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2015/0283 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**relating to certain aspects of company law (codification)**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

1. In the context of a people's Europe, the Commission attaches great importance to simplifying and clarifying the law of the Union so as to make it clearer and more accessible to citizens, thus giving them new opportunities and the chance to make use of the specific rights it gives them.

This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules.

For this reason a codification of rules that have frequently been amended is also essential if the law is to be clear and transparent.

2. On 1 April 1987 the Commission decided<sup>1</sup> to instruct its staff that all acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they are responsible, to ensure that their provisions are clear and readily understandable.
3. The Conclusions of the Presidency of the Edinburgh European Council (December 1992) confirmed this<sup>2</sup>, stressing the importance of codification as it offers certainty as to the law applicable to a given matter at a given time.

Codification must be undertaken in full compliance with the normal procedure for the adoption of acts of the Union.

Given that no changes of substance may be made to the instruments affected by codification, the European Parliament, the Council and the Commission have agreed, by an interinstitutional agreement dated 20 December 1994, that an accelerated procedure may be used for the fast-track adoption of codification instruments.

4. The purpose of this proposal is to undertake a codification of Sixth Council Directive of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC), Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (89/666/EEC), Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on

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<sup>1</sup> COM(87) 868 PV.

<sup>2</sup> See Annex 3 to Part A of the Conclusions.

the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent<sup>3</sup>. The new Directive will supersede the various acts incorporated in it<sup>4</sup>; this proposal fully preserves the content of the acts being codified and hence does no more than bring them together with only such formal amendments as are required by the codification exercise itself.

5. The codification proposal was drawn up on the basis of a preliminary consolidation, in 23 official languages of Directives 82/891/EEC, 89/666/EEC, 2005/56/EC, 2009/101/EC, 2011/35/EU and 2012/30/EU and the instruments amending them, carried out by the Publications Office of the European Union, by means of a data-processing system. Where the Articles have been given new numbers, the correlation between the old and the new numbers is shown in a table set out in Annex IV to this Directive.

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<sup>3</sup> Entered in the legislative programme for 2015.

<sup>4</sup> See Annex III, Part A to this proposal.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**⊗ relating to certain aspects of company law ⊗ (⊗ codification ⊗)**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 50(1) and (2)(g) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>5</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:



- (1) Council Directive 82/891/EEC<sup>6</sup>, Council Directive 89/666/EEC<sup>7</sup>, Directive 2005/56/EC of the European Parliament and of the Council<sup>8</sup>, Directive 2009/101/EC of the European Parliament and of the Council<sup>9</sup>, Directive 2011/35/EU of the European Parliament and of the Council<sup>10</sup> and Directive 2012/30/EU of the European Parliament

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<sup>5</sup> OJ C [...], [...], p. [...].

<sup>6</sup> Sixth Council Directive of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC) (OJ L 378, 31.12.1982, p. 47).

<sup>7</sup> Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (89/666/EEC) (OJ L 395, 30.12.1989, p. 36).

<sup>8</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1).

<sup>9</sup> Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (OJ L 258, 1.10.2009, p. 11).

<sup>10</sup> Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (OJ L 110, 29.4.2011, p. 1).

and of the Council<sup>11</sup> have been substantially amended several times<sup>12</sup>. In the interests of clarity and rationality those Directives should be codified.

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↓ 2012/30/EU recital 2 (adapted)

- (2) The coordination provided for in Article 50(2)(g) of the Treaty and in the General Programme for the abolition of restrictions on freedom of establishment, which was begun by the First Council Directive 68/151/EEC<sup>13</sup>,  facilitates the integration of the economies of the Member States. It  is especially important in relation to public limited liability companies, because their activities predominate in the economy of the Member States and frequently extend beyond their national boundaries.
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↓ 2012/30/EU recital 3

- (3) In order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important.
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↓ 2012/30/EU recital 4

- (4) In the Union, the statutes or instrument of incorporation of a public limited liability company must make it possible for any interested person to acquaint himself with the basic particulars of the company, including the exact composition of its capital.
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↓ 2009/101/EC recital 9 (adapted)

- (5) The protection of third parties should be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of  public or private limited liability  companies are not valid.
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↓ 2009/101/EC recital 10

- (6) It is necessary, in order to ensure certainty in the law as regards relations between the companies and third parties, and also between members, to limit the cases in which

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<sup>11</sup> Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

<sup>12</sup> See Annex III, Part A.

<sup>13</sup> First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8).

nullity can arise and the retroactive effect of a declaration of nullity, and to fix a short time limit within which third parties may enter objection to any such declaration.

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↓ 2009/101/EC recital 2

- (7) The coordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability, is of special importance, particularly for the purpose of protecting the interests of third parties.
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↓ 2009/101/EC recital 3

- (8) The basic documents of a company should be disclosed in order for third parties to be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company.
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↓ 2009/101/EC recital 4

- (9) Without prejudice to substantive requirements and formalities established by the national law of the Member States, companies should be able to choose to file their compulsory documents and particulars by paper means or by electronic means.
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↓ 2009/101/EC recital 5

- (10) Interested parties should be able to obtain from the register a copy of such documents and particulars by paper means as well as by electronic means.
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↓ 2009/101/EC recital 6

- (11) Member States should be allowed to decide to keep the national gazette, designated for publication of compulsory documents and particulars, in paper form or electronic form, or to provide for disclosure by equally effective means.
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↓ 2009/101/EC recital 7 (adapted)

- (12) Cross-border access to company information should be facilitated by allowing, in addition to the  compulsory  disclosure made in one of the languages permitted in the company's Member State, the voluntary registration in additional languages of the required documents and particulars. Third parties acting in good faith should be able to rely on the translations thereof.

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↓ 2009/101/EC recital 8

- (13) It is appropriate to clarify that the statement of the compulsory particulars set out in this Directive should be included in all company letters and order forms, whether they are in paper form or use any other medium. In the light of technological developments, it is also appropriate to provide that these statements be placed on any company website.

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↓ 89/666/EEC recital 3 (adapted)

- (14) The opening of a branch, like the creation of a subsidiary, is one of the possibilities currently open to companies in the exercise of their right of establishment in another Member State.

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↓ 89/666/EEC recital 4

- (15) In respect of branches, the lack of coordination, in particular concerning disclosure, gives rise to some disparities, in the protection of shareholders and third parties, between companies which operate in other Member States by opening branches and those which operate there by creating subsidiaries.

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↓ 89/666/EEC recital 5 (adapted)

- (16) ☒ The ☒ differences in the laws of the Member States may interfere with the exercise of the right of establishment ☒ of branches ☒. It is therefore necessary to eliminate such differences in order to safeguard, *inter alia*, the exercise of that right.

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↓ 89/666/EEC recital 6 (adapted)

- (17) To ensure the protection of persons who deal with companies through the intermediary of branches, measures in respect of disclosure are required in the Member State in which a branch is situated. In certain respects, the economic and social influence of a branch may be comparable to that of a subsidiary company, so that there is public interest in disclosure of the company at the branch. To effect such disclosure, it is necessary to make use of the procedure already instituted for companies with share capital within the ☒ Union ☒ .

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↓ 89/666/EEC recital 7

- (18) Such disclosure relates to a range of important documents and particulars and amendments thereto.

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↓ 89/666/EEC recital 8 (adapted)

- (19) Such disclosure, with the exception of the powers of representation, the name and legal form, and the winding-up of the company and the insolvency proceedings to which it is subject, may be confined to information concerning a branch itself together with a reference to the register of the company of which that branch is part, since under existing  Union  rules, all information covering the company as such is available in that register.

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↓ 89/666/EEC recital 9

- (20) National provisions in respect of the disclosure of accounting documents relating to a branch can no longer be justified following the coordination of national law in respect of the drawing up, audit and disclosure of companies' accounting documents. It is accordingly sufficient to disclose, in the register of the branch, the accounting documents as audited and disclosed by the company.

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↓ 89/666/EEC recital 10  
(adapted)

- (21) Letters and order forms used by a branch  should  give at least the same information as letters and order forms used by the company, and state the register in which the branch is entered.

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↓ 89/666/EEC recital 11  
(adapted)

- (22) To ensure that the purposes of this Directive are fully realised and to avoid any discrimination on the basis of a company's country of origin, this Directive  should  also cover branches opened by companies governed by the law of  third  countries and set up in legal forms comparable to companies to which  this Directive  applies. For these branches it is necessary to apply  specific  provisions  that are  different from those that apply to the branches of companies governed by the law of other Member States since  this  Directive does not apply to companies from  third  countries.

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↓ 89/666/EEC recital 12

- (23) This Directive in no way affects the disclosure requirements for branches under other provisions of, for example, employment law on workers' rights to information and tax law, or for statistical purposes.

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↓ 2012/17/EU recital 5 (adapted)

- (24) The interconnection of central, commercial and companies registers is a measure required to create a more business-friendly legal and fiscal environment. ☒ It ☒ should contribute to fostering the competitiveness of European business by reducing administrative burdens and increasing legal certainty and thus contributing to an exit from the global economic and financial crisis, which is one of the priorities of the agenda Europe 2020. It should also improve cross-border communication between registers by using innovations in information and communication technology.

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↓ 2012/17/EU recital 8 (adapted)

- (25) The Multi-annual European e-Justice action plan 2009–2013<sup>14</sup> ☒ provided ☒ for the development of a European e-Justice portal (‘the portal’) as the single European electronic access point for legal information, judicial and administrative institutions, registers, databases and other services and considers the interconnection of central, commercial and companies registers to be important.

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↓ 2012/17/EU recital 9

- (26) Cross-border access to business information on companies and their branches opened in other Member States can only be improved if all Member States engage in enabling electronic communication to take place between registers and transmitting information to individual users in a standardised way, by means of identical content and interoperable technologies, throughout the Union. This interoperability of registers should be ensured by the registers of Member States (‘domestic registers’) providing services, which should constitute interfaces to the European central platform (‘the platform’). The platform should be a centralised set of information technology tools integrating services and should form a common interface. That interface should be used by all domestic registers. The platform should also provide services constituting an interface to the portal serving as the European electronic access point, and to the optional access points established by Member States. The platform should be conceived only as an instrument for the interconnection of registers and not as a distinct entity possessing legal personality. On the basis of unique identifiers, the platform should be capable of distributing information from each of the Member States’ registers to the competent registers of other Member States in a standard message format (an electronic form of messages exchanged between information technology systems, such as, for example, xml) and in the relevant language version.

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↓ 2012/17/EU recital 10

- (27) This Directive is not aimed at establishing any centralised registers database storing substantive information about companies. At the stage of implementation of the system of interconnection of central, commercial and companies registers (‘the system

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<sup>14</sup> OJ C 75, 31.3.2009, p. 1.

of interconnection of registers’), only the set of data necessary for the correct functioning of the platform should be defined. The scope of those data should include, in particular, operational data, dictionaries and glossaries. It should be determined taking also into account the need to ensure the efficient operation of the system of interconnection of registers. Those data should be used for the purpose of enabling the platform to perform its functions and should never be made publicly available in a direct form. Moreover, the platform should modify neither the content of the data on companies stored in domestic registers nor the information about companies transmitted through the system of interconnection of registers.

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↓ 2012/17/EU recital 12  
(adapted)

- (28) The portal  should  deal, through the use of the platform, with queries submitted by individual users concerning the information on companies and their branches opened in other Member States which is stored in the domestic registers. That  should  enable the search results to be presented on the portal, including the explanatory labels in all the official languages of the Union, listing the information provided. In addition, in order to improve the protection of third parties in other Member States, basic information on the legal value of documents and particulars disclosed pursuant to the laws of Member States adopted in accordance with  this Directive  should be available on the portal.
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↓ 2012/17/EU recital 13

- (29) Member States should be able to establish one or more optional access points, which may have an impact on the use and operation of the platform. Therefore, the Commission should be notified of their establishment and of any significant changes to their operation, in particular of their closure. Such notification should not in any way restrict the powers of Member States as to the establishment and operation of the optional access points.
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↓ 2012/17/EU recital 14  
(adapted)

- (30) Companies and their branches opened in other Member States should have a unique identifier allowing them to be unequivocally identified within the Union. The identifier is intended to be used for communication between registers through the system of interconnection of registers. Therefore, companies and branches should not be obliged to include the unique identifier in the company letters or order forms mentioned in  this Directive . They should continue to use their domestic registration number for their own communication purposes.
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↓ 2012/17/EU recital 15

- (31) It should be made possible to establish a clear connection between the register of a company and the registers of its branches opened in other Member States, consisting

in the exchange of information on the opening and termination of any winding-up or insolvency proceedings of the company and on the striking-off of the company from the register, if this entails legal consequences in the Member State of the register of the company. While Member States should be able to decide on the procedures they follow with respect to the branches registered in their territory, they should ensure, at least, that the branches of a dissolved company are struck off the register without undue delay and, if applicable, after liquidation proceedings of the branch concerned. This obligation should not apply to branches of companies that have been struck off the register but which have a legal successor, such as in the case of any change in the legal form of the company, a merger or division, or a cross-border transfer of its registered office.

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↓ 2012/17/EU recital 16  
(adapted)

- (32) ☒ The provisions of this Directive relating to the interconnection of registers ☒ should not apply to a branch opened in a Member State by a company which is not governed by the law of a Member State.
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↓ 2012/17/EU recital 18

- (33) Member States should ensure that, in the event of any changes to information entered in the registers concerning companies, the information is updated without undue delay. The update should be disclosed, normally, within 21 days from receipt of the complete documentation regarding those changes, including the legality check in accordance with national law. That time limit should be interpreted as requiring Member States to make reasonable efforts to meet the deadline laid down in this Directive. It should not be applicable as regards the accounting documents which companies are obliged to submit for each financial year. This exclusion is justified by the overload on the domestic registers during reporting periods. In accordance with general legal principles common to all Member States, the time limit of 21 days should be suspended in cases of *force majeure*.
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↓ 2012/17/EU recital 19  
(adapted)

- (34) ☒ If ☒ the Commission decides to develop and/or operate the platform through a third party, this should be done in accordance with Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council<sup>15</sup>. An appropriate degree of Member States' involvement in this process should be ensured by establishing the technical specifications for the purpose of the public procurement procedure by means of implementing acts adopted in accordance with the examination procedure referred

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<sup>15</sup> Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

to in Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>16</sup>.

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↓ 2012/17/EU recital 20  
(adapted)

- (35) ☒ If ☒ the Commission decides to operate the platform through a third party, the continuity of the provision of services by the system of interconnection of registers and a proper public supervision of the functioning of the platform should be ensured. Detailed rules on the operational management of the platform should be adopted by means of implementing acts adopted in accordance with the examination procedure referred to in Article 5 of Regulation (EU) No 182/2011. In any case, the involvement of Member States in the functioning of the whole system should be ensured by means of a regular dialogue between the Commission and the representatives of Member States on the issues concerning the operation of the system of interconnection of registers and its future development.
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↓ 2012/17/EU recital 21

- (36) The interconnection of central, commercial and companies registers necessitates the coordination of national systems having varying technical characteristics. This entails the adoption of technical measures and specifications which need to take account of differences between registers. In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission to tackle these technical and operational issues. Those powers should be exercised in accordance with the examination procedure referred to in Article 5 of Regulation (EU) No 182/2011.
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↓ 2012/17/EU recital 22

- (37) This Directive should not limit the right of Member States to charge fees for obtaining information on companies through the system of interconnection of registers, if such fees are required under national law. Therefore, technical measures and specifications for the system of interconnection of registers should allow for the establishment of payment modalities. In this respect, this Directive should not prejudge any specific technical solution as the payment modalities should be determined at the stage of adoption of the implementing acts, taking into account widely available online payment facilities.

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<sup>16</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

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↓ 2012/17/EU recital 23

- (38) It could be desirable for third countries to be able, in the future, to participate in the system of interconnection of registers.
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↓ 2012/17/EU recital 24

- (39) An equitable solution regarding the funding of the system of interconnection of registers entails participation both by the Union and by its Member States in the financing of that system. The Member States should bear the financial burden of adjusting their domestic registers to that system, while the central elements — the platform and the portal serving as the European electronic access point — should be funded from an appropriate budget line in the general budget of the Union. In order to supplement non-essential elements of this Directive, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of the charging of fees for obtaining company information. This does not affect the possibility for the domestic registers to charge fees, but it may involve an additional fee in order to co-finance the maintenance and functioning of the platform. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
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↓ 2012/30/EU recital 5 (adapted)

- (40) Union provisions are necessary for maintaining the capital, which constitutes the creditors' security, in particular by prohibiting any reduction thereof by distribution to shareholders where the latter are not entitled to it and by imposing limits on the  right of public limited liability companies  to acquire their own shares.
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↓ 2012/30/EU recital 6 (adapted)

- (41) The restrictions on a  public limited liability  company's acquisition of its own shares apply not only to acquisitions made by a company itself but also to those made by any person acting in his own name but on the company's behalf.
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↓ 2012/30/EU recital 7

- (42) In order to prevent a public limited liability company from using another company in which it holds a majority of the voting rights or on which it can exercise a dominant influence to make such acquisitions without complying with the restrictions imposed in that respect, the arrangements governing a company's acquisition of its own shares should be extended to cover the most important and most frequent cases of the acquisition of shares by such other companies. Those arrangements should be extended to cover subscription for shares in the public limited liability company.

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↓ 2012/30/EU recital 8 (adapted)

- (43) In order to prevent the circumvention of this Directive,  public limited liability  companies governed by  this  Directive and companies governed by the laws of third countries, and having comparable legal forms, should also be covered by the arrangements referred to in recital 42.
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↓ 2012/30/EU recital 9

- (44) Where the relationship between a public limited liability company and another company such as referred to in recital 42 is only indirect, it would appear to be justified to relax the provisions applicable when that relationship is direct, by providing for the suspension of voting rights as a minimum measure, for the purpose of achieving the aims of this Directive.
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↓ 2012/30/EU recital 10

- (45) Furthermore, it is justifiable to exempt cases in which the specific nature of a professional activity rules out the possibility that the attainment of the objectives of this Directive may be endangered.
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↓ 2012/30/EU recital 11

- (46) It is necessary, having regard to the objectives of Article 50(2)(g) of the Treaty, that the Member States' laws relating to the increase or reduction of capital ensure that the principles of equal treatment of shareholders in the same position and of protection of creditors whose claims exist prior to the decision on reduction are observed and harmonised.
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↓ 2012/30/EU recital 12

- (47) In order to enhance standardised creditor protection in all Member States, creditors should be able to resort, under certain conditions, to judicial or administrative proceedings where their claims are at stake, as a consequence of a reduction in the capital of a public limited liability company.
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↓ 2012/30/EU recital 13

- (48) In order to ensure that market abuse is prevented, Member States should take into account, for the purpose of the implementation of this Directive, the provisions of

Directive 2003/6/EC of the European Parliament and of the Council<sup>17</sup>, Commission Regulation (EC) No 2273/2003<sup>18</sup> and Commission Directive 2004/72/EC<sup>19</sup>.

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↓ 2011/35/EU recital 4 (adapted)

- (49) The protection of the interests of members and third parties requires that the laws of the Member States relating to mergers of public limited liability companies be coordinated, and that provision for mergers be made in the laws of all the Member States.
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↓ 2011/35/EU recital 5

- (50) In the context of such coordination, it is particularly important that the shareholders of merging companies be kept adequately informed in as objective a manner as possible, and that their rights be suitably protected. However, there is no reason to require an examination of the draft terms of a merger by an independent expert for the shareholders if all the shareholders agree that it may be dispensed with.
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↓ 2011/35/EU recital 7

- (51) Creditors, including debenture holders, and persons having other claims on the merging companies should be protected so that the merger does not adversely affect their interests.
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↓ 2011/35/EU recital 8 (adapted)

- (52) The disclosure requirements  for the protection of the interests of members and third parties  should include mergers so that third parties are kept adequately informed.
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↓ 2011/35/EU recital 9 (adapted)

- (53) The safeguards afforded to members and third parties in connection with mergers  of public limited liability companies  should be extended to cover certain legal

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<sup>17</sup> Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L 96, 12.4.2003, p. 16).

<sup>18</sup> Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (OJ L 336, 23.12.2003, p. 33).

<sup>19</sup> Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions (OJ L 162, 30.4.2004, p. 70).

practices which in important respects are similar to merger, so that the obligation to provide such protection cannot be evaded.

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↓ 2011/35/EU recital 10  
(adapted)

- (54) To ensure certainty in the law as regards relations between the companies concerned  by a merger , between them and third parties, and between the members, it is necessary to limit the cases in which nullity can arise by providing that defects be remedied wherever that is possible, and by restricting the period within which nullification proceedings may be commenced.
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↓ 2005/56/EC recital 2 (adapted)

- (55) This Directive  also  facilitates the cross-border merger of limited liability companies. The laws of the Member States  should  allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of company.
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↓ 2005/56/EC recital 3 (adapted)

- (56) In order to facilitate cross-border merger operations, it should be  specified  that, unless this Directive provides otherwise, each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger. None of the provisions and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the free movement of capital, save where these can be justified in accordance with the case-law of the Court of Justice  of the European Union  and in particular, by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements.
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↓ 2005/56/EC recital 4 (adapted)

- (57) The common draft terms of a cross-border merger  should  be drawn up in the same terms for each of the companies concerned in the various Member States. The minimum content of such common draft terms should therefore be specified, while leaving the companies free to agree on other items.
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↓ 2005/56/EC recital 5 (adapted)

- (58) In order to protect the interests of members and others, both the common draft terms of the cross-border merger and the completion of the cross-border merger  should  be publicised for each merging company via an entry in the appropriate public register.

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↓ 2005/56/EC recital 6 (adapted)

- (59) The laws of all the Member States should provide for the drawing-up at national level of a report on the common draft terms of the cross-border merger by one or more experts on behalf of each of the companies that are merging. In order to limit experts' costs connected with cross-border mergers, provision should be made for the possibility of drawing up a single report intended for all members of companies taking part in a cross-border merger operation. The common draft terms of the cross-border merger  should  be approved by the general meeting of each of those companies.

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↓ 2005/56/EC recital 7

- (60) In order to facilitate cross-border merger operations, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of the completion and legality of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger. The national authority in question may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the cross-border merger takes effect, this being the law to which the company resulting from the cross-border merger is subject, should also be specified.

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↓ 2005/56/EC recital 8

- (61) In order to protect the interests of members and others, the legal effects of the cross-border merger, distinguishing as to whether the company resulting from the cross-border merger is an acquiring company or a new company, should be specified. In the interests of legal certainty, it should no longer be possible, after the date on which a cross-border merger takes effect, to declare the merger null and void.

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↓ 2005/56/EC recital 9 (adapted)

- (62) This Directive is without prejudice to the application of the legislation on the control of concentrations between undertakings, both at  Union  level, by Council Regulation (EC) No 139/2004<sup>20</sup>, and at Member State level.

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↓ 2005/56/EC recital 10 (adapted)

- (63) This Directive does not affect  Union  legislation regulating credit intermediaries and other financial undertakings and national rules made or introduced pursuant to such  Union  legislation.

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<sup>20</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

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↓ 2005/56/EC recital 11

- (64) This Directive is without prejudice to Member State legislation demanding information on the place of central administration or the principal place of business proposed for the company resulting from the cross-border merger.

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↓ 2005/56/EC recital 12

- (65) Employees' rights, other than rights of participation, should remain subject to the national provisions referred to in Council Directive 98/59/EC<sup>21</sup>, Council Directive 2001/23/EC<sup>22</sup>, Directive 2002/14/EC of the European Parliament and of the Council<sup>23</sup> and Directive 2009/38/EC of the European Parliament and of the Council<sup>24</sup>.

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↓ 2005/56/EC recital 13 (adapted)

- (66) If employees have participation rights in one of the merging companies under the circumstances set out in this Directive and, if the national law of the Member State in which the company resulting from the cross-border merger has its registered office does not provide for the same level of participation as operated in the relevant merging companies, including in committees of the supervisory board that have decision-making powers, or does not provide for the same entitlement to exercise rights for employees of establishments resulting from the cross-border merger, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights ☒ should ☒ be regulated. To that end, the principles and procedures provided for in Council Regulation (EC) No 2157/2001<sup>25</sup> and in Council Directive 2001/86/EC<sup>26</sup>, ☒ should ☒ be taken as a basis, subject, however, to modifications that are deemed necessary because the resulting company will be subject to the national laws of the Member State where it has its registered office. A prompt start to negotiations under Article 132 of this Directive, with a view to not unnecessarily delaying mergers, may be ensured by Member States in accordance with Article 3(2)(b) of Directive 2001/86/EC.

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<sup>21</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 16).

<sup>22</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

<sup>23</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

<sup>24</sup> Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Text with EEA relevance) (OJ L 122, 16.5.2009, p. 28).

<sup>25</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, p. 1).

<sup>26</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ L 294, 10.11.2001, p. 22).

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↓ 2005/56/EC recital 14

- (67) For the purpose of determining the level of employee participation operated in the relevant merging companies, account should also be taken of the proportion of employee representatives amongst the members of the management group, which covers the profit units of the companies, subject to employee participation.

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↓ 82/891/EEC recital 5

- (68) The protection of the interests of members and third parties requires that the laws of the Member States relating to divisions of public limited liability companies be coordinated where the Member States permit such operations.

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↓ 82/891/EEC recital 6

- (69) In the context of such coordination, it is particularly important that the shareholders of the companies involved in a division be kept adequately informed in as objective a manner as possible, and that their rights be suitably protected.

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↓ 82/891/EEC recital 8 (adapted)

- (70) Creditors, including debenture holders, and persons having other claims on the companies involved in a division  of public limited liability companies ,  should  be protected so that the division does not adversely affect their interests.

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↓ 82/891/EEC recital 9 (adapted)

- (71) Disclosure requirements  should  include divisions so that third parties are kept adequately informed.

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↓ 82/891/EEC recital 10  
(adapted)

- (72) The safeguards afforded to members and third parties in connection with divisions  should  be extended to cover certain legal practices which in important respects are similar to division, so that the obligation to provide such protection cannot be evaded.

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↓ 82/891/EEC recital 11  
(adapted)

- (73) To ensure certainty in the law as regards relations between the  public limited liability  companies involved in the division, between them and third parties, and

between the members, the cases in which nullity can arise  should  be limited by providing that defects  should  be remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced.

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↓ 2009/109/EC recital 4 (adapted)

- (74) Company websites or other websites offer, in certain cases, an alternative to publication via the companies registers. Member States should be able to designate those other websites which companies may use free of charge for such publication, such as websites of business associations or chambers of commerce or the central electronic platform referred to in  this  Directive. Where the possibility exists of using company or other websites for publication of draft terms of merger and/or division and of other documents that have to be made available to shareholders and creditors in the process, guarantees relating to the security of the website and the authenticity of the documents should be met.
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↓ 2009/109/EC recital 6 (adapted)

- (75) Member States should be able to provide that the extensive reporting or information requirements relating to the merger or division of companies, laid down in  Chapter I and Chapter III of Title II  , need not be complied with if all the shareholders of the companies involved in the merger or division agree that such compliance may be dispensed with.
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↓ 2009/109/EC recital 7 (adapted)

- (76) Any modification of  Chapter I and Chapter III of Title II  allowing such agreement by shareholders, should be without prejudice to the systems of protection of the interests of creditors of the companies involved, and to rules aimed at ensuring the provision of necessary information to the employees of those companies and to public authorities, such as tax authorities, controlling the merger or division in accordance with existing  Union  law.
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↓ 2009/109/EC recital 8

- (77) It is not necessary to impose the requirement to draw up an accounting statement where an issuer whose securities are admitted to trading on a regulated market publishes half-yearly financial reports in accordance with Directive 2004/109/EC of the European Parliament and of the Council<sup>27</sup>.

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<sup>27</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

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↓ 2009/109/EC recital 9 (adapted)

- (78) An independent expert's report ☒ on consideration other than in cash ☒ is often not needed where an independent expert's report protecting the interests of shareholders or creditors also has to be drawn up in the context of the merger or the division. Member States should therefore have the possibility in such cases of dispensing companies from the reporting requirement ☒ regarding consideration other than in cash ☒ or of providing that both reports may be drawn up by the same expert.

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↓ 2009/109/EC recital 10  
(adapted)

- (79) Mergers between parent ☒ undertakings ☒ and their subsidiaries have a reduced economic impact on shareholders and creditors where the parent ☒ undertaking's ☒ holding in the subsidiary amounts to 90 % or more of the shares and other securities conferring the right to vote. The same applies to certain divisions, in particular when companies are split into new companies that are owned by the shareholders in the proportion to their rights in the company being divided. In those cases, the reporting requirements should therefore be reduced.

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↓ 2012/17/EU recital 25

- (80) Directive 95/46/EC of the European Parliament and of the Council<sup>28</sup> and Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>29</sup> govern the processing of personal data, including the electronic transmission of personal data within the Member States. Any processing of personal data by the registers of Member States, by the Commission and, if applicable, by any third party involved in operating the platform should take place in compliance with those acts. The implementing acts to be adopted in relation to the system of interconnection of registers should, where appropriate, ensure such compliance, in particular by establishing the relevant tasks and responsibilities of all the participants concerned and the organisational and technical rules applicable to them.

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↓ 2012/17/EU recital 28

- (81) This Directive respects fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union, in particular Article 8 thereof, which states that everyone has the right to the protection of personal data concerning him or her.

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<sup>28</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

<sup>29</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).



(82) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law and the dates of application of the directives set out in Annex III, Part B,

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↓ 2012/30/EU (adapted)

HAVE ADOPTED THIS DIRECTIVE:

## **Title I**

### **⊗ General provisions and the establishment and functioning of limited liability companies ⊗**

#### **Chapter I**

#### **⊗ Subject matter ⊗**

##### *Article 1*

#### **⊗ Subject matter ⊗**

⊗ This Directive lays down measures concerning the following: ⊗

- ⊗ the ⊗ coordination of safeguards which are required by Member States in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent;
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↓ 2009/101/EC (adapted)

- ⊗ the ⊗ coordination of safeguards which are required by Member States ⊗ concerning disclosure requirements in respect of public and private limited liability companies ⊗, with a view to making such safeguards equivalent;
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↓ 89/666/EEC (adapted)

- ⊗ the ⊗ disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State;
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↓ 2011/35/EU (adapted)

- mergers of public limited liability companies;

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↓ 2005/56/EC (adapted)

- cross-border mergers of limited liability companies;

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↓ 82/891/EEC (adapted)

- the division of public limited liability companies.

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↓ 2012/30/EU (adapted)

## Chapter II

### ⊗ Incorporation and nullity of the company and validity of its obligations ⊗

#### SECTION 1

#### ⊗ INCORPORATION OF THE PUBLIC LIMITED LIABILITY COMPANY ⊗

##### *Article 2*

##### ⊗ Scope ⊗

1. The coordination measures prescribed by this Section shall apply to the provisions laid down by law, regulation or administrative action in Member States relating to the types of company listed in Annex I.

The name for any company of the types listed in Annex I shall comprise or be accompanied by a description which is distinct from the description required of other types of companies.

2. The Member States may decide not to apply ⊗ the provisions of this Section ⊗ to investment companies with variable capital and to cooperatives incorporated as one of the types of company listed in Annex I. In so far as the laws of the Member States make use of this option, they shall require such companies to include the words ‘investment company with variable capital’, or ‘cooperative’ in all documents indicated in Article 25.

The ⊗ term ⊗ ‘investment company with variable capital’, within the meaning of this Directive, means only those companies:

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↓ 2012/30/EU

- the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets,
- which offer their own shares for subscription by the public, and

- the statutes of which provide that, within the limits of a minimum and maximum capital, they may at any time issue, redeem or resell their shares.
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↓ 2012/30/EU (adapted)

### Article 3

#### ⊗ **Compulsory information to be provided in the statutes or instruments of incorporation** ⊗

The statutes or the instrument of incorporation of ⊗ a company of a type listed in Annex I ⊗ shall always give at least the following information:

- (a) the type and name of the company;
- (b) the objects of the company;
- (c) when the company has no authorised capital, the amount of the subscribed capital;
- (d) when the company has an authorised capital, the amount thereof and also the amount of the capital subscribed at the time the company is incorporated or is authorised to commence business, and at the time of any change in the authorised capital, without prejudice to Article 13 (e);
- (e) in so far as they are not legally determined, the rules governing the number of, and the procedure for, appointing members of the bodies responsible for representing the company with regard to third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies;
- (f) the duration of the company, except where this is indefinite.

### Article 4

#### ⊗ **Compulsory information to be provided in the statutes or instruments of incorporation or separate documents** ⊗

The following information at least ⊗ shall ⊗ appear in either the statutes or the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 15:

- (a) the registered office;
- (b) the nominal value of the shares subscribed and, at least once a year, the number thereof;
- (c) the number of shares subscribed without stating the nominal value, where such shares may be issued under national law;
- (d) the special conditions, if any, limiting the transfer of shares;
- (e) where there are several classes of shares, the information referred to in points (b), (c) and (d) for each class and the rights attaching to the shares of each class;
- (f) whether the shares are registered or bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;

- (g) the amount of the subscribed capital paid up at the time the company is incorporated or is authorised to commence business;
- (h) the nominal value of the shares or, where there is no nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing this consideration;
- (i) the identity of the natural or legal persons or companies or firms by whom or in whose name the statutes or the instrument of incorporation, or where the company was not formed at the same time, the drafts of these documents, have been signed;
- (j) the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of its formation and, where appropriate, before the company is authorised to commence business;
- (k) any special advantage granted, at the time the company is formed or up to the time it receives authorisation to commence business, to anyone who has taken part in the formation of the company or in transactions leading to the grant of such authorisation.

#### *Article 5*

#### **⊗ Authorisation for commencing business ⊗**

1. Where the laws of a Member State prescribe that a company may not commence business without authorisation, they shall also make provision for responsibility for liabilities incurred by or on behalf of the company during the period before such authorisation is granted or refused.
2. Paragraph 1 shall not apply to liabilities under contracts concluded by the company conditionally upon its being granted authorisation to commence business.

#### *Article 6*

#### **⊗ Multiple-member companies ⊗**

1. Where the laws of a Member State require a company to be formed by more than one member, the fact that all the shares are held by one person or that the number of members has fallen below the legal minimum after incorporation of the company shall not lead to the automatic dissolution of the company.
2. If, in the cases referred to in paragraph 1, the laws of a Member State permit the company to be wound up by order of the court, the judge having jurisdiction must be able to give the company sufficient time to regularise its position.
3. Where a winding up order as referred to in paragraph 2 is made, the company shall enter into liquidation.

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↓ 2009/101/EC (adapted)

## SECTION 2

### ⊗ NULLITY OF THE LIMITED LIABILITY COMPANY AND VALIDITY OF ITS OBLIGATIONS ⊗

#### ⊗ Article 7 ⊗

##### ⊗ General provisions and joint and several liability ⊗

⊗ 1. The provisions laid down in this Section shall apply to the types of company listed in Annex II. ⊗

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↓ 2009/101/EC

2. If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed.

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↓ 2009/101/EC (adapted)

#### Article 8

##### ⊗ Effects of disclosure with respect to third parties ⊗

Completion of the formalities of disclosure of the particulars concerning the persons who, as an organ of the company, are authorised to represent it, shall constitute a bar to any irregularity in their appointment being relied upon as against third parties, unless the company proves that such third parties had knowledge thereof.

#### Article 9

##### ⊗ Acts of the organs of a company and its representation ⊗

1. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof.

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may not be relied on as against third parties, even if they have been disclosed.

3. If the national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on

several persons acting jointly, that law may provide that such a provision in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by Article 15.

#### *Article 10*

##### **⊗ Drawing up and certification of the instrument of constitution and the company statutes in due legal form ⊗**

In all Member States whose laws do not provide for preventive administrative or judicial control, at the time of formation of a company, the instrument of constitution, the company statutes and any amendments to those documents shall be drawn up and certified in due legal form.

#### *Article 11*

##### **⊗ Conditions for nullity of a company ⊗**

The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:

- (a) nullity must be ordered by decision of a court of law;
- (b) nullity may be ordered only on the grounds:
  - (i) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with,
  - (ii) that the objects of the company are unlawful or contrary to public policy,
  - (iii) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company,
  - (iv) of failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up,
  - (v) of the incapacity of all the founder members,
  - (vi) that, contrary to the national law governing the company, the number of founder members is less than two.

Apart from the foregoing grounds of nullity, a company shall not be subject to any cause of non-existence, absolute nullity, relative nullity or declaration of nullity.

#### *Article 12*

##### **⊗ Consequences of nullity ⊗**

1. The question whether a decision of nullity pronounced by a court of law may be relied on as against third parties shall be governed by Article 15. Where the national law entitles a third party to challenge the decision, he may do so only within six months of public notice of the decision of the court being given.
2. Nullity shall entail the winding-up of the company, as may dissolution.
3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up.

4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.
5. Holders of shares in the capital shall remain obliged to pay up the capital agreed to be subscribed by them but which has not been paid up, to the extent that commitments entered into with creditors so require.

↓ 2013/24/EU (adapted) ↓ 2009/101/EC (adapted)
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## Chapter III

### Disclosure and interconnection of central, commercial and companies registers

#### SECTION 1

#### GENERAL PROVISIONS

##### *Article 13*

#### Documents and particulars to be disclosed by companies

Member States shall take the measures required to ensure compulsory disclosure by the  types of company listed in Annex II  of at least the following documents and particulars:

- (a) the instrument of constitution, and the statutes if they are contained in a separate instrument;
- (b) any amendments to the instruments mentioned in point (a), including any extension of the duration of the company;
- (c) after every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date;
- (d) the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:
  - (i) are authorised to represent the company in dealings with third parties and in legal proceedings; it must be apparent from the disclosure whether the persons authorised to represent the company may do so alone or must act jointly,
  - (ii) take part in the administration, supervision or control of the company;
- (e) at least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorised capital, unless any increase in the capital subscribed necessitates an amendment of the statutes;
- (f) the accounting documents for each financial year which are required to be published in accordance with Council Directives 86/635/EEC<sup>30</sup> and 91/674/EEC<sup>31</sup> and Directive 2013/34/EU of the European Parliament and of the Council<sup>32</sup>;

<sup>30</sup> Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

- (g) any change of the registered office of the company;
  - (h) the winding-up of the company;
  - (i) any declaration of nullity of the company by the courts;
  - (j) the appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company;
  - (k) the termination of the liquidation and, in Member States where striking off the register entails legal consequences, the fact of any such striking off.
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↓ 2012/17/EU Art. 3(1) (adapted)

#### Article 14

##### ⊗ Changes in documents and particulars ⊗

1. Member States shall take the measures required to ensure that any changes in the documents and particulars referred to in Article 13 are entered in the competent register referred to in the first subparagraph of Article 15(1) and are disclosed, in accordance with Article 15(3) and (5), normally within 21 days from receipt of the complete documentation regarding those changes including, if applicable, the legality check as required under national law for entry in the file.

2. Paragraph 1 shall not apply to the accounting documents referred to in Article 13(f).

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↓ 2009/101/EC (adapted)

#### Article 15

##### ⊗ Disclosure in the register ⊗

1. In each Member State, a file shall be opened in a central ~~register~~, commercial ~~register~~ or companies register ⊗ ('the register') ⊗, for each of the companies registered therein.

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↓ 2012/17/EU Art. 3(2)

Member States shall ensure that companies have a unique identifier allowing them to be unequivocally identified in communications between registers through the system of interconnection of central, commercial and companies registers established in accordance with Article 21(2) ('the system of interconnection of registers'). That unique identifier shall

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<sup>31</sup> Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 31.12.1991, p. 7).

<sup>32</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (Text with EEA relevance) (OJ L 182, 29.6.2013, p. 19).

comprise, at least, elements making it possible to identify the Member State of the register, the domestic register of origin and the company number in that register and, where appropriate, features to avoid identification errors.

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↓ 2009/101/EC (adapted)

2. For the purposes of this Article, ‘by electronic means’ shall mean that the information is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received in a manner to be determined by Member States by wire, by radio, by optical means or by other electromagnetic means.

3. All documents and particulars which must be disclosed pursuant to Article 13 shall be kept in the file, or entered in the register; the subject matter of the entries in the register must in every case appear in the file.

Member States shall ensure that the filing by companies, as well as by other persons and bodies required to make or assist in making notifications, of all documents and particulars which must be disclosed pursuant to Article 13 is possible by electronic means. In addition, Member States may require all, or certain categories of, companies to file all, or certain types of, such documents and particulars by electronic means.

All documents and particulars referred to in Article 13 which are filed, whether by paper means or by electronic means, shall be kept in the file, or entered in the register, in electronic form. To this end, Member States shall ensure that all such documents and particulars which are filed by paper means are converted by the register to electronic form.

The documents and particulars referred to in Article 13 that have been filed by paper means up to 31 December 2006, shall not be required to be converted automatically into electronic form by the register. Member States shall nevertheless ensure that they are converted into electronic form by the register upon receipt of an application for disclosure by electronic means submitted in accordance with the measures adopted to give effect to paragraph 4.

4. A copy of the whole or any part of the documents or particulars referred to in Article 13  shall  be obtainable on application. Applications may be submitted to the register by paper means or by electronic means as the applicant chooses.

Copies as referred to in the first subparagraph  shall  be obtainable from the register by paper means or by electronic means as the applicant chooses. This shall apply in the case of all documents and particulars already filed. However, Member States may decide that all, or certain types of, documents and particulars filed by paper means on or before a date which may not be later than 31 December 2006 shall not be obtainable from the register by electronic means if a specified period has elapsed between the date of filing and the date of the application submitted to the register. Such specified period may not be less than 10 years.

The price of obtaining a copy of the whole or any part of the documents or particulars referred to in Article 13, whether by paper means or by electronic means, shall not exceed the administrative cost thereof.

Paper copies supplied shall be certified as ‘true copies’, unless the applicant dispenses with such certification. Electronic copies supplied shall not be certified as ‘true copies’, unless the applicant explicitly requests such a certification.

Member States shall take the necessary measures to ensure that certification of electronic copies guarantees both the authenticity of their origin and the integrity of their contents, by

means at least of an advanced electronic signature within the meaning of Article 2(2) of Directive 1999/93/EC of the European Parliament and of the Council<sup>33</sup>.

5. Disclosure of the documents and particulars referred to in paragraph 3 shall be effected by publication in the national gazette designated for that purpose by the Member State, either of the full text or of a partial text, or by means of a reference to the document which has been deposited in the file or entered in the register. The national gazette designated for that purpose may be kept in electronic form.

Member States may decide to replace publication in the national gazette 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.

6. The documents and particulars may be relied on by the company as against third parties only after they have been disclosed in accordance with paragraph 5, unless the company proves that the third parties had knowledge thereof.

However, with regard to transactions taking place before the sixteenth day following the disclosure, the documents and particulars shall not be relied on as against third parties who prove that it was impossible for them to have had knowledge thereof.

7. Member States shall take the necessary measures to avoid any discrepancy between what is disclosed in accordance with paragraph 5 and what appears in the register or file.

However, in cases of discrepancy, the text disclosed in accordance with paragraph 5 may not be relied on as against third parties; such third parties may nevertheless rely thereon, unless the company proves that they had knowledge of the texts deposited in the file or entered in the register.

Third parties may, moreover, always rely on any documents and particulars in respect of which the disclosure formalities have not yet been completed, save where non-disclosure causes them not to have effect.

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↓ 2012/17/EU Art. 3(3) (adapted)

#### *Article 16*

#### ⊗ **Up-to-date information on national law with regard to the rights of third parties** ⊗

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↓ 2012/17/EU Art. 3(3)

1. Member States shall ensure that up-to-date information is made available explaining the provisions of national law according to which third parties can rely on particulars and each type of document referred to in Article 13, in accordance with Article 15(5), (6) and (7).

2. Member States shall provide the information required for publication on the European e-Justice portal ('the portal') in accordance with the portal's rules and technical requirements.

3. The Commission shall publish that information on the portal in all the official languages of the Union.

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<sup>33</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L 13, 19.1.2000, p. 12).

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↓ 2012/17/EU Art. 3(3) (adapted)

*Article 17*

⊗ **Availability of electronic copies of documents and particulars** ⊗

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↓ 2012/17/EU Art. 3(3)

1. Electronic copies of the documents and particulars referred to in Article 13 shall also be made publicly available through the system of interconnection of registers.

2. Member States shall ensure that the documents and particulars referred to in Article 13 are available through the system of interconnection of registers in a standard message format and accessible by electronic means. Member States shall also ensure that minimum standards for the security of data transmission are respected.

3. The Commission shall provide a search service in all the official languages of the Union in respect of companies registered in the Member States, in order to make available through the portal:

- (a) the documents and particulars referred to in Article 13;
  - (b) the explanatory labels, available in all the official languages of the Union, listing those particulars and the types of those documents.
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↓ 2012/17/EU Art. 3(3) (adapted)

*Article 18*

⊗ **Fees chargeable for documents and particulars** ⊗

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↓ 2012/17/EU Art. 3(3)

1. The fees charged for obtaining the documents and particulars referred to in Article 13 through the system of interconnection of registers shall not exceed the administrative costs thereof.

2. Member States shall ensure that the following particulars are available free of charge through the system of interconnection of registers:

- (a) the name and legal form of the company;
- (b) the registered office of the company and the Member State where it is registered; and
- (c) the registration number of the company.

In addition to those particulars, Member States may choose to make further documents and particulars available free of charge.

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↓ 2012/17/EU Art. 3(3) (adapted)

*Article 19*

**⊗ Information on the opening and termination of winding-up or insolvency proceedings and on striking-off of a company from the register ⊗**

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↓ 2012/17/EU Art. 3(3)

1. The register of a company shall, through the system of interconnection of registers, make available, without delay, the information on the opening and termination of any winding-up or insolvency proceedings of the company and on the striking-off of the company from the register, if this entails legal consequences in the Member State of the register of the company.
  2. The register of the branch shall, through the system of interconnection of registers, ensure receipt, without delay, of the information referred to in paragraph 1.
  3. The exchange of information referred to in paragraphs 1 and 2 shall be free of charge for the registers.
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↓ 2009/101/EC (adapted)

*Article 20*

**⊗ Language of disclosure and translation of documents and particulars disclosed ⊗**

1. Documents and particulars which must be disclosed pursuant to Article 13 shall be drawn up and filed in one of the languages permitted by the language rules applicable in the Member State in which the file referred to in Article 15(1) is opened.
2. In addition to the ⊗ compulsory ⊗ disclosure referred to in Article 15, Member States shall allow documents and particulars referred to in Article 13 to be disclosed voluntarily in accordance with Article 15 in any official language(s) of the ⊗ Union ⊗.

Member States may prescribe that the translation of such documents and particulars be certified.

Member States shall take the necessary measures to facilitate access by third parties to the translations voluntarily disclosed.

3. In addition to the ⊗ compulsory ⊗ disclosure referred to in Article 15, and to the voluntary disclosure provided for under paragraph 2 of this Article, Member States may allow the documents and particulars concerned to be disclosed, in accordance with Article 15, in any other language(s).

Member States may prescribe that the translation of such documents and particulars be certified.

4. In cases of discrepancy between the documents and particulars disclosed in the official languages of the register and the translation voluntarily disclosed, the latter may not be relied upon as against third parties. Third parties may nevertheless rely on the translations

voluntarily disclosed, unless the company proves that the third parties had knowledge of the version which was the subject of the  compulsory  disclosure.

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↓ 2012/17/EU Art. 3(4) (adapted)

### *Article 21*

#### **System of interconnection of registers**

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↓ 2012/17/EU Art. 3(4)

1. A European central platform ('the platform') shall be established.
  2. The system of interconnection of registers shall be composed of:
    - the registers of Member States,
    - the platform,
    - the portal serving as the European electronic access point.
  3. The Member States shall ensure the interoperability of their registers within the system of interconnection of registers via the platform.
  4. Member States may establish optional access points to the system of interconnection of registers. They shall notify the Commission without undue delay of the establishment of such access points and of any significant changes to their operation.
  5. Access to information from the system of interconnection of registers shall be ensured through the portal and through the optional access points established by the Member States.
  6. The establishment of the system of interconnection of registers shall not affect existing bilateral agreements concluded between Member States concerning the exchange of information on companies.
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↓ 2012/17/EU Art. 3(4) (adapted)

### *Article 22*

#### **Development and operation of the platform**

1. The Commission shall decide to develop and/or operate the platform either by its own means or through a third party.  
 If  the Commission decides to develop and/or operate the platform through a third party, the choice of the third party and the enforcement by the Commission of the agreement concluded with that third party shall be done in accordance with Regulation (EU, Euratom) No 966/2012.
2.  If  the Commission decides to develop the platform through a third party, it shall, by means of implementing acts, establish the technical specifications for the purpose of the public procurement procedure and the duration of the agreement to be concluded with that third party.

3.  If  the Commission decides to operate the platform through a third party, it shall, by means of implementing acts, adopt detailed rules on the operational management of the platform.

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2012/17/EU Art. 3(4)

The operational management of the platform shall include, in particular:

- the supervision of the functioning of the platform,
- the security and protection of data distributed and exchanged using the platform,
- the coordination of relations between Member States' registers and the third party.

The supervision of the functioning of the platform shall be carried out by the Commission.

4. The implementing acts referred to in paragraphs 2 and 3 shall be adopted in accordance with the examination procedure referred to in Article 164(2).

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2012/17/EU Art. 3(4) (adapted)

### *Article 23*

#### **Implementing acts**

By means of implementing acts, the Commission shall adopt the following:

- (a) the technical specification defining the methods of communication by electronic means for the purpose of the system of interconnection of registers;
- (b) the technical specification of the communication protocols;
- (c) the technical measures ensuring the minimum information technology security standards for communication and distribution of information within the system of interconnection of registers;
- (d) the technical specification defining the methods of exchange of information between the register of the company and the register of the branch as referred to in Articles 19 and 33;
- (e) the detailed list of data to be transmitted for the purpose of exchange of information between registers, as referred to in Articles 19, 33 and 129;
- (f) the technical specification defining the structure of the standard message format for the purpose of the exchange of information between the registers, the platform and the portal;
- (g) the technical specification defining the set of the data necessary for the platform to perform its functions as well as the method of storage, use and protection of such data;
- (h) the technical specification defining the structure and use of the unique identifier for communication between registers;
- (i) the specification defining the technical methods of operation of the system of interconnection of registers as regards the distribution and exchange of information,

and the specification defining the information technology services, provided by the platform, ensuring the delivery of messages in the relevant language version;

- (j) the harmonised criteria for the search service provided by the portal;
- (k) the payment modalities, taking into account available payment facilities such as online payments;
- (l) the details of the explanatory labels listing the particulars and the types of documents referred to in Article 13;
- (m) the technical conditions of availability of services provided by the system of interconnection of registers;
- (n) the procedure and technical requirements for the connection of the optional access points to the platform.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 164(2).

#### *Article 24*

#### ⊗ **Financing** ⊗

↓ 2012/17/EU Art. 3(4)

1. The establishment and future development of the platform and the adjustments to the portal resulting from this Directive shall be financed from the general budget of the Union.
2. The maintenance and functioning of the platform shall be financed from the general budget of the Union and may be co-financed by fees for access to the system of interconnection of registers charged to its individual users. Nothing in this paragraph shall affect fees at the national level.
3. By means of delegated acts and in accordance with Article 163, the Commission may adopt rules on whether to co-finance the platform by charging fees, and, in that case, the amount of the fees charged to individual users in accordance with paragraph 2.
4. Any fees imposed in accordance with paragraph 2 shall be without prejudice to the fees, if any, charged by Member States for obtaining documents and particulars as referred to in Article 18(1).
5. Any fees imposed in accordance with paragraph 2 shall not be charged for obtaining the particulars referred to in Article 18(2) (a), (b) and (c).
6. Each Member State shall bear the costs of adjusting its domestic registers, as well as their maintenance and functioning costs resulting from this Directive.

*Article 25*

**⊗ Information on letters and order forms ⊗**

Member States shall prescribe that letters and order forms, whether they are in paper form or use any other medium, are to state the following particulars:

- (a) the information necessary in order to identify the register in which the file mentioned in Article 15 is kept, together with the number of the company in that register;
- (b) the legal form of the company, the location of its registered office and, where appropriate, the fact that the company is being wound up.

Where, in those documents, mention is made of the capital of the company, the reference shall be to the capital subscribed and paid up.

Member States shall prescribe that company websites are to contain at least the particulars mentioned in the first paragraph and, if applicable, a reference to the capital subscribed and paid up.

*Article 26*

**⊗ Persons carrying out disclosure formalities ⊗**

Each Member State shall determine by which persons the disclosure formalities are to be carried out.

*Article 27*

**⊗ Penalties ⊗**

Member States shall provide for appropriate penalties at least in the case of:

- (a) failure to disclose accounting documents as required by Article 13(f);
- (b) omission from commercial documents or from any company website of the compulsory particulars provided for in Article 25.

**SECTION 2**

**⊗ DISCLOSURE RULES APPLICABLE TO ⊗ BRANCHES OF COMPANIES FROM OTHER MEMBER STATES**

*Article 28*

**⊗ Disclosure of documents and particulars relating to a branch ⊗**

1. Documents and particulars relating to a branch opened in a Member State by a company ⊗ of a type listed in Annex II ⊗, which is governed by the law of another Member State,

shall be disclosed pursuant to the law of the Member State of the branch, in accordance with Article 15.

2. Where disclosure requirements in respect of the branch differ from those in respect of the company, the branch's disclosure requirements shall take precedence with regard to transactions carried out with the branch.

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↓ 2012/17/EU Art. 1(1) (adapted)

3. The documents and particulars referred to in Article 29 (1) shall be made publicly available through the system of interconnection of registers. Article 17 and Article 18(1) shall apply *mutatis mutandis*.

4. Member States shall ensure that branches have a unique identifier allowing them to be unequivocally identified in communications between registers through the system of interconnection of registers. That unique identifier shall comprise, at least, elements making it possible to identify the Member State of the register, the domestic register of origin and the branch number in that register, and, where appropriate, features to avoid identification errors.

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↓ 89/666/EEC (adapted)

#### Article 29

#### ⊠ Documents and particulars to be disclosed ⊠

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↓ 89/666/EEC

1. The compulsory disclosure provided for in Article 28 shall cover the following documents and particulars only:

- (a) the address of the branch;
- (b) the activities of the branch;
- (c) the register in which the company file mentioned in Article 15 is kept, together with the registration number in that register;
- (d) the name and legal form of the company and the name of the branch, if that is different from the name of the company;
- (e) the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings;
  - as a company organ constituted pursuant to law or as members of any such organ, in accordance with the disclosure by the company as provided for in Article 13(d),
  - as permanent representatives of the company for the activities of the branch, with an indication of the extent of their powers;
- (f) – the winding-up of the company, the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation in

- accordance with disclosure by the company as provided for in Article 13(h), (j) and (k),
- insolvency proceedings, arrangements, compositions, or any analogous proceedings to which the company is subject;
- (g) the accounting documents in accordance with Article 30;
- (h) the closure of the branch.

2. The Member State in which the branch has been opened may provide for the disclosure, as referred to in Article 28, of

- (a) the signature of the persons referred to in paragraph 1(e) and (f) of this Article;
- (b) the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, in accordance with Article 13(a), (b) and (c), together with amendments to those documents;
- (c) an attestation from the register referred to in paragraph 1(c) of this Article relating to the existence of the company;
- (d) an indication of the securities on the company's property situated in that Member State, provided such disclosure relates to the validity of those securities.

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↓ 89/666/EEC (adapted)

#### *Article 30*

#### ⊗ **Limits on the compulsory disclosure of accounting documents** ⊗

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↓ 89/666/EEC

The compulsory disclosure provided for by Article 29(1)(g) shall be limited to the accounting documents of the company as drawn up, audited and disclosed pursuant to the law of the Member State by which the company is governed in accordance with Directive 2006/43/EC of the European Parliament and of the Council<sup>34</sup> and Directive 2013/34/EU .

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↓ 89/666/EEC (adapted)

#### *Article 31*

#### ⊗ **Language of disclosure and translation of documents disclosed** ⊗

The Member State in which the branch has been opened may stipulate that the documents referred to in Article 29(2)(b) and Article 30 must be published in another official language of the ⊗ Union ⊗ and that the translation of such documents must be certified.

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<sup>34</sup> Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (Text with EEA relevance) (OJ L 157, 9.6.2006, p. 87).

*Article 32*

**⊗ Disclosure in cases of multiple branches in a Member State ⊗**

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↓ 89/666/EEC

Where a company has opened more than one branch in a Member State, the disclosure referred to in Article 29(2)(b) and Article 30 may be made in the register of the branch of the company's choice.

In this case, compulsory disclosure by the other branches shall cover the particulars of the branch register of which disclosure was made, together with the number of that branch in that register.

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↓ 2012/17/EU Art. 1(2) (adapted)

*Article 33*

**⊗ Information on the opening and termination of winding-up or insolvency proceedings and on striking-off of the company from the register ⊗**

⊗ 1. Article 19 shall apply to the register of the company and to the register of the branch respectively. ⊗

2. Member States shall determine the procedure to be followed upon receipt of the information referred to in ⊗ Article 19(1) and (2) ⊗. Such procedure shall ensure that, where a company has been dissolved or otherwise struck-off the register, its branches are likewise struck-off the register without undue delay.

3. The second sentence of paragraph 2 shall not apply to branches of companies that have been struck-off the register as a consequence of any change in the legal form of the company concerned, a merger or division, or a cross-border transfer of its registered office.

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↓ 89/666/EEC (adapted)

*Article 34*

**⊗ Information on letters and order forms ⊗**

The Member States shall prescribe that letters and order forms used by a branch shall state, in addition to the information prescribed by Article 25, the register in which the file in respect of the branch is kept together with the number of the branch in that register.

## SECTION 3

### **⊗ DISCLOSURE RULES APPLICABLE TO ⊗ BRANCHES OF COMPANIES FROM THIRD COUNTRIES**

#### *Article 35*

#### **⊗ Disclosure of documents and particulars relating to a branch ⊗**

1. Documents and particulars concerning a branch opened in a Member State by a company which is not governed by the law of a Member State but which is of a legal form comparable with the types of company ⊗ listed in Annex II ⊗, shall be disclosed in accordance with the law of the Member State of the branch as laid down in Article 15.

2. Article 28(2) shall apply.

#### *Article 36*

#### **⊗ Compulsory documents and particulars to be disclosed ⊗**

The compulsory disclosure provided for in Article 35 shall cover at least the following documents and particulars:

- (a) the address of the branch;
- (b) the activities of the branch;
- (c) the law of the State by which the company is governed;
- (d) where that law so provides, the register in which the company is entered and the registration number of the company in that register;
- (e) the instruments of constitution, and memorandum and articles of association if they are contained in a separate instrument, with all amendments to these documents;
- (f) the legal form of the company, its principal place of business and its object and, at least annually, the amount of subscribed capital if these particulars are not given in the documents referred to in point (e);
- (g) the name of the company and the name of the branch if that is different from the name of the company;
- (h) the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings:
  - as a company organ constituted pursuant to law or as members of any such organ,
  - as permanent representatives of the company for the activities of the branch.

The extent of the powers of the persons authorised to represent the company ⊗ shall ⊗ be stated, together with whether they may do so alone or must act jointly;

- (i)
  - the winding-up of the company and the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation,
  - insolvency proceedings, arrangements, compositions or any analogous proceedings to which the company is subject;

- (j) the accounting documents in accordance with Article 35;
- (k) the closure of the branch.

#### *Article 37*

##### **⊗ Limits of compulsory disclosure of accounting documents ⊗**

1. The compulsory disclosure provided for by Article 36(j) shall apply to the accounting documents of the company as drawn up, audited and disclosed pursuant to the law of the State which governs the company. Where they are not drawn up in accordance with or in a manner equivalent to Directive 2013/34/EU, Member States may require that accounting documents relating to the activities of the branch be drawn up and disclosed.

2. Articles 31 and 32 shall apply.

#### *Article 38*

##### **⊗ Information on letters and order forms ⊗**

The Member States shall prescribe that letters and order forms used by a branch state the register in which the file in respect of the branch is kept together with the number of the branch in that register. Where the law of the State by which the company is governed requires entry in a register, the register in which the company is entered, and the registration number of the company in that register ⊗ shall ⊗ also be stated.

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↓ 2012/17/EU Art. 1(3) (adapted)

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↓ 89/666/EEC (adapted)

### SECTION 4

#### **⊗ APPLICATION AND IMPLEMENTING ARRANGEMENTS ⊗**

##### *Article 39*

##### **⊗ Penalties ⊗**

The Member States shall provide for appropriate penalties in the event of failure to disclose the matters set out in Articles 28, 29, 30, 35, 36 and 37 and of omission from letters and order forms of the compulsory particulars provided for in Articles 34 and 38.

##### *Article 40*

##### **⊗ Persons carrying out disclosure formalities ⊗**

Each Member State shall determine who shall carry out the disclosure formalities provided for in Sections 2 and 3.

#### Article 41

#### ⊗ Exemptions to provisions on disclosure of accounting documents for branches ⊗

1. Articles 30 and 37 shall not apply to branches opened by credit institutions and financial institutions covered by Council Directive 89/117/EEC<sup>35</sup>.
2. Pending subsequent coordination, the Member States need not apply Articles 30 and 37 to branches opened by insurance companies.

#### Article 42

#### ⊗ Contact Committee ⊗

The Contact Committee set up pursuant to Article 52 of Council Directive 78/660/EEC<sup>36</sup> shall also:

- (a) facilitate, without prejudice to Articles 258 and 259 of the Treaty, the harmonised application of ⊗ the provisions of Sections 2, 3 and this Section ⊗, through regular meetings dealing, in particular, with practical problems arising in connection with their application;
- (b) advise the Commission, if necessary, on any additions or amendments to ⊗ the provisions of Sections 2, 3 and this Section ⊗.

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↓ 2012/30/EU (adapted)
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## Chapter IV

### ⊗ Capital maintenance and alteration ⊗

#### SECTION 1

#### ⊗ CAPITAL REQUIREMENTS ⊗

#### Article 43

#### ⊗ General provisions ⊗

- ⊗ 1. The provisions laid down in this Chapter shall apply to the types of company listed in Annex I. ⊗
- ⊗ 2. The Member States may decide not to apply the provisions of this Chapter to investment companies with variable capital and to cooperatives incorporated as one of the types of company listed in Annex I. In so far as the laws of the Member States make use of this option, they shall require such companies to include the words ‘investment company with variable capital’, or ‘cooperative’ in all documents indicated in Article 25. ⊗

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<sup>35</sup> Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents (OJ L 44, 16.2.1989, p. 40).

<sup>36</sup> Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

*Article 44*

⊗ **Minimum capital** ⊗

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↓ 2012/30/EU

1. The laws of the Member States shall require that, in order that a company may be incorporated or obtain authorisation to commence business, a minimum capital shall be subscribed the amount of which shall be not less than EUR 25 000.

2. Every five years the European Parliament and the Council, acting on a proposal from the Commission in accordance with Article 50(1) and (2)(g) of the Treaty, shall examine and, if need be, revise the amount expressed in paragraph 1 in euro in the light of economic and monetary trends in the Union and of the tendency towards allowing only large and medium-sized undertakings to opt for the types of company listed in Annex I.

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↓ 2012/30/EU (adapted)

*Article 45*

⊗ **Assets** ⊗

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↓ 2012/30/EU

The subscribed capital may be formed only of assets capable of economic assessment. However, an undertaking to perform work or supply services may not form part of those assets.

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↓ 2012/30/EU (adapted)

*Article 46*

⊗ **Issuing price of shares** ⊗

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↓ 2012/30/EU

Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par.

However, Member States may allow those who undertake to place shares in the exercise of their profession to pay less than the total price of the shares for which they subscribe in the course of this transaction.

*Article 47*

**⊗ Paying up of shares issued for a consideration ⊗**

Shares issued for consideration ⊗ shall ⊗ be paid up at the time the company is incorporated or is authorised to commence business at not less than 25 % of their nominal value or, in the absence of a nominal value, their accountable par.

However, where shares are issued for consideration other than in cash at the time the company is incorporated or is authorised to commence business, the consideration ⊗ shall ⊗ be transferred in full within five years of that time.

**SECTION 2**

**⊗ PRESERVATION OF THE STATUTORY CAPITAL ⊗**

*Article 48*

**⊗ Experts' report on consideration other than in cash ⊗**

1. A report on any consideration other than in cash shall be drawn up before the company is incorporated or is authorised to commence business, by one or more independent experts appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.

2. The experts' report referred to in paragraph 1 shall contain at least a description of each of the assets comprising the consideration as well as of the methods of valuation used and shall state whether the values arrived at by the application of those methods correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them.

3. The experts' report shall be published in the manner laid down by the laws of each Member State, in accordance with Article 15.

4. Member States may decide not to apply this Article where 90 % of the nominal value, or where there is no nominal value, of the accountable par, of all the shares is issued to one or more companies for a consideration other than in cash, and where the following requirements are met:

- (a) with regard to the company in receipt of such consideration, the persons referred to in Article 4(i) have agreed to dispense with the experts' report;
- (b) such agreement has been published as provided for in paragraph 3;
- (c) the companies furnishing such consideration have reserves which may not be distributed under the law or the statutes and which are at least equal to the nominal value or, where there is no nominal value, the accountable par of the shares issued for consideration other than in cash;
- (d) the companies furnishing such consideration guarantee, up to an amount equal to that indicated in point (c), the debts of the recipient company arising between the time the shares are issued for a consideration other than in cash and one year after the publication of that company's annual accounts for the financial year during which

such consideration was furnished; any transfer of these shares is prohibited within this period;

- (e) the guarantee referred to in point (d) has been published as provided for in paragraph 3; and
- (f) the companies furnishing such consideration shall place a sum equal to that indicated in point (c) into a reserve which may not be distributed until three years after publication of the annual accounts of the recipient company for the financial year during which such consideration was furnished or, if necessary, until such later date as all claims relating to the guarantee referred to in point (d) which are submitted during this period have been settled.

5. Member States may decide not to apply this Article to the formation of a new company by way of merger or division where a report by one or more independent experts on the draft terms of merger or division is drawn up.

Where Member States decide to apply this Article in the cases referred to in the first subparagraph, they may provide that the report under this Article and the report by one or more independent experts on the draft terms of merger or division may be drawn up by the same expert or experts.

#### *Article 49*

#### **⊗ Derogation from the requirement for an experts' report ⊗**

1. Member States may decide not to apply Article 48(1), (2) and (3) where, upon a decision of the administrative or management body, transferable securities as defined in point 18 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council<sup>37</sup> or money-market instruments as defined in point 19 of Article 4(1) of that Directive are contributed as consideration other than in cash, and those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated markets as defined in point 14 of Article 4(1) of that Directive during a sufficient period, to be determined by national law, preceding the effective date of the contribution of the respective consideration other than in cash.

However, where that price has been affected by exceptional circumstances that would significantly change the value of the asset at the effective date of its contribution, including situations where the market for such transferable securities or money-market instruments has become illiquid, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of ⊗ such ⊗ revaluation, Article 48(1), (2) and (3) shall apply.

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<sup>37</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

2. Member States may decide not to apply Article 48(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognised independent expert and where the following conditions are fulfilled:

- (a) the fair value is determined for a date not more than six months before the effective date of the asset contribution;
- (b) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State which are applicable to the kind of assets to be contributed.

In the case of new qualifying circumstances that would significantly change the fair value of the asset at the effective date of its contribution, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of the aforementioned revaluation, Article 48(1), (2) and (3) shall apply.

In the absence of such a revaluation, one or more shareholders holding an aggregate percentage of at least 5 % of the company's subscribed capital on the day the decision on the increase in the capital is taken, may demand a valuation by an independent expert, in which case Article 48(1), (2) and (3) shall apply.

Such shareholder(s) may submit a demand up until the effective date of the asset contribution, provided that, at the date of the demand, the shareholder(s) in question still hold(s) an aggregate percentage of at least 5 % of the company's subscribed capital, as it was on the day the decision on the increase in the capital was taken.

3. Member States may decide not to apply Article 48(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as consideration other than in cash whose fair value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been subject to an audit in accordance with Directive 2006/43/EC.

The second to fifth subparagraphs of paragraph 2 of this Article shall apply *mutatis mutandis*.

#### *Article 50*

#### **⊗ Consideration other than in cash without an experts' report ⊗**

↓ 2012/30/EU

1. Where consideration other than in cash as referred to in Article 49 occurs without an experts' report as referred to in Article 48(1), (2) and (3), in addition to the requirements set out in Article 4(h) and within one month after the effective date of the asset contribution, a declaration containing the following shall be published:

- (a) a description of the consideration other than in cash at issue;
- (b) its value, the source of this valuation and, where appropriate, the method of valuation;

- (c) a statement whether the value arrived at corresponds at least to the number, to the nominal value or, where there is no nominal value, the accountable par and, where appropriate, to the premium on the shares to be issued for such consideration; and
- (d) a statement that no new qualifying circumstances with regard to the original valuation have occurred.

That publication shall be effected in the manner laid down by the laws of each Member State in accordance with Article 15.

2. Where consideration other than in cash is proposed to be made without an experts' report as referred to in Article 48(1), (2) and (3) in relation to an increase in the capital proposed to be made under Article 67(2), an announcement containing the date when the decision on the increase was taken and the information listed in paragraph 1 of this Article shall be published, in the manner laid down by the laws of each Member State in accordance with Article 15, before the contribution of the asset as consideration other than in cash is to become effective. In that event, the declaration pursuant to paragraph 1 of this Article shall be limited to the statement that no new qualifying circumstances have occurred since the aforementioned announcement was published.

3. Each Member State shall provide for adequate safeguards ensuring compliance with the procedure set out in Article 49 and in this Article where a contribution for a consideration other than in cash is made without an experts' report as referred to in Article 48(1), (2) and (3).

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↓ 2012/30/EU (adapted)

#### *Article 51*

#### **⊗ Substantial acquisitions after incorporation or authorisation to commence business ⊗**

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↓ 2012/30/EU

1. If, before the expiry of a time-limit laid down by national law of at least two years from the time the company is incorporated or is authorised to commence business, the company acquires any asset belonging to a person or company or firm referred to in Article 4(i) for a consideration of not less than one-tenth of the subscribed capital, the acquisition shall be examined and details of it published in the manner provided for in Article 48(1), (2) and (3), and it shall be submitted for the approval of the general meeting.

Articles 49 and 50 shall apply *mutatis mutandis*.

Member States may also require these provisions to be applied when the assets belong to a shareholder or to any other person.

2. Paragraph 1 shall not apply to acquisitions effected in the normal course of the company's business, to acquisitions effected at the instance or under the supervision of an administrative or judicial authority, or to stock exchange acquisitions.

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↓ 2012/30/EU (adapted)

*Article 52*

⊗ **Shareholders' obligation to pay up contributions** ⊗

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↓ 2012/30/EU

Subject to the provisions relating to the reduction of subscribed capital, the shareholders may not be released from the obligation to pay up their contributions.

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↓ 2012/30/EU (adapted)

*Article 53*

⊗ **Safeguards in the event of conversion** ⊗

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↓ 2012/30/EU

Pending coordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 3 to 6 and Articles 44 to 52 in the event of the conversion of another type of company into a public limited liability company.

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↓ 2012/30/EU (adapted)

*Article 54*

⊗ **Modification of the statutes or of the instrument of incorporation** ⊗

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↓ 2012/30/EU

Articles 3 to 6 and Articles 44 to 53 shall not prejudice the provisions of Member States on competence and procedure relating to the modification of the statutes or of the instrument of incorporation.

## SECTION 3

### ⊗ RULES ON DISTRIBUTION ⊗

#### *Article 55*

#### ⊗ General rules on distribution ⊗

1. Except for cases of reductions of subscribed capital, no distribution to shareholders may be made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes.
2. Where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, that amount shall be deducted from the amount of subscribed capital referred to in paragraph 1.
3. The amount of a distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.
4. The ⊗ term ⊗ 'distribution' used in paragraphs 1 and 3 includes, in particular, the payment of dividends and of interest relating to shares.
5. When the laws of a Member State allow the payment of interim dividends, the following conditions at least shall apply:
  - (a) interim accounts shall be drawn up showing that the funds available for distribution are sufficient;
  - (b) the amount to be distributed may not exceed the total profits made since the end of the last financial year for which the annual accounts have been drawn up, plus any profits brought forward and sums drawn from reserves available for this purpose, less losses brought forward and sums to be placed to reserve pursuant to the requirements of the law or the statutes.
6. Paragraphs 1 to 5 shall not affect the provisions of the Member States as regards increases in subscribed capital by capitalisation of reserves.
7. The laws of a Member State may provide for derogation from paragraph 1 in the case of investment companies with fixed capital.

The ⊗ term ⊗ 'investment company with fixed capital', within the meaning of this paragraph, means only those companies:

  - (a) the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets; and
  - (b) which offer their own shares for subscription by the public.

In so far as the laws of Member States make use of this option they shall:

- (a) require such companies to include the  term  ‘investment company’ in all documents indicated in Article 25;
- (b) not permit any such company whose net assets fall below the amount specified in paragraph 1 to make a distribution to shareholders when on the closing date of the last financial year the company's total assets as set out in the annual accounts are, or following such distribution would become, less than one-and-a-half times the amount of the company's total liabilities to creditors as set out in the annual accounts;
- (c) require any such company which makes a distribution when its net assets fall below the amount specified in paragraph 1 to include in its annual accounts a note to that effect.

#### *Article 56*

#### **Recovery of distributions unlawfully made**

Any distribution made contrary to Article 55  shall  be returned by shareholders who have received it if the company proves that those shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.

#### *Article 57*

#### **Serious loss of the subscribed capital**

1. In the case of a serious loss of the subscribed capital, a general meeting of shareholders  shall  be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken.
2. The amount of a loss deemed to be serious within the meaning of paragraph 1 may not be set by the laws of Member States at a figure higher than half the subscribed capital.

### **SECTION 4**

#### **RULES ON COMPANIES’ ACQUISITIONS OF THEIR OWN SHARES**

#### *Article 58*

#### **No subscription of own shares**

↓ 2012/30/EU

1. The shares of a company may not be subscribed for by the company itself.
2. If the shares of a company have been subscribed for by a person acting in his own name, but on behalf of the company, the subscriber shall be deemed to have subscribed for them for his own account.
3. The persons or companies or firms referred to in Article 4(i) or, in cases of an increase in subscribed capital, the members of the administrative or management body shall be liable to pay for shares subscribed in contravention of this Article.

However, the laws of a Member State may provide that any such person may be released from his obligation if he proves that no fault is attributable to him personally.

*Article 59*

**⊠ Acquisition of own shares ⊠**

1. Without prejudice to the principle of equal treatment of all shareholders who are in the same position, and to Directive 2003/6/EC, Member States may permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf. To the extent that the acquisitions are permitted, Member States shall make such acquisitions subject to the following conditions:

- (a) authorisation shall be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and, in particular, the maximum number of shares to be acquired, the duration of the period for which the authorisation is given, the maximum length of which shall be determined by national law without, however, exceeding five years, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body shall satisfy themselves that, at the time when each authorised acquisition is effected, the conditions referred to in points (b) and (c) are respected;
- (b) the acquisitions, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not have the effect of reducing the net assets below the amount mentioned in Article 55(1) and (2);
- (c) only fully paid-up shares may be included in the transaction.

Furthermore, Member States may subject acquisitions within the meaning of the first subparagraph to any of the following conditions:

- (a) that the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, ⊠ does ⊠ not exceed a limit to be determined by Member States; this limit may not be lower than 10 % of the subscribed capital;
- (b) that the power of the company to acquire its own shares within the meaning of the first subparagraph, the maximum number of shares to be acquired, the duration of the period for which the power is given and the maximum or minimum consideration are laid down in the statutes or in the instrument of incorporation of the company;
- (c) that the company complies with appropriate reporting and notification requirements;
- (d) that certain companies, as determined by Member States, may be required to cancel the acquired shares provided that an amount equal to the nominal value of the shares cancelled must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves;
- (e) that the acquisition shall not prejudice the satisfaction of creditors' claims.

2. The laws of a Member State may provide for derogations from the first sentence of point (a) of the first subparagraph of paragraph 1 where the acquisition of a company's own shares is necessary to prevent serious and imminent harm to the company. In such a case, the

next general meeting shall be informed by the administrative or management body of the reasons for and nature of the acquisitions effected, of the number and nominal value or, in the absence of a nominal value, the accountable par, of the shares acquired, of the proportion of the subscribed capital which they represent, and of the consideration for these shares.

3. Member States may decide not to apply the first sentence point (a) of the first subparagraph of paragraph 1 to shares acquired by either the company itself or by a person acting in his own name but on the company's behalf, for distribution to that company's employees or to the employees of an associate company. Such shares  shall  be distributed within 12 months of their acquisition.

#### *Article 60*

##### **Derogation from rules on acquisition of own shares**

1. Member States may decide not to apply Article 59 to:

- (a) shares acquired in carrying out a decision to reduce capital, or in the circumstances referred to in Article 81;
- (b) shares acquired as a result of a universal transfer of assets;
- (c) fully paid-up shares acquired free of charge or by banks and other financial institutions as purchasing commission;
- (d) shares acquired by virtue of a legal obligation or resulting from a court ruling for the protection of minority shareholders in the event, particularly, of a merger, a change in the company's object or form, transfer abroad of the registered office, or the introduction of restrictions on the transfer of shares;
- (e) shares acquired from a shareholder in the event of failure to pay them up;
- (f) shares acquired in order to indemnify minority shareholders in associated companies;
- (g) fully paid-up shares acquired under a sale enforced by a court order for the payment of a debt owed to the company by the owner of the shares; and
- (h) fully paid-up shares issued by an investment company with fixed capital, as defined in the second subparagraph of Article 55(7), and acquired at the investor's request by that company or by an associate company. Point (a) of the third subparagraph of Article 55(7) shall apply. These acquisitions may not have the effect of reducing the net assets below the amount of the subscribed capital plus any reserves the distribution of which is forbidden by law.

2. Shares acquired in the cases listed in paragraph 1(b) to (g)  shall , however, be disposed of within not more than three years of their acquisition unless the nominal value or, in the absence of a nominal value, the accountable par of the shares acquired, including shares which the company may have acquired through a person acting in his own name but on the company's behalf, does not exceed 10 % of the subscribed capital.

3. If the shares are not disposed of within the period laid down in paragraph 2, they  shall  be cancelled. The laws of a Member State may make this cancellation subject to a corresponding reduction in the subscribed capital. Such a reduction  shall  be prescribed where the acquisition of shares to be cancelled results in the net assets having fallen below the amount specified in Article 55(1) and (2).

### Article 61

#### ⊗ Consequences of illegal acquisition of own shares ⊗

Shares acquired in contravention of Articles 59 and 60 shall be disposed of within one year of their acquisition. ⊗ If ⊗ they ⊗ are ⊗ not disposed of within that period, Article 60(3) shall apply.

### Article 62

#### ⊗ Holding of own shares and annual report in case of acquisition of own shares ⊗

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↓ 2012/30/EU

1. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make the holding of these shares at all times subject to at least the following conditions:

- (a) among the rights attaching to the shares, the right to vote attaching to the company's own shares shall in any event be suspended;
- (b) if the shares are included among the assets shown in the balance sheet, a reserve of the same amount, unavailable for distribution, shall be included among the liabilities.

2. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall require the annual report to state at least:

- (a) the reasons for acquisitions made during the financial year;
  - (b) the number and nominal value or, in the absence of a nominal value, the accountable par of the shares acquired and disposed of during the financial year and the proportion of the subscribed capital which they represent;
  - (c) in the case of acquisition or disposal for a value, the consideration for the shares;
  - (d) the number and nominal value or, in the absence of a nominal value, the accountable par of all the shares acquired and held by the company and the proportion of the subscribed capital which they represent.
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↓ 2012/30/EU (adapted)

### Article 63

#### ⊗ Financial assistance by a company for acquisition of its shares by a third party ⊗

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↓ 2012/30/EU

1. Where Member States permit a company to, either directly or indirectly, advance funds or make loans or provide security, with a view to the acquisition of its shares by a third party, they shall make such transactions subject to the conditions set out in paragraphs 2 to 5.

2. The transactions shall take place under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company and with regard to security provided to the company for the loans and advances referred to in paragraph 1.

The credit standing of the third party or, in the case of multiparty transactions, of each counterparty thereto shall have been duly investigated.

3. The transactions shall be submitted by the administrative or management body to the general meeting for prior approval, whereby the general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 82.

The administrative or management body shall present a written report to the general meeting, indicating:

- (a) the reasons for the transaction;
- (b) the interest of the company in entering into such a transaction;
- (c) the conditions on which the transaction is entered into;
- (d) the risks involved in the transaction for the liquidity and solvency of the company; and
- (e) the price at which the third party is to acquire the shares.

This report shall be submitted to the register for publication in accordance with Article 15.

4. The aggregate financial assistance granted to third parties shall at no time result in the reduction of the net assets below the amount specified in Article 55(1) and (2), taking into account also any reduction of the net assets that may have occurred through the acquisition, by the company or on behalf of the company, of its own shares in accordance with Article 59(1).

The company shall include, among the liabilities in the balance sheet, a reserve, unavailable for distribution, of the amount of the aggregate financial assistance.

5. Where a third party by means of financial assistance from a company acquires that company's own shares within the meaning of Article 59(1) or subscribes for shares issued in the course of an increase in the subscribed capital, such acquisition or subscription shall be made at a fair price.

6. Paragraphs 1 to 5 shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, nor to transactions effected with a view to the acquisition of shares by or for the company's employees or the employees of an associate company.

However, these transactions may not have the effect of reducing the net assets below the amount specified in Article 55(1).

7. Paragraphs 1 to 5 shall not apply to transactions effected with a view to acquisition of shares as described in of Article 60(1)(h).

*Article 64*

**⊗ Additional safeguards in case of related party transactions ⊗**

In cases where individual members of the administrative or management body of the company being party to a transaction referred to in Article 63(1), or of the administrative or management body of a parent undertaking within the meaning of Article 22 of Directive 2013/34/EU or such parent undertaking itself, or individuals acting in their own name, but on behalf of the members of such bodies or on behalf of such undertaking, are counterparties to such a transaction, Member States shall ensure through adequate safeguards that such transaction does not conflict with the company's best interests.

*Article 65*

**⊗ Acceptance of the company's own shares as security ⊗**

1. The acceptance of the company's own shares as security, either by the company itself or through a person acting in his own name but on the company's behalf, shall be treated as an acquisition for the purposes of Article 59, Article 60(1), and Articles 62 and 63.
2. The Member States may decide not to apply paragraph 1 to transactions concluded by banks and other financial institutions in the normal course of business.

*Article 66*

**⊗ Subscription, acquisition or holding of shares by a company in which the public limited liability company holds a majority of the voting rights or on which it can exercise a dominant influence ⊗**

1. The subscription, acquisition or holding of shares in a public limited liability company by another company ⊗ of a type listed in Annex II ⊗ in which the public limited liability company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence shall be regarded as having been effected by the public limited liability company itself.

The first subparagraph shall also apply where the other company is governed by the law of a third country and has a legal form comparable to those listed in ⊗ Annex II ⊗.

However, where the public limited liability company holds a majority of the voting rights indirectly or can exercise a dominant influence indirectly, Member States need not apply the first and the second subparagraphs if they provide for the suspension of the voting rights attached to the shares in the public limited liability company held by the other company.

2. In the absence of coordination of national legislation on groups of companies, Member States may:
  - (a) define the cases in which a public limited liability company shall be regarded as being able to exercise a dominant influence on another company; if a Member State

exercises this option, its national law must in any event provide that a dominant influence can be exercised if a public limited liability company:

- (i) has the right to appoint or dismiss a majority of the members of the administrative organ, of the management organ or of the supervisory organ, and is at the same time a shareholder or member of the other company, or
- (ii) is a shareholder or member of the other company and has sole control of a majority of the voting rights of its shareholders or members under an agreement concluded with other shareholders or members of that company.

Member States shall not be obliged to make provision for any cases other than those referred to in points (i) and (ii) of the first subparagraph;

- (b) define the cases in which a public limited liability company shall be regarded as indirectly holding voting rights or as able indirectly to exercise a dominant influence;
- (c) specify the circumstances in which a public limited liability company shall be regarded as holding voting rights.

3. Member States need not apply the first and second subparagraphs of paragraph 1 where the subscription, acquisition or holding is effected on behalf of a person other than the person subscribing, acquiring or holding the shares, who is neither the public limited liability company referred to in paragraph 1 nor another company in which the public limited liability company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence.

4. Member States need not apply the first and second subparagraphs of paragraph 1 where the subscription, acquisition or holding is effected by the other company in its capacity and in the context of its activities as a professional dealer in securities, provided that it is a member of a stock exchange situated or operating within a Member State, or is approved or supervised by an authority of a Member State competent to supervise professional dealers in securities which, within the meaning of this Directive, may include credit institutions.

5. Member States need not apply the first and second subparagraphs of paragraph 1 where shares in a public limited liability company held by another company were acquired before the relationship between the two companies corresponded to the criteria laid down in paragraph 1.

However, the voting rights attached to those shares shall be suspended and the shares shall be taken into account when it is determined whether the condition laid down in Article 59(1)(b) is fulfilled.

6. Member States need not apply Article 60(2) or (3) or Article 61 where shares in a public limited liability company are acquired by another company on condition that they provide for:

- (a) the suspension of the voting rights attached to the shares in the public limited liability company held by the other company; and
- (b) the members of the administrative or the management organ of the public limited liability company to be obliged to buy back from the other company the shares referred to in Article 60(2) and (3) and Article 61 at the price at which the other company acquired them; this sanction shall be inapplicable only where the members of the administrative or the management organ of the public limited liability company prove that that company played no part whatsoever in the subscription for or acquisition of the shares in question.

## SECTION 5

### ⊗ RULES FOR THE INCREASE AND REDUCTION OF CAPITAL ⊗

#### *Article 67*

##### ⊗ Decision by the general meeting on the increase of capital ⊗

1. Any increase in capital ⊗ shall ⊗ be decided upon by the general meeting. Both that decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 15.
2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with the rules referred to in paragraph 1, may authorise an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.
3. Where there are several classes of shares, the decision by the general meeting concerning the increase in capital referred to in paragraph 1 or the authorisation to increase the capital referred to in paragraph 2, shall be subject to a separate vote at least for each class of shareholder whose rights are affected by the transaction.
4. This Article shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.

#### *Article 68*

##### ⊗ Paying up shares issued for consideration ⊗

Shares issued for consideration, in the course of an increase in subscribed capital, ⊗ shall ⊗ be paid up to at least 25 % of their nominal value or, in the absence of a nominal value, of their accountable par. Where provision is made for an issue premium, it ⊗ shall ⊗ be paid in full.

#### *Article 69*

##### ⊗ Shares issued for consideration other than in cash ⊗

1. Where shares are issued for consideration other than in cash in the course of an increase in the subscribed capital, the consideration ⊗ shall ⊗ be transferred in full within a period of five years from the decision to increase the subscribed capital.
2. The consideration referred to in paragraph 1 shall be the subject of a report drawn up before the increase in capital is made by one or more experts who are independent of the company and appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies and firms under the laws of each Member State.

Article 48(2) and (3) and Articles 49 and 50 shall apply.

3. Member States may decide not to apply paragraph 2 in the event of an increase in subscribed capital made in order to give effect to a merger, a division or a public offer for the purchase or exchange of shares and to pay the shareholders of the company which is being absorbed or divided, or which is the object of the public offer for the purchase or exchange of shares.

In the case of a merger or a division, however, Member States shall apply the first subparagraph only where a report by one or more independent experts on the draft terms of merger or division is drawn up.

Where Member States decide to apply paragraph 2 in the case of a merger or a division, they may provide that the report under this Article and the report by one or more independent experts on the draft terms of merger or division may be drawn up by the same expert or experts.

4. Member States may decide not to apply paragraph 2 if all the shares issued in the course of an increase in subscribed capital are issued for a consideration other than in cash to one or more companies, on condition that all the shareholders in the company which receive the consideration have agreed not to have an experts' report drawn up and that the requirements of Article 48(4)(b) to (f) are met.

#### *Article 70*

##### **Increase in capital not fully subscribed**

Where an increase in capital is not fully subscribed, the capital will be increased by the amount of the subscriptions received only if the conditions of the issue so provide.

#### *Article 71*

##### **Increase in capital by consideration in cash**

1. Whenever the capital is increased by consideration in cash, the shares  shall  be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

2. The laws of a Member State:

- (a) need not apply paragraph 1 to shares which carry a limited right to participate in distributions within the meaning of Article 55 and/or in the company's assets in the event of liquidation; or
- (b) may permit, where the subscribed capital of a company having several classes of shares carrying different rights with regard to voting, or participation in distributions within the meaning of Article 55 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the right of pre-emption of shareholders of the other classes to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued.

3. Any offer of subscription on a pre-emptive basis and the period within which this right  shall  be exercised shall be published in the national gazette appointed in accordance with Article 15. However, the laws of a Member State need not provide for such publication where all of a company's shares are registered. In such case, all the company's shareholders  shall  be informed in writing. The right of pre-emption  shall  be exercised within

a period which shall not be less than 14 days from the date of publication of the offer or from the date of dispatch of the letters to the shareholders.

4. The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. This may, however, be done by decision of the general meeting. The administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price. The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 82. Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 15.

5. The laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 4, may give the power to restrict or withdraw the right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limit of the authorised capital. This power may not be granted for a longer period than the power for which provision is made in Article 67(2).

6. Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.

7. The right of pre-emption is not excluded for the purposes of paragraphs 4 and 5 where, in accordance with the decision to increase the subscribed capital, shares are issued to banks or other financial institutions with a view to their being offered to shareholders of the company in accordance with paragraphs 1 and 3.

#### *Article 72*

##### **⊗ Decision by the general meeting on reduction in the subscribed capital ⊗**

Any reduction in the subscribed capital, except under a court order, ⊗ shall ⊗ be subject at least to a decision of the general meeting acting in accordance with the rules for a quorum and a majority laid down in Article 82 without prejudice to Articles 78 and 79. Such decision shall be published in the manner laid down by the laws of each Member State in accordance with Article 15.

The notice convening the meeting ⊗ shall ⊗ specify at least the purpose of the reduction and the way in which it is to be carried out.

#### *Article 73*

##### **⊗ Reduction in the subscribed capital in case of several classes of shares ⊗**

Where there are several classes of shares, the decision by the general meeting concerning a reduction in the subscribed capital shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

#### *Article 74*

##### **⊗ Safeguards for creditors in case of reduction in the subscribed capital ⊗**

1. In the event of a reduction in the subscribed capital, at least the creditors whose claims antedate the publication of the decision on the reduction shall at least have the right to obtain security for claims which have not fallen due by the date of that publication. Member States

may not set aside such a right unless the creditor has adequate safeguards, or unless such safeguards are not necessary having regard to the assets of the company.

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

2. The laws of the Member States shall also stipulate at least that the reduction shall be void, or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.

3. This Article shall apply where the reduction in the subscribed capital is brought about by the total or partial waiving of the payment of the balance of the shareholders' contributions.

#### *Article 75*

##### **⊗ Derogation from safeguards for creditors in case of reduction in the subscribed capital ⊗**

1. Member States need not apply Article 74 to a reduction in the subscribed capital whose purpose is to offset losses incurred or to include sums of money in a reserve provided that, following this operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders; it may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, in so far as the Member States permit such an operation.

2. In the cases referred to in paragraph 1, the laws of the Member States ⊗ shall ⊗ at least provide for the measures necessary to ensure that the amounts deriving from the reduction of subscribed capital may not be used for making payments or distributions to shareholders, or discharging shareholders from the obligation to make their contributions.

#### *Article 76*

##### **⊗ Reduction in the subscribed capital and the minimum capital ⊗**

The subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 44.

However, Member States may permit such a reduction if they also provide that the decision to reduce the subscribed capital may take effect only when the subscribed capital is increased to an amount at least equal to the prescribed minimum.

#### *Article 77*

##### **⊗ Redemption of subscribed capital without reduction ⊗**

Where the laws of a Member State authorise total or partial redemption of the subscribed capital without reduction of the latter, they shall at least require that the following conditions are observed:

- (a) where the statutes or instrument of incorporation provide for redemption, the latter shall be decided on by the general meeting voting at least under the usual conditions of quorum and majority; where the statutes or instrument of incorporation do not

provide for redemption, the latter shall be decided upon by the general meeting acting at least under the conditions of quorum and majority laid down in Article 82; the decision  shall  be published in the manner prescribed by the laws of each Member State, in accordance with Article 15;

- (b) only sums which are available for distribution within the meaning of Article 55(1) to (4) may be used for redemption purposes;
- (c) shareholders whose shares are redeemed shall retain their rights in the company, with the exception of their rights to the repayment of their investment and participation in the distribution of an initial dividend on unredeemed shares.

#### *Article 78*

##### **Reduction in the subscribed capital by compulsory withdrawal of shares**

1. Where the laws of a Member State may allow companies to reduce their subscribed capital by compulsory withdrawal of shares, they shall require that at least the  following  conditions are observed:

- (a) compulsory withdrawal must be prescribed or authorised by the statutes or instrument of incorporation before the shares which are to be withdrawn are subscribed for;
- (b) where the compulsory withdrawal is merely authorised by the statutes or instrument of incorporation, it shall be decided upon by the general meeting unless it has been unanimously approved by the shareholders concerned;
- (c) the company body deciding on the compulsory withdrawal shall fix the terms and manner thereof, where they have not already been fixed by the statutes or instrument of incorporation;
- (d) Article 74 shall apply except in the case of fully paid-up shares which are made available to the company free of charge or are withdrawn using sums available for distribution in accordance with Article 55(1) to (4); in these cases, an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the withdrawn shares must be included in a reserve; except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders; it can be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, in so far as Member States permit such an operation; and
- (e) the decision on compulsory withdrawal shall be published in the manner laid down by the laws of each Member State in accordance with Article 15.

2. The first paragraph of Article 72 and Articles 73, 75 and 82 shall not apply to the cases to which paragraph 1 of this Article refers.

#### *Article 79*

##### **Reduction in the subscribed capital by the withdrawal of shares acquired by the company itself or on its behalf**

1. In the case of a reduction in the subscribed capital by the withdrawal of shares acquired by the company itself or by a person acting in his own name but on behalf of the company, the withdrawal must always be decided on by the general meeting.

2. Article 74 shall apply unless the shares are fully paid up and are acquired free of charge or using sums available for distribution in accordance with Article 55(1) to (4); in these cases an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the shares withdrawn  shall  be included in a reserve. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders. It may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalisation of such reserve, in so far as the Member States permit such an operation.

3. Articles 73, 75 and 82 shall not apply to the cases to which paragraph 1 of this Article refers.

#### *Article 80*

##### **Redemption of the subscribed capital or its reduction by withdrawal of shares in case of several classes of shares**

In the cases covered by Article 77, Article 78(1)(b) and Article 79(1), when there are several classes of shares, the decision by the general meeting concerning redemption of the subscribed capital or its reduction by withdrawal of shares shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.

#### *Article 81*

##### **Conditions for redemption of shares**

Where the laws of a Member State authorise companies to issue redeemable shares, they shall require that the following conditions, at least, are complied with for the redemption of such shares:

- (a) redemption must be authorised by the company's statutes or instrument of incorporation before the redeemable shares are subscribed for;
- (b) the shares must be fully paid up;
- (c) the terms and the manner of redemption must be laid down in the company's statutes or instrument of incorporation;
- (d) redemption can be only effected by using sums available for distribution in accordance with Article 55(1) to (4) or the proceeds of a new issue made with a view to effecting such redemption;
- (e) an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the redeemed shares must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; it may be used only for the purpose of increasing the subscribed capital by the capitalisation of reserves;
- (f) point (e) shall not apply to redemption using the proceeds of a new issue made with a view to effecting such redemption;
- (g) where provision is made for the payment of a premium to shareholders in consequence of a redemption, the premium may be paid only from sums available for distribution in accordance with Article 55(1) to (4), or from a reserve other than that referred to in point (e) of this Article which may not be distributed to shareholders except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves or for covering the costs referred to in Article 4(j) or the cost of issuing

shares or debentures or for the payment of a premium to holders of redeemable shares or debentures;

- (h) notification of redemption shall be published in the manner laid down by the laws of each Member State in accordance with Article 15.

#### *Article 82*

##### **⊗ Voting requirements for the decisions of the general meeting ⊗**

The laws of the Member States shall provide that the decisions referred to in Article 71(4) and (5) and Articles 72, 73, 77 and 80 must be taken at least by a majority of not less than two-thirds of the votes attaching to the securities or the subscribed capital represented.

The laws of the Member States may, however, lay down that a simple majority of the votes specified in the first paragraph is sufficient when at least half the subscribed capital is represented.

### **SECTION 6**

#### **⊗ APPLICATION AND IMPLEMENTING ARRANGEMENTS ⊗**

#### *Article 83*

##### **⊗ Derogation from certain requirements ⊗**

1. Member States may derogate from the first paragraph of Article 47, the first sentence of Article 59(1)(a) and Articles 67, 68 and 71 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings.

2. Member States may decide not to apply the first sentence of Article 59(1)(a) and Articles 72, 73 and 78 to 81 to companies incorporated under a special law which issue both capital shares and workers' shares, the latter being issued to the company's employees as a body, who are represented at general meetings of shareholders by delegates having the right to vote.

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**↓ 2014/59/EU Art. 123 (adapted)**

3. Member States shall ensure that Article 48, Articles 57(1) and 67(1), (2) and (3), the first subparagraph of Article 69(2), Articles 71 to 74, 78, 79 and 80 do not apply in the case of use of the resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council<sup>38</sup>.

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<sup>38</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

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↓ 2012/30/EU (adapted)

*Article 84*

**⊗ Equal treatment of all shareholders who are in the same position ⊗**

For the purposes of the implementation of this ⊗ Chapter ⊗ the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.

*Article 85*

**⊗ Transitional provisions ⊗**

Member States may decide not to apply Article 4 (g), (i), (j) and (k) to companies already in existence at the date of entry into force of the laws, regulations and administrative provisions adopted in order to comply with Council Directive 77/91/EEC<sup>39</sup>.

↓ 2011/35/EU (adapted)

## **Title II**

### **⊗ Mergers and divisions of limited liability companies ⊗**

#### **Chapter I**

##### **⊗ Mergers of public limited liability companies ⊗**

###### **SECTION 1**

###### **⊗ GENERAL PROVISIONS ON MERGERS ⊗**

*Article 86*

**⊗ General provisions ⊗**

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

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<sup>39</sup> Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1).

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↓ 2013/24/EU (adapted)  
↓ 2011/35/EU (adapted)

2. The Member States need not apply this  Chapter  to cooperatives incorporated as one of the types of company listed in  Annex I  . In so far as the laws of the Member States make use of this option, they shall require such companies to include the word ‘cooperative’ in all the documents referred to in Article 25.

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

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↓ 2014/59/EU Art. 122 (adapted)

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

↓ 2011/35/EU (adapted)

#### *Article 87*

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

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↓ 2011/35/EU

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

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↓ 2011/35/EU (adapted)

#### *Article 88*

### **Definition of a ‘merger by acquisition’**

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

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

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*Article 89*

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

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

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

**SECTION 2**

**MERGER BY ACQUISITION**

*Article 90*

**⊗ Draft terms of merger ⊗**

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

2. Draft terms of merger shall specify at least:

- (a) the type, name and registered office of each of the merging companies;
- (b) the share exchange ratio and the amount of any cash payment;
- (c) the terms relating to the allotment of shares in the acquiring company;
- (d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;
- (e) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company;
- (f) the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;

- (g) any special advantage granted to the experts referred to in Article 95(1) and members of the merging companies' administrative, management, supervisory or controlling bodies.

#### *Article 91*

##### **⊗ Publication of the draft terms of merger ⊗**

Draft terms of merger ⊗ shall ⊗ be published in the manner prescribed by the laws of each Member State in accordance with Article 15, for each of the merging companies, at least one month before the date fixed for the general meeting which is to decide thereon.

Any of the merging companies shall be exempt from the publication requirement laid down in Article 15 if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of merger and ending not earlier than the conclusion of that meeting, it makes the draft terms of such merger available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph of this Article, Member States may require that publication be effected via the central electronic platform referred to in Article 15(5). Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

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

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

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

#### *Article 92*

##### **⊗ Approval by the general meeting of each of the merging companies ⊗**

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

The laws of a Member State may, however, provide that a simple majority of the votes specified in the first subparagraph shall be sufficient when at least half of the subscribed

capital is represented. Moreover, where appropriate, the rules governing alterations to the memorandum and articles of association shall apply.

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

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

#### *Article 93*

##### **⊗ Derogation from the requirement of approval by the general meeting of the acquiring company ⊗**

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

- (a) the publication provided for in Article 91 must be effected, for the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which is to decide on the draft terms of merger;
- (b) at least one month before the date specified in point (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 96(1) at the registered office of the acquiring company;
- (c) one or more shareholders of the acquiring company holding a minimum percentage of the subscribed capital must be entitled to require that a general meeting of the acquiring company be called to decide whether to approve the merger; this minimum percentage may not be fixed at more than 5 %. Member States may, however, provide for the exclusion of non-voting shares from this calculation.

For the purposes of point (b) of the first paragraph, Article 96(2), (3) and (4) shall apply.

#### *Article 94*

##### **⊗ Detailed written report and information on a merger ⊗**

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

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

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

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

## Article 95

### ⊗ Examination of the draft terms of merger by experts ⊗

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

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

- (a) indicate the method or methods used to arrive at the share exchange ratio proposed;
- (b) state whether such method or methods are adequate in the case in question, indicate the values arrived at using each such method and give an opinion on the relative importance attributed to such methods in arriving at the value decided on.

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

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

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

## Article 96

### ⊗ Availability of documents for inspection by shareholders ⊗

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

- (a) the draft terms of merger;
- (b) the annual accounts and annual reports of the merging companies for the preceding three financial years;
- (c) where applicable, an accounting statement drawn up as at a date which ⊗ shall ⊗ not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date;
- (d) where applicable, the reports of the administrative or management bodies of the merging companies provided for in Article 94;
- (e) where applicable, the report referred to in Article 95(1).

For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report in accordance with Article 5

of Directive 2004/109/EC of the European Parliament and of the Council<sup>40</sup> and makes it available to shareholders in accordance with this paragraph. Furthermore, Member States may provide that an accounting statement shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.

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

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

- (a) it is not necessary to take a fresh physical inventory;
- (b) the valuations shown in the last balance sheet are to be altered only to reflect entries in the books of account; the following shall nevertheless be taken into account:
  - interim depreciation and provisions,
  - material changes in actual value not shown in the books.

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

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

4. A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of merger and ending not earlier than the conclusion of that meeting, it makes them available on its website. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

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

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

#### *Article 97*

#### **⊠ Protection of employees' rights ⊠**

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

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<sup>40</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

#### *Article 98*

##### **⊗ Protection of the interests of creditors of the merging companies ⊗**

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

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

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

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

#### *Article 99*

##### **⊗ Protection of the interests of debenture holders of the merging companies ⊗**

Without prejudice to the rules governing the collective exercise of their rights, Article 98 shall apply to the debenture holders of the merging companies, except where the merger has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

#### *Article 100*

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

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

#### *Article 16101*

##### **⊗ Drawing up and certification of documents in due legal form ⊗**

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

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

#### Article 102

##### **Date on which a merger takes effect**

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

#### Article 103

##### **Publication formalities**

1. A merger  shall  be publicised in the manner prescribed by the laws of each Member State, in accordance with Article 15, in respect of each of the merging companies.
2. The acquiring company may itself carry out the publication formalities relating to the company or companies being acquired.

#### Article 104

##### **Consequences of a merger**

1. A merger shall have the following consequences *ipso jure* and simultaneously:
  - (a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;
  - (b) the shareholders of the company being acquired become shareholders of the acquiring company;
  - (c) the company being acquired ceases to exist.
2. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:
  - (a) by the acquiring company itself or through a person acting in his own name but on its behalf; or
  - (b) by the company being acquired itself or through a person acting in his own name but on its behalf.
3. The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights and obligations by the acquired company to be effective as against third parties. The acquiring company may carry out these formalities itself; however, the laws of the Member States may permit the company being acquired to continue to carry out these formalities for a limited period which cannot, save in exceptional cases, be fixed at more than six months from the date on which the merger takes effect.

*Article 105*

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

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

*Article 106*

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

The laws of the Member States shall at least lay down rules governing the civil liability, towards the shareholders of the company being acquired, of the experts responsible for drawing up on behalf of that company the report referred to in Article 95(1), in respect of misconduct on the part of those experts in the performance of their duties.

*Article 107*

**⊗ Conditions for nullity of a merger ⊗**

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

- (a) nullity must be ordered in a court judgment;
- (b) mergers which have taken effect pursuant to Article 102 may be declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;
- (c) nullification proceedings may not be initiated more than six months after the date on which the merger becomes effective as against the person alleging nullity or if the situation has been rectified;
- (d) where it is possible to remedy a defect liable to render a merger void, the competent court shall grant the companies involved a period of time within which to rectify the situation;
- (e) a judgment declaring a merger void shall be published in the manner prescribed by the laws of each Member State in accordance with Article 15;
- (f) where the laws of a Member State permit a third party to challenge such a judgment, that party may do so only within six months of publication of the judgment in the manner prescribed by ⊗ this ⊗ Directive ;

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↓ 2011/35/EU

- (g) a judgment declaring a merger void shall not of itself affect the validity of obligations owed by or in relation to the acquiring company which arose before the judgment was published and after the date on which the merger takes effect;
- (h) companies which have been parties to a merger shall be jointly and severally liable in respect of the obligations of the acquiring company referred to in point (g).

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

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

### SECTION 3

#### MERGER BY FORMATION OF A NEW COMPANY

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↓ 2011/35/EU (adapted)

##### *Article 108*

#### ⊗ Merger by formation of a new company ⊗

1. Articles 90, 91, 92 and 94 to 107 shall apply, without prejudice to Articles 11 and 12, to merger by formation of a new company. For this purpose, ‘merging companies’ and ‘company being acquired’ shall mean the companies which will cease to exist, and ‘acquiring company’ shall mean the new company.

Article 90(2)(a) shall also apply to the new company.

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

### SECTION 4

#### ACQUISITION OF ONE COMPANY BY ANOTHER WHICH HOLDS 90 % OR MORE OF ITS SHARES

##### *Article 109*

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

Member States shall make provision, in respect of companies governed by their laws, for the operation whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company which is the holder of all their shares and other securities conferring the right to vote at general meetings. Such operations shall be regulated by the provisions of Section 2 of this Chapter. However, Member States shall not impose the requirements set out in Article 90(2)(b), (c) and (d), Articles 94 and 95, Article 96(1)(d) and (e), Article 104(1) (b) and Articles 105 and 106.

### *Article 110*

#### **☒ Exemption from the requirement of approval by the general meeting ☒**

Member States shall not apply Article 92 to the operations referred to in Article 109 if the following conditions are fulfilled:

- (a) the publication provided for in Article 91 must be effected, as regards each company involved in the operation, at least one month before the operation takes effect;
- (b) at least one month before the operation takes effect, all shareholders of the acquiring company must be entitled to inspect the documents referred to in Article 96(1)(a), (b) and (c) at the company's registered office;
- (c) point (c) of the first paragraph of Article 93 must apply.

For the purposes of point (b) of the first paragraph of this Article, Article 96 (2), (3) and (4) shall apply.

### *Article 111*

#### **☒ Shares held by or on behalf of the acquiring company ☒**

The Member States may apply Articles 109 and 110 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if all the shares and other securities specified in Article 109 of the company or companies being acquired are held by the acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

### *Article 112*

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

Where a merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, Member States shall not require approval of the merger by the general meeting of the acquiring company if the following conditions are fulfilled:

- (a) the publication provided for in Article 91 must be effected, as regards the acquiring company, at least one month before the date fixed for the general meeting of the company or companies being acquired which is to decide on the draft terms of merger;
- (b) at least one month before the date specified in point (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in Article 96(1)(a), (b) and, where applicable, (c), (d) and (e) at the company's registered office;
- (c) point (c) of the first paragraph of Article 93 must apply.

For the purposes of point (b) of the first paragraph of this Article, Article 96(2), (3) and (4) shall apply.

### *Article 113*

#### **☒ Exemption from requirements applicable to mergers by acquisition ☒**

Member States shall not impose the requirements set out in Articles 94, 95 and 96 in the case of a merger within the meaning of Article 112 if the following conditions are fulfilled:

- (a) the minority shareholders of the company being acquired must be entitled to have their shares acquired by the acquiring company;
- (b) if they exercise that right, they must be entitled to receive consideration corresponding to the value of their shares;
- (c) in the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a court or by an administrative authority designated by the Member State for that purpose.

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

### *Article 114*

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

The Member States may apply Articles 112 and 113 to operations whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company, if 90 % or more, but not all, of the shares and other securities referred to in Article 112 of the company or companies being acquired are held by that acquiring company and/or by persons holding those shares and securities in their own names but on behalf of that company.

## **SECTION 5**

### **OTHER OPERATIONS TREATED AS MERGERS**

#### *Article 115*

##### **☒ Mergers with cash payment exceeding 10 % ☒**

Where in the case of one of the operations referred to in Article 87 the laws of a Member State permit a cash payment to exceed 10 %, Sections 2 and 3 of this Chapter and Articles 112, 113 and 114 shall apply.

#### *Article 116*

##### **☒ Mergers without all of the transferring companies ceasing to exist ☒**

Where the laws of a Member State permit one of the operations referred to in Articles 87, 109 and 115, without all of the transferring companies thereby ceasing to exist, Section 2, except for Article 104(1)(c), Section 3 or 4 of this Chapter shall apply as appropriate.

## Chapter II

### ⊗ Cross-border mergers of limited liability companies ⊗

#### *Article 117*

#### ⊗ General provisions ⊗

This ⊗ Chapter ⊗ shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the ⊗ Union ⊗, provided at least two of them are governed by the laws of different Member States (hereinafter referred to as ‘cross-border mergers’).

#### *Article 118*

#### Definitions

For the purposes of this ⊗ Chapter ⊗ :

- (1) ‘limited liability company’, hereinafter referred to as ‘company’, means
  - (a) a company ⊗ of a type listed in Annex II ⊗; or
  - (b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by ⊗ Chapter III of Title I ⊗ for the protection of the interests of members and others;

- (2) ‘merger’ means an operation whereby:
  - (a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
  - (b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or
  - (c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

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↓ 2005/56/EC (adapted)

*Article 119*

**Further provisions concerning scope**

1. Notwithstanding Article 118(2), this  Chapter  shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in Article 118(2)(a) and (b) to exceed 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger.
2. Member States may decide not to apply this  Chapter  to cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of limited liability company as laid down in Article 118(1).
3. This  Chapter  shall not apply to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption.

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↓ 2014/59/EU Art. 120 (adapted)

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

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↓ 2005/56/EC (adapted)

*Article 120*

**Conditions relating to cross-border mergers**

1. Save as otherwise provided in this  Chapter  ,
  - (a) cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States;
  - (b) a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable.
2. The provisions and formalities referred to in paragraph 1(b) shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account

the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 132. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.

#### *Article 121*

##### **Common draft terms of cross-border mergers**

The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger. The common draft terms of cross-border merger shall include at least the following particulars:

- (a) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;
- (b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;
- (c) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;
- (d) the likely repercussions of the cross-border merger on employment;
- (e) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;
- (f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;
- (g) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;
- (h) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
- (i) the statutes of the company resulting from the cross-border merger;
- (j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 132;
- (k) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;
- (l) dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

## Article 122

### Publication

1. The common draft terms of the cross-border merger shall be published in the manner prescribed by the laws of each Member State in accordance with Article 15 for each of the merging companies at least one month before the date of the general meeting which is to decide thereon.

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↓ 2009/109/EC Art. 4(1)

Any of the merging companies shall be exempt from the publication requirement laid down in Article 15 if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the common draft terms of cross-border merger and ending not earlier than the conclusion of that meeting, it makes the common draft terms of such merger available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second subparagraph, Member States may require that publication be effected via the central electronic platform referred to in Article 15(5). Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

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

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

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

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↓ 2005/56/EC (adapted)

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

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

- (b) the register in which the documents referred to in Article 15(2) are filed in respect of each merging company, and the number of the entry in that register;
- (c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

#### *Article 123*

##### **Report of the management or administrative organ**

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

The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting referred to in Article 125.

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

#### *Article 124*

##### **Independent expert report**

1. An independent expert report intended for members and made available not less than one month before the date of the general meeting referred to in Article 125 shall be drawn up for each merging company. Depending on the law of each Member State, such experts may be natural persons or legal persons.
2. As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts, appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the cross-border merger or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members.
3. The expert report shall include at least the particulars provided for by Article 95(2). The experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.
4. Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed.

#### *Article 125*

##### **Approval by the general meeting**

1. After taking note of the reports referred to in Articles 123 and 124, the general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger.

2. The general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

3. The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company if the conditions laid down in Article 93 are fulfilled.

#### *Article 126*

##### **Pre-merger certificate**

1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law.

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

3. If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the cross-border merger in accordance with Article 125(1), the possibility for the members of that merging company to have recourse to such procedure, to be initiated before the court having jurisdiction over that merging company. In such cases, the authority referred to in paragraph 1 may issue the certificate referred to in paragraph 2 even if such procedure has commenced. The certificate  shall , however, indicate that the procedure is pending. The decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members.

#### *Article 127*

##### **Scrutiny of the legality of the cross-border merger**

1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 132.

2. To that end each merging company shall submit to the authority referred to in paragraph 1 the certificate referred to in Article 126(2) within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting referred to in Article 125.

## Article 128

### **⊗ Date on which ⊗ the cross-border merger ⊗ takes effect ⊗**

The law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect. That date ⊗ shall ⊗ be after the scrutiny referred to in Article 127 has been carried out.

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↓ 2012/17/EU Art. 2(1) (adapted)

## Article 129

### **Registration**

The law of each of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements, in accordance with Article 15, for publicising the completion of the cross-border merger in the public register in which each of the companies is required to file documents.

The registry for the registration of the company resulting from the cross-border merger shall notify, through the system of interconnection registers established in accordance with Article 21(2) and without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.

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↓ 2005/56/EC (adapted)

## Article 130

### **Consequences of ⊗ a ⊗ cross-border merger**

1. A cross-border merger carried out as laid down in Article 118(2)(a) and (c) shall, from the date referred to in Article 128, have the following consequences:

- (a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
- (b) the members of the company being acquired shall become members of the acquiring company;
- (c) the company being acquired shall cease to exist.

2. A cross-border merger carried out as laid down in Article 118(2)(b) shall, from the date referred to in Article 128, have the following consequences:

- (a) all the assets and liabilities of the merging companies shall be transferred to the new company;
- (b) the members of the merging companies shall become members of the new company;
- (c) the merging companies shall cease to exist.

3. Where, in the case of a cross-border merger of companies covered by this ⊗ Chapter ⊗, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against

third parties, those formalities shall be carried out by the company resulting from the cross-border merger.

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↓ 2005/56/EC

4. The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect.

5. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

- (a) by the acquiring company itself or through a person acting in his or her own name but on its behalf;
- (b) by the company being acquired itself or through a person acting in his or her own name but on its behalf.

#### *Article 131*

#### **Simplified formalities**

1. Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired:

- Article 121(b), (c) and (e), Article 124 and Article 130(1)(b) shall not apply,
  - Article 125(1) shall not apply to the company or companies being acquired.
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↓ 2009/109/EC Art. 4(2)  
(adapted)

2. Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company or companies being acquired so requires, in accordance with  Chapter I of Title II .

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↓ 2005/56/EC (adapted)

#### *Article 132*

#### **Employee participation**

1. Without prejudice to paragraph 2, the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office.

2. However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply, where at least one of the merging companies has, within the six months prior to the publication of the draft terms of the cross-border merger as referred to in Article 122, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of Article 2(k) of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not:

- (a) provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation; or
- (b) provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.

3. In the cases referred to in paragraph 2, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights shall be regulated by the Member States, *mutatis mutandis* and subject to paragraphs 4 to 7, in accordance with the principles and procedures laid down in Article 12(2), (3) and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:

- (a) Article 3(1), (2) and (3), the first indent of the first subparagraph of Article 3(4), the second subparagraph of Article 3(4) and Article 3(5) and (7);
- (b) Article 4(1), Article 4(2) (a), (g) and (h) and Article 4(3);
- (c) Article 5;
- (d) Article 6;
- (e) Article 7(1), point (b) of the first subparagraph of Article 7(2), the second subparagraph of Article 7(2) and Article 7(3). However, for the purposes of this  Chapter , the percentages required by point (b) of the first subparagraph of Article 7(2) of Directive 2001/86/EC for the application of the standard rules contained in part 3 of the Annex to that Directive shall be raised from 25 to 33 1/3 %;
- (f) Articles 8, 10 and 12;
- (g) Article 13(4);
- (h) point (b) of part 3 of the Annex .

4. When regulating the principles and procedures referred to in paragraph 3, Member States:

- (a) shall confer on the relevant organs of the merging companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in paragraph 3(h), as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration;
- (b) shall confer on the special negotiating body the right to decide, by a majority of two-thirds of its members representing at least two thirds of the employees, including the votes of members representing employees in at least two different Member

States, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the Member State where the registered office of the company resulting from the cross-border merger will be situated;

- (c) may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding these rules, determine to limit the proportion of employee representatives in the administrative organ of the company resulting from the cross-border merger. However, if in one of the merging companies employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third.

5. The extension of participation rights to employees of the company resulting from the cross-border merger employed in other Member States, referred to in paragraph 2(b), shall not entail any obligation for Member States which choose to do so to take those employees into account when calculating the size of workforce thresholds giving rise to participation rights under national law.

6. When at least one of the merging companies is operating under an employee participation system and the company resulting from the cross-border merger is to be governed by such a system in accordance with the rules referred to in paragraph 2, that company shall be obliged to take a legal form allowing for the exercise of participation rights.

7. When the company resulting from the cross-border merger is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of subsequent domestic mergers for a period of three years after the cross-border merger has taken effect, by applying *mutatis mutandis* the rules laid down in this Article.

### Article 133

#### Validity

A cross-border merger which has taken effect as provided for in Article 128 may not be declared null and void.

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↓ 2012/17/EU (adapted)
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↓ 2005/56/EC (adapted)
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### Article 134

#### Review

⊗ Five years after 15 December 2007 ⊗ the Commission shall review ⊗ the provisions of ⊗ this ⊗ Chapter ⊗ in the light of the experience acquired in applying it and, if necessary, propose its amendment.

## Chapter III

### ⊗ Divisions of public limited liability companies ⊗

#### SECTION 1

#### ⊗ DIVISION BY ACQUISITION ⊗

##### *Article 135*

#### ⊗ General provisions ⊗

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

4. Article 86(2), (3) and (4) shall apply.

##### *Article 136*

#### ⊗ Definition of a ‘division by acquisition’ ⊗

1. For the purposes of this ⊗ Chapter ⊗ , ‘division by acquisition’ shall mean the operation whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division (hereinafter referred to as ‘recipient companies’) and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.
2. Article 88(2) shall apply.

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

*Article 137*

**Draft terms of division**

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↓ 82/891/EEC

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

2. Draft terms of division shall specify at least:

- (a) the type, name and registered office of each of the companies involved in the division;
- (b) the share exchange ratio and the amount of any cash payment;
- (c) the terms relating to the allotment of shares in the recipient companies;
- (d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;
- (e) the date from which the transactions of the company being divided shall be treated for accounting purposes as being those of one or other of the recipient companies;
- (f) the rights conferred by the recipient companies on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;
- (g) any special advantage granted to the experts referred to in Article 142(1) and members of the administrative, management, supervisory or controlling bodies of the companies involved in the division;
- (h) the precise description and allocation of the assets and liabilities to be transferred to each of the recipient companies;
- (i) the allocation to the shareholders of the company being divided of shares in the recipient companies and the criterion upon which such allocation is based.

3. Where an asset is not allocated by the draft terms of division and where the interpretation of these terms does not make a decision on its allocation possible, the asset or the consideration therefor shall be allocated to all the recipient companies in proportion to the share of the net assets allocated to each of those companies under the draft terms of division.

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

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↓ 82/891/EEC (adapted)

*Article 138*

**⊗ Publication of the draft terms of division ⊗**

Draft terms of division ⊗ shall ⊗ be published in the manner prescribed by the laws of each Member State in accordance with Article 15 for each of the companies involved in a division, at least one month before the date of the general meeting which is to decide thereon.

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↓ 2009/109/EC Art. 3(1)

Any of the companies involved in the division shall be exempt from the publication requirement laid down in Article 15 if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes the draft terms of division available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph, Member States may require that publication be effected via the central electronic platform referred to in Article 15(5). Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

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

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

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

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↓ 82/891/EEC (adapted)

*Article 139*

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

1. A division shall require at least the approval of a general meeting of each company involved in the division. Article 92 shall apply with regard to the majority required for such decisions, their scope and the need for separate votes.

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

*Article 140*

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

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↓ 82/891/EEC

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

- (a) the publication provided for in Article 138 must be effected, for each recipient company, at least one month before the date fixed for the general meeting of the company being divided which is to decide on the draft terms of division;
- (b) at least one month before the date specified in point (a), all shareholders of each recipient company must be entitled to inspect the documents specified in Article 143(1) at the registered office of that company;
- (c) one or more shareholders of any recipient company holding a minimum percentage of the subscribed capital must be entitled to require that a general meeting of such recipient company be called to decide whether to approve the division. This minimum percentage may not be fixed at more than 5 %. Member States may, however, provide for the exclusion of non-voting shares from this calculation.

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↓ 2009/109/EC Art. 3(2)

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

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↓ 82/891/EEC (adapted)

*Article 141*

**⊗ Detailed written report and information on a division ⊗**

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

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

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↓ 2009/109/EC Art. 3(3)

Where applicable, it shall disclose the preparation of the report on the consideration other than in cash referred to in Article 69(2) for recipient companies and the register where that report must be lodged.

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↓ 82/891/EEC (adapted)

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

*Article 142*

**⊗ Examination of the draft terms of division by experts ⊗**

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

2. Article 95(2) and (3) shall apply.

Article 143

⊗ Availability of documents for inspection by shareholders ⊗

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

- (a) the draft terms of division;
- (b) the annual accounts and annual reports of the companies involved in the division for the preceding three financial years;

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↓ 2009/109/EC Art. 3(5)(a)(i)  
(adapted)

- (c) where applicable, an accounting statement drawn up as at a date which ⊗ shall ⊗ not be earlier than the first day of the third month preceding the date of the draft terms of division, if the latest annual accounts relate to a financial year which ended more than six months before that date;
- (d) where applicable, the reports of the administrative or management bodies of the companies involved in the division provided for in Article 141(1);

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↓ 2007/63/EC Art. 3(1)(ii)

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

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↓ 2009/109/EC Art. 3

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

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↓ 82/891/EEC

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

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

- (a) it shall not be necessary to take a fresh physical inventory;
- (b) the valuations shown in the last balance sheet shall be altered only to reflect entries in the books of account; the following shall nevertheless be taken into account:
  - (i) interim depreciation and provisions,
  - (ii) material changes in actual value not shown in the books.

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

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↓ 2009/109/EC Art. 3(5)(b)

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

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↓ 2009/109/EC Art. 3(5)(c)

4. A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes them available on its website. Member States shall not subject that exemption to requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

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

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

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↓ 2007/63/EC Art. 3(2) (adapted)

#### *Article 144*

##### ⊗ **Simplified formalities** ⊗

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

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

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↓ 82/891/EEC (adapted)

#### *Article 145*

##### ⊗ **Protection of employees' rights** ⊗

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

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

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

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↓ 2009/109/EC Art. 3(6)

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

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

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↓ 82/891/EEC

3. In so far as a creditor of the company to which the obligation has been transferred in accordance with the draft terms of division has not obtained satisfaction, the recipient companies shall be jointly and severally liable for that obligation. Member States may limit that liability to the net assets allocated to each of those companies other than the one to which the obligation has been transferred. However, they need not apply this paragraph where the division operation is subject to the supervision of a judicial authority in accordance with Article 157 and a majority in number representing three-fourths in value of the creditors or any class of creditors of the company being divided have agreed to forego such joint and several liability at a meeting held pursuant to Article 157(1)(c).

4. Article 98(3) shall apply.

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

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

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

*Article 147*

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

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

*Article 148*

**⊗ Drawing up and certification of documents in due legal form ⊗**

Where the laws of a Member State do not provide for judicial or administrative preventive supervision of the legality of divisions or where such supervision does not extend to all the legal acts required for a division, Article 101 shall apply.

*Article 149*

**⊗ Date on which a division takes effect ⊗**

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

*Article 150*

**⊗ Publication formalities ⊗**

1. A division ⊗ shall ⊗ be published in the manner prescribed by the laws of each Member State in accordance with Article 15 in respect of each of the companies involved in a division.
2. Any recipient company may itself carry out the publication formalities relating to the company being divided.

*Article 151*

**⊗ Consequences of a division ⊗**

1. A division shall have the following consequences *ipso jure* and simultaneously:
  - (a) the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided; such transfer shall take effect with the assets and liabilities being divided in accordance with the allocation laid down in the draft terms of division or in Article 137(3);

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

(c) the company being divided ceases to exist.

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

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

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

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

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↓ 82/891/EEC (adapted)
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#### *Article 152*

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

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

#### *Article 153*

#### **⊗ Conditions for nullity of a division ⊗**

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

(a) nullity must be ordered in a court judgment;

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

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

- (d) where it is possible to remedy a defect liable to render a division void, the competent court shall grant the companies involved a period of time within which to rectify the situation;
  - (e) a judgment declaring a division void shall be published in the manner prescribed by the laws of each Member State in accordance with Article 15 ;
  - (f) where the laws of a Member State permit a third party to challenge such a judgment, he may do so only within six months of publication of the judgment in the manner prescribed by  Chapter III of Title I .
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82/891/EEC

- (g) a judgment declaring a division void shall not of itself affect the validity of obligations owed by or in relation to the recipient companies which arose before the judgment was published and after the date referred to in Article 149;
- (h) each of the recipient companies shall be liable for its obligations arising after the date on which the division took effect and before the date on which the decision pronouncing the nullity of the division was published. The company being divided shall also be liable for such obligations; Member States may provide that this liability be limited to the share of net assets transferred to the recipient company on whose account such obligations arose.

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

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

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82/891/EEC (adapted)

#### *Article 154*

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

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2009/109/EC Art. 3(7)(a)

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

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↓ 82/891/EEC

- (a) each of the companies involved in the operation must carry out the publication provided for in Article 138 at least one month before the operation takes effect;
- (b) at least one month before the operation takes effect, all shareholders of companies involved in the operation must be entitled to inspect the documents specified in Article 143(1), at their company's registered office;
- (c) where a general meeting of the company being divided, required for the approval of the division, is not summoned, the information provided for by Article 141(3) covers any material change in the asset and liabilities after the date of preparation of the draft terms of division.

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↓ 2009/109/EC Art. 3(7)(d)

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

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↓ 82/891/EEC (adapted)

## SECTION 2

### DIVISION BY THE FORMATION OF NEW COMPANIES

#### *Article 155*

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

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

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↓ 82/891/EEC

2. Article 89(2) shall apply.

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↓ 82/891/EEC (adapted)

*Article 156*

**⊗ Application of rules on divisions by acquisition ⊗**

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

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

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

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↓ 2009/109/EC Art. 3(8)(b)

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

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↓ 82/891/EEC

**SECTION 3**

**DIVISIONS UNDER THE SUPERVISION OF A JUDICIAL AUTHORITY**

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↓ 82/891/EEC (adapted)

*Article 157*

**⊗ Divisions under the supervision of a judicial authority ⊗**

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

- (a) to call a general meeting of the shareholders of the company being divided in order to decide upon the division;
- (b) to ensure that the shareholders of each of the companies involved in a division have received or can obtain at least the documents referred to in Article 143 in time to examine them before the date of the general meeting of their company called to

decide upon the division. Where a Member State makes use of the option provided for in Article 140, the period  shall  be long enough for the shareholders of the recipient companies to be able to exercise the rights conferred on them by that Article;

- (c) to call any meeting of creditors of each of the companies involved in a division in order to decide upon the division;
- (d) to ensure that the creditors of each of the companies involved in a division have received or can obtain at least the draft terms of division in time to examine them before the date referred to in point (b);
- (e) to approve the draft terms of division.

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

- (a) Article 138, on condition that the adequate system of protection of the interest of the creditors referred to in Article 146(1) covers all claims regardless of their date;
- (b) the conditions referred to in Article 140(a) and (b) where a Member State makes use of the option provided for in Article 140;
- (c) Article 143, as regards the period and the manner prescribed for the inspection of the documents referred to therein.

## SECTION 4

### OTHER OPERATIONS TREATED AS DIVISIONS

#### *Article 158*

#### Divisions with cash payment exceeding 10 %

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↓ 82/891/EEC
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Where, in the case of one of the operations specified in Article 135, the laws of a Member State permit the cash payment to exceed 10 %, Sections 1, 2 and 3 of this Chapter shall apply.

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↓ 82/891/EEC (adapted)
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#### *Article 159*

#### Divisions without the company being divided ceasing to exist

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↓ 82/891/EEC
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Where the laws of a Member State permit one of the operations specified in Article 135 without the company being divided ceasing to exist, Sections 1, 2 and 3 of this Chapter shall apply, except for Article 151(1)(c).

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↓ 82/891/EEC (adapted)

## SECTION 5

### ⊗ APPLICATION ARRANGEMENTS ⊗

#### *Article 160*

##### ⊗ Transitional provisions ⊗

1. Where, after ⊗ 1 January 1986 ⊗, a Member State permits division operations, it shall bring into force the ⊗ laws, regulations and administrative provisions necessary for it to comply with this Chapter ⊗ on the date on which it permits such operations. It shall immediately inform the Commission thereof.
2. Member States need not apply Articles 146 and 147 as regards the holders of convertible debentures and other securities convertible into shares if, at the time when the provisions referred to in paragraph 1 ⊗ came ⊗ into force, the position of these holders in the event of a division has previously been determined by the conditions of issue.

↓ 2012/17/EU Art. 3(5) (adapted)

## Title III

### ⊗ Final Provisions ⊗

#### *Article 161*

##### ⊗ Data protection ⊗

The processing of personal data carried out in the context of ⊗ Chapter III of Title I and Chapter II of Title II ⊗ shall be subject to Directive 95/46/EC.

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↓ 2012/17/EU Art. 4 (adapted)

#### *Article 162*

##### **Report and regular dialogue ⊗ on the system of interconnection of registers ⊗**

1. The Commission shall, not later than ⊗ 8 June 2022 ⊗, publish a report concerning the functioning of the system of interconnection of registers, in particular examining its technical operation and its financial aspects.
2. That report shall be accompanied, if appropriate, by proposals for amending this Directive.
3. The Commission and the representatives of the Member States shall regularly convene to discuss ⊗ the functioning of the system of interconnection of registers ⊗ in any appropriate forum.

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↓ 2012/17/EU Art. 3(6) (adapted)

*Article 163*

⊗ **Exercise of the delegation** ⊗

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 24(3) shall be conferred on the Commission for an indeterminate period of time.
3. The delegation of power referred to in Article 24(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 24(3) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

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↓ 2012/17/EU Art. 3(4) (adapted)

*Article 164*

⊗ **Committee procedure** ⊗

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

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↓ 2012/30/EU (adapted)

*Article 165*

⊗ **Communication** ⊗

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the fields covered by this Directive.



*Article 166*

**Repeal**

Directives 82/891/EEC, 89/666/EEC, 2005/56/EC, 2009/101/EC, 2011/35/EU and 2012/30/EU, as amended by the Directives listed in Annex III, Part A, are repealed, without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law and the dates of application of the Directives set out in Annex III, Part B.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV.

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2012/30/EU (adapted)

*Article 167*

**☒ Entry into force ☒**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 168*

**☒ Addressees ☒**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*