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Fiontar agus Nuálaíochta
Department of Business,
Enterprise and Innovation

Public Consultation on the Transposition of Directive (EU) 2019/2121 of the European Parliament and Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

Company Law

August 2020

A. Overview

Introduction

The Department of Business, Enterprise and Innovation invites submissions to a public consultation on the transposition of Directive (EU) 2019/2121 amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions. This Directive will be of particular interest to companies, their members and employees.

This Directive, which must be transposed by 31 January 2023, amends the provisions of Directive (EU) 2017/1132 on cross-border mergers and creates harmonised rules on cross-border conversions and divisions.

This consultation is primarily seeking views on the Member State options under the Directive. Opportunity is also provided to provide general comments, including on the mandatory provisions of the Directive in the Response Template provided.

Background

Directive 2019/2121 is part of the EU Commission's 'Company Law Package'. Negotiations commenced in May 2018 on the Proposal and the Department of Business, Enterprise and Innovation sought views on the Proposal in July 2018. The Proposal rested on the principal of the freedom of establishment and arose in part from the European Court of Justice decision in *Polbud* which held that a national rule which imposed a winding up prerequisite on a cross-border transfer of a company was an unjustified and disproportionate restriction[1].

The objective of the Proposal was to make it easier for companies to merge, divide or move within the Single Market, and to safeguard employee, creditor and shareholder rights.

Objective of the Directive

Freedom of establishment is one of the fundamental principles of Union law. This is extended to companies and firms to, *inter alia*, form and manage companies or firms under the conditions laid down by the legislation of the Member State of establishment, under Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU). In the absence of a harmonized Union law it falls to the competence of each Member State to define the connecting factor that determines the national law applicable to a company or firm, in accordance with Article 54 TFEU.

This Directive seeks to meet the objective of an internal market without internal borders for companies, and to reconcile this with the objective of social protection. Additional rules provide

[1] Case C-106/16 *Polbud – Wykonawstwo* [2017] EU:C:2017:804.

for rights to information and participation for employees and protection for members and creditors.

Additional to the development of the legal framework on cross-border mergers, this Directive is responding to a European Parliament request to adopt harmonised rules on cross-border conversions and divisions. The new rules apply to both full and partial divisions, but only relate to cross-border divisions that involve the formation of new companies.

Current Irish Law

Directive 2005/56/EC regulating cross border mergers was transposed into Irish law by Statutory Instrument 157/2008, referred to as the European Communities (Cross Border Mergers) Regulations 2008 (as amended by Statutory Instrument 306/2011). Further amendments will be necessary to transpose Directive 2019/2121 into Irish law.

Under the 2008 Regulations 11 company acquisitions were completed in 2019, while another 5 were absorbed (deleted from the register). 75 companies have been merged into Ireland and 113 companies have left the State since the legislation was enacted in 2008[2].

Domestic mergers involving companies other than PLCs, are dealt with under Irish law by Part 9 of the Companies Act 2014, entitled "Reorganisations, Acquisitions, Mergers and Divisions." Whilst Part 9 does not deal with cross border mergers, this part of the Companies Act 2014 is modelled on Directive 2005/56/EC.

Implementation of provisions with options for Member States

The Department of Business, Enterprise and Innovation is consulting on the use of Member State options, being matters in respect of which Member States can or must make a choice. Interested parties are asked to bear in mind that, except for the exercise of options, Member States are obliged to implement the Directive.

While this consultation is focused on Member State options views are welcome from respondents on any aspect of the Directive they may wish to raise. The provision of such views will facilitate the Department's work on transposition of the measures.

Please note that options regarding national experts, Article 86f(1), and options relating to discretionary application of the competent authority, Articles 86m(1), 86m(7)(b), 160m(1) and 160m(7)(b), are not included in this consultation. Irish law currently provides for experts to be qualified natural persons, ss469 and 1028 of the Companies Act 2014. It is not currently

[2] Companies Registration Office Report 2019, pp 23-24.

considered that this will be extended to legal persons. Submissions are not sought on Articles 160s, 3, 4, 5 or 6.

The text of each Article with Member State options from Directive (EU) 2019/2121 of the European Parliament and Council are inserted in the tables that follow. The options in each Article are shown in ***bold italicised text***. The numbering on each question relates to the subsection of the relevant Article. Please note that references and footnotes included in the Directive have been removed in this paper.

Respondents have the opportunity to comment generally on the Directive should they wish to express any views on these Articles of the Directive. There is also capacity to comment on Articles without Member State options.

Please use the separate response template for your response to the consultation.

B. Implementation of the Directive

Directive (EU) 2019/2121 must be implemented in Irish law by 31 January 2023.

Submissions

Submissions are invited on the transposition of the Directive in Irish law, in particular answers to the questions raised are sought. A separate response template is attached, completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

Respondents are requested to make their submissions by email to;
companylawconsultation@dbei.gov.ie

Hardcopy submissions are not being received at this time due to remote working.

The closing date for receipt of submissions is 14 October 2020. Please clearly mark your submission as 'Public Consultation on the Transposition of Directive (EU) 2019/2121'.

General Data Protection Regulation

The Department of Business, Enterprise and Innovation is subject to the provisions of the Regulation in relation to personal data collected by it.

Any personal information which you volunteer to this Department will be treated with the highest standards of security and confidentiality, in accordance with the Data Protection Act 2018.

Responses to the consultation may be made publicly available by the Department of Business, Enterprise and Innovation. Any material contained in your submission to the consultation which respondents do not wish to be made public should be clearly identified as confidential in their submission.

Freedom of Information Act 2014

Respondents should also be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Act 2014. Any information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information Act, the Department will consult with respondents about information identified as commercially sensitive before making a decision on such a request.

C. Questions on Member State Options

Article 86a

Scope

1. This Chapter shall apply to conversions 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, into limited liability companies governed by the law of another Member State.

2. This Chapter shall not apply to cross-border conversions 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.

3. Member States shall ensure that this Chapter does not apply to companies in either of the following circumstances:

(a) the company is in liquidation and has begun to distribute assets to its members;

(b) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU.

4. Member States may decide not to apply this Chapter to companies which are:

(a) the subject of insolvency proceedings or subject to preventive restructuring frameworks;

(b) the subject of liquidation proceedings other than those referred to in point (a) of paragraph 3, or

(c) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU.

Question

4. Should Ireland avail of these options relating to companies' subject to liquidation, insolvency or crisis prevention measures? Please provide reasons for your answer in each case.

Article 86e

Report of the administrative or management body for members and employees

1. The administrative or management body of the company shall draw up a report for members and employees, explaining and justifying the legal and economic aspects of the cross-border conversion, as well as explaining the implications of the cross-border conversion for employees.

It shall, in particular, explain the implications of the cross-border conversion for the future business of the company.

2. The report shall also include a section for members and a section for employees.

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

3. The section of the report for members shall, in particular, explain the following:

(a) the cash compensation and the method used to determine the cash compensation;

(b) the implications of the cross-border conversion for members;

(c) the rights and remedies available to members in accordance with Article 86i.

4. The section of the report for members shall not be required where all the members of the company have agreed to waive that requirement***. Member States may exclude single-member companies from the provisions of this Article.***

5. The section of the report for employees shall, in particular, explain the following:

(a) the implications of the cross-border conversion for employment relationships, as well as, where applicable, any measures for safeguarding those relationships;

(b) any material changes to the applicable conditions of employment or to the location of the company's places of business;

(c) how the factors set out in points (a) and (b) affect any subsidiaries of the company.

6. The report or reports shall be made available in any case electronically, together with the draft terms of the cross-border conversion, if 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 six weeks before the date of the general meeting referred to in Article 86h.

7. Where the administrative or management body of the company receives an opinion on the information referred to in paragraphs 1 and 5 in good time from the representatives of the employees or, where there are no such representatives, from the employees

themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to the report.

8. The section of the report for employees shall not be required where a company and its subsidiaries, if any, have no employees other than those who form part of the administrative or management body.

9. Where the section of the report for members referred to in paragraph 3 is waived in accordance with paragraph 4 and the section for employees referred to in paragraph 5 is not required under paragraph 8, the report shall not be required.

10. Paragraphs 1 to 9 of this Article shall be without prejudice to the applicable information and consultation rights and procedures provided for at national level following the transposition of Directives 2002/14/EC and 2009/38/EC.

Question

4. Should Ireland take the option to exclude single-member companies from the provisions of this Article? Please provide reasons for your answer.

Article 86f

Independent expert report

1. Member States shall ensure that an independent expert examines the draft terms of cross-border conversion and draws up a report for members. That report shall be made available to the members not less than one month before the date of the general meeting referred to in Article 86h. ***Depending on the law of the Member State, the expert may be a natural or legal person.***

2. The report referred to in paragraph 1 shall in any case include the expert's opinion as to whether the cash compensation is adequate. When assessing the cash compensation, the expert shall consider any market price of the shares in the company prior to the announcement of the conversion proposal or the value of the company excluding the effect of the proposed conversion, as determined in accordance with generally accepted valuation methods. The report shall at least:

(a) indicate the method or methods used to determine the cash compensation proposed;

(b) state whether the method or methods used are adequate for the assessment of the cash compensation, indicate the value arrived at using such methods and give an opinion on the relative importance attributed to those methods in arriving at the value decided on; and

(c) describe any special valuation difficulties which have arisen.

The expert shall be entitled to obtain from the company all information necessary for the discharge of the duties of the expert.

3. Neither an examination of the draft terms of cross-border conversion by an independent expert nor an independent expert report shall be required if all the members of the company have so agreed.

Member States may exclude single-member companies from the application of this Article.

Questions

3. Should Ireland take the option to exclude single-member companies from the application of this Article? Please provide reasons for your answer.

Article 86g

Disclosure

1. Member States shall ensure that the following documents are disclosed by the company and made publicly available in the register of the departure Member State, at least one month before the date of the general meeting referred to in Article 86h:

(a) the draft terms of the cross-border conversion; and

(b) a notice informing the members, creditors and representatives of the employees of the company, or, where there are no such representatives, the employees themselves, that they may submit to the company, at the latest five working days before the date of the general meeting, comments concerning the draft terms of the cross-border conversion.

Member States may require that the independent expert report be disclosed and made publicly available in the register.

Member States shall ensure that the company is able to exclude confidential information from the disclosure of the independent expert report.

The documents disclosed in accordance with this paragraph shall also be accessible through the system of interconnection of registers.

2. ***Member States may exempt a company from the disclosure requirement referred to in paragraph 1 of this Article where, for a continuous period beginning at least one month before the date fixed for the general meeting referred to in Article 86h and ending not earlier than the conclusion of that meeting, that company makes the documents referred to in paragraph 1 of this Article available on its website free of charge to the public.***

However, Member States shall not subject that exemption to any requirements or constraints other than those which are necessary to ensure the security of the website and the authenticity of the documents, and which are proportionate to achieving those objectives.

3. Where the company makes the draft terms of the cross-border conversion available in accordance with paragraph 2 of this Article, it shall submit to the register of the departure Member State, at least one month before the date of the general meeting referred to in Article 86h, the following information:

(a) the legal form and name of the company and the location of its registered office in the departure Member State and the legal form and name proposed for the converted company in the destination Member State and the proposed location of its registered office in that Member State;

(b) the register in which the documents referred to in Article 14 are filed in respect of the company and its registration number in that register;

(c) an indication of the arrangements made for the exercise of the rights of creditors, employees and members; and

(d) details of the website from which the draft terms of the cross-border conversion, the notice referred to in paragraph 1, the independent expert report and complete information on the arrangements referred to in point (c) of this paragraph may be obtained online and free of charge.

The register of the departure Member State shall make publicly available the information referred to in points (a) to (d) of the first subparagraph.

4. Member States shall ensure that the requirements referred to in paragraphs 1 and 3 can be fulfilled fully online without the necessity for the applicants to appear in person before any competent authority in the departure Member State, in accordance with the relevant provisions of Chapter III of Title I.

5. ***Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3 of this Article, that the draft terms of the cross-border conversion, or the information referred to in paragraph 3 of this Article, be published in their national gazette or through a central electronic platform in accordance with Article 16(3).*** In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette or to a central electronic platform.

6. Member States shall ensure that the documentation referred to in paragraph 1 or the information referred to in paragraph 3 is accessible to the public free of charge through the system of interconnection of registers.

Member States shall further ensure that any fees charged to the company by the registers for the disclosure referred to in paragraphs 1 and 3 and, where applicable, for the publication referred to in paragraph 5 do not exceed the recovery of the cost of providing such services.

Questions

1. Should the expert report be disclosed and made publicly available in the register? Please provide reasons for your answer.

2. Should Ireland avail of this exemption? Please provide reasons for your answer.

5. Should the drafter terms referred to in paragraph (3) be required to be published? Please provide reasons for your answer.

Article 86h

Approval by the general meeting

1. After taking note of the reports referred to in Articles 86e and 86f, where applicable, employees' opinions submitted in accordance with Article 86e and comments submitted in accordance with Article 86g, the general meeting of the company shall decide, by means of a resolution, whether to approve the draft terms of the cross-border conversion and whether to adapt the instrument of constitution, and the statutes if they are contained in a separate instrument.

2. The general meeting of the company may reserve the right to make implementation of the cross-border conversion conditional on express ratification by it of the arrangements referred to in Article 86l.

3. Member States shall ensure that the approval of the draft terms of the cross-border conversion, and of any amendment to those draft terms, requires a majority of not less than two thirds but not more than 90 % of the votes attached either to the shares or to the subscribed capital represented at the general meeting. In any event, the voting threshold shall not be higher than that provided for in national law for the approval of cross-border mergers.

4. ***Where a clause in the draft terms of the cross-border conversion or any amendment to the instrument of constitution of the converting company leads to an increase of the economic obligations of a member towards the company or third parties, Member States may require, in such specific circumstances, that such clause or the amendment to the instrument of constitution be approved by the member concerned, provided that such member is unable to exercise the rights laid down in Article 86i.***

5. Member States shall ensure that the approval of the cross-border conversion by the general meeting cannot be challenged solely on the following grounds:

(a) the cash compensation referred to in point (i) of Article 86d has been inadequately set; or

(b) the information given with regard to the cash compensation referred to in point (a) did not comply with the legal requirements.

Questions

4. Should Ireland avail of this option? Please provide reasons for your answer.

Article 86i

Protection of members

1. Member States shall ensure that at least the members of a company who voted against the approval of the draft terms of the cross-border conversion have the right to dispose of their shares for adequate cash compensation, under the conditions laid down in paragraphs 2 to 5.

Member States may also provide for other members of the company to have the right referred to in the first subparagraph.

Member States may require that express opposition to the draft terms of the cross-border conversion, the intention of members to exercise their right to dispose of their shares, or both, be appropriately documented, at the latest at the general meeting referred to in Article 86h. Member States may allow the recording of opposition to the draft terms of the cross-border conversion to be considered proper documentation of a negative vote.

2. Member States shall establish the period within which the members referred to in paragraph 1 have to declare to the company their decision to exercise the right to dispose of their shares. That period shall not exceed one month after the general meeting referred to in Article 86h. Member States shall ensure that the company provides an electronic address for receiving that declaration electronically.

3. Member States shall further establish the period within which the cash compensation specified in the draft terms of the cross-border conversion is to be paid. That period shall not end later than two months after the cross-border conversion takes effect in accordance with Article 86q.

4. Member States shall ensure that any members who have declared their decision to exercise the right to dispose of their shares, but who consider that the cash compensation offered by the company has not been adequately set, are entitled to claim additional cash compensation before the competent authority or body mandated under national law. Member States shall establish a time limit for the claim for additional cash compensation.

Member States may provide that the final decision to provide additional cash compensation is valid for all members who have declared their decision to exercise the right to dispose of their shares in accordance with paragraph 2.

5. Member States shall ensure that the law of the departure Member State governs the rights referred to in paragraphs 1 to 4 and that the exclusive competence to resolve any disputes relating to those rights lies within the jurisdiction of that departure Member State.

Questions

1. Should Ireland avail of these options? Please provide reasons for your answer.

4. Should Ireland avail of this option? Please provide reasons for your answer.

Article 86j

Protection of creditors

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

Member States shall ensure that creditors who are dissatisfied with the safeguards offered in the draft terms of the cross-border conversion, as provided for in point (f) of Article 86d, may apply, within three months of the disclosure of the draft terms of the cross-border conversion referred to in Article 86g, to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly demonstrate that, due to the cross-border conversion, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the company.

Member States shall ensure that the safeguards are conditional on the cross-border conversion taking effect in accordance with Article 86q.

2. ***Member States may require that the administrative or management body of the company provide a declaration that accurately reflects its current financial status at a date no earlier than one month before the disclosure of that declaration***. The declaration shall state that, on the basis of the information available to the administrative or management body of the company at the date of that declaration, and after having made reasonable enquiries, that administrative or management body is unaware of any reason why the company would, after the conversion takes effect, be unable to meet its liabilities when those liabilities fall due. The declaration shall be disclosed together with the draft terms of the cross-border conversion in accordance with Article 86g.

3. Paragraphs 1 and 2 shall be without prejudice to the application of the law of the departure Member State concerning the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies.

4. Member States shall ensure that creditors whose claims antedate the disclosure of the draft terms of the cross-border conversion are able to institute proceedings against the company also in the departure Member State within two years of the date the conversion has taken effect, without prejudice to the jurisdiction rules arising from Union or national law or from a contractual agreement. The option of instituting such proceedings shall be in addition to other rules on the choice of jurisdiction that are applicable pursuant to Union law.

Questions

2. Should Ireland avail of this option? Please provide reasons for your answer.

Article 86k

Employee information and consultation

1. Member States shall ensure that employees' rights to information and consultation are respected in relation to the cross-border conversion and are exercised in accordance with the legal framework provided for in Directive 2002/14/EC and, where applicable for Community-scale undertakings or Community-scale groups of undertakings, in accordance with Directive 2009/38/EC. ***Member States may decide that employees' rights to information and consultation apply with respect to the employees of companies other than those referred to in Article 3(1) of Directive 2002/14/EC.***

2. Notwithstanding Article 86e(7) and point (b) of Article 86g(1), Member States shall ensure that employees' rights to information and consultation are respected, at least before the draft terms of the cross-border conversion or the report referred to in Article 86e are decided upon, whichever is earlier, in such a way that a reasoned response is given to the employees before the general meeting referred to in Article 86h.

3. Without prejudice to any provisions or practices in force more favourable to employees, Member States shall determine the practical arrangements for exercising the right to information and consultation in accordance with Article 4 of Directive 2002/14/EC.

Questions

1. Should Ireland avail of this option? Please provide reasons for your answer.

Article 86l

Employee participation

1. Without prejudice to paragraph 2, the converted company shall be subject to the rules in force concerning employee participation, if any, in the destination Member State.

2. However, the rules in force concerning employee participation, if any, in the destination Member State shall not apply where the company has, in the six months prior to the disclosure of the draft terms of the cross-border conversion, an average number of employees equivalent to four fifths of the applicable threshold, as laid down in the law of the departure Member State, for triggering the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC, or where the law of the destination Member State does not:

(a) provide for at least the same level of employee participation as operated in the company prior to the cross-border conversion, measured by reference to the proportion of employee representatives among the members of the administrative or supervisory body 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 converted company that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the destination Member State.

3. In the cases referred to in paragraph 2 of this Article, the participation of employees in the converted company 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 of this Article, in accordance with the principles and procedures laid down in Article 12(2) and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:

(a) Article 3(1), points (a)(i) and (b) of Article 3(2), Article 3(3), the first two sentences of Article 3(4), and Article 3(5) and (7);

(b) Article 4(1), points (a), (g) and (h) of Article 4(2), and Article 4(3) and (4);

(c) Article 5;

(d) Article 6;

(e) Article 7(1), with the exception of the second indent of point (b);

(f) Articles 8, 10, 11 and 12; and

(g) point (a) 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 special negotiating body the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the destination Member State;

(b) ***may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding such rules, decide to limit the proportion of employee representatives in the administrative body of the converted company. However, if, in the company, employee representatives constituted at least one third of the administrative or supervisory body, the limitation may never result in a lower proportion of employee representatives in the administrative body than one third;***

(c) shall ensure that the rules on employee participation that applied prior to the cross-border conversion continue to apply until the date of application of any subsequently agreed rules or, in the absence of agreed rules, until the application of standard rules in accordance with point (a) of Part 3 of the Annex to Directive 2001/86/EC.

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

6. Where the converted company is to be governed by an employee participation system, in accordance with the rules referred to in paragraph 2, it shall be obliged to take a legal form allowing for the exercise of participation rights.

7. Where the converted company is operating under an employee participation system, it shall be obliged to take measures to ensure that employees' participation rights are protected in the event of any subsequent conversion, merger or division, be it cross-border or domestic, for a period of four years after the cross-border conversion has taken effect, by applying *mutatis mutandis* the rules laid down in paragraphs 1 to 6.

8. A company shall communicate to its employees or their representatives the outcome of the negotiations concerning employee participation without undue delay.

Questions

4(b) Should Ireland avail of this option? Please provide reasons for your answer.

Article 86m

Pre-conversion certificate

1. Member States shall designate the court, notary or other authority or authorities competent to scrutinise the legality of cross-border conversions as regards those parts of the procedure which are governed by the law of the departure Member State and to issue a pre-conversion certificate attesting to compliance with all relevant conditions and to the proper completion of all procedures and formalities in the departure Member State ("the competent authority").

Such completion of procedures and formalities may comprise the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies or compliance with specific sectoral requirements, including securing obligations arising from ongoing proceedings.

2. Member States shall ensure that the application to obtain a pre-conversion certificate by the company is accompanied by the following:

(a) the draft terms of the cross-border conversion;

(b) the report and the appended opinion, if any, referred to in Article 86e, as well as the report referred to in Article 86f, where they are available;

(c) any comments submitted in accordance with Article 86g(1); and

(d) information on the approval by the general meeting referred to in Article 86h.

3. ***Member States may require that the application to obtain a pre-conversion certificate by the company is accompanied by additional information, such as, in particular:***

(a) the number of employees at the time of the drawing up of the draft terms of the cross-border conversion;

(b) the existence of subsidiaries and their respective geographical location;

(c) information regarding the satisfaction of obligations due to public bodies by the company.

For the purposes of this paragraph, competent authorities may request such information, if not provided by the company, from other relevant authorities.

4. Member States shall ensure that the application referred to in paragraphs 2 and 3, including the submission of any information and documents, may be completed fully online without the necessity for the applicants to appear in person before the competent authority, in accordance with the relevant provisions of Chapter III of Title I.

5. In respect of compliance with the rules concerning employee participation as laid down in Article 86l, the competent authority of the departure Member State shall verify that the draft terms of the cross-border conversion include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.

6. As part of the scrutiny referred to in paragraph 1, the competent authority shall examine the following:

(a) all documents and information submitted to the competent authority in accordance with paragraphs 2 and 3;

(b) an indication by the company that the procedure referred to in Article 86l(3) and (4) has started, where relevant.

7. Member States shall ensure that the scrutiny referred to in paragraph 1 is carried out within three months of the date of receipt of the documents and information concerning the approval of the cross-border conversion by the general meeting of the company. That scrutiny shall have one of the following outcomes:

(a) where it is determined that the cross-border conversion complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the competent authority shall issue the pre-conversion certificate;

(b) where it is determined that the cross-border conversion does not comply with all the relevant conditions or that not all necessary procedures and formalities have been completed, the competent authority shall not issue the pre-conversion certificate and shall inform the company of the reasons for its decision; in that case, the competent authority may give the company the opportunity to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.

8. Member States shall ensure that the competent authority does not issue the pre-conversion certificate where it is determined in compliance with national law that a cross-border conversion is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.

9. Where the competent authority, during the scrutiny referred to in paragraph 1, has serious doubts indicating that the cross-border conversion is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, it shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware, in the course of the scrutiny referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.

10***. Where it is necessary for the purposes of the assessment under paragraphs 8 and 9 to take into account additional information or to perform additional***

investigative activities, the period of three months provided for in paragraph 7 may be extended by a maximum of three months.

11. Where, due to the complexity of the cross-border procedure, it is not possible to carry out the assessment within the deadlines provided for in paragraphs 7 and 10, Member States shall ensure that the applicant is notified of the reasons for any delay before the expiry of those deadlines.

12. Member States shall ensure that the competent authority may consult other relevant authorities with competence in the different fields concerned by the cross-border conversion, including those of the destination Member State, and obtain from those authorities and from the company information and documents necessary to scrutinise the legality of the cross-border conversion, within the procedural framework laid down in national law. For the purposes of the assessment, the competent authority may have recourse to an independent expert.

Questions

1. Should Ireland avail of this option? Please provide reasons for your answer.

3. Should Ireland avail of this option? Please provide reasons for your answer.

10. Should Ireland avail of this option? Please provide reasons for your answer.

Article 86t

Validity

(7)Article 120 is amended as follows:

(a)paragraph 4 is replaced by the following:

'4. Member States shall ensure that this Chapter does not apply to companies in either of the following circumstances:

(a)the company is in liquidation and has begun to distribute assets to its members;

(b)the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU.';

(b)the following paragraph is added:

'5. Member States may decide not to apply this Chapter to companies which are:

(a)the subject of insolvency proceedings or subject to preventive restructuring frameworks;

(b)the subject of liquidation proceedings other than those referred to in point (a) of paragraph 4, or

(c)the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU.'

Questions

7(b). Should Ireland avail of these options relating to companies subject to liquidation, insolvency or crisis prevention measures? Please provide reasons for your answer in each case.

Article 123

Disclosure

1. Member States shall ensure that the following documents are disclosed by the company and made publicly available in the register of the Member State of each of the merging companies, at least one month before the date of the general meeting referred to in Article 126:

(a) the common draft terms of the cross-border merger; and

(b) a notice informing the members, creditors and representatives of the employees of the merging company, or, where there are no such representatives, the employees themselves, that they may submit to their respective company, at the latest five working days before the date of the general meeting, comments concerning the common draft terms of the cross-border merger.

Member States may require that the independent expert report be disclosed and made publicly available in the register.

Member States shall ensure that the company is able to exclude confidential information from the disclosure of the independent expert report.

The documents disclosed in accordance with this paragraph shall also be accessible through the system of interconnection of registers.

2. ***Member States may exempt merging companies from the disclosure requirement referred to in paragraph 1 of this Article where, for a continuous period beginning at least one month before the date fixed for the general meeting referred to in Article 126 and ending not earlier than the conclusion of that meeting, those companies make the documents referred to in paragraph 1 of this Article available on their websites free of charge to the public.***

However, Member States shall not subject that exemption to any requirements or constraints other than those which are necessary to ensure the security of the website and the authenticity of the documents, and which are proportionate to achieving those objectives.

3. Where merging companies make the common draft terms of the cross-border merger available in accordance with paragraph 2 of this Article, they shall submit to their respective register, at least one month before the date of the general meeting referred to in Article 126, the following information:

(a) for each of the merging companies its legal form and name and the location of its registered office and the legal form and name proposed for any newly created company and the proposed location of its registered office;

(b) the register in which the documents referred to in Article 14 are filed in respect of each of the merging companies, and the registration number of the respective company in that register;

(c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors, employees and members; and

(d) details of the website from which the common draft terms of the cross-border merger, the notice referred to in paragraph 1, the independent expert report and complete information on the arrangements referred to in point (c) of this paragraph may be obtained online and free of charge.

The register of the Member State of each of the merging companies shall make publicly available the information referred to in points (a) to (d) of the first subparagraph.

4. Member States shall ensure that the requirements referred to in paragraphs 1 and 3 can be fulfilled fully online without the necessity for the applicants to appear in person before any competent authority in the Member States of the merging companies, in accordance with the relevant provisions of Chapter III of Title I.

5. Where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the disclosure referred to in paragraphs 1, 2 and 3 of this Article shall be made at least one month before the date of the general meeting of the other merging company or companies.

6. ***Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3 of this Article, that the common draft terms of the cross-border merger, or the information referred to in paragraph 3 of this Article, be published in their national gazette or through a central electronic platform in accordance with Article 16(3). In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette or to a central electronic platform.***

7. Member States shall ensure that the documentation referred to in paragraph 1 or the information referred to in paragraph 3 is accessible to the public free of charge through the system of interconnection of registers.

Member States shall further ensure that any fees charged to the company by the registers for the disclosure referred to in paragraphs 1 and 3 and, where applicable, for the publication referred to in paragraph 6 do not exceed the recovery of the cost of providing such services.

Questions

1. Should Ireland avail of this option? Please provide reasons for your answer.

2. Should Ireland avail of this option? Please provide reasons for your answer.

6. Should Ireland avail of this option? Please provide reasons for your answer.

Article 124

Report of the administrative or management body for members and employees

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

It shall, in particular, explain the implications of the cross-border merger for the future business of the company.

2. The report shall also include a section for members and a section for employees.

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

3. The section of the report for members shall, in particular, explain the following:

(a) the cash compensation and the method used to determine the cash compensation;

(b) the share exchange ratio and the method or methods used to arrive at the share exchange ratio, where applicable;

(c) the implications of the cross-border merger for members;

(d) the rights and remedies available to members in accordance with Article 126a.

4. The section of the report for members shall not be required where all the members of the company have agreed to waive that requirement***. Member States may exclude single-member companies from the provisions of this Article.***

5. The section of the report for employees shall, in particular, explain the following:

(a) the implications of the cross-border merger for employment relationships, as well as, where applicable, any measures for safeguarding those relationships;

(b) any material changes to the applicable conditions of employment or to the location of the company's places of business;

(c) how the factors set out in points (a) and (b) affect any subsidiaries of the company.

6. The report or reports shall be made available in any case electronically, together with the common draft terms of the cross-border merger, if available, to the members and to the representatives of the employees of each of the merging companies or, where there are no such representatives, to the employees themselves, not less than six weeks before the date of the general meeting referred to in Article 126.

However, where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available at least six weeks before the date of the general meeting of the other merging company or companies.

7. Where the administrative or management body of the merging company receives an opinion on the information referred to in paragraphs 1 and 5 in good time from the representatives of the employees or, where there are no such representatives, from the employees themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to the report.

8. The section of the report for employees shall not be required where a merging company and its subsidiaries, if any, have no employees other than those who form part of the administrative or management body.

9. Where the section of the report for members referred to in paragraph 3 is waived in accordance with paragraph 4 and the section for employees referred to in paragraph 5 is not required under paragraph 8, the report shall not be required.

10. Paragraphs 1 to 9 of this Article shall be without prejudice to the applicable information and consultation rights and procedures provided for at national level following the transposition of Directives 2002/14/EC and 2009/38/EC.';

Questions

4. Should Ireland exclude single member companies from the provisions of this Article? Please provide reasons for your answer.

Article 125

Independent expert report

(11)Article 125 is amended as follows:

(a)in paragraph 1, the following subparagraph is added:

'However, where the approval of the merger is not required by the general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available at least one month before the date of the general meeting of the other merging company or companies.';

(b)paragraph 3 is replaced by the following:

'3. The report referred to in paragraph 1 shall in any case include the expert's opinion as to whether the cash compensation and the share exchange ratio are adequate. When assessing the cash compensation, the expert shall consider any market price of the shares in the merging companies prior to the announcement of the merger proposal or the value of the companies excluding the effect of the proposed merger, as determined in accordance with generally accepted valuation methods. The report shall at least:

(a)indicate the method or methods used to determine the cash compensation proposed;

(b)indicate the method or methods used to arrive at the share exchange ratio proposed;

(c)state whether the method or methods used are adequate for the assessment of the cash compensation and the share exchange ratio, indicate the value arrived at using such methods and give an opinion on the relative importance attributed to those methods in arriving at the value decided on, and in the event that different methods are used in the merging companies, state also whether the use of different methods was justified; and

(d)describe any special valuation difficulties which have arisen.

The expert shall be entitled to obtain from the merging companies all information necessary for the discharge of the duties of the expert.';

(c)***in paragraph 4, the following subparagraph is added:***

'Member States may exclude single-member companies from the application of this Article.';

Question

11(c). Should Ireland exclude single member companies from the provisions of this Article? Please provide reasons for your answer.

Article 126a

Protection of members

1. Member States shall ensure that at least the members of the merging companies who voted against the approval of the common draft-terms of the cross-border merger have the right to dispose of their shares for adequate cash compensation, under the conditions laid down in paragraphs 2 to 6, provided that as a result of the merger they would acquire shares in the company resulting from the merger which would be governed by the law of a Member State other than the Member State of their respective merging company.

Member States may also provide for other members of the merging companies to have the right referred to in the first subparagraph.

Member States may require that express opposition to the common draft terms of the cross-border merger, the intention of members to exercise their right to dispose of their shares, or both, be appropriately documented, at the latest at the general meeting referred to in Article 126. Member States may allow the recording of opposition to the common draft terms of the cross-border merger to be considered proper documentation of a negative vote.

2. Member States shall establish the period within which the members referred to in paragraph 1 have to declare to the merging company concerned their decision to exercise the right to dispose of their shares. That period shall not exceed one month after the general meeting referred to in Article 126. Member States shall ensure that the merging companies provide an electronic address for receiving that declaration electronically.

3. Member States shall further establish the period within which the cash compensation specified in the common draft terms of the cross-border merger is to be paid. That period shall not end later than two months after the cross-border merger takes effect in accordance with Article 129.

4. Member States shall ensure that any members who have declared their decision to exercise the right to dispose of their shares, but who consider that the cash compensation offered by the merging company concerned has not been adequately set, are entitled to claim additional cash compensation before the competent authority or body mandated under national law. Member States shall establish a time limit for the claim for additional cash compensation.

Member States may provide that the final decision to provide additional cash compensation is valid for all members of the merging company concerned who have declared their decision to exercise the right to dispose of their shares in accordance with paragraph 2.

5. Member States shall ensure that the law of the Member State to which a merging company is subject governs the rights referred to in paragraphs 1 to 4 and that the exclusive competence to resolve any disputes relating to those rights lies within the jurisdiction of that Member State.

6. Member States shall ensure that members of the merging companies who did not have or did not exercise the right to dispose of their shares, but who consider that the share exchange ratio set out in the common draft terms of the cross-border merger is inadequate, may dispute that ratio and claim a cash payment. Proceedings in that regard shall be initiated before the competent authority or body mandated under the law of the Member State to which the relevant merging company is subject, within the time limit laid down in that national law and such proceedings shall not prevent the registration of the cross-border merger. The decision shall be binding on the company resulting from the cross-border merger.

Member States may also provide that the share exchange ratio as established in that decision is valid for any members of the merging company concerned who did not have or did not exercise their right to dispose of their shares.

7. ***Member States may also provide that the company resulting from the cross-border merger can provide shares or other compensation instead of a cash payment.***

Questions

1. Should Ireland avail of the options available under this article? Please provide reasons for your answer.

4. Should Ireland avail of this option? Please provide reasons for your answer.

6. Should Ireland avail of this option? Please provide reasons for your answer.

7. Should Ireland avail of this option? Please provide reasons for your answer.

Article 126c

Protection of creditors

1. Member States shall ensure that employees' rights to information and consultation are respected in relation to the cross-border merger and are exercised in accordance with the legal framework provided for in Directive 2002/14/EC, and Directive 2001/23/EC where the cross-border merger is considered to be a transfer of an undertaking within the meaning of Directive 2001/23/EC, and, where applicable for Community-scale undertakings or Community-scale groups of undertakings, in accordance with Directive 2009/38/EC. ***Member States may decide that employees' rights to information and consultation apply with respect to the employees of companies other than those referred to in Article 3(1) of Directive 2002/14/EC.***

2. Notwithstanding point (b) of Article 123(1) and Article 124(7), Member States shall ensure that employees' rights to information and consultation are respected, at least before the common draft terms of the cross-border merger or the report referred to in Article 124 are decided upon, whichever is earlier, in such a way that a reasoned response is given to the employees before the general meeting referred to in Article 126.

3. Without prejudice to any provisions or practices in force more favourable to employees, Member States shall determine the practical arrangements for exercising the right to information and consultation in accordance with Article 4 of Directive 2002/14/EC.';

Question

1. Should Ireland avail of this option? Please provide reasons for your answer.

Article 127

Pre-merger certificate

1. Member States shall designate the court, notary or other authority or authorities competent to scrutinise the legality of cross-border mergers as regards those parts of the procedure which are governed by the law of the Member State of the merging company and to issue a pre-merger certificate attesting to compliance with all relevant conditions and to the proper completion of all procedures and formalities in the Member State of the merging company ("the competent authority").

Such completion of procedures and formalities may comprise the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies or compliance with specific sectoral requirements, including securing obligations arising from ongoing proceedings.

2. Member States shall ensure that the application to obtain a pre-merger certificate by the merging company is accompanied by the following:

(a) the common draft terms of the cross-border merger;

(b) the report and the appended opinion, if any, referred to in Article 124, as well as the report referred to in Article 125, where they are available;

(c) any comments submitted in accordance with Article 123(1); and

(d) information on the approval by the general meeting referred to in Article 126.

3. ***Member States may require that the application to obtain a pre-merger certificate by the merging company is accompanied by additional information, such as, in particular:***

(a) the number of employees at the time of the drawing up of the common draft terms of the cross-border merger;

(b) the existence of subsidiaries and their respective geographical location;

c) information regarding the satisfaction of obligations due to public bodies by the merging company.

For the purposes of this paragraph, competent authorities may request such information, if not provided by the merging company, from other relevant authorities.

4. Member States shall ensure that the application referred to in paragraphs 2 and 3, including the submission of any information and documents, may be completed fully online without the necessity for the applicants to appear in person before the competent authority, in accordance with the relevant provisions of Chapter III of Title I.

5. In respect of compliance with the rules concerning employee participation as laid down in Article 133, the competent authority in the Member State of the merging company shall verify

that the common draft terms of the cross-border merger include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.

6. As part of the scrutiny referred to in paragraph 1, the competent authority shall examine the following:

(a) all documents and information submitted to the competent authority in accordance with paragraphs 2 and 3;

(b) an indication by the merging companies that the procedure referred to in Article 133(3) and (4) has started, where relevant.

7. Member States shall ensure that the scrutiny referred to in paragraph 1 is carried out within three months of the date of receipt of the documents and information concerning the approval of the cross-border merger by the general meeting of the merging company. That scrutiny shall have one of the following outcomes:

(a) where it is determined that the cross-border merger complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the competent authority shall issue the pre-merger certificate;

(b) where it is determined that the cross-border merger does not comply with all the relevant conditions or that not all necessary procedures and formalities have been completed, the competent authority shall not issue the pre-merger certificate and shall inform the company of the reasons for its decision; in that case, the competent authority may give the company the opportunity to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.

8. Member States shall ensure that the competent authority does not issue the pre-merger certificate where it is determined in compliance with national law that a cross-border merger is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.

9. Where the competent authority, during the scrutiny referred to in paragraph 1, has serious doubts indicating that the cross-border merger is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, it shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware, in the course of the scrutiny referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.

10. Where it is necessary for the purposes of the assessment under paragraphs 8 and 9 to take into account additional information or to perform additional investigative activities, the period of three months provided for in paragraph 7 may be extended by a maximum of three months.

11. Where, due to the complexity of the cross-border procedure, it is not possible to carry out the assessment within the deadlines provided for in paragraphs 7 and 10, Member States shall ensure that the applicant is notified of the reasons for any delay before the expiry of those deadlines.

12. Member States shall ensure that the competent authority may consult other relevant authorities with competence in the different fields concerned by the cross-border merger, including those of the Member State of the company resulting from the merger, and obtain from those authorities and from the merging company information and documents necessary to scrutinise the legality of the cross-border merger, within the procedural framework laid down in national law. For the purposes of the assessment, the competent authority may have recourse to an independent expert.';

Question

1. Should Ireland avail of this option? Please provide reasons for your answer.

3. Should Ireland require the additional information for pre-merger certificates? Please provide reasons for your answer.

Article 160a

Scope

1. This Chapter shall apply to cross-border divisions 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 that at least two of the limited liability companies involved in the division are governed by the laws of different Member States (hereinafter referred to as “cross-border division”).

2. Notwithstanding point 4 of Article 160b, this Chapter shall also apply to cross-border divisions where the law of at least one of the Member States concerned allows the cash payment referred to in points (a) and (b) of point 4 of Article 160b to exceed 10 % of the nominal value, or, in the absence of a nominal value, 10 % of the accounting par value of the securities or shares representing the capital of the recipient companies.

3. This Chapter shall not apply to cross-border divisions involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders’ request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption.

4. Member States shall ensure that this Chapter does not apply to companies in either of the following circumstances:

(a)the company is in liquidation and has begun to distribute assets to its members;

(b)the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU.

5. ***Member States may decide not to apply this Chapter to companies which are:***

(a)the subject of insolvency proceedings or subject to preventive restructuring frameworks;

(b)the subject of liquidation proceedings other than those referred to in point (a) of paragraph 4; or

(c)the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU

Question

5. Should Ireland avail of these options relating to companies subject to liquidation, insolvency or crisis prevention measures? Please provide reasons for your answer in each case.

Article 160e

Report of the administrative or management body for members and employees

1. The administrative or management body of the company being divided shall draw up a report for members and employees, explaining and justifying the legal and economic aspects of the cross-border division, as well as explaining the implications of the cross-border division for employees.

It shall, in particular, explain the implications of the cross-border division for the future business of the companies.

2. The report shall also include a section for members and a section for employees.

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

3. The section of the report for members shall, in particular, explain the following:

(a) the cash compensation and the method used to determine the cash compensation;

(b) the share exchange ratio and the method or methods used to arrive at the share exchange ratio, where applicable;

(c) the implications of the cross-border division for members;

(d) the rights and remedies available to members in accordance with Article 160i.

4. The section of the report for members shall not be required where all the members of the company have agreed to waive that requirement. ***Member States may exclude single-member companies from the provisions of this Article.***

5. The section of the report for employees shall, in particular, explain the following:

(a) the implications of the cross-border division for employment relationships, as well as, where applicable, any measures for safeguarding those relationships;

(b) any material changes to the applicable conditions of employment or to the location of the company's places of business;

(c) how the factors set out in points (a) and (b) affect any subsidiaries of the company.

6. The report or reports shall be made available in any case electronically, together with the draft terms of the cross-border division, if available, to the members and to the representatives of the employees of the company being divided or, where there are no such representatives, to the employees themselves, not less than six weeks before the date of the general meeting referred to in Article 160h.

7. Where the administrative or management body of the company being divided receives an opinion on the information referred to in paragraphs 1 and 5 in good time from the representatives of the employees or, where there are no such representatives, from the employees themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to the report.

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

9. Where the section of the report for members referred to in paragraph 3 is waived in accordance with paragraph 4 and the section for employees referred to in paragraph 5 is not required under paragraph 8, the report shall not be required.

10. Paragraphs 1 to 9 of this Article shall be without prejudice to the applicable information and consultation rights and procedures provided for at national level following the transposition of Directives 2002/14/EC and 2009/38/EC.

Question

4. Should Ireland exclude single member companies from the provisions of this Article? Please provide reasons for your answer.

Article 160f

Independent expert report

1. Member States shall ensure that an independent expert examines the draft terms of the cross-border division and draws up a report for members. That report shall be made available to the members not less than one month before the date of the general meeting referred to in Article 160h. Depending on the law of the Member State, the expert may be a natural or legal person.

2. The report referred to in paragraph 1 shall in any case include the expert's opinion as to whether the cash compensation and the share exchange ratio are adequate. When assessing the cash compensation, the expert shall consider any market price of the shares in the company being divided prior to the announcement of the division proposal or the value of the company excluding the effect of the proposed division, as determined in accordance with generally accepted valuation methods. The report shall at least:

(a) indicate the method or methods used to determine the cash compensation proposed;

(b) indicate the method or methods used to arrive at the share exchange ratio proposed;

(c) state whether the method or methods are adequate for the assessment of the cash compensation and the share exchange ratio, indicate the value arrived at using such methods and give an opinion on the relative importance attributed to those methods in arriving at the value decided on; and

(d) describe any special valuation difficulties which have arisen.

The expert shall be entitled to obtain from the company being divided all information necessary for the discharge of the duties of the expert.

3. Neither an examination of the draft terms of cross-border division by an independent expert nor an independent expert report shall be required if all the members of the company being divided have so agreed.

Member States may exclude single-member companies from the application of this Article.

Question

3. Should Ireland exclude single member companies from the provisions of this Article? Please provide reasons for your answer.

Article 160g

Disclosure

1. Member States shall ensure that the following documents are disclosed by the company and made publicly available in the register of the Member State of the company being divided, at least one month before the date of the general meeting referred to in Article 160h:

(a) the draft terms of the cross-border division; and

(b) a notice informing the members, creditors and representatives of the employees of the company being divided, or, where there are no such representatives, the employees themselves, that they may submit to the company, at the latest five working days before the date of the general meeting, comments concerning the draft terms of the cross-border division.

Member States may require that the independent expert report be disclosed and made publicly available in the register.

Member States shall ensure that the company is able to exclude confidential information from the disclosure of the independent expert report.

The documents disclosed in accordance with this paragraph shall be also accessible through the system of interconnection of registers.

2***. Member States may exempt a company being divided from the disclosure requirement referred to in paragraph 1 of this Article where, for a continuous period beginning at least one month before the date fixed for the general meeting referred to in Article 160h and ending not earlier than the conclusion of that meeting, that company makes the documents referred to in paragraph 1 of this Article available on its website free of charge to the public.***

However, Member States shall not subject that exemption to any requirements or constraints other than those which are necessary to ensure the security of the website and the authenticity of the documents, and which are proportionate to achieving those objectives.

3. Where the company being divided makes the draft terms of the cross-border division available in accordance with paragraph 2 of this Article, it shall submit to the register, at least one month before the date of the general meeting referred to in Article 160h, the following information:

(a) the legal form and name of the company being divided and the location of its registered office and the legal form and name proposed for the newly created company or companies resulting from the cross-border division and the proposed location of their registered office;

(b) the register in which the documents referred to in Article 14 are filed in respect of the company being divided, and its registration number in that register;

(c) an indication of the arrangements made for the exercise of the rights of creditors, employees and members; and

(d) details of the website from which the draft terms of the cross-border division, the notice referred to in paragraph 1, the independent expert report and complete information on the arrangements referred to in point (c) of this paragraph may be obtained online and free of charge.

The register shall make publicly available the information referred to in points (a) to (d) of the first subparagraph.

4. Member States shall ensure that the requirements referred to in paragraphs 1 and 3 can be fulfilled fully online without the necessity for the applicants to appear in person before any competent authority in the Member State concerned, in accordance with the relevant provisions of Chapter III of Title I.

5. ***Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3 of this Article, that the draft terms of the cross-border division, or the information referred to in paragraph 3 of this Article, be published in their national gazette or through a central electronic platform in accordance with Article 16(3). In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette or to a central electronic platform.***

6. Member States shall ensure that the documentation referred to in paragraph 1 or the information referred to in paragraph 3 is accessible to the public free of charge through the system of interconnection of registers.

Member States shall further ensure that any fees charged to the company by the registers for the disclosure referred to in paragraphs 1 and 3 and, where applicable, for the publication referred to in paragraph 5 do not exceed the recovery of the cost of providing such services.

Questions

1. Should the expert report be disclosed and made publicly available in the register? Please provide reasons for your answer.

5. Should the draft terms be disclosed and made publicly available in the register? Please provide reasons for your answer.

Article 160h

Approval by the general meeting

1. After taking note of the reports referred to in Articles 160e and 160f, where applicable, employees' opinions submitted in accordance with Article 160e and comments submitted in accordance with Article 160g, the general meeting of the company being divided shall decide, by means of a resolution, whether to approve the draft terms of cross-border division and whether to adapt the instrument of constitution, and the statutes if they are contained in a separate instrument.

2. The general meeting of the company being divided may reserve the right to make implementation of the cross-border division conditional on express ratification by it of the arrangements referred to in Article 160l.

3. Member States shall ensure that the approval of the draft terms of the cross-border division, and of any amendment to those draft terms, requires a majority of not less than two thirds but not more than 90 % of the votes attached either to the shares or to the subscribed capital represented at the general meeting. In any event, the voting threshold shall not be higher than that provided for in national law for the approval of cross-border mergers.

4***. Where a clause in the draft terms of the cross-border division or any amendment to the instrument of constitution of the company being divided leads to an increase of the economic obligations of a member towards the company or third parties, Member States may require, in such specific circumstances, that such clause or the amendment to the instrument of constitution of the company being divided be approved by the member concerned, provided that such member is unable to exercise the rights laid down in Article 160i.***

5. Member States shall ensure that the approval of the cross-border division by the general meeting cannot be challenged solely on the following grounds:

(a) the share exchange ratio referred to in point (b) of Article 160d has been inadequately set;

(b) the cash compensation referred to in point (p) of Article 160d has been inadequately set; or

(c) the information given with regard to the share exchange ratio referred to in point (a) or the cash compensation referred to in point (b) did not comply with the legal requirements.

Question

4. Should Ireland avail of this option? Please provide reasons for your answer.

Article 160i

Protection of members

1. ***Member States shall ensure that at least the members of a company being divided who voted against the approval of the draft terms of the cross-border division have the right to dispose of their shares for adequate cash compensation, under the conditions laid down in paragraphs 2 to 6, provided that, as a result of the cross-border division, they would acquire shares in the recipient companies which would be governed by the law of a Member State other than the Member State of the company being divided.***

Member States may also provide for other members of the company being divided to have the right referred to in the first subparagraph.

Member States may require that express opposition to the draft terms of the cross-border division, the intention of members to exercise their right to dispose of their shares, or both, be appropriately documented at the latest at the general meeting referred to in Article 160h. Member States may allow the recording of opposition to the draft terms of the cross-border division to be considered proper documentation of a negative vote.

2. Member States shall establish the period within which the members referred to in paragraph 1 have to declare to the company being divided their decision to exercise the right to dispose of their shares. That period shall not exceed one month after the general meeting referred to in Article 160h. Member States shall ensure that the company being divided provides an electronic address for receiving that declaration electronically.

3. Member States shall further establish the period within which the cash compensation specified in the draft terms of the cross-border division is to be paid. That period shall not end later than two months after the cross-border division takes effect in accordance with Article 160q.

4. Member States shall ensure that any members who have declared their decision to exercise the right to dispose of their shares, but who consider that the cash compensation offered by the company being divided has not been adequately set, are entitled to claim additional cash compensation before the competent authority or body mandated under national law. Member States shall establish a time limit for the claim for additional cash compensation.

Member States may provide that the final decision to provide additional cash compensation is valid for all members of the company being divided who have declared their decision to exercise the right to dispose of their shares in accordance with paragraph 2.

5. Member States shall ensure that the law of the Member State of a company being divided governs the rights referred to in paragraphs 1 to 4 and that the exclusive competence to resolve any disputes relating to those rights lies within the jurisdiction of that Member State.

6. Member States shall ensure that members of the company being divided who did not have or did not exercise the right to dispose of their shares, but who consider that the share-exchange ratio set out in the draft terms of the cross-border division is inadequate, may dispute that ratio and claim a cash payment. Proceedings in that regard shall be initiated before the competent authority or body mandated under the law of the Member State to which the company being divided is subject, within the time limit laid down in that national law and such proceedings shall not prevent the registration of the cross-border division. The decision shall be binding on the recipient companies and, in the event of a partial division, also on the company being divided.

7. ***Member States may also provide that the recipient company concerned and, in the event of a partial division, also the company being divided, can provide shares or other compensation instead of a cash payment.***

Questions

1. Should Ireland avail of this option? Please provide reasons for your answer.

4. Should Ireland avail of this option? Please provide reasons for your answer.

7. Should Ireland avail of this option? Please provide reasons for your answer.

Article 160j

Protection of creditors

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

Member States shall ensure that creditors who are dissatisfied with the safeguards offered in the draft terms of the cross-border division, as provided for in point (q) of Article 160d, may apply, within three months of the disclosure of the draft terms of cross-border division referred to in Article 160g, to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly demonstrate that, due to the cross-border division, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the company.

Member States shall ensure that the safeguards are conditional on the cross-border division taking effect in accordance with Article 160q.

2. Where a creditor of the company being divided does not obtain satisfaction from the company to which the liability is allocated, the other recipient companies, and in the case of a partial division or a division by separation, the company being divided, shall be jointly and severally liable with the company to which the liability is allocated for that obligation. However, the maximum amount of joint and several liability of any company involved in the division shall be limited to the value, at the date on which the division takes effect, of the net assets allocated to that company.

3. ***Member States may require that the administrative or management body of the company being divided provide a declaration that accurately reflects its current financial status at a date no earlier than one month before the disclosure of that declaration***. The declaration shall state that, on the basis of the information available to the administrative or management body of the company being divided at the date of that declaration, and after having made reasonable enquiries, that administrative or management body is unaware of any reason why any recipient company and, in the case of a partial division, the company being divided, would, after the division takes effect, be unable to meet the liabilities allocated to them under the draft terms of the cross-border division when those liabilities fall due. The declaration shall be disclosed together with the draft terms of the cross-border division in accordance with Article 160g.

4. Paragraphs 1, 2 and 3 shall be without prejudice to the application of the law of the Member State of the company being divided concerning the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies.

Question

3. Should Ireland avail of this option? Please provide reasons for your answer

Article 160k

Employee information and consultation

1. Member States shall ensure that employees' rights to information and consultation are respected in relation to the cross-border division and are exercised in accordance with the legal framework provided for in Directive 2002/14/EC, and Directive 2001/23/EC where the cross-border division is considered to be a transfer of an undertaking within the meaning of Directive 2001/23/EC, and, where applicable for Community-scale undertakings or Community-scale groups of undertakings, in accordance with Directive 2009/38/EC***. Member States may decide that employees' rights to information and consultation apply with respect to the employees of companies other than those referred to in Article 3(1) of Directive 2002/14/EC.***

2. Notwithstanding Article 160e(7) and point (b) of Article 160g(1), Member States shall ensure that employees' rights to information and consultation are respected, at least before the draft terms of the cross-border division or the report referred to in Article 160e are decided upon, whichever is earlier, in such a way that a reasoned response is given to the employees before the general meeting referred to in Article 160h.

3. Without prejudice to any provisions or practices in force more favourable to employees, Member States shall determine the practical arrangements for exercising the right to information and consultation in accordance with Article 4 of Directive 2002/14/EC.

Question

1. Should Ireland avail of this option? Please provide reasons for your answer

Article 160l

Employee participation

1. Without prejudice to paragraph 2, each recipient company 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 division has its registered office shall not apply where the company being divided has, in the six months prior to the disclosure of the draft terms of the cross-border division, an average number of employees equivalent to four fifths of the applicable threshold, as laid down in the law of the Member State of the company being divided, for triggering the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC, or where the national law applicable to each of the recipient companies does not:

(a) provide for at least the same level of employee participation as operated in the company being divided prior to its cross-border division, measured by reference to the proportion of employee representatives among the members of the administrative or supervisory body 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 recipient companies 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 recipient company has its registered office.

3. In the cases referred to in paragraph 2 of this Article, the participation of employees in the companies resulting from the cross-border division 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 of this Article, in accordance with the principles and procedures laid down in Article 12(2) and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:

(a) Article 3(1), points (a)(i) and (b) of Article 3(2), Article 3(3), the first two sentences of Article 3(4), and Article 3(5) and (7);

(b) Article 4(1), points (a), (g) and (h) of Article 4(2), and Article 4(3) and (4);

(c) Article 5;

(d) Article 6;

(e) Article 7(1), with the exception of the second indent of point (b);

(f) Articles 8, 10, 11 and 12; and

(g)point (a) 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 special negotiating body the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the Member States of each of the recipient companies;

(b)***may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding such rules, decide to limit the proportion of employee representatives in the administrative body of the recipient companies***. However, if, in the company being divided, employee representatives constituted at least one third of the administrative or supervisory body, the limitation may never result in a lower proportion of employee representatives in the administrative body than one third;

(c)shall ensure that the rules on employee participation that applied prior to the cross-border division continue to apply until the date of application of any subsequently agreed rules or, in the absence of agreed rules, until the application of standard rules in accordance with point (a) of Part 3 of the Annex to Directive 2001/86/EC.

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

6. Where any of the recipient companies is to be governed by an employee participation system in accordance with the rules referred to in paragraph 2, that company shall be obliged to take a legal form allowing for the exercise of participation rights.

7. Where the recipient company 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 any subsequent conversion, merger or division, be it cross-border or domestic, for a period of four years after the cross-border division has taken effect, by applying, *mutatis mutandis*, the rules laid down in paragraphs 1 to 6.

8. A company shall communicate to its employees or their representatives the outcome of the negotiations concerning employee participation without undue delay.

Question

4(b). Should Ireland avail of this option? Please provide reasons for your answer

Article 160m

Pre-division certificate

1. Member States shall designate the court, notary or other authority or authorities competent to scrutinise the legality of cross-border divisions as regards those parts of the procedure which are governed by the law of the Member State of the company being divided, and to issue a pre-division certificate attesting to compliance with all relevant conditions and to the proper completion of all procedures and formalities in that Member State ("the competent authority").

Such completion of procedures and formalities may comprise the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies or compliance with specific sectoral requirements, including securing obligations arising from ongoing proceedings.

2. Member States shall ensure that the application to obtain a pre-division certificate by the company being divided is accompanied by the following:

(a) the draft terms of the cross-border division;

(b) the report and the appended opinion, if any, referred to in Article 160e, as well as the report referred to in Article 160f, where they are available;

(c) any comments submitted in accordance with Article 160g(1); and

(d) information on the approval by the general meeting referred to in Article 160h.

3. ***Member States may require that the application to obtain a pre-division certificate by the company being divided is accompanied by additional information, such as, in particular:***

(a) the number of employees at the time of the drawing up of the draft terms of the cross-border division;

(b) the existence of subsidiaries and their respective geographical location;

(c) information regarding the satisfaction of obligations due to public bodies by the company being divided.

For the purposes of this paragraph, competent authorities may request such information, if not provided by the company being divided, from other relevant authorities.

4. Member States shall ensure that the application referred to in paragraphs 2 and 3, including the submission of any information and documents, may be completed fully online without the necessity for the applicants to appear in person before the competent authority, in accordance with the relevant provisions of Chapter III of Title I.

5. In respect of compliance with the rules concerning employee participation as laid down in Article 160l, the competent authority of the Member State of the company being divided shall

verify that the draft terms of the cross-border division include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.

6. As part of the scrutiny referred to in paragraph 1, the competent authority shall examine the following:

(a) all documents and information submitted to the competent authority in accordance with paragraphs 2 and 3;

(b) an indication by the company being divided that the procedure referred to in Article 160l(3) and (4) has started, where relevant.

7. Member States shall ensure that the scrutiny referred to in paragraph 1 is carried out within three months of the date of receipt of the documents and information concerning the approval of the cross-border division by the general meeting of the company being divided. That scrutiny shall have one of the following outcomes:

(a) where it is determined that the cross-border division complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the competent authority shall issue the pre-division certificate;

(b) where it is determined that the cross-border division does not comply with all the relevant conditions or that not all necessary procedures and formalities have been completed, the competent authority shall not issue the pre-division certificate and shall inform the company of the reasons for its decision; in that case, the competent authority may give the company the opportunity to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.

8. Member States shall ensure that the competent authority does not issue the pre-division certificate where it is determined in compliance with national law that a cross-border division is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.

9. Where the competent authority, during the scrutiny referred to in paragraph 1, has serious doubts indicating that the cross-border division is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, it shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware, in the course of the scrutiny referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis, through a procedure governed by national law.

10. Where it is necessary for the purposes of the assessment under paragraphs 8 and 9 to take into account additional information or to perform additional investigative activities, the period of three months provided for in paragraph 7 may be extended by a maximum of three months.

11. Where, due to the complexity of the cross-border procedure, it is not possible to carry out the assessment within the deadlines provided for in paragraphs 7 and 10, Member States shall ensure that the applicant is notified of the reasons for any delay before the expiry of those deadlines.

12. Member States shall ensure that the competent authority may consult other relevant authorities with competence in the different fields concerned by the cross-border division, including those of the Member State of the recipient companies, and obtain from those authorities and from the company being divided information and documents necessary to scrutinise the legality of the cross-border division, within the procedural framework laid down in national law. For the purposes of the assessment, the competent authority may have recourse to an independent expert.

Question

3. Should Ireland avail of this option? Please provide reasons for your answer