6(1) Dir.). National law or the articles of association of the merging companies, within the limits of national law, can provide for a longer period. In this case, however, any such longer period will only apply to the merging company governed by that country's law. However, the other companies will be required to prepare their draft terms of merger sufficiently far in advance in order to allow each company to publish them in accordance with its national law.

At least the following information must be published in the official gazettes of the Member States concerned: (i) the corporate form, name and registered office of each merging company; (ii) the register in which documents relating to the merging companies are filed in accordance with the provisions of national law implementing the First Company Law Directive and the entry number in that register for each merging company; and (iii) an indication, for each merging company, of the arrangements made to allow creditors and minority shareholders to exercise their rights and the address at which complete information on these arrangements may be obtained free of charge (Art. 6(2) Dir.). This information must be published in the official gazette together with the draft

33 *Ibid.*, fourth recital.
34 Art. 3 First Company Law Directive.

terms of cross-border merger (in full or an extract therefrom) or a mention of the fact that the draft terms may be consulted at the national register.

The Member States may specify additional information that must be included in the publication in the official gazette (Art. 6(2) Dir.). Any such additional information need only be published in the official gazette of that Member State.

Publication is intended to protect the interests of both the shareholders of the merging companies and third parties.[35]

3 Management report

21. The management or administrative organ of each merging company shall prepare a report for the shareholders of that company explaining and justifying the legal and economic aspects of the cross-border merger and the implications of the merger for shareholders, creditors and employees (Art. 7 Dir.).

The report shall be made available to shareholders and the employee representatives or, in the absence thereof, the employees directly no later than one month before the date of the general meeting scheduled to approve the merger.

In the event the employee representatives issue an opinion in accordance with national law, this opinion must be appended to the report.

The management report on the merger shall be made available to the shareholders of each merging company before the date of the general meeting scheduled to vote on the merger (see nos 25 and 26 of this chapter).

4 Report of the independent expert(s)

22. The draft terms of cross-border merger must be examined by an independent expert(s).[36] The expert(s) shall prepare a written report for the merging companies' shareholders.

The report should state whether, in the experts' opinion, the share-exchange ratio is fair and reasonable, indicating the method(s) used to arrive at the proposed share-exchange ratio; whether these method(s) are adequate; the value reached using each method; and an opinion on the relative importance attributed to these methods in arriving at the value decided on. The report must furthermore describe any special valuation difficulties which may have arisen.[37]

The shareholders of the merging companies can waive their right to an expert's examination and report. Furthermore, no report will be required if the shareholders of all merging companies agree that a report need not be prepared

35 Fifth recital to the Cross-border Merger Directive.

36 With respect to the simplified mergers see nos 39 and 40 of this chapter.

37 Art. 8(3) of the Cross-border Merger Directive refers to Art. 10(2) of the Domestic Merger Directive.

(Art. 8(4) Dir.). The waiver should be in writing, signed by all shareholders and must be produced at the general meetings of the respective merging companies in order to be confirmed in the minutes.

23. The experts shall be appointed or approved by a judicial or administrative authority in the Member States of the relevant merging companies.[38] Although they are considered to act on behalf of the merging company and are therefore paid by it, the experts should be independent of this company and of all other merging companies (Art. 8(1) Dir.). The degree of independence can be defined by national law.

In general, one or more independent expert(s) should be appointed for each merging company further to a request of management (unless that company's articles of association or national law provide otherwise). Alternatively, if jointly requested by the merging companies, one or more expert(s) can be appointed to act on behalf of all companies involved and to prepare a single report on the cross-border merger (Art. 8(2) Dir.). This will help to contain the costs of the expert's investigation and opinion.[39]

The experts may be natural persons or legal entities, unless national law provides otherwise (Art. 8(1) Dir.). Any special advantages granted the experts must be defined in the draft terms of merger (Art. 5(h) Dir.), including their remuneration and any other financial advantages.

24. The experts are entitled to request any information from each merging company they consider necessary to perform their tasks (Art. 8(3) Dir.). This means that if each merging company has appointed its own expert, the latter can request information not only from the company responsible for the appointment but also from the other companies involved. Such information includes copies of documents and access to books of account and other relevant documents of the merging companies.[40] The experts are entitled to examine, amongst other things, the report on the cross-border merger prepared by the management of each merging company.

25. The experts' reports shall be made available to the shareholders of each merging company no later than one month before the date of the general meeting scheduled to vote on the merger (Art. 8(1) Dir.).

5 Shareholder approval

26. In general, a cross-border merger must be approved by the general meeting of each merging company; the general meeting approves at such time the terms of cross-border merger (Art. 9(1) Dir.). Majority and quorum requirements are determined in accordance with national law. Under the Domestic Merger

38 Art. 10(1) Domestic Merger Directive.

39 Sixth recital to the Cross-border Merger Directive.

40 Art. 10(3) Domestic Merger Directive.

Directive (Art. 7) a majority of not less than two thirds of the votes attaching to the shares represented is required. Member States may provide that a simple majority is sufficient if at least half of the subscribed capital is represented. Moreover, the rules governing amendments to the articles shall apply. The general meeting is held at least one month (national law may provide for a longer period) after publication of the draft terms of cross-border merger (see no 20 of this chapter).

In the event of a merger by absorption, national law may provide that the approval of the general meeting of the acquiring company is not required if the following conditions are met: (i) the draft terms of cross-border merger are published in the Member State of the acquiring company at least one month before the general meetings of the companies to be absorbed; (ii) all shareholders of the acquiring company are entitled to inspect the corporate documents mentioned in no 27 of this chapter no later than the date mentioned in (i); and (iii) one or more shareholders holding a minimum percentage of the acquiring company are entitled to request that a general meeting be called to approve the merger. The minimum percentage is defined by national law, but may not be higher than 5 per cent. National law may exclude non-voting shares from this calculation (Art. 9(3) Dir.).

The general meeting of each merging company can resolve to make implementation of the cross-border merger contingent on its express ratification of the arrangements with respect to the participation of employees in the company resulting from the merger (Art. 9(2) Dir.). In this case, the arrangement on employee participation must be presented to the general meeting prior to final approval of the merger (see no 42 of this chapter).

27. The management and experts' reports must be made available to all shareholders before the general meeting scheduled to vote on the merger (Art. 9(1) Dir.).

The shareholders of each merging company are entitled to inspect these reports at its registered office at least one month before the date of the general meeting scheduled to vote on the draft terms of cross-border merger.[41] All reports of each merging company must be made available at its registered office.

Along with the above reports, the following information must be made available for inspection at each merging company's registered office: (i) the draft terms of cross-border merger; (ii) the annual accounts and management reports of the merging companies for the last three financial years; and (iii) an accounting statement prepared no 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 that ended more than six months before that date.[42] The accounting statement must be prepared using the same methods and layout

41 Ibid., Art. 11(1).

42 *Ibid.*

as the last annual balance sheet. National law may provide, however, that this statement can be prepared without having to take a fresh physical inventory. Furthermore, national law may also provide that the valuation shown on the last balance sheet need only be altered to reflect entries in the books of account, provided interim depreciation and reserves as well as material changes in actual value not shown in the books are taken into account.[43]

Each shareholder is entitled to obtain copies upon request and free of charge of the documents made available at the company's registered office. Shareholders can also request copies in full or in part of these documents.[44]

6 Protection of minority shareholders

28. The protection of shareholders in a cross-border merger is governed by national law (Art. 4(2) Dir.). The applicable provisions of the law of the Member State where the merging company is situated will apply. National law may contain special provisions designed to ensure *appropriate* protection of minority shareholders who have opposed the merger (Art. 4(2) *in fine* Dir.), including a right for such shareholders to claim reimbursement of their shares on the conditions defined by law and in the company's articles of association or to have recourse to the courts to challenge the share-exchange ratio or to obtain compensation for the loss of a right or value (see no 30 of this chapter for the consequences of such legal proceedings for the merger procedure).

Together with the draft terms of merger, any arrangements provided for the exercise of the rights of minority shareholders as well as the address where complete information on these arrangements may be obtained free of charge must be published in the national gazettes of the relevant Member States (Art. 6(2)(c) Dir.).

7 Pre-merger certificate and scrutiny of the legality of a cross-border merger

29. The legality of a cross-border merger will first be scrutinised before the merger takes effect by a court, notary or other authority designated by the Member States concerned (Art. 10 Dir.).

The merger procedure will be scrutinised in each Member State concerned with respect to that portion of the merger which is subject to the laws of that state (Art. 10(1) Dir.). The authority designated to supervise cross-border mergers in each Member State will issue to each merging company subject to this state's national law a certificate conclusively attesting to proper completion of the requisite pre-merger acts and formalities (the 'pre-merger certificate'). This authority is bound to issue the pre-merger certificate without delay (Art. 10(2) Dir.). The pre-merger certificate is valid for a period of six months (see no 31 *in fine* of this chapter).

43 *Ibid*., Art. 11(2).
44 *Ibid*., Art. 11(3).

30. In the event the law of a Member State of one of the merging companies provides for a procedure to scrutinise and amend the share-exchange ratio or to compensate minority shareholders, without preventing registration of the cross-border merger, this procedure will only apply to such merging company if the general meetings of the other participating companies, when approving the draft terms of merger, expressly agree to allow the shareholders of that merging company to have recourse to this procedure. In this case, the procedure must be initiated before the court with jurisdiction over the merging company whose shareholders are entitled to initiate this procedure (Art. 10(3) Dir.).

The decision to permit shareholders to have recourse to the above procedure(s) must be taken by the general meeting.[45] The majority required in this respect shall be defined by national law.

If national law allows shareholders to have recourse to the above-mentioned procedures or the general meeting has resolved to allow shareholders to have recourse thereto, the authority responsible for scrutinising the merger may issue the pre-merger certificate even if the procedure has commenced. In this case, the pre-merger certificate must mention that a procedure is ongoing. The procedure must be sufficiently described in the certificate to allow third parties to identify the procedure and the country in which it has been initiated. The decision ultimately taken in the procedure will be binding on the company resulting from the merger and on all its shareholders (Art. 10(3) Dir.).

31. The legality of completion of the cross-border merger will in addition be scrutinised by the court, notary or competent authority designated by the Member State whose law governs the company resulting from the merger. Such scrutiny should cover the completion of the merger and, if a new company is formed, the formation of that company. In particular, the competent authority must verify whether the merging companies have approved the common draft terms of merger on the same terms and, where appropriate or applicable, that arrangements for employee participation have been determined in accordance with Article 16 of the Cross-border Merger Directive (Art. 11(1) Dir.) (see no 42 of this chapter).

Each merging company must submit its pre-merger certificate to the court, notary or competent authority of the Member State in which the surviving company is situated within six months of its issuance together with a copy of the draft terms of cross-border merger as approved by the general meetings of the merging companies (Art. 11(2) Dir.). The surviving company need not issue a pre-merger certificate, as its decision is part of the completion process monitored by the court, notary or authority designated to supervise completion of the merger, unless the general meeting of the surviving company is held before the completion of the cross-border merger is enacted.

45 Art. 10(3) of the Directive refers to Art. 9(1), not to Art. 9(3), thereof.

8 No prospectus obligation

32. If the shares of a merging company are held by a large number of persons, this company must contact its shareholders (and the holders of other securities) through public means in order to ask them to approve the merger and to offer to exchange their shares for shares in the company resulting from the merger. This contact could qualify as a public offering within the meaning of Directive 2003/71 of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the 'Prospectus Directive').[46] According to the Prospectus Directive, the offering of securities to 100 persons or more who are not qualified investors in any given Member State constitutes a public offering for which a prospectus, approved by the competent authority, must be published.

The Prospectus Directive, however, expressly exempts mergers carried out in accordance with the Cross-border Merger Directive and the Domestic Merger Directive from the prospectus obligation, provided a document is made available containing information which the competent authorities consider equivalent to that set forth in the prospectus required under the Prospectus Directive, taking into account the requirements of Community law, in particular the applicable directive (Art. 4(1)(c) of the Prospectus Directive). The same applies in the event the shares of the surviving company are admitted to trading on a regulated market simultaneously with the merger process (Art. 4(2)(d) Prospectus Directive).

The competent authority of each Member State where securities are offered to 100 persons or more (who are not qualified investors) will decide whether the information contained in the draft terms of cross-border merger is equivalent to the information required for the offering of these securities under the Prospectus Directive. If this is not the case, a prospectus must be prepared for that Member State in accordance with the provisions of national law implementing the Prospectus Directive (see no 33 of this chapter). The merging companies must put a question to the supervisory authorities of the relevant Member States in this respect.[47] In order to determine whether information is 'equivalent', the content of the offer document is compared to the information

46 *Official Journal* L 345 of 31 December 2003. For a discussion of the Prospectus Directive, see D. Van Gerven, 'General Provisions of Community Law Relating to the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading' in *Prospectus for the Public Offering of Securities in Europe*, D. Van Gerven (ed.), Cambridge University Press, vol. I, 2008, 3.

47 This is also the opinion of the informal task force of representatives of the supervisory authorities organised by the Commission (Summary record of the third Informal Meeting of 26 January 2005, 6). During this meeting the Commission stated that it has no immediate plans to adopt implementing measures with respect to the meaning of 'equivalence' in this provision of the Prospectus Directive.

required by the Prospectus Regulation.[48] There is no obligation to provide all the information required for a prospectus.[49]

An equivalence opinion issued by the supervisory authority of one Member State does not imply a passport in this respect. Consequently, the competent authorities in other Member States need not accept this opinion and are entitled to verify independently whether the information contained in the draft terms of merger is equivalent.[50] The supervisory authorities of the Member States concerned must, however, consult one another with a view to ensuring a common position on the issue of equivalence (Art. 4(4) Prospectus Directive).

33. If the competent authority within the meaning of the Prospectus Directive reaches the opinion that the draft terms of merger do not contain equivalent information to that required by the Prospectus Directive, a prospectus will be required. In this case, the prospectus must be approved by the competent authority determined in accordance with the rules contained in the Prospectus Directive (see below), before the shareholders are called to vote on the merger and the prospectus is made public (Art. 3 Prospectus Directive).

In general, the authority competent to approve a prospectus is that of the Member State where the issuer's registered office is located, i.e. the state where the registered office of the company resulting from the merger is located (Art. 2(1)(h) Prospectus Directive).

Of course, it is possible to propose completing the draft terms of merger with the necessary information in order to avoid the need for a prospectus. This could be the best solution to avoid having to prepare, approve and publish a prospectus.

9 Entry into force, registration and publication

34. A cross-border merger enters into effect on the date determined by the national law of the Member State to whose law the company resulting from the merger is subject.[51] In any case, this date cannot precede scrutiny of the legality of the cross-border merger (Art. 12 Dir.) (see no 31 of this chapter). The effects

48 Regulation 809/2004 of 29 April 2004 implementing the Prospectus Directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and the dissemination of advertisements.

49 Summary record of the third Informal Meeting on the Transposition of the Prospectus Directive (26 January 2005) of the informal task force of representatives of the supervisory authorities organised by the Commission (available at http://europa.eu.int/comm/internal_market).

50 This has also been confirmed by the informal task force of representatives of the supervisory authorities organised by the Commission (see previous footnote).

51 The Domestic Merger Directive states that the Member States can provide in their national law when a merger in accordance with this directive shall take effect (Art. 17).

of the entry into force of a cross-border merger are discussed in nos 16 and 17 of this chapter. These effects are considered to have taken place on the date of dissolution of the merged companies.

In the event an arrangement on employee participation must be entered into which is different from the rules on employee participation applicable in the Member State to whose law the company resulting from the merger is subject, the merger can only be registered and take effect once such an arrangement has been concluded (see no 42 of this chapter).

Cross-border mergers in accordance with the Cross-border Merger Directive must, like any other form of concentration, meet the requirements of Community and national law on the control of concentrations between undertakings.[52]

A merger cannot be carried out if a competent national authority has opposed it and this opposition has not been retracted or revoked (see no 15 of this chapter).

35. The completion of a cross-border merger is published in the Member States of the merging companies in accordance with the national rules implementing the First Company Law Directive of 9 March 1968. To this effect, a notice of completion shall be filed with the public register in which each merging company is required to file documents (Art. 13 Dir.).

Furthermore, a notice of completion shall be published in the official gazette of each Member State concerned in accordance with national law.[53] This requirement applies both to the companies that will disappear as a result of the merger and to the surviving company.

The public register with which the company resulting from the merger is required to file its corporate documents and information (in accordance with the provisions of national law implementing the First Company Law Directive) must notify, without delay, the public register with which each of the other companies is required to file a notice of completion that the cross-border merger has taken effect (Art. 13 Dir.). This notification should include the date of entry into effect of the merger.

The disappearing companies' registrations will be deleted only upon receipt of the above-mentioned notification from the surviving company's register (Art. 13 Dir.).

36. The information regarding the company resulting from the merger which must be filed with the public register and published in the official gazette of the Member State where this company is situated shall be determined by the national law of that Member State.

37. The information published is enforceable against third parties in accordance with the provisions of national law implementing the First Company Law

52 Ninth recital to the Cross-border Merger Directive; see also no 15 of this chapter.
53 Art. 3(4) First Company Law Directive.

Directive. Consequently, the cross-border merger will be enforceable against third parties after publication of the notice of completion.[54] The only exception to this rule is where it can be established that the third party in question had prior knowledge of the published information.[55]

Following publication, there is a transition period of fifteen days, during which time third parties can attempt to prove that they could not have known of the publication. If they can do so, the published information cannot be enforced against them.[56]

In general, third parties may rely on documents which must be published, even if they have yet to be published. However, to the extent that, in accordance with national law (see no 34 of this chapter), publication is required for a cross-border merger to take effect – which will normally be the case – they cannot rely on the notice of completion of the merger prior to the publication thereof.[57]

10 No avoidance of the merger

38. As from the time a cross-border merger enters into effect, on the date defined by national law, it can no longer be declared null and void (Art. 17 Dir.). This rule is intended to ensure legal certainty.[58]

In the event of violation of the applicable provisions or formalities relating to a merger, the court before which the case is brought cannot avoid the merger. It can only award damages to the injured parties. The latter can in turn claim damages from the notary or authority that scrutinised the acts and decisions leading to the merger and failed to notice the violation in accordance with applicable national law.

This prohibition on avoiding a cross-border merger is the main difference with the rules applicable to internal mergers. With respect to the latter, national law can allow a domestic merger which has already taken effect to be declared null and void if the required judicial or administrative supervision of the legality of the merger was not properly performed or if the merger documents were not drawn up and certified in due legal form or if the general meeting's decision is void or voidable under national law.[59]

VII Simplified merger procedures

1 Merger with a wholly owned subsidiary or subsidiaries

39. In the event of a cross-border merger by acquisition by a company that holds all the shares and other securities entitled to vote at general meetings of the

54 *Ibid.*, Art. 3(5).
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*, Art. 3(7).
58 Eighth recital to the Cross-border Merger Directive.
59 Art. 22 Domestic Merger Directive.

company or companies being acquired, the merger can be carried out by means of a simplified procedure (Art. 15(1) Dir.). In this case, a number of formalities designed to protect minority shareholders will not be applicable, since all shares and other voting securities are held by the (acquiring) parent company. Furthermore, when acquiring a wholly owned subsidiary, the parent company may not issue new shares in exchange for the transfer of all the subsidiary's assets and liabilities.

The common draft terms of cross-border merger must be prepared and rendered public in order to inform interested third parties, such as creditors. However, these draft terms need not include (i) the ratio applicable to the exchange of shares or securities representing capital and the amount of any cash payment; (ii) the terms for the allocation of shares or securities representing capital in the company resulting from the merger; or (iii) the date from which the holding of such securities or shares representing capital will entitle the holders to share in the profits and any special conditions affecting that entitlement. All other information described in no 18 of this chapter must be included.

An independent expert's report is not required. A management report on the merger will suffice. Furthermore, the general meeting of the subsidiary or subsidiaries being absorbed need not be convened to approve the merger.

The other formalities and rules applicable to a cross-border merger discussed in this chapter shall apply. The cross-border merger will enter into effect in accordance with national law.

2 Merger with a 90 per cent subsidiary

40. In the event of a cross-border merger by acquisition by a company that holds 90 per cent or more (but not all) of the shares and other voting securities in the acquiring company or companies, the report(s) of the independent expert(s) and the documents necessary for scrutiny of the merger shall be required only to the extent the national law of one Member State governing the merging companies so requires (Art. 15(2) Dir.). The term 'scrutiny' is not defined but is taken to refer to the scrutiny which national law may require for a merger with a 90 per cent subsidiary. Such scrutiny does not include the pre-merger certificate or completion of the cross-border merger in accordance with the Cross-border Merger Directive (see no 31 of this chapter). The rules of the Cross-border Merger Directive remain fully applicable, and national law cannot derogate from the scrutiny required by this directive.

Approval of the cross-border merger by the general meeting of shareholders of the subsidiary or subsidiaries is required.

VIII Employee participation

41. In general, the company resulting from the cross-border merger will be subject to the rules of employee participation, if any, in the Member State where its

registered office is located (Art. 16(1) Dir.).[60] Employee participation implies participation in the decision-making process of corporate bodies of the relevant company[61] and is defined as a system permitting the 'influence of the body representative of the employees and/or the employees' representatives in the affairs of the company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ'.[62]

42. In the event that the national law of the Member State where the company resulting from the merger has its registered office does not provide for employee participation, the employees will not be entitled to participate in the management of the company, unless the rules of this Member State are set aside in accordance with the principles explained below.[63]

Even if the national law of the Member State where the company resulting from the merger has its registered office provides for employee participation, the rules on employee participation of this Member State will be set aside when at least one of the merging companies has employed, in the six months leading up to publication of the common draft terms of cross-border merger in the official gazette of the Member State concerned, more than 500 employees on average and provides for a system of employee participation (as defined above).

These rules will also be set aside if they do not provide for (i) at least the same level of employee participation as in the relevant merging companies, or (ii) an entitlement for employees of establishments of the company resulting from the merger situated in different Member States to exercise the same participation rights as employees employed in the Member State where the company resulting from the merger has its registered office (Art. 16(2) Dir.).

In these cases, employee participation will be regulated by the Member States largely in accordance with the principles and procedures set down in

60 It should be noted that reference is made to the law of the state where the company has its registered office and not to the state where the company's principal place of business is located.

61 See the thirteenth recital to the Directive.

62 Art. 16(2) of the Directive refers to Art. 2(k) of Council Directive 2001/86 of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (*Official Journal* L 294 of 10 November 2001).

63 It could also be deduced from a reading of Art. 16(1) in conjunction with the beginning of Art. 16(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', combined with the discussion of the proposal in the European Parliament (see p. 28 of the Report of the European Parliament of 25 April 2005 (A6-0089/2005) final), that in the event that the national law of the Member State where the company resulting from the merger has its registered office does not provide for employee participation, the employees will not be entitled to participate in the management of the company, regardless of whether employee participation existed in any merging company that ceased to exist due to the merger. But this

Directive 2001/86 of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (the 'SE Directive'). This issue is discussed in Chapter 2 of this book.

The merging companies must initiate negotiations with the employee representatives to reach an agreement on employee participation. If they fail to do so, the standard rules for participation contained in Part 3 of the Annex to the SE Directive shall apply. The merging companies can also decide to apply immediately the standard rules for participation without initiating negotiations. The special negotiating body has the right to decide, by a qualified majority, not to open negotiations or to terminate negotiations already started and to rely on the rules on participation in force in the Member State where the registered office of the surviving company will be situated. The procedure is discussed in Chapter 2 of this book. However, as long as an agreement on employee participation has not been reached or a decision taken to apply the standard rules, the completion of the merger cannot be registered.[64]

43. The articles of association of the company resulting from the merger may not contain provisions that conflict with the arrangement for employee participation. In the event of a new arrangement or modifications thereto, the articles must be amended to reflect the new or modified arrangement. National law may provide that the board of directors or the equivalent management organ is entitled to proceed with the required amendments to the articles of association without having to call a general meeting of shareholders.[65]

44. If one of the merging companies provides for an employee participation system and, as a result of the above rules, the company resulting from the merger shall be governed by that system, it must take a legal form that allows the exercise of employee participation rights (Art. 16(6) Dir.).

Furthermore, if the company resulting from the merger has an employee participation system it must take measures to ensure that the employees' participation rights are protected in the event of subsequent domestic mergers for a period of at least three years after the cross-border merger takes effect. To this end, it shall provide that the above rules of the Cross-border Merger Directive will apply *mutatis mutandis* to protect these rights (Art. 16(7) Dir.).

IX Protection of creditors, debenture holders and the holders of non-equity securities

45. The protection of creditors and debenture holders in a cross-border merger is governed by national law (Art. 4(2) Dir.). This means that the relevant

interpretation contradicts the Community legislature's intent, as described in the Explanatory Memorandum to the first proposal for the Directive (see no 2 of this chapter).

64 In this regard, Art. 16(3) of the Directive refers to Art. 12 of the SE Regulation.

65 In this regard, Art. 16(3) of the Directive refers to Art. 12(4) of the SE Regulation.