Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance)

DIRECTIVE (EU) 2019/2121 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 November 2019

amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

(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) 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[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Directive (EU) 2017/1132 of the European Parliament and of the Council[(3)] regulates cross#border mergers of limited liability companies. The rules on cross-border mergers represent a significant milestone in improving the functioning of the internal market for companies and firms and their exercise of the freedom of establishment. However, evaluation of those rules shows that they need to be changed. Furthermore, it is appropriate to provide for rules regulating cross-border conversions and divisions, since Directive (EU) 2017/1132 only provides for rules on domestic divisions of public limited liability companies.

(2) Freedom of establishment is one of the fundamental principles of Union law. Under the second paragraph of Article 49 of the Treaty on the Functioning of the European Union (‘TFEU’), when read in conjunction with Article 54 of the TFEU, the freedom of establishment for companies or firms includes, inter alia, the right to form and manage such companies or firms under the conditions laid down by the legislation of the Member State of establishment. This has been interpreted by the Court of Justice of the European Union as encompassing the right of a company or firm formed in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law of another Member State, provided that the conditions laid down by the legislation of that other Member State are satisfied and, in particular, that the test adopted by the latter Member State to determine the connection of a company or firm with its national legal order is satisfied.

(3) In the absence of harmonisation of Union law, defining the connecting factor that determines the national law applicable to a company or firm falls, in accordance with Article 54 of the TFEU, within the competence of each Member State. Article 54 of the TFEU places the connecting factors of the registered office, the central administration and the principal place of business of a company or firm on an equal footing. Therefore, as clarified in case-law, the fact that only the registered office, and not the central administration or principal place of business, is transferred does not as such exclude the applicability of the freedom of establishment under Article 49 of the TFEU.

(4) Developments in the case-law have opened up new opportunities for companies in the internal market to foster economic growth, effective competition and productivity. At the same time, the objective of an internal market without internal borders for companies has also to be reconciled with other objectives of European integration, such as social protection as set out in Article 3 of the Treaty on European Union (TEU) and Article 9 of the TFEU, as well as the promotion of social dialogue as set out in Articles 151 and 152 of the TFEU. The rights of companies to convert, merge and divide across borders should go hand in hand, and be properly balanced, with the protection of employees, creditors and members.

(5) The lack of a legal framework for cross-border conversions and divisions leads to legal fragmentation and legal uncertainty, and thus to barriers to the exercise of the freedom of establishment. It also leads to the suboptimal protection of employees, creditors and minority members within the internal market.

(6) The European Parliament has called upon the Commission to adopt harmonised rules on cross-border conversions and divisions. A harmonised legal framework would further contribute to the removal of restrictions on the freedom of establishment while at the same time providing adequate protection for stakeholders such as employees, creditors and members.

(7) The Commission announced in its Communication of 28 October 2015 entitled ‘Upgrading the Single Market: more opportunities for people and business’ that it would assess the need to update the existing rules on cross-border mergers in order to make it easier for SMEs to choose their preferred business strategies and to better adapt to changes in market conditions, but without weakening existing employment protection. In its Communication of 25 October 2016 entitled ‘Commission Work Programme 2017: Delivering a Europe that protects, empowers and defends’, the Commission announced an initiative to facilitate cross-border mergers.

(8) In addition to new rules on conversions, this Directive lays down rules on cross-border divisions, both for partial and full divisions, but those rules only relate to cross-border divisions that involve the formation of new companies. This Directive does not provide a harmonised framework for cross-border divisions in which a company transfers assets and liabilities to one or more existing companies, as such cases have been viewed as being very complex, requiring the involvement of competent authorities from several Member States and entailing additional risks in terms of the circumvention of Union and national rules. The possibility of forming a company through a division by separation as provided for in this Directive offers companies a new harmonised procedure in the

internal market. However, companies should be free to directly set up subsidiaries in other Member States.

(9) This Directive should not apply to companies in liquidation where the distribution of assets has begun. In addition, Member States should be able to choose to exclude companies subject to other liquidation proceedings from the application of this Directive. Member States should also be able to choose not to apply this Directive to companies subject to insolvency proceedings, as defined by national law, or to preventive restructuring frameworks, as defined by national law, irrespective of whether such proceedings are part of a national insolvency framework or regulated outside of it. Also, Member States should be able to choose not to apply this Directive to companies that are subject to crisis prevention measures as defined in Directive 2014/59/EU of the European Parliament and of the Council[(4)]. This Directive should be without prejudice to Directive (EU) 2019/1023 of the European Parliament and of the Council[(5)].

(10) Given the complexity of cross-border conversions, mergers and divisions (collectively, 'cross-border operations') and the multitude of the interests concerned, it is appropriate to provide for the scrutiny of the legality of cross-border operations before they take effect, in order to provide legal certainty. To that effect, the competent authorities of the Member States involved should ensure that a decision on the approval of a cross-border operation is taken in a fair, objective and non-discriminatory manner and on the basis of all relevant elements required by Union and national law.

(11) This Directive should be without prejudice to Member States' powers to provide strengthened protection for employees in accordance with the existing social *acquis*.

(12) To allow all stakeholders' legitimate interests to be taken into account in the procedure governing a cross-border operation, the company should draw up and disclose the draft terms of the proposed operation, containing the most important information about it. The administrative or management body should, where provided for in national law or in accordance with national practice, or both, include board level employee representatives in the decision on the draft terms of a cross-border operation. Such information should at least include the legal form envisaged for the company or companies, the instrument of constitution where applicable, the statutes, the proposed indicative timetable for the operation and details of any safeguards offered to members and creditors. A notice should be disclosed in the register informing the members, creditors and representatives of the employees, or, where there are no such representatives, the employees themselves, that they may submit comments with regard to the proposed operation. Member States could also decide that the independent expert report required by this Directive has to be disclosed.

(13) In order to provide information to its members and employees, the company carrying out the cross-border operation should prepare a report for them. The report should explain and justify the legal and economic aspects of the proposed cross-border operation and the implications of the proposed cross-border operation for employees. In particular, the report should explain the implications of the cross-border operation with regard to the future business of the company, including its subsidiaries. As far as members are concerned, the report should include remedies available to them,

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

especially information about their right to exit the company. For employees, the report should explain the implications of the proposed cross-border operation on the employment situation. In particular, the report should explain whether there would be any material change to the employment conditions laid down by law, to collective agreements or to transnational company agreements, and in the locations of the company's places of business, such as the location of the head office. In addition, the report should include information on the management body and, where applicable, on staff, equipment, premises and assets before and after the cross-border operation and the likely changes to the organisation of work, wages and salaries, the location of specific posts and the expected consequences for the employees occupying those posts, as well as on the company-level social dialogue, including, where applicable, board level employee representation. The report should also explain how those changes would affect any subsidiaries of the company.

No section for employees should be required where the only employees of the company are in its administrative or management body. Furthermore, in order to enhance the protection afforded to employees, either the employees themselves or their representatives should be able to provide their opinion on the report's section setting out the implications of the cross-border operation for them. The provision of the report and of any opinion should be without prejudice to applicable information and consultation procedures provided for at national level including those following the implementation of Directive 2002/14/EC of the European Parliament and of the Council[(6)] or Directive 2009/38/EC of the European Parliament and of the Council[(7)]. The report or, where drawn up separately, the reports, should be available to the members and to the representatives of the employees of the company carrying out the cross-border operation or, where there are no such representatives, the employees themselves.

(14) The draft terms of the cross-border operation, the offer of cash compensation made by the company to those members who wish to exit the company and, where applicable, the share-exchange ratio, including the amount of any complementary cash payment included in the draft terms, should be examined by an expert who is independent from the company. With regard to the independence of the expert, Member States should take into account the requirements laid down in Articles 22 and 22b of Directive 2006/43/EC of the European Parliament and of the Council[(8)].

(15) The information disclosed by the company should be comprehensive and make it possible for stakeholders to assess the implications of the intended cross-border operation. However, companies should not be obliged to disclose confidential information, the disclosure of which would be prejudicial to their business position, in accordance with Union or national law. Such non-disclosure should not undermine the other requirements provided for in this Directive.

(16) On the basis of the draft terms and the reports, the general meeting of the members of the company or companies should decide on whether or not to approve those draft terms and the necessary amendments to the instruments of constitution, including the statutes. It is important that the required majority for the vote be sufficiently large in order to ensure that the decision is taken by a solid majority. In addition, members should also

have the right to vote on any arrangements concerning employee participation, if they have reserved that right during the general meeting.

(17) The lack of harmonisation of safeguards for members has been identified as an obstacle to cross-border operations. Companies and their members face a wide variety of different forms of protection leading to complexity and legal uncertainty. Members should, therefore, be offered the same minimum level of protection regardless of the Member State in which the company is situated. Member States should be able therefore to maintain or introduce additional rules on protection for members, unless such rules conflict with those provided for under this Directive or with the freedom of establishment. Members' individual rights to information should remain unaffected.

(18) As a consequence of a cross-border operation, members often face a situation whereby the law applicable to their rights changes because they become members of a company governed by the law of a Member State other than the Member State the law of which was applicable to the company before the operation. Member States should, therefore, at least provide for members holding shares with voting rights and who voted against the approval of the draft terms to have the right to exit the company and receive cash compensation for their shares that is equivalent to the value of those shares. However, Member States should be free to decide to extend that right also to other members, for example, to members holding shares without voting rights or members who, as a result of a cross-border division, would acquire shares in the recipient company in proportions different from those they held before the operation, or to members for whom there would be no change of applicable law but for whom certain rights would change due to the operation. This Directive should not affect national rules on the validity of contracts for the sale and transfer of shares in companies or special legal form requirements. Member States should, for example, be able to require a notarial deed or a confirmation of signatures.

(19) Companies should be able to estimate, to the extent possible, the costs related to the cross#border operation. Members should, therefore, be required to declare to the company whether they have decided to exercise the right to dispose of their shares. That requirement should be without prejudice to any formal requirements laid down in national law. Members might also be required to indicate, together with that declaration or within a specific time limit, whether they intend to dispute the cash compensation offered and claim additional cash compensation.

(20) The calculation of the offer of cash compensation should be based on generally accepted valuation methods. Members should have a right to dispute the calculation and question the adequacy of the cash compensation before a competent administrative or judicial authority or a body mandated under national law, including arbitral tribunals. Member States should be able to provide that members who have declared their decision to exercise the right to dispose of their shares are entitled to join such proceedings. Member States should also be able to establish time limits in national law for joining those proceedings.

(21) As far as cross-border mergers or divisions are concerned, members who did not have or did not exercise the right to exit the company should, nevertheless, have a right to