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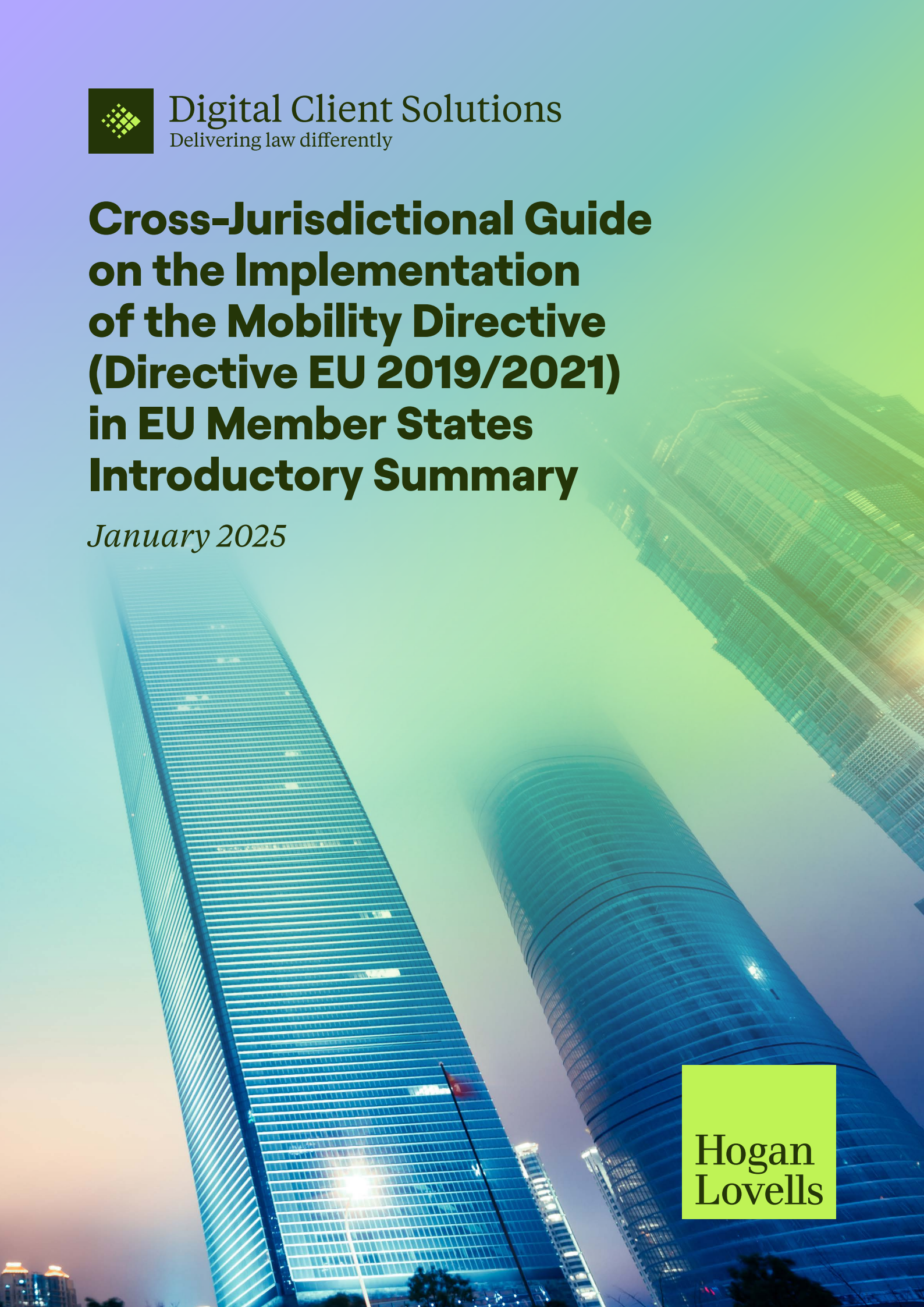
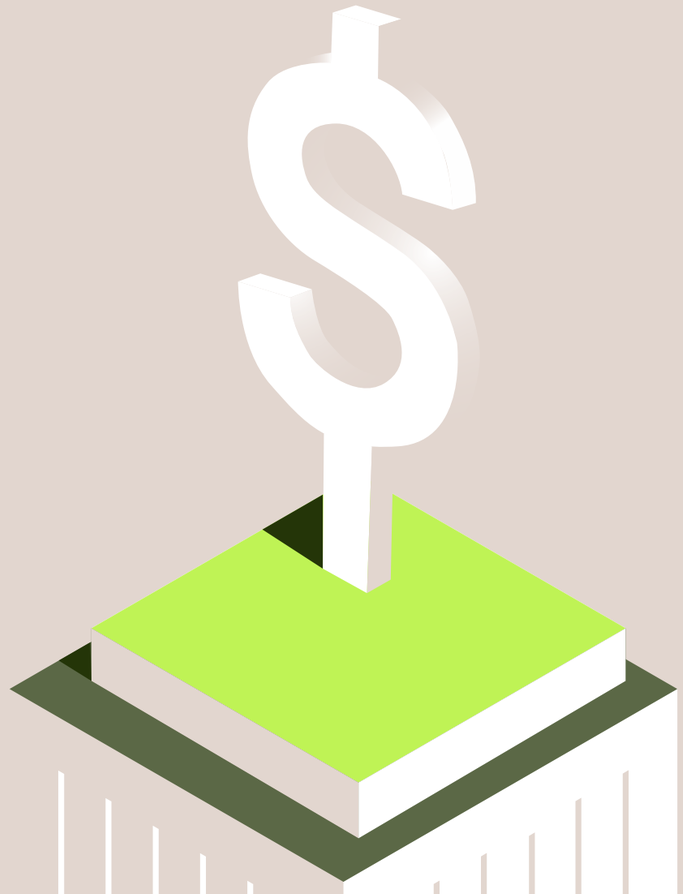
Cross-Jurisdictional Guide on the Implementation of the Mobility Directive (Directive EU 2019/2021) in EU Member States Introductory Summary

January 2025



Hogan Lovells

Our Cross-Jurisdictional Guide provides an overview of the status of the implementation of the Directive (EU) 2019/2121 of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Mobility Directive) in each individual EU Member State.



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Introductory summary report on mobility directive

1. Introduction

On 27 November 2019, the Directive (EU) 2019/2121 of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (**Mobility Directive**) was adopted. The Mobility Directive is amending the so-called Consolidated Company Law Directive (Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law (**CLD**)[1], OJ L 169).

The Mobility Directive became effective on 1 January 2020. The Mobility Directive harmonizes the existing legal framework for cross-border mergers and for the first time also includes codifications on cross-border divisions and conversions (i.e. cross-border changes of legal form). Cross-border mergers, cross-border divisions and cross-border conversions will in the following be collectively referred to as "**cross-border operation**".

By 31 January 2023 the implementation deadline ended. The Mobility Directive has been transposed by all Member States with the exception of Luxembourg. The European Commission has the possibility to set an ultimatum to implement the Mobility Directive into national law; failure to do so could result in sanctions against the non-compliant Member State.

This cross-jurisdictional guide provides an overview of the status of the implementation of the Mobility Directive in the individual Member States. For this overview, we will first summarize the key aspects of the Mobility Directive. Thereafter we will describe the status of implementation in each Member States. To the extent that the implementation is in line with the Mobility Directive, the individual country reports will refer to the summary of the key aspects of the Mobility Directive. Where the implementation deviates from the Mobility Directive or makes use of an optionality allowed thereunder, the individual country reports will describe such deviations in more detail.

1 All references to the CLD below are to the Consolidated Company Law Directive as amended by the Mobility Directive.

2. Scope of application – Available forms of cross-border operations

The Mobility Directive introduces cross-border conversions and cross-border divisions and modifies the existing provisions of the CLD on cross-border mergers. Consequently, the CLD covers the following three forms of cross-border operations:

2.1 Cross-border conversion

Under a cross-border conversion the converted company – without being dissolved or wound up or going into liquidation – changes the legal form under which it is registered in a departure Member State into a legal form of the destination Member State and transfers its registered office to the destination Member State, while retaining its legal personality.

2.2 Cross-border merger

A cross-border merger can be done under the CLD in either of the following manners:

- A cross-border **merger via acquisition** (i.e. the merger with a pre-existing entity as receiving entity) whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, i.e. the acquiring company, in exchange for the issue to their shareholders of securities or shares representing the capital of that other company; or

- A cross-border **merger via incorporation** (i.e. the merger with a newly established legal entity created in connection with the merger as receiving entity) whereby two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, i.e. the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company;

2.3 Cross-border division

A cross-border division can be done under the CLD in either of the following manners:

- A cross-border **full division** whereby the company being divided, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more recipient companies, in exchange for the issue to the **shareholders** of the company being divided of securities or shares in the recipient company; or

- A cross-border **partial division** whereby a company being divided transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the **shareholders** of the company being divided of securities or shares in the recipient companies, in the company being divided or in both the recipient companies and the company being divided; or

- A cross-border **division by separation** whereby a company being divided transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the **company being divided** of securities or shares in the recipient companies.

With respect to cross-border divisions, the CLD only regulates cross-border divisions **via incorporation** (i.e. the division involving the transfer of assets and liabilities to a newly established legal entity created in connection with the division as receiving entity). The Mobility Directive does not provide a harmonized framework for cross-border divisions **via acquisition** in which a company transfers assets and liabilities to one or more pre-existing companies. Such cases have been viewed by the EU legislator as being too complex, requiring the involvement of competent authorities from several Member States and entailing additional risks in terms of the circumvention of EU and national law.

3. Scope of application – Forms of companies covered by directive

The CLD applies to all forms of companies listed in Annex II of the CLD, i.e. to companies in the legal form of a **stock corporation** (Aktiengesellschaft, société anonyme, naamloze vennootschap, società per azioni etc.), a **joint stock corporation** (Kommanditgesellschaft auf Aktien, société en commandite par actions, commanditaire vennootschap op aandelen, società in accomandita per azioni etc.) or a **limited liability company** (Gesellschaft mit beschränkter Haftung, société à responsabilité limitée, besloten vennootschap met beperkte aansprakelijkheid, società a responsabilità limitata etc.) and their equivalents in the other Member States.

The respective company participating in the cross-border operation must have been formed in accordance with the law of a Member State and must have its registered office, central administration, or principal place of business within the European Union for the Mobility Directive to apply.

Partnerships are not covered by the CLD. Furthermore, the CLD does not apply to companies in liquidation where the distribution of assets has begun. Member States have the option to decide whether to apply the CLD to companies undergoing insolvency proceedings or preventive restructuring frameworks.

Furthermore, the CLD does not apply to cross-border operations 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.

Finally, the Member States may decide not to allow cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of a limited liability company.

4. Overview of procedure of a cross-border operation

4.1 Standard procedure

The CLD aims to ensure a uniform and standardized procedure which is largely identical across all three forms of cross-border operations, i.e. cross-border mergers, divisions and conversions. Therefore, this procedure is presented below for all three types of cross-border operations together. Particularities for individual forms of cross-border operations are mentioned where appropriate.

The standard procedure as summarized below applies where the company or companies involved in the cross-border operation has or have two or more shareholders. A simplified procedure which is described in more detail below at section is available for group internal operations involving wholly owned entities.

(a) Draft terms

At the outset of the process the administrative or management body of the company to be converted, merged or divided draws up the draft terms of a cross-border operation. The terms to be included are listed in Art. 86d, 122, 160d CLD. In particular, the following items have to be addressed in the draft terms (unless noted otherwise below, these items apply to all three firms of cross-border operations):

- the legal form and name of the companies being involved in the cross-border operation as transferring, receiving or converted entity and the location of their registered office;
- in case of merger or division: the ratio applicable to the exchange of securities or shares representing the companies' capital and the amount of any cash payment, where appropriate;
- in case of merger or division: the terms for the allotment of securities or shares representing the capital of the recipient companies or of the company being divided;
- in case of conversion or division: the proposed indicative timetable for the cross-border operation;
- the likely repercussions of the cross-border operation on employment;
- in case of merger or division: the date from which the holding of securities or shares representing the companies' capital will entitle the holders to share in profits, and any special conditions affecting that entitlement;
- in case of merger or division: the date or dates from which the transactions of the company being divided will be treated for accounting purposes as being those of the recipient companies;
- any special advantages granted to members of the administrative, management, supervisory or controlling bodies of the company being converted, merged or divided;
- the rights conferred by the recipient companies on shareholders of the company being converted, merged or divided enjoying special rights or on holders of securities other than shares representing the converted, merged or company capital, or the measures proposed concerning them;
- the instruments of constitution of the company or companies resulting from the conversion, merger or division, where applicable, and the statutes if they are contained in a separate instrument, and – in case of division – any changes to the instrument of constitution of the company being converted, merged or divided in the case of a partial division or a division by separation;
- where appropriate, information on the procedures by which the employee rights regarding the employee participation in the recipient companies are determined;

- in case of division: a precise description of the assets and liabilities of the company being divided and a statement of how those assets and liabilities are to be allocated between the recipient companies, or are to be retained by the company being divided in the case of a partial division or a division by separation;
- in case of merger or division: information on the evaluation of the assets and liabilities which are to be allocated to each company involved in the cross-border merger or division;
- in case of merger or division: the date of the accounts of the company being merged or divided used to establish the conditions of the cross-border merger or division;
- in case of division: where appropriate, the allocation to the shareholders of the company being divided of shares in the recipient companies, in the company being divided or in both, and the criterion upon which such allocation is based;
- in case of conversion: whether any incentives or subsidies were received by the company in the departure Member State in the preceding five years;
- details of the offer of cash compensation available for shareholders objecting to the cross-border operation;
- any safeguards offered to creditors, such as guarantees or pledges.

In case of a merger, the draft terms can be drawn up jointly by the administrative or management bodies of the merging entities.

(b) Reports to shareholders and employees

The second essential procedural step is the report for the shareholders and employees which the administrative or management body of each company involved in the cross-border operation has to prepare. The report has to explain the legal and economic aspects of the cross-border operation and the further items described below.

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

The **section** of the report **for shareholders** has to explain, in particular, the following:

- the cash compensation for objecting shareholders and the method used to determine the cash compensation;
- in case of merger or division: the share exchange ratio and the method or methods used to arrive at the share exchange ratio, where applicable;
- the implications of the cross-border division for shareholders;
- the rights and remedies available to shareholders objecting to the cross-border operation.

The section of the report for shareholders is not required where all shareholders of the company have agreed to waive that requirement.

Furthermore, Member States may exclude single-shareholder companies from the requirement of a report for the shareholders.

The **section** of the report **for employees** has to explain, in particular, the following:

- the implications of the cross-border operation for employment relationships, as well as, where applicable, any measures for safeguarding those relationships;
- any material changes to the applicable conditions of employment or to the location of the company's places of business;
- how the factors set out above affect any subsidiaries of the company.

The section of the report for employees is not required where a company being converted, merged or divided and its subsidiaries, if any, have no employees other than those who form part of the administrative or management body.

If neither the section for shareholders nor the section for employees is required, no report needs to be produced at all.

The report has to be made electronically available (together with the draft terms of the cross-border operation if available at that point in time) to the shareholders and the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than six weeks before the date of the shareholders' meeting of the company voting on the cross-border operation.

Where the administrative or management body receives comments on the report from the representatives of the employees or from the employees, in good time as provided for under the national law, the shareholders have to be informed thereof and those comments have to be attached to the report.

(c) Independent expert report

Furthermore, an independent expert has to examine the draft terms of the cross-border operation and to draw up a report on its audit for the shareholders of the company participating in the cross-border operation.

The examination by an independent expert has to specifically cover and the report has to describe

- the methods used to determine the proposed cash compensation and – in case of a merger or division – the proposed share exchange ratio,
- whether the methods used are adequate for the valuation of the cash compensation and – in case of a merger or division – the share exchange ratio as well as the values resulting from such methods, and
- any special valuation difficulties that may have arisen.

The report must be made available to the shareholders at least one month before the date of the shareholders' meeting deciding on the cross-border operation.

The audit and the report by the independent expert is not required if all shareholders have waived this requirement. Furthermore, Member States may exclude single-shareholder companies from the requirement of an independent expert audit and report.

(d) Disclosure of draft terms of cross-border operation and independent expert report

The **draft terms of the cross-border operation** and a notice informing the shareholders, creditors and representatives of the employees of the company, or, where there are no such representatives, the employees themselves, that they may submit to the company, at the latest five working days before the date of the shareholders' meeting, comments concerning the draft terms of the cross-border operation have to be disclosed by the company and made publicly available in the register of the departure Member State at least one month before the date of the shareholders' meeting deciding on the cross-border operation.

Member States may require that the **independent expert report** has to be disclosed and made publicly available in the register as well. The company is able to exclude confidential information from the disclosure of the independent expert report.

Member States may exempt a company from the above disclosure requirements where, for a continuous period beginning at least one month before the date fixed for the shareholders' meeting deciding on the cross-border operation and ending not earlier than the conclusion of that meeting, that company makes the documents described above available on its website free of charge to the public.

Member States may require, in addition to the disclosure described above, that the draft terms of the cross-border operation be published in their national gazette or through a central electronic platform.

(e) Shareholder resolution

The shareholders' meeting of the company being converted or divided, or, in case of a cross-border merger, the shareholders' meeting of each merging company decides by resolution whether to approve the draft terms of the cross-border operation. This is done after the shareholders' meeting has taken note of the report of the administrative or management body and the independent expert report and any comments submitted by the employees or employee representatives.

The shareholders can make their consent conditional on the express ratification by the shareholders' meeting of the arrangements of the employee participation resulting from the negotiation process between the special negotiation body of the employees and the company management on the employee participation (see Section 7.2 below).

The approval of the draft terms of the cross-border operation requires a majority of not less than 2/3 but not more than 90% of the votes attached either to the shares or the subscribed capital represented at the shareholders' meeting.

The approval of a cross-border operation by the shareholders' meeting cannot be challenged solely on the grounds that

- (in case of a merger or division) the share exchange ratio has been set inadequately;
- the cash compensation has been set inadequately; or
- the information given with regard to the cash compensation or (in case of a merger or division) the share exchange ratio did not comply with the legal requirements.

(f) Review by departure Member State

The court, commercial register or notary in the departure Member State designated by the respective Member State (the "**competent authority**") reviews the legality of the cross-border operation as regards those parts of the procedure which are governed by the law of the departure Member State and issues a pre-conversion/merger/division certificate confirming the compliance with all relevant conditions and the proper completion of all procedures and formalities under the law of the departure Member State.

For the purpose of this review, the company has to submit the **following documents** to the competent authority together with the application for the pre-conversion/merger/division certificate:

- the draft terms of the cross-border operation;
- the report by the administrative or management body and the appended comments by the employee representatives or employees and the independent expert report;
- any comments by the shareholders, creditors or employee representatives or employees received by the company on the draft terms; and
- the information on the approval of the draft terms by the shareholders' meeting.

Furthermore, Member States may require that **additional information** is provided by the company to the competent authority, such as

- the number of employees at the time of the drawing up of the draft terms of the cross-border operation;
- the existence of subsidiaries and their respective geographical location; and
- information regarding the satisfaction of liabilities due to public bodies by the company.

In respect of compliance with the rules concerning **employee participation** (see Section 7.2 below), the competent authority has to verify that the draft terms of the cross-border operation include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements and that the procedure for negotiating the employee participation has started (where relevant).

The review by the competent authority has to be carried out within three months of the date of receipt of the documents and the information concerning the approval of the cross-border operation by the shareholders' meeting.

Where the competent authority has serious doubts indicating that the cross-border operation is set up for **abusive** or **fraudulent purposes** leading to or aimed at the evasion or circumvention of EU or national law, or for **criminal purposes**, it has to consider relevant facts and circumstances, such as indicative factors of which the competent authority has become aware in the course of the review, including through consultation of relevant authorities. Where it is necessary for the purposes of the above assessment to consider additional information or to perform additional investigative activities, the review period of three months may be extended by a maximum of another three months.

Where the competent authority determines that the cross-border operation complies with all relevant conditions and that all necessary procedures and formalities under the law of the departure Member State have been completed, it issues the **pre-conversion/merger/division certificate**, which is then shared through the Business Registers Interconnection System (BRIS) with the competent authority of the destination Member State.

(g) Review by destination Member State

The competent authority in the destination Member State reviews the legality of the cross-border operation as regards that part of the procedure which is governed by the law of the destination Member State. In particular, the competent authority in the destination Member State has to ensure that the converted company (in case of a conversion) or the formation of the new company resulting from the merger or division complies with provisions of national law on the incorporation and registration of companies. In addition, the competent authority has to ascertain, where relevant, that the procedure for determining the employee participation has been completed in compliance with applicable law.

For the purpose of the review by the competent authority in the destination Member State, the company being subject to the cross-border operation has to submit draft terms of the cross-border operation as approved by the shareholders' meeting together with its application for registration. In addition, the company has to submit all documents and information required for the review that the provisions of national law of the destination Member State on the incorporation and registration of companies have been complied with.

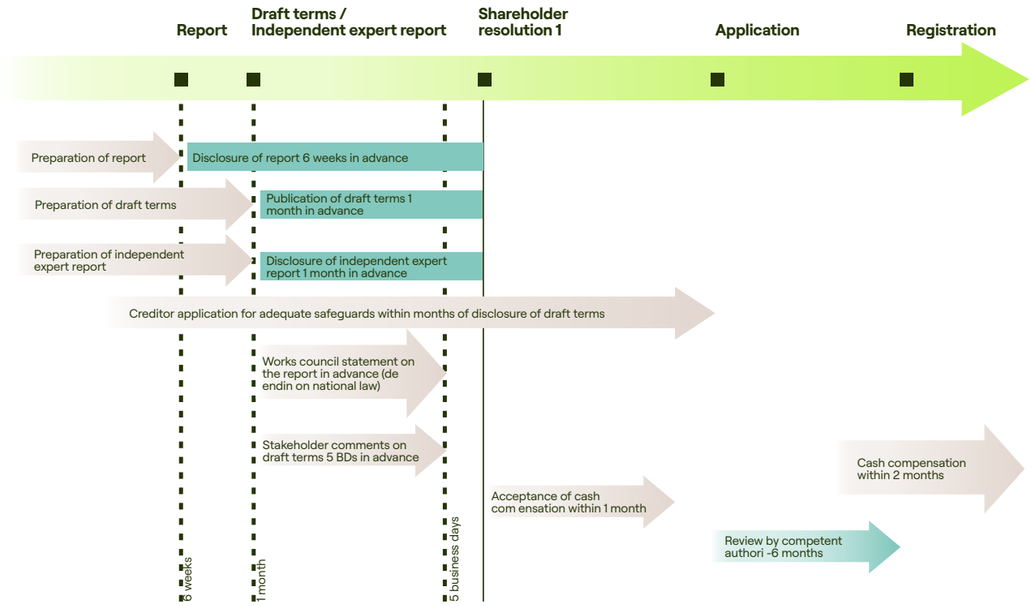
The pre-conversion/merger/division certificate issued by the competent authority of the departure Member State has to be accepted by the competent authority of the destination Member State as conclusively attesting to the proper completion of the applicable procedures and formalities in the departure Member State.

The competent authority in the destination Member State has to approve the cross-border operation and to register it in the register of the destination Member State as soon as it has determined that all relevant conditions have been properly fulfilled and formalities properly completed in the destination Member State.

Upon notification of the competent authority of the departure Member State through the Business Registers Interconnection System (BRIS) of the above registration in the destination Member State, the register in the departure Member State has to strike off the company being converted, merged or divided from its register together with a note that this is the result of the cross-border operation (except in case of a partial division or division by separation).

The cross-border operation takes legal effect upon such registrations in the departure and destination Member States having been completed.

(h) Graphical overview of procedure



4.2 Simplified procedure for intra-group restructurings

The following simplified procedure applies to **certain intra-group cross-border conversions, mergers or divisions**:

- The **report section for shareholders** of the report by the administrative or management body of the company being converted, merged or divided is not required where all the **shareholders** of the company have agreed to **waive** that requirement. In addition, Member States may exclude companies which have only a **sole shareholder** from the requirement of this report section.[2]

- The **audit and report by the independent expert** is not required where all the **shareholders** of the company have agreed to **waive** that requirement. In addition, Member States may exclude companies which have only a **sole shareholder** from the requirement of this report.

In addition, the following procedural simplifications apply to intra-group cross-border mergers:

Where a **cross-border merger by acquisition** is carried out by way of

- an **upstream merger of a wholly-owned subsidiary** into the parent company, i.e. into a company which holds all the shares conferring the right to vote at shareholders' meetings of the company or companies being acquired, or

2 N.B.: While the wording of the CLD allows to exclude companies with sole shareholders from the requirement of the entire report by the administrative or management body, this wording is generally interpreted more narrowly in the sense that it only applies to the requirement for a report section for shareholders – while the requirement of a report section for employees continues to apply also in case of companies with sole shareholders.

- a **side-step merger of companies with the same direct or indirect shareholder**, i.e. in case of the same person holding directly or indirectly all the shares in the acquiring company and in the company or companies being acquired, and the acquiring company does **not issue any shares** under the merger,

the following simplifications apply due to the fact that no capital increase is implemented under the merger:

- The following items are not required in the draft terms of the merger: (i) any statements on the exchange ratio, (ii) any terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger, (iii) 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 and (iv) any details of the offer of cash compensation for shareholders objecting to the merger.
- No report of the administrative or management body is required for the company or companies being acquired.
- No audit and report by the independent expert is required.
- No approval by the shareholders' meeting is being required for the company or companies being acquired.

Furthermore, where a **cross-border merger by acquisition** is carried out by a company which holds **90 % or more**, but not all, of the **shares** conferring the right to vote at shareholders' meetings of the company or companies being acquired, an audit and report by an independent expert and the documents necessary for review are required only to the extent that the national law governing either the acquiring company or the company or companies being acquired so requires.

In addition, where the laws of the Member States of all of the merging companies provide for the **exemption from the approval by the shareholders' meeting**, the common draft terms of cross-border merger, the report of the administrative or management body and the report of the independent expert to have be made available at least one month before the decision on the merger is taken by the company in accordance with national law.

Finally, in case of a **cross-border** division carried out as **division by separation**, the following simplifications apply due to the fact that no shares are issued to the shareholders of company being divided under the division by separation:

- The following items are not required in the draft terms of the division: (i) any statements on the exchange ratio, (ii) any terms for the allotment of securities or shares representing the capital of the company being divided, (iii) 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, (iv) the rights conferred by the recipient companies on shareholders of the company being divided enjoying special rights or on holders of securities other than shares representing the divided company capital, (v) the allocation to the shareholders of the company being divided of shares and securities in the recipient companies, in the company being divided or in both and (vi) any details of the offer of cash compensation for shareholders objecting to the merger.

- No report of the administrative or management body is required.
- No audit and report by the independent expert is required.
- No cash compensation for objecting shareholders and no right to have the share exchange ratio reviewed is required.

5. Protection of shareholders

5.1 Right to cash compensation

Those shareholders of the company being converted, merged or divided who voted against the approval of the draft terms in the shareholders' meeting have the right to exit the company and to receive an adequate cash compensation for their shares.

The Member States have to establish a period of at most one month after the shareholders' meeting of the shareholders within which the shareholders have to **declare** to the company their **decision to exercise the right to dispose of their shares**. This declaration can be made in electronic form.

The shareholders exercising this right cease to be shareholders as soon as the cross-border operation becomes legally effective. The cash compensation must be paid to the requesting shareholders within a time period of no more than two months after the cross-border operation takes effect.

Shareholders, who have declared their decision to exercise the right to dispose of their shares, are entitled to **dispute the calculation and the adequacy of the cash compensation** before a competent administrative or judicial authority. Member States may provide that the final decision on the additional cash compensation is valid for all shareholders of the company who have declared their decision to exercise the right to dispose of their shares. The exclusive competence to resolve the disputes regarding the adequacy of the cash compensation lies with the courts of the Member State of the company being converted, merged or divided.

5.2 Right to dispute share exchange ratio

In case of cross-border mergers and cross-border divisions, shareholders who do not exercise the right to dispose of their shares can **dispute the share exchange ratio** and claim an additional cash compensation. Member States may also provide that the receiving company can provide shares or other compensation instead of a cash payment to those shareholders.

Member States must ensure **judicial review of adequateness of the share exchange ratio** and the resulting cash compensation. Such judicial proceedings must not prevent the registration of the cross-border merger or division. The judicial decision is binding on the company resulting from the cross-border conversion, merger or division.

Member States may provide that the share exchange ratio as established in that judicial decision is valid for all members of the company being merged or divided concerned who did not exercise their right to dispose of their shares.

6. Protection of creditors

6.1 Right to request adequate safeguards

Member States have to provide for an adequate system of protection of the interests of creditors whose claims predate the disclosure of the draft terms of the cross-border operation and have not fallen due at the time of such disclosure.

Member States have to ensure that creditors who are dissatisfied with the safeguards offered in the draft terms of the cross-border operation may **apply**, within three months of the disclosure of the draft terms of the cross-border operation, to the competent administrative or judicial authority **for adequate safeguards** which is typically being provided by way of collateral. In order to obtain such collateral, the creditors have to credibly demonstrate that, due to the cross-border operation, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the company being converted, merged or divided. The right to obtains such additional collateral is conditional on the cross-border operation becoming legally effective.

6.2 Declaration of solvency by administrative or management body

The Member States have the option to require the administrative or management body of the company or the companies to make a **declaration of solvency**, i.e. a declaration that accurately reflects the current financial status of the company being converted, merged or divided at a date no earlier than one month before the disclosure of that declaration.

In this declaration, the administrative or management body of the company states that, on the basis of the information available to the administrative or management body of the company being converted, merged or divided at the date of that declaration, and after having made reasonable enquiries, they are not aware of any reason why the company or companies resulting from the cross-border operation would not be able to meet their liabilities when they fall due; in case of a division this declaration only refers to the liabilities allocated to the respective company under the draft terms of cross-border division.

If the Member State decides to require such declaration of solvency, it has to be publicly disclosed together with the draft terms of the cross-border operation.

6.3 Joint liability in case of cross-border divisions

The legal entities involved in the cross-border division are **jointly and severally liable** for the liabilities of the transferring legal entity that were established before the cross-border division became legally effective.

Where a creditor of the company being divided does not obtain satisfaction from the company to which the liability is allocated, the other recipient companies, and, in case of a partial division or a division by separation, the company being divided, are jointly and severally liable with the company to which the liability is allocated for that obligation.

The maximum amount of joint and several liability of any company involved in the division is **limited to the value**, at the date on which the division takes effect, **of** the **net assets** allocated to that company.

7. Protection of employees

7.1 Information and consultation

As outlined above, the Members States have to ensure that the rights of the employees to be informed and consulted in the context of cross-border operations are fully respected. For this purpose, the section of the **report of the administrative or management body** for employees has to explain the legal and economic aspects of the cross-border operation and the implications of the cross-border operation for employees. Furthermore, the employee representatives of the company being converted, merged or divided may **submit comments** on the report of the administrative or management body and on the draft terms of the cross-border operation. These comments have to be considered by the shareholders when deciding on the cross-border operation. For further details see above Sections (b), (d) and (e).

7.2 Employee participation

In addition, the aim of the CLD is to maintain the status quo of any existing rights for employees to participate in business decisions through the presence of employee representatives in the management or administrative body of the company being converted, merged or divided. For this purpose, the CLD provides for the following legal framework for determining the system of employee participation in the company resulting from the cross-border operation:

In general, according to the so-called "**seat principle**", the rules on employee participation of the destination Member State in which the company resulting from the cross-border operation is registered apply to that company.

However, in derogation of the above rule, the employee participation regime is determined by way of a **negotiated procedure** between a special negotiation body of the employees and the management of the company being converted, merged or divided in either of the following three cases:

- The company being converted or divided (in case of a cross-border conversion or division) or at least one of the companies being merged (in case of a cross-border merger) has had, in the six months preceding the public disclosure of the draft terms of the cross-border operation, an **average number of employees equivalent to at least 4/5 of the statutory threshold** for triggering employee participation as laid down in the law of the departure Member State (in case of conversion or division) or as laid down in the law of the Member State to whose jurisdiction the merging company is subject (in case of merger); or

- The national law of the destination Member State applicable to the company resulting from a cross-border operation does **not provide for at least the same level of employee participation** as operated in the company being converted, merged or divided prior to the cross-border operation that is subject to employee representation, measured by reference to the proportion of employee representatives among the members of the administrative or supervisory body or their committees; or

- The national law of the destination Member State applicable to the

company resulting from a cross-border operation does **not provide for the same level of employee participation** for employees **in establishments of that company situated in other Member States** as is enjoyed by employees in the destination Member State in which the company resulting from the cross-border operation is registered.

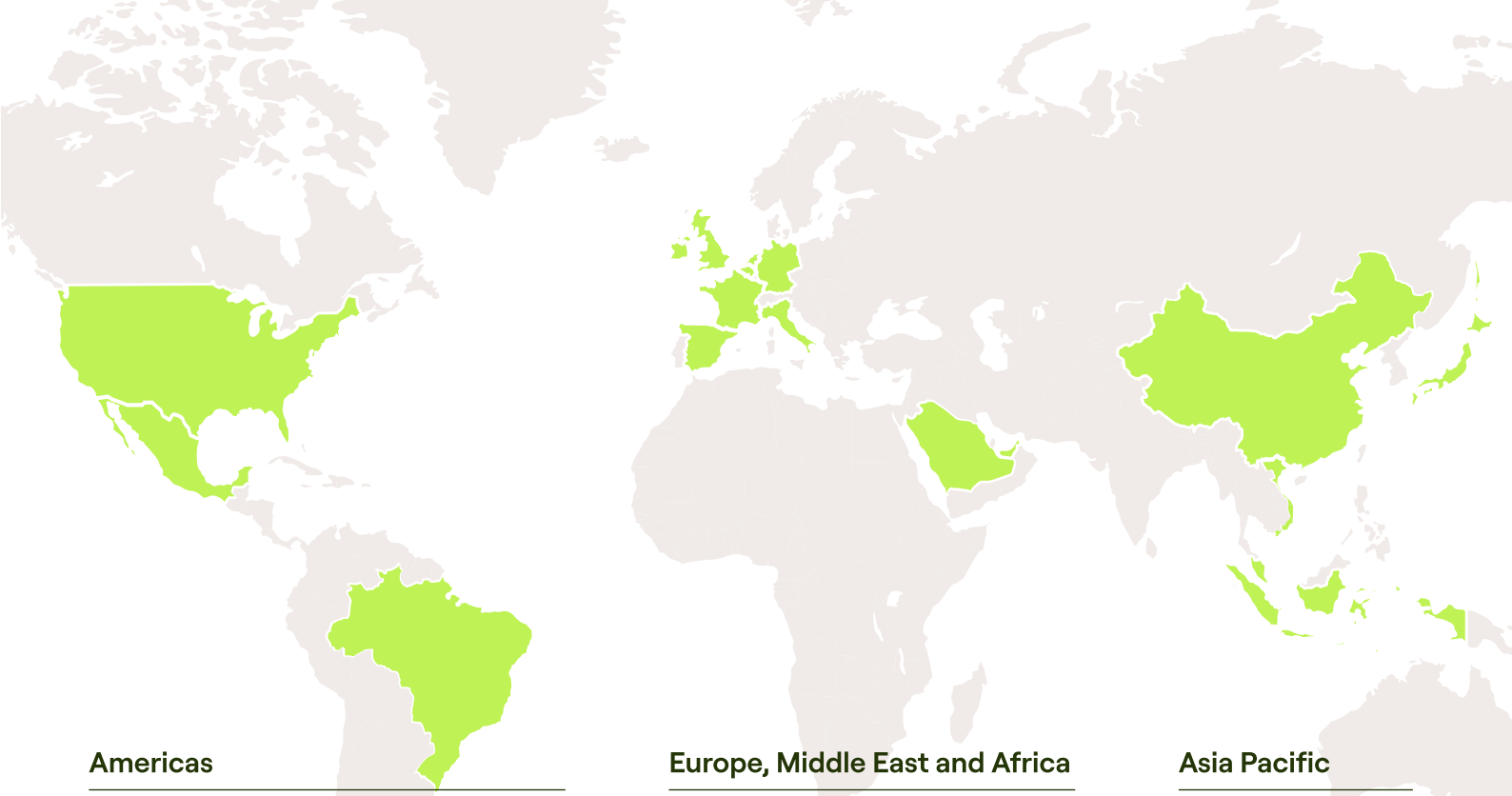
With respect to the procedure for (i) the election of the members of the special negotiation body of the employees and (ii) the conduct of the negotiations between the special negotiation body and the management of the company, the CLD refers in large parts to Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company (SE) with regard to the involvement of employees.

In case of a cross-border conversion, merger or division, the **special negotiating body of the employees may unilaterally decide**, by a majority of 2/3 of its members representing at least 2/3 of the employees, not to open negotiations or to terminate negotiations already opened and to rely on the rules on employee participation in force in the destination Member State where the company resulting from the cross-border operation will be registered.

In case of a cross-border merger only, the **relevant corporate bodies of the merging companies**, in the event that at least one of the merging companies is operating under an employee participation system, **may unilaterally decide** without any prior negotiation to be directly subject to the rules for employee participation granting the right to elect a number of members of the administrative or supervisory body of the company resulting from the merger equal to the highest proportion in force in the participating companies concerned before the cross-border merger. If none of the participating companies was governed by participation rules before registration of the merger, the company resulting from the merger is not required to establish provisions for employee participation.

The Member States may decide to **limit the proportion of employee representatives in the administrative body** of the recipient companies resulting from the negotiation between the special negotiation body and the company management. However, if, in the company being converted or divided or in at least one of the merging companies, employee representatives constituted at least one third of the administrative or supervisory body, the limitation may never result in a lower proportion of employee representatives in the administrative body than one third of the members of such body.

Where the company resulting from the cross-border operation is operating under an employee participation system, in the event of any **subsequent conversion, merger or division**, be it cross-border or domestic, that occurs during a period of four years after the first cross-border operation has become legally effective, the above procedures for determining the system of employee participation apply again mutatis mutandis.



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