LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest.

We would welcome any comment you might have.

DIRECTIVE 2005/56/EC OF THE COUNCIL AND THE EUROPEAN PARLIAMENT ON CROSS BORDER-MERGER OF LIMITED LIABILITY COMPANIES

Directive No. 2005/56/EC
Regulation EC No. 2157/2001
Directive No. 2001/86/EC
Directive No. 78/855/EEC
Directive No. 68/151/EEC
European Union Treaty, Article 58

INTRODUCTION – By December 15, 2007 the EU Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the new EU Directive 2005/56/EC of the European Parliament and of the Council regulating the cross—border mergers between limited liability companies.

The scope of this Directive, which was enacted on October 26, 2005 (OJ L 310 of 25.11.2005, p.1), is to facilitate cross-border mergers between limited liability companies in the European Union by introducing a simplified legislative framework.

It represents an important step in the EU efforts to implement the Lisbon Strategy and is designed to identify the legislation applicable in the event of a merger to each of the merging companies.

Once the new entity resulting from the merger has been set up, a single body of national legislation applies: That of the Member State in which the entity has established its registered office.

SCOPE OF THE DIRECTIVE – The Directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the community, provided at least two of them are governed by the laws of different Member States.

To summarize, the Directive applies to mergers of Limited liability companies:

- Formed in accordance with the law of a Member State
- With their registered office, central administration or principal place of business within the European Community
- If at least two of them are governed by the law of different Member States.

Member States may resolve to exclude the application of the Directive to cross-border mergers involving a cooperative society even when this latter would fall within the definition of “limited liability company”.

As well, companies dealing in the collective investment of capital provided by the public are excluded by the scope of this Directive.

One of the main issues at stake during the adoption process was the provision on employee participation, given the widely diverging systems in force in Member States, and the related question of how to deal with cross-border mergers implying a loss or a reduction of employee participation.

Under the adopted Directive, employee participation schemes should apply to cross-border mergers where at least one of the merging companies already operates under such a scheme. Employee participation in the newly created company will be subject to negotiations based on the model of the European Company Statute.

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DEFINITIONS – According to Article 2, for the purposes of the Directive:

1) "Limited liability company" means:

(a) A company as referred to in Article 1 of Directive 68/151/EEC (Directive on coordination of safeguards which, for the protection of the interests of Members and others, are required by Member States of companies within the meaning of the second paragraph af Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community)

(b) A company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others.

2) "Merger" means an operation whereby:

(a) One or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or

(b) Two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or

(c) A company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

Article 3 sets forth further provisions concerning the scope of the directive specifying that:

1. Notwithstanding Article 2(2), this Directive shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in points (a) and (b) of Article 2(2) to exceed 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger

2. Member States may decide not to apply this Directive to cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of "limited liability company"

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

CONDITIONS RELATING TO CROSS-BORDER MERGERS – Save as otherwise provided in the Directive, cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States.

In addition, a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject.

The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable.

The above mentioned provisions and formalities shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 16.

A Member State may, in the case of companies participating in a cross-border merger and

governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.

COMMON DRAFT TERMS OF CROSS-BORDER MERGERS – The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger. The common draft terms of cross-border merger shall include at least the following particulars:

(a) The form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger

(b) The ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment

(c) The terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger

(d) The likely repercussions of the cross-border merger on employment

(e) The date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement

(f) The date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger

(g) The rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them

(h) Any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies

(i) The statutes of the company resulting from the cross-border merger

(j) Where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16

(k) Information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger

(l) Dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

PUBLICATION – The common draft terms of the cross-border merger shall be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC for each of the merging companies at least one month before the date of the general meeting which is to decide thereon.

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

(a) The type, name and registered office of every merging company

(b) The register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register

(c) An indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

REPORT OF THE MANAGEMENT – The management of each of the merging companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees.

The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting resolving on the approval of the merger. Where the management of any of the merging companies receives, in good time, an opinion from the representatives of their employees, as provided for under national law, that opinion shall be enclosed to the report.

INDEPENDENT EXPERT REPORT – An independent expert report intended for members and made available not less than one month before the date of each general meeting called for voting on the resolution about the merger, shall be drawn up for each merging company. Depending on the law of each Member State, such experts may be natural persons or legal persons.

As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts, appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the cross-border merger or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members.

The expert report shall include at least the particulars provided for by Article 10(2) of Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies. The experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed.

APPROVAL BY THE GENERAL MEETING – After taking note of the required reports, the general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger.

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

The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company if the conditions laid down in Article 8 of Directive 78/855/EEC are fulfilled.

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

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

When the law of a Member State to which a merging company is subject provides for a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall apply only if the other merging companies situated in Member States (which do not provide for such procedure) explicitly accept - when approving the draft terms of the cross-border merger - the possibility for the members of that merging company to have recourse to such procedure, to be initiated before the court having jurisdiction over that merging company.

In such cases, the competent authority may issue the above certificate even if such procedure has commenced. The certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members.

ENTRY INTO EFFECT OF THE CROSS-BORDER MERGER – In accordance with provision of Article 12, the law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect. That date must be after the scrutiny referred to in Article 11 has been carried out.

The law of each of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of

that State, the arrangements, in accordance with Article 3 of Directive 68/151/EEC, for advertising completion of the cross-border merger in the public register in which each of the companies is required to file documents.

The registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.

CONSEQUENCES OF THE CROSS-BORDER MERGER – A cross-border merger shall, from the date referred to in Article 12, have the following consequences:

(a) All the assets and liabilities of the company being acquired shall be transferred to the acquiring company

(b) The members of the company being acquired shall become members of the acquiring company

(c) The company being acquired shall cease to exist.

A cross-border merger shall, from the date referred to in Article 12, have the following consequences:

(a) All the assets and liabilities of the merging companies shall be transferred to the new company

(b) The members of the merging companies shall become members of the new company

(c) The merging companies shall cease to exist.

Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger.

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

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

(a) The acquiring company itself or through a person acting in his or her own name but on its behalf;

(b) The company being acquired itself or through a person acting in his or her own name but on its behalf.

SIMPLIFIED FORMALITIES – Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at the general meetings of the company or companies being acquired, some requirements as such as some otherwise mandatory particulars of the common draft terms [Articles 5, points (b), (c) and (e)] and the independent expert report shall not apply.

In addition, upon the above occurrence, the requirement that the members of the company being acquired has to become members of the acquiring company shall not apply.

Moreover, the general meeting(s) of the company or companies being acquired shall not necessarily decide on the approval of the common draft terms of cross-border merger after taking note of the management and the expert report.

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

EMPLOYEE PARTICIPATION - The general principle as regards the employees' rights of participation is that national laws governing the company resulting from the cross-border merger apply.

By way of exception, the principles and arrangements relating to worker participation laid down by the relevant regulation and the Directive on the European Company (SE) apply as follows:

- Where at least one of the merging companies has, in the six months before publication of the draft terms of the cross-border merger, an average number of employees that exceeds 500 and is operating under an employment participation system;

- Where the national legislation applicable to the company resulting from the cross-border merger does not provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ which covers the profit units of the company, subject to employee representation;

- Where the national legislation applicable to the company resulting from the cross-border merger does not provide for employees of establishments of that company that are situated in other Member States, the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.

Under the Directive supplementing the Statute for a European Company with regard to the involvement of employees, the threshold for applying the benchmark provisions laid down for the European Company is increased to 331/3% of the total number of workers in the merging companies that have had to operate under any form of worker participation system. For a period of three years after the cross-border merger has taken effect, the rights of the workers are protected in the event of any subsequent domestic mergers.

The provisions on worker participation apply to any domestic merger subsequent to a cross-border merger for a period of three years after the cross-border merger has taken effect.

VALIDITY – In accordance with provision of Article 17, cross-border merger which has taken effect as provided for in Article 12 may not be declared null and void.

CONCLUSIONS – The European Commission welcomed in 2005 the adoption of the cross-border mergers Directive.

The Directive was adopted in a single reading by both the Council and the European Parliament. This key measure responds to strong demand from businesses and enables cross-border mergers of limited-liability companies in the European Union, which until now had been impossible or very difficult and expensive.

It will be of particular interest to small and medium sized companies that want to operate in more than one Member State, but not throughout Europe, and are not able to seek incorporation under the European Company Statute.

The Directive is expected to reduce costs, while guaranteeing the requisite legal certainty and enabling as many companies as possible to benefit. It is one of the key actions for growth and employment under the Lisbon agenda.

In 2005, Internal Market and Services Commissioner Charlie McCreevy said: "*It will now be much easier for Europe's companies to cooperate and restructure themselves across borders. This will make Europe more competitive and enable businesses further to reap the benefits of the Single Market. I congratulate all parties on the swift adoption of this Directive and call upon Member States to ensure equally swift implementation at national level.*"

The Directive will facilitate mergers of limited-liability companies on a cross-border basis, which at present are impossible or entail prohibitive costs. It sets up a simple framework drawing largely on national rules applicable to domestic mergers and avoids the winding up of the acquired company.

The Directive fills an important gap in company law and is the first measure to be adopted under the Commission's Action Plan on company law and corporate governance in the European Union, published in May 2003.

Article contributed by Mr. Riccardo G. Cajola, LL.M.