1

THE CROSS-BORDER MERGER DIRECTIVE

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A. Introduction 1.01
(1) History 1.01
(2) Legal basis 1.06
(3) General remarks 1.08
B. Scope of Application 1.12
(1) Principle 1.12
(2) Merger 1.13
(3) Mergeable limited liability companies 1.19
(4) EEA companies 1.30
(5) Companies of different 'nationalities' 1.31
(6) Veto by the national authorities 1.33
C. Procedure 1.35
(1) General principles 1.35
(2) Common draft terms of merger 1.40
(3) Management report 1.54
(4) Interim accounting statement 1.59
(5) Independent expert report 1.61
(6) Informing shareholders and employees 1.71
(7) Approval of the merger 1.76
(8) Employee participation 1.90
(9) Verification of the legality of the merger 1.93
(10) Language requirements 1.105
D. Entry into Effect and Consequences of the Merger 1.106
(1) Entry into effect 1.106
(2) Consequences of the merger 1.108
E. Simplified Merger Procedures 1.109
(1) Merger with a wholly owned subsidiary 1.109
(2) Merger with a 90% subsidiary 1.112
F. Post-Merger Formalities 1.113
(1) Publications and deregistration 1.113
(2) Issuance of shares 1.115
(3) Opening of branch offices 1.118
G. Protection of Minority Shareholders 1.120
H. Protection of Creditors 1.123
I. Nullity, Liabilities, and Criminal Sanctions 1.127
(1) Nullity 1.127
(2) Liabilities 1.128
(3) Criminal sanctions 1.130

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A. Introduction

(1) History

1.01 The CBMD[1] and its implementation in the Member States are the result of a very lengthy process.[2] As early as 1965, the Member States of the European Community started negotiating an international convention. A draft convention was published in 1973 but it was never

[1] The Cross-Border Merger Directive, ie Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (Text with EEA relevance), also known as the Tenth Directive.

[2] For more detailed accounts of this process see A Ugliano, 'The New Cross-Border Merger Directive: Harmonisation of European Company Law and Free Movement', (2007) European Business Law Review, 586–8; D Beutel, *Der neue rechtliche Rahmen grenzüberschreitender Verschmelzungen in der EU—Einflüsse des Gemeinschaftsrechts auf die Schaffung nationaler Rechtsgrundlagen grenzüberschreitender Verschmelzungen unter Beteiligung deutscher Kapitalgesellschaften*, (Munich, Herbert Utz Verlag, 2008) 106–11; M Evrard and E Van Der Vaeren, 'Les fusions transfrontalières: un pas de plus vers une Europe harmonisée', (2007) Le droit des affaires—Het ondernemingsrecht (DAOR), 105–10.

ratified. One of the obstacles to agreement was the lack of harmonization of national legislation on domestic mergers. This issue was solved through the Domestic Merger Directive of 1978,[3] which harmonized domestic mergers of public limited liability companies. The other major issues were the tax treatment of such mergers and the protection of employees' rights, including the issue of whether or not existing employee participation in the management of one of the merging companies was maintained when the company resulting from the merger was established in a Member State of the European Community where no such employee participation rights existed. The draft convention was definitively dropped in 1980.

1.02 In 1984, the European Commission approved a proposal for a new directive on cross-border mergers of public limited liability companies. Despite the harmonization of domestic mergers in 1978 and the adoption of the MTD[4] in 1990, the proposal was rejected and, in 2001, officially abandoned. The issue of employee participation proved fatal.

1.03 The final breakthrough was the adoption in 2001 of the SE Regulation[5] which enables cross-border mergers through the formation of SEs[6] and provides a solution to the issue of employee participation.

1.04 The Commission presented a new proposal for a directive on cross-border mergers of limited liability companies on 18 November 2003. This proposal included an improved version of the solution to the employee participation issue devised by the SE Regulation. After the Economic and Social Committee gave its opinion and proposed some amendments, the CBMD was approved by the European Parliament and the Council and was published in 2005. EU Member States had until 15 December 2007 to implement it.[7]

1.05 As a result of Decision No 127/2006 of the EEA Joint Committee of 22 September 2006 amending Annex XXII (Company law) to the EEA Agreement, the CBMD also applies to all EEA countries.[8] Although some were late, all Member States have now implemented the CBMD into their national law.

(2) **Legal basis**

1.06 While the 1973 draft convention was based on Article 220 EC[9] (later Article 293 EC, which was repealed by the Treaty of Lisbon in 2009[10]), the 1984 proposal and the CBMD's legal basis is Article 44(2)(g) EC (numbered Article 54(3)(g) EC in 1984, now Article 50(2)(g)

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[3] Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (codification) (Text with EEA relevance), which replaced the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies.

[4] The Merger Tax Directive, ie Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies from different Member States (as amended).

[5] Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

[6] *societas europaea*.

[7] Art 19 CBMD.

[8] European Economic Area, currently consisting of the EU Member States, plus Norway, Iceland, and Liechtenstein. In this chapter, any reference to a 'Member State' is a reference to an EEA Member State unless specified otherwise.

[9] Treaty establishing the European Economic Community, later renamed Treaty establishing the European Community.

[10] Art 293 EC provided that: 'Members States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals . . . the possibility of mergers between companies or firms governed by the laws of different countries . . . '.

TFEU[11]).[12] Although Article 293 EC is more specific than Article 50(2)(g) TFEU, the advantage of harmonization through a directive instead of a convention is that unanimity is not required.

1.07 The CBMD is therefore primarily based on the right of establishment vested in Articles 49 and 54 TFEU (formerly Articles 43 and 48 EC).[13] Indeed, as decided by the Court[14] in *Sevic*,[15]

> cross-border merger operations, like other company transformation operations, respond to the need for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 [now Article 49 TFEU].

Arguably cross-border mergers can also be based on Article 63 TFEU, which guarantees the free movement of capital.[16]

(3) General remarks

1.08 Although before the CBMD cross-border mergers were, in principle, already possible under the freedom of establishment, in practice, countless (national law) obstacles often made them very difficult if not impossible, to achieve.[17] While the SE was seen as an important step forward, its numerous disadvantages made it an unattractive means for organizing cross-border mergers.[18] Practitioners[19] therefore widely welcomed the CBMD as a much-needed tool which facilitates[20] cross-border mergers and increases their legal certainty.

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[11] Treaty on the Functioning of the European Union.

[12] Art 50 TFEU provides that:

> 1. In order to attain freedom of establishment as regards a particular activity, the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.
> 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: . . .
> (g) by coordinating to the necessary extent the safeguards which, for the protection of the interest of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union.

[13] For a description of the right of establishment, see paras 2.61–2.81 and C Verdure, 'La règlementation des fusions transfrontalières: une nouvelle étape dans la modernisation du droit européen des sociétés', (2008) Revue de Droit International et de Droit Comparé, 99–105.

[14] Court of Justice of the European Union.

[15] C-411/03, 13 December 2005, *SEVIC Systems AG v Amtsgericht Neuwied*, [2005] ECR I-10805; see paras 2.190–2.198.

[16] Ugliano, see n 2, 591–2; see also the third recital to the CBMD referring to the free movement of capital.

[17] First recital to the CBMD.

[18] For a comparison of the advantages and the disadvantages of the SE Regulation and the CBMD for achieving cross-border mergers see FA Behrens, *Die grenzüberschreitende Verschmelzung nach der Richtlinie 2005/56 EG (Verschmelzungsrichtlinie)*, (Göttigen, Cuvillier Verlag, 2007) 254–60; J Rickford, 'The Proposed Tenth Company Law Directive on Cross-Border Mergers and its Impact in the UK', (2008) European Business Law Review 1410–11; J Pieper, 'European Cross-Border Mergers after SEVIC', (2009) Company Lawyer, 169–73.

[19] Ugliano, see n 2, 611–14; Evrard and Van Der Vaeren, see n 2, 103–104; M Wyckaert, 'Grensoverschrijdende fusies', (2006) *Tijdschrift voor Rechtspersoon en Vennootschap,* 102–103; D Van Gerven, 'Community Rules Applicable to Cross-Border Mergers' in *Cross-Border Mergers in Europe*, I, (Cambridge, Cambridge University Press, 2010) 27; J Pieper, see n 18, 173.

[20] Second recital to the CBMD.

1.09 The main disadvantages of the CBMD are: (i) the employee participation procedure which is a deterrent to mergers involving companies to which employee participation applies; and (ii) the burdensome and complex merger procedure which makes it inappropriate for mergers between independent parties.[21] As a result, mergers under the CBMD are mainly used for intra-group restructurings in circumstances under which the employee participation procedure does not apply. The Commission is due to review the CBMD five years after the deadline for its implementation (ie 15 December 2012) and, if necessary, propose its amendment.[22]

1.10 One of the CBMD's side effects is that cross-border mergers between companies which are within the scope of the CBMD can no longer be performed outside the rules and formalities of the CBMD, including the employee participation procedure.[23] Moreover, due to the so-called *Sperrwirkung* or blocking effect of EU law, Member States may no longer adopt national rules on cross-border mergers of companies falling within the scope of the CBMD unless these rules are compatible with the CBMD.[24]

1.11 In this chapter and in the other chapters of this book:

- any reference to 'a merger' without further specification is a reference to a cross-border merger and not to a purely domestic merger;
- any reference to 'a merging company' is a reference to any company participating in a merger in the context of a merger by acquisition or a simplified merger and to any company being acquired (but not the newly formed company) in the context of a merger by the formation of a new company;
- any reference to 'the acquiring company' or 'the company resulting from the merger' is a reference to the surviving company (irrespective of whether this is an existing company or a newly formed company);
- any reference to 'a company being acquired' is a reference to a company which ceases to exist and whose assets and liabilities are transferred to the acquiring company as a result of a merger; and
- any reference to 'a shareholder'[25] is a reference to the holder of one or several shares or other securities or titles representing the equity capital of the company, or of a share in the corporate assets of the company.

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B. Scope of Application

(1) Principle

1.12 The CBMD applies to mergers (see paragraphs 1.13 to 1.18) of limited liability companies (see paragraphs 1.19 to 1.26) which are entitled to merge under their respective *lex societatis*[26]

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21 Rickford, see n 18, 1410–11.
22 Art 18 CBMD.
23 P Storm, 'Scope and Limitations of the Cross-Border Merger Directive', in *Cross-Border Mergers in Europe*, I, (Cambridge, Cambridge University Press, 2010) 73.
24 Ibid, 73–4.
25 The CBMD uses the more generic term 'member'. However, we have deliberately decided to use the term 'shareholder' as it is clearer (ie there is no risk of confusion with the member of a management organ or with a Member State or with other types of members). The term 'shareholder' therefore also refers to and includes terms such as 'member' or 'partner'.
26 Art 4(1)(a) CBMD.

(see paragraphs 1.27 to 1.29) formed in accordance with the law of a Member State and having their registered office, central administration, or principal place of business within the EEA (see paragraph 1.30) provided that at least two of them are governed by the laws of different Member States (see paragraphs 1.31 and 1.32)[27] and provided that each of them comply with the provisions and formalities of their respective *lex societatis* (see paragraph 1.35).[28] We will also examine the right of national authorities to oppose a cross-border merger (see paragraphs 1.33 and 1.34).[29]

(2) Merger

1.13 The CBMD only applies to mergers. Three types of mergers can be distinguished:[30]

- the merger by acquisition, which is an operation whereby one or more companies being acquired, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company (the acquiring company) in exchange for the issuance to their shareholders of securities or shares representing the capital of the acquiring company and, if applicable, a cash payment not exceeding 10% of the nominal value, or if the securities or shares do not have a nominal value, of the accounting par value of the securities or shares issued by the acquiring company;
- the merger by the formation of a new company, which can be defined as an operation whereby two or more companies being acquired, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form (the newly formed acquiring company) in exchange for the issuance to their shareholders of securities or shares representing the capital of the new company and, if applicable, a cash payment not exceeding 10% of the nominal value, or if the securities or shares do not have a nominal value, of the accounting par value of the securities or shares granted by the newly formed acquiring company; and
- the so-called 'simplified merger' which is an operation whereby a company being acquired, 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 (the acquiring company) without additional shares being issued. Although a cross-border merger between a company and its subsidiary in which it owns at least 90% but less than 100% of the shares and other securities conferring the right to vote at the general assembly of shareholders is not expressly referred to in the merger definitions of Article 2(2) CBMD, Member States may also decide to apply simplified merger formalities in such circumstances.[31] This may, therefore, also be qualified as a kind of simplified merger.

1.14 Both kinds of simplified mergers are in fact mergers by acquisition to which simplified requirements and formalities apply in order to take into account the fact that they are mergers between a company and its wholly owned or almost wholly owned subsidiary.

1.15 The merger definitions of Article 2(2) CBMD refer to the issuance of 'securities or shares representing the capital' of the acquiring company. This wording is different from the

[27] Art 1 CBMD.
[28] Art 4(1)(b) CBMD.
[29] Ibid.
[30] Art 2(2) CBMD.
[31] Art 15(2) CBMD.

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wording of the merger definitions of the Domestic Merger Directive which only refer to the issuance of shares in the acquiring company.[32] This difference in wording could be interpreted as meaning that, in the context of a cross-border merger, the acquiring company may also issue non-equity securities (eg bonds, convertibles etc.) to the shareholders of the companies being acquired.[33] However, this interpretation is not convincing. The words 'representing the capital' qualify both the shares and the securities to be issued. This interpretation is confirmed by the French wording '*de titres ou de parts représentatifs du capital social*' in which the ending of '*représentatifs*' indicates that it also relates to the '*titres*' (securities).[34] The same conclusion can be made based on the Dutch wording '*bewijzen van deelgerechtigdheid in het kapitaal*'. Moreover, compensating equity shareholders with non-equity securities, possibly against their wishes, would be very drastic. This is unlikely to have been the intention of the European legislator.

1.16 The CBMD also applies to mergers by acquisition or by the formation of a new company if the law of at least one of the Member States concerned authorizes the cash payment to exceed 10% of the face value or the par value of the securities or shares to be issued by the company resulting from the merger.[35] The CBMD does not impose an upper limit on cash payments. Therefore, if the *lex societatis* of one of the merging companies allows it, a cross-border merger could take place with a 100% cash payment.[36] If none of the laws applicable to the companies involved in the merger allow the granting of a cash payment higher than 10%, the merger can only be implemented under the merger rules of the CBMD, provided that the 10% limit is observed.

1.17 Both definitions of mergers by acquisition and by the formation of a new company indicate that the shareholders of the companies being acquired shall receive securities or shares representing the capital of the acquiring company. As a result, triangular cross-border mergers[37] are outside the scope of the CBMD.[38] However, this should not prevent triangular cross-border mergers from taking place based on the freedom of establishment (see paragraphs 2.189 to 2.238).

1.18 Mergers resulting in the formation of SEs and SCEs[39] cannot take place under the CBMD. These mergers are governed by the SE Regulation and the SCE Regulation[40] respectively. For a description of these types of cross-border mergers, see paragraphs 2.143 to 2.168.

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[32] Arts 3(1) and 4(1) Domestic Merger Directive.
[33] Ugliano, see n 2, 601.
[34] Van Gerven, see n 19, 9.
[35] Art 3(1) CBMD; regarding the tax aspects, see paras 3.11 and 3.12.
[36] F Bernard, 'Les fusions transfrontalières au sein de l'Union européenne', (2011) (97) Le droit des affaires—Het ondernemingsrecht (DAOR), 24; this legal scholar rightly remarks that such an operation seems closer to a sale than to a merger.
[37] ie mergers whereby the shareholders of the companies being acquired receive shares from a company other than the acquiring company.
[38] Bernard, see n 36, 22.
[39] *societas cooperativa europaea*.
[40] Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).

(3) Mergeable limited liability companies

(a) Limited liability companies

1.19 **(i) Definition** While the scope of the Domestic Merger Directive, the SE Regulation, and the 1984 proposal for a cross-border merger directive[41] was limited to public limited liability companies, the CBMD's scope is broadened to cover all limited liability companies, regardless of their legal form. Limited liability companies are defined under Article 2(1) CBMD as:

(a) the companies listed under Article 1 Publicity Directive;[42]
(b) any company with share capital and having a 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 those provided for by the Publicity Directive for the protection of interests of members and others.

1.20 The purpose and effect of the second part of the definition is to widen the CBMD's scope of application to limited liability companies which are not expressly included in the Publicity Directive's list of companies but are nonetheless subject to the same rules. For example, new legal forms to be created by Member States in the future are not listed under Article 1 Publicity Directive but may have the features described under Article 2(1)(b) CBMD.[43] This also includes SEs which are therefore entitled to participate in a merger under the CBMD provided that the merging companies do not intend to form an SE through the merger.[44]

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1.21 As a result, mergers under the CBMD are open to a wide range of companies, including many small and medium-sized companies which, in many Member States, are rarely incorporated under the form of public limited liability companies.

1.22 **(ii) Excluded limited liability companies** Due to the lack of harmonization of cooperative societies,[45] Member States may decide not to apply the CBMD merger provisions to their cooperative societies, even if they qualify as limited liability companies as defined in Article 2(1) CBMD.[46] However, cooperative societies are entitled to merge under the SCE Regulation.

1.23 Companies whose purpose is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holder's request, repurchased or redeemed,[47] directly or indirectly, out of the assets of those companies, are excluded from the CBMD's scope.[48] Cross-border mergers of these collective

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[41] See para 1.02.
[42] Directive 2009/101/EC of the European Parliament and the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (codified version) (Text with EEA relevance) (which repealed and replaced First Council Directive 68/151/EEC of 9 March 1968).
[43] Behrens, see n 18, 11–12; Bernard, see n 36, 55–6.
[44] W Bayer and J Schmidt, 'Die neue Richtlinie über die grenzüberschreitende Verschmelzung von Kapitalgesellschaften', (2006) Neue Jurististische Wochenschrift, 401; Behrens, see n 18, 24–37; Beutel, see n 2, 136–43.
[45] Evrard and Van Der Vaeren, see n 2, 112.
[46] Art 3(2) CBMD.
[47] According to Art 3(2) CBMD, such repurchase or redemption includes actions taken by these companies to ensure that the market value of its units does not vary significantly from its net asset value.
[48] Art 3(3) CBMD.

investment companies are governed by Articles 37 to 48 UCITS IV[49] and Articles 3 and 4 Commission Directive 2010/42/EU[50] which were both due to be implemented by 30 June 2011. These legal provisions are discussed in paragraphs 2.169 to 2.188.

1.24 Many legal scholars are of the opinion that companies which have already been dissolved (ie put into voluntary liquidation) are no longer authorized to participate in a cross-border merger under the CBMD, even if they have not yet started the distribution of their assets.[51] These scholars refer to the wording of the merger definitions of Article 2(2) CBMD which indicates that a merger involves the transfer of all assets and liabilities of companies '*on being dissolved* without going into liquidation'. This wording deviates from that of the merger definition of Articles 3(1), 4(2), and 26 Domestic Merger Directive which does not include such a reference to timing. According to these legal scholars, the European legislator thereby indicated that, while the Domestic Merger Directive enables companies in liquidation to take part in a domestic merger as long as they have not yet started the distribution of their assets,[52] only companies which are not yet dissolved can take part in a cross-border merger. However, other legal scholars disagree with this interpretation and argue that the added wording is not intended to exclude companies in liquidation from taking part in cross-border mergers.[53] Several Member States[54] expressly excluded companies in liquidation from the scope of application of cross-border mergers while others[55] did the opposite. Some national legislators did not take clear positions.[56]

1.25 (iii) **Extension to other companies** All companies which do not qualify as limited liability companies under the CBMD are outside the scope of the CBMD. Therefore, Member States may validly decide to limit the application of their national rules implementing the CBMD to the merger of domestic companies qualifying as limited liability companies under the CBMD with foreign companies also qualifying as limited liability companies under the CBMD. They are not obliged to extend the applicability of their national rules implementing the CBMD to other legal forms.[57]

1.26 As described under paragraph 1.07, the right to perform a cross-border merger in the EEA is based on the freedom of establishment. Cross-border mergers should therefore be possible between any companies which are entitled to participate in a domestic merger, including those which are outside the scope of the CBMD and other types of harmonized mergers.[58]

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[49] Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) (Text with EEA relevance).

[50] Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure (Text with EEA relevance).

[51] Evrard and Van Der Vaeren, see n 2, 112; G Palmaers and A Gubbels, 'De Grensoverschrijdende fusie', (2008) *Tijdschrift Financieel Recht* No 4, 255; Wyckaert, see n 19, 96; Bernard, see n 36, 22.

[52] Arts 3(2) and 4(2) Domestic Merger Directive.

[53] J-A Delcorde and T Tilquin, 'La fusion transfrontalière de sociétés de capitaux en droit belge après la transposition de la Directive 2005/56/CE', (2009) *Revue Pratique des Sociétés*, 55–6; K Byttebier and T Van de Gehuchte,' De Richtlijn 2005/56/EG betreffende grensoverschrijdende fusie van kapitaalvennootschappen: een eerste verkenning,' (2006) *Tijdschrift Financieel Recht* No 3, 1425.

[54] eg Belgium and the UK (see paras 5.03 and 17.13).

[55] eg Germany and Spain (see paras 8.20 and 15.12).

[56] eg Italy and France (see paras 11.14 and 7.15).

[57] Behrens, see n 18, 37–9.

[58] See paras 2.189–2.223.

Although Member States are not obliged to do so, several have extended the applicability of their national rules implementing the CBMD to other legal forms which can participate in a domestic merger but nevertheless fall outside the scope of the CBMD. See paragraphs 2.233 to 2.238 for an analysis of the practical implications of these extensions.

(b) Mergeable companies

1.27 (i) **General capacity to merge** Only companies which are entitled to participate in domestic mergers may participate in a merger under the CBMD.[59] Limited liability companies as defined in Article 2(1) CBMD are therefore not entitled to take part in a cross-border merger if their national law does not authorize them to merge with other domestic companies. Nevertheless, a Member State may not refuse the merger between one of its domestic companies qualifying for a cross-border merger and a company of another Member State which also qualifies for a cross-border merger under the CBMD and the laws of the second Member State, based on the single fact that the company's legal form in the second Member State is similar or equivalent to a legal form in the first Member State which is not authorized to merge, even though it qualifies as a limited liability company as defined in Article 2(1) CBMD.[60]

1.28 (ii) **Specific capacity to merge** In some Member States,[61] companies which have the general capacity to merge are not authorized to merge with all other types of mergeable companies. In these jurisdictions, companies are only allowed to merge with certain other mergeable companies, usually those having the same or a similar legal form. Although Article 4(1)(a) CBMD could have indicated this more clearly, Member States which limit the specific capacity of their companies to take part in a domestic merger are also entitled to do the same in the context of a cross-border merger.[62] A Member State may refuse a cross-border merger between one of its limited liability companies and a limited liability company of another Member State, if a domestic merger between the same types of companies is not authorized either.

1.29 This limitation may raise practical difficulties, because some Member States have domestic legal forms of limited liability companies which may not have equivalents in other Member States. Another problem is that the features of non-harmonized legal forms may vary considerably across the EEA, even if the same names are used in the various Member States. The issue is how to determine whether or not a company has the specific capacity to merge with a foreign company whose legal form should enable a merger if its features are substantially different to those of the corresponding domestic legal form.

(4) **EEA companies**

1.30 The CBMD applies 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 EEA.[63] This broad wording is the same as in Article 54 TFEU which grants the freedom of establishment to companies. It enables, for example, companies incorporated and with a registered office in the EEA but with their central administration

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[59] Art 4(1) CBMD.
[60] Behrens, see n 18, 62–4.
[61] ie Greece, the Czech Republic, and the Netherlands (see paras 6.08, 13.20, and 13.21).
[62] Beutel, see n 2, 2008, 135; Bernard, see n 36, 25; Delcorde and Tilquin, n 53, 53–4.
[63] Art 1 CBMD.

and principal place of business outside the EEA, to take part in a merger under the CBMD.[64] [65] The CBMD does not apply to mergers involving a company formed in a country outside the EEA or formed in a Member State but having its registered office, its central administration, and its principal place of business outside the EEA.

(5) Companies of different 'nationalities'

1.31 For a merger to qualify as a cross-border merger governed by the CBMD, at least two of the participating companies must be governed by the laws of different Member States.[66] The CBMD does not apply to purely domestic mergers. Although this is not explicitly stated in the CBMD, it should also apply when all existing companies participating in the merger are governed by the same *lex societatis* but their assets and liabilities are transferred to a newly incorporated company which is governed by another *lex societatis*.[67] [68]

1.32 Whether or not companies are governed by the same *lex societatis* is determined by the conflict of law rules of each Member State, taking into account the principle of freedom of establishment as interpreted by the Court.[69] [70] The application of the conflict of law rules may result in more than one Member State considering that a company is governed by its *lex societatis*. The best example of this type of so-called 'bi-national company' is a company incorporated in a Member State applying the incorporation theory (eg the Netherlands) which moves its head office to a Member State where the real seat theory prevails (eg Belgium). Dutch conflict of law rules consider it to be a Dutch company while Belgian conflict of law rules will treat it as a Belgian company. In the case of a merger between such a bi-national company and another Belgian company, the issue is whether the merger should be treated as a (Belgian) domestic merger or as a cross-border merger between a Dutch and a Belgian company. Based on the Court's interpretation of the freedom of establishment in *Überseering*,[71] Belgian law should recognize it as a foreign company governed by Dutch *lex societatis*. Its merger with a Belgian company should therefore be seen as a cross-border merger, even if both companies have their real seat in Belgium.[72]

(6) Veto by the national authorities

1.33 The laws of a Member State may enable its national authorities to veto a cross-border merger on the grounds of public interest, provided that the same applies to domestic mergers,[73] and

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[64] Rickford, see n 18, 1401; Ugliano, see n 2, 599.

[65] This is in contrast with Art 2 SE Regulation which requires participating companies to have their registered offices and their head offices in the EU (with one exception).

[66] Art 1 CBMD.

[67] Beutel, see n 2, 152–3; Palmaers and Gubbels, see n 51, 257; Delcorde and Tilquin, see n 53, 57–8.

[68] The definition of 'cross-border merger' in Art 2(1)(q) UCITS IV expressly specifies that it also includes a merger between UCITS established in the same Member State into a newly constituted UCITS established in another Member State. There is no reason why the same should not apply in the context of the CBMD.

[69] Behrens, see n 18, 15–23.

[70] For a description of the incorporation theory and the real seat theory, see paras 2.13–2.26. For a description of the Court's case law, see paras 2.82–2.96.

[71] C-208/00, 5 November 2002, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, [2002] ECR I-09919; see paras 2.34, 2.92, and 2.93.

[72] J-P Spang, 'La fusion transfrontalière en droit luxembourgeois: regard du praticien', in P-H Conac, *Fusions transfrontalières de sociétés—Droit luxembourgeois et droit comparé*, (Brussels, Larcier, 2011) 91; Bernard, see n 36, 21; Behrens, see n 18, 15–23.

[73] Unlike in the context of a cross-border merger resulting in the formation of an SE (Art 19 SE Regulation), a right of veto is only acceptable under the CBMD provided and in so far as it is also applicable to domestic mergers. Any veto right which only applies to cross-border mergers would be contrary to Art 4(1)(b) CBMD.

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at least one of the merging companies is subject to the laws of that Member State.[74] This includes concentration control at the level of the Member States.[75]

1.34 The last sentence of Article 4(1)(b) CBMD is somewhat unclear. It states that '[the right of veto by the national authorities of a Member State] shall not apply to the extent that [a European concentration control] is applicable'. A literal interpretation of this provision would mean that Member States are no longer entitled to make use of any right of veto they may have under national law if a merger is subject to European concentration control.[76] However, it seems difficult to justify why a Member State should no longer be entitled to make use of any veto right it may have on other grounds than concentration control merely because the merger is subject to a European concentration control. This sentence should therefore be interpreted as simply confirming that no Member State may apply its national concentration control rules to mergers with an EEA dimension.[77]

C. Procedure

(1) General principles

1.35 Companies taking part in a merger must comply with the provisions and formalities imposed by the national law to which they are subject.[78] This provision is essential. It indicates that each company participating in a cross-border merger must apply the rules of its national legislation which would be applicable in the case of a purely domestic merger,[79] unless specific rules are imposed by the CBMD. Therefore, any matter which the CBMD fails to specify is to be determined based on the national rules which apply to each of the participating companies. This also implies compliance with any national rules regulating specific economic activities.[80]

1.36 This distributive application of national rules was recommended by many legal scholars before the CBMD.[81] [82] The advantage is that the CBMD did not impose a very extensive harmonization and therefore cross-border mergers can benefit from the familiarity with existing national rules. In any case, at least in respect of public limited liability companies, national merger rules were already largely harmonized by the Domestic Merger Directive.

1.37 However, the provisions and formalities of national law must not introduce restrictions on the freedom of establishment or on the free movement of capital, unless these are justified by the case law of the Court and, in particular, by requirements of the general interest and are

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[74] Art 4(1)(b) CBMD.

[75] Ninth recital to the CBMD.

[76] Behrens, see n 18, 141.

[77] Ninth recital to the CBMD and Art 4(1)(b) CBMD in conjunction with Art 21 of Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance); Bayer and Schmidt, see n 44, 405.

[78] Art 4(1)(b) and (2) CBMD.

[79] Third recital to the CBMD.

[80] The tenth recital to the CBMD, which specifies that the CBMD is without prejudice to Community legislation regulating credit intermediaries and other financial undertakings and national rules made or introduced pursuant to such Community legislation, is a mere confirmation of this principle.

[81] The first of these scholars was G Beitzke, 'Le conflit de lois en matière de fusion de sociétés (droit communautaire et droit international privé)', (1967) *Revue Critique de Droit International Privé*, 1–22.

[82] For an analysis of the differences between the *Vereinigungstheorie* (see paras 2.228–2.232) and the conflict of laws rules under the CBMD, Beutel, see n 2, 121–30.

both necessary for, and proportionate to, the attainment of such over-riding requirements.[83] Moreover, Member States must not impose stricter rules or requirements on cross-border mergers than those applying to domestic mergers.

1.38 One difficulty is that the CBMD does not determine which national law applies when, according to the conflict of laws rules of the Member States concerned, a company is subject to several *leges societatis*. As described under paragraphs 1.32 and 2.34, the principle of freedom of establishment as interpreted by the Court in *Überseering* can have an impact on the determination of the applicable *lex societatis* of a company whose registered office and head office are situated in different Member States.[84] As a result, in the context of a cross-border merger each participating company should be subject to only one set of rules.[85]

1.39 If both Member States concerned apply the incorporation theory, the *lex societatis* of the Member State of incorporation applies. If both Member States concerned apply the real seat theory, the *lex societatis* of the Member State where the head office is situated applies. If the Member State where the company was incorporated applies the incorporation theory but its real seat is situated in a Member State applying the real seat theory, the *lex societatis* of the Member State of incorporation shall apply (*Überseering*). Finally, if a company incorporated in a Member State applying the real seat theory moves its head office to a Member State applying the incorporation theory, this may be problematic as in principle the *lex societatis* of neither of the Member States should apply (unless this is corrected by an exception to the main rules).

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(2) Common draft terms of merger

(a) Purpose

1.40 The management or administrative organs of each of the merging companies[86] are first required to draw up a so-called 'common draft terms of cross-border merger',[87] also often referred to by practitioners as a 'joint merger proposal'. This is a written document setting forth the main terms and conditions of the proposed merger.

1.41 The purpose of the common draft terms of merger is threefold:[88]

- to crystallize the results of the negotiations between the management or administrative organs of the merging companies;
- to inform the shareholders of the merging companies; and
- to serve as a base for the preparation of the management reports, the independent experts reports, and for the decisions of the general assemblies of shareholders voting on the proposed merger.

[83] Third recital to the CBMD.
[84] Behrens, see n 18, 19–23.
[85] For a contrasting view, see Van Gerven, n 19, 10–11.
[86] In the context of a merger by the formation of a new company, no common draft terms of merger must be prepared at the level of the new company to be formed for the purpose of being the acquiring company. See the definition of 'a merging company' in para 1.11.
[87] Art 5 CBMD.
[88] Bernard, see n 36, 27.

(b) Form and content

1.42 In principle, the rules and formalities to be complied with in relation to the approval of the common draft terms of merger by each of the participating companies, including the form of the common draft terms of merger, are determined by their respective *lex societatis*. However, these rules and formalities may not be identical.[89] As its name indicates, the common draft terms of merger is a legal document which is common to all companies participating in the merger. The merging companies, therefore, must not approve different (versions of) common draft terms of merger. As a result, all merging companies must take into account and apply cumulatively all the rules and formalities imposed by the *lex societatis* of all participating companies.[90] In the case of a contradiction, the strictest rules shall apply.[91] [92]

1.43 The content of the common draft terms of merger approved by each merging company must be identical.[93] [94]

1.44 The common draft terms of merger must include at least the following information:[95]

(a) the legal form, name, and registered office address of the merging companies, including those proposed for the company resulting from the merger;
(b) the likely repercussions of the merger on employment;
(c) the date as from which the transactions of the dissolved companies will be treated for accounting purposes as being those of the company resulting from the merger;
(d) the rights conferred by the company resulting from the merger on shareholders enjoying special rights, or on holders of securities other than shares representing the share capital of the company resulting from the merger, or the measures proposed concerning them;
(e) any special advantages granted to the experts who will examine the common draft terms of merger or to members of the administrative, management, supervisory, or controlling organs of the merging companies;
(f) the statutes of the company resulting from the merger;
(g) 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 merger are determined;
(h) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the merger; and
(i) the dates of the merging companies' accounts used to establish the conditions of the merger.

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[89] In many Member States the common draft terms of merger do not have to be notarized while in some other Member States, this is required.
[90] Beutel, see n 2, 161–2; Evrard and Van Der Vaeren, see n 2, 114; Bernard, see n 36, 29–30.
[91] Behrens, see n 18, 94; Beutel, see n 2, 161
[92] For example, if a notarized deed is required by the *lex societatis* of one or several participating companies, all merging companies will have to participate in the joint notarization of the common draft terms of merger. Further difficulties may arise, for example if several of the relevant Member States prohibit notarization abroad.
[93] Fourth recital to the CBMD.
[94] As a result, also in relation to the content of the common draft terms of merger, a cumulative application of the national rules of each participating company prevails.
[95] Art 5 CBMD.

1.45 Unless in the context of a merger with a wholly owned subsidiary,[96] the common draft terms of merger should also contain the following information:[97]

(a) the ratio applicable to the exchange of securities or shares representing the share capital of the company resulting from the merger and the amount of any cash payment;
(b) the terms for the allotment of securities or shares representing the share capital of the company resulting from the merger; and
(c) the date as from which the holding of such securities or shares representing the share capital of the company resulting from the merger will entitle the holders to share in the profits and any special conditions affecting that entitlement.

1.46 Although the CBMD does not specify this, most legal scholars seem to agree that the statutes to be included in the common draft terms of merger (item (f) of paragraph 1.44) are the statutes of the acquiring company as they will be at completion of the planned merger. If the acquiring company is newly incorporated, the common draft terms of merger must include the future statutes of the new company. If the acquiring company is an existing company whose statutes are expected to be amended before or at completion of the merger, the common draft terms of merger must include the statutes taking into account the expected amendments.[98]

1.47 Article 5 CBMD expressly indicates that the above is the minimum content of the common draft terms of merger. The management or administrative organs of the merging companies are free to include more information than imposed by the CBMD.[99] It is less clear whether or not Member States are also free to impose additional information to be provided in the common draft terms of merger. The wording of the fourth recital to the CBMD could be interpreted as excluding this possibility for the Member States.[100] However, several Member States and legal scholars[101] are of the opinion that Member States are free to request additional information to be included in the common draft terms of merger.

(c) Filing, publication, and availability

1.48 The common draft terms of merger must be published for each of the merging companies at least one month prior to the meeting of the general assembly of shareholders which is to decide on the merger.[102] [103] The purpose of this publication is the protection of the interests of the merging companies' shareholders and of third parties.[104]

1.49 Member States may impose a longer period between the date of publication of the common draft terms of merger and the date of the meeting of the general assembly of shareholders. Companies of Member States where the minimum one-month term applies do not have to comply with any longer term imposed by the *lex societatis* of other merging companies. However, they will have to take such longer term into account when approving the common draft terms of merger in order to enable all merging companies to comply with the term

[96] See paras 1.109–1.111.
[97] Arts 5 and 15(1) CBMD.
[98] Delcorde and Tilquin, see n 53, 68; Van Gerven, see n 19, 13; *contra* Behrens, see n 18, 89.
[99] Fourth recital to the CBMD.
[100] Beutel, see n 2, 162; Bernard, see n 36, 27–8 and cited references.
[101] Behrens, see n 18, 91–3.
[102] Art 6(1) CBMD.
[103] If no approval by the general assembly of shareholders is required, see paras 1.77–1.83.
[104] Fifth recital to the CBMD.

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between publication and the meeting of the general assembly of shareholders applicable to them.[105]

1.50 The publication must take place in the manner prescribed by the laws of each relevant Member State in accordance with Article 3 Publicity Directive.

1.51 However, Article 4 Reporting and Documentation Directive[106] introduced, in Article 6(1) CBMD, an exemption to the publication requirements of Article 3 Publicity Directive. Such exemption applies if a merging company, for a continuous period beginning at least one month before the day fixed for the meeting of the general assembly of shareholders deciding upon the merger and ending not earlier than the conclusion of that meeting, makes the common draft terms of merger available on its website free of charge for the public. Moreover, Member States may instead require that the publication be effected through the central electronic platform referred to in Article 3(4) Publicity Directive or any other website designated by them for that purpose. If a website other than the central electronic platform is used, a reference giving access to that website must be published on the central electronic platform at least one month before the date of the meeting of the general assembly of shareholders to approve the merger. The deadline for Member States to implement the Reporting and Documentation Directive was 30 June 2011. Many of them were late.

1.52 For each of the merging companies, at least the following information must be published in the national gazette of the Member State to which the company concerned is subject:[107]

(a) the legal form, name, and registered office of every merging company;
(b) the register in which the company documents related to the merging companies are filed in respect of each merging company and the number of the entry in that register; and
(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 shareholders of the merging companies, and the address[108] at which complete information on those arrangements may be obtained free of charge.

Member States may impose additional publication requirements in their national gazette.

1.53 With the exception of companies harmonized by the Domestic Merger Directive (Article 11(1)(a)) or unless provided otherwise under national law, it is not required for the merging companies to make the common draft terms of merger available at their registered office. We refer to paragraphs 1.72 regarding the exception to such requirement to make the common draft terms of merger available at the company's registered office.

(3) Management report

1.54 Beside approving and publishing the common draft terms of merger, the management or administrative organ of each merging company[109] must draw up a written report intended

[105] Van Gerven, see n 19, 14.

[106] Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions.

[107] Art 6(2) CBMD.

[108] The CBMD does not specify whether or not this can be an e-mail address instead of a postal address. Legal scholars have differing views on this issue; see Bernard, see n 36, 32 and cited references.

[109] In the context of a merger by the formation of a new company, no management report must be prepared at the level of the new company to be formed for the purpose of being the acquiring company. See the definition of 'a merging company' in para 1.11.

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for the shareholders.[110] In this report, the management or administrative organ must (i) explain and justify the legal and economic aspects of the cross-border merger; and (ii) explain its implications for the shareholders, the creditors, and the employees. This should include not only the immediate implications of the merger for the employees but also the expected longer-term implications such as planned restructurings.[111]

1.55 The purpose of the management report is to inform the shareholders and the employees. Although the managem ent report must contain some information regarding the implications of the merger for the creditors, it is not drafted with a view to inform the latter and does not have to be made available to them.[112]

1.56 The management report must be made available to the shareholders and to the employees' representatives or, if there are no such representatives, to the employees themselves.[113] This must take place at the latest one month before the meeting of the general assembly of shareholders convened to vote on the merger. Member States may impose a longer period between the date the management report must be made available and the date of the meeting of the general assembly of shareholders.

1.57 If the management or administrative organ of any merging company receives, in good time,[114] an opinion from the representatives of their employees as provided under national law, that opinion must be appended to the management report.

1.58 A management report must be drafted in all circumstances, including in the context of a merger through the simplified merger procedure[115]. The shareholders are not entitled, even by a unanimous decision, to waive the one-month period during which the management report must be made available. This is because the management report is prepared not only to inform the shareholders but also to inform the employees.[116] However, arguably a Member State could entitle the shareholders to renounce a management report if the company does not employ anybody or it could entitle the shareholders and all (representatives of the) employees to unanimously renounce it.[117]

(4) **Interim accounting statement**

1.59 Provided that the merging company[118] is a public limited liability company (or any company with another legal form to which the Member State concerned decided to apply the merger rules harmonized by the Domestic Merger Directive), it must make available to its shareholders, at least one month prior to the date of the meeting of the general assembly of shareholders called to approve the merger, the annual accounts, and annual management reports

[110] Art 7 CBMD.
[111] Beutel, see n 2, 180–81.
[112] Behrens, see n 18, 101.
[113] Art 7 CBMD.
[114] ie before the meeting of the general assembly of shareholders.
[115] Art 15(1) CBMD does not exclude the preparation of a management report in the context of a merger with a wholly owned subsidiary. Although the wording of Art 15(2) CBMD is unclear (see para 1.112), a fortiori it must also be drafted in the context of a merger with a 90% subsidiary.
[116] D Willermain, 'Les fusions transfrontalières de sociétés', (2009) Journal des Tribunaux, 587; Delcorde and Tilquin, see n 53, 75.
[117] Beutel, see n 2, 184–5.
[118] In the context of a merger by the formation of a new company, of course this does not apply to the new company to be formed for the purpose of being the acquiring company. See the definition of 'a merging company' in para 1.11.

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for each of the merging companies for the last three financial years.[119] Provided again that a merging company is a public limited liability company (or any company with another legal form to which the Member State concerned decided to apply the merger rules harmonized by the Domestic Merger Directive) and provided that its latest annual accounts relate to a financial year which ended more than six months before the date of the common draft terms of merger (ie the date of the approval of the common draft terms of merger by the management or administrative organ), an interim accounting statement must be drawn up by its management or administrative organ as at a date which must not be earlier than the first day of the third month preceding the date of the common draft terms of merger.[120] [121] This means that, in principle, an interim accounting statement is required if the management or administrative organ approves the common draft terms of merger in the second half of a company's financial year.

An interim accounting statement does not have to be prepared if the company publishes a half-yearly financial report in accordance with Article 5 Directive 2004/109/EC[121a] and makes it available to shareholders. Moreover, Member States may provide that an interim accounting statement shall not be required if all the shareholders and the holders of other securities conferring the right of vote of each of the companies involved in the merger have so agreed.[121b]

1.60 The interim accounting statement must be prepared using the same methods and the same layout as the last annual balance sheet. However, Member States may provide that:

- it is not required to take a fresh physical inventory; and
- the valuations shown in the last balance sheet shall be altered only to reflect entries in the books of account; however, interim depreciations and provisions and material changes in actual value not shown in the books shall nevertheless be taken into account.

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(5) Independent expert report

(a) *Principles*

1.61 A report must be prepared by one or more independent experts for the shareholders of each merging company (but not the employees or the creditors) to receive independent advice regarding the terms of the proposed merger.[122] In principle, a separate report must be prepared for each merging company.[123]

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[119] Art 11(1)(b) Domestic Merger Directive.

[120] Art 11(1)(c) Domestic Merger Directive.

[121] Art 2 Reporting and Documentation Directive introduced, in Art 11(1) Domestic Merger Directive, an exemption for companies publishing a half-yearly financial report in accordance with Art 5 Directive 2004/109/EC. Moreover, Member States may provide that an interim accounting statement shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the merging companies unanimously so decide.

[121a] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

[121b] Art 11(1), last subparagraph Domestic Merger Directive introduced by Art 2 Reporting and Documentation Directive.

[122] Art 8(1) CBMD; Beutel, see n 2, 188.

[123] In the context of a merger by the formation of a new company, such an independent expert report does not have to be prepared at the level of the new company to be formed for the purpose of being the acquiring company. See the definition of 'a merging company' in para 1.11.

1.62 Each report must be made available to the shareholders at least one month before the date of the meeting of the general assembly of shareholders convened to approve the merger. Member States may impose a longer period between the date of availability of the independent expert report and the date of the meeting of the general assembly of shareholders.

(b) Independent experts

1.63 The independent experts may be natural persons or legal persons, depending on the law of each Member State.[124] Each Member State shall determine who is qualified to act as an independent expert for the purpose of drafting the report.

1.64 The independent experts must be provided by the merging companies with all necessary information and documents,[125] and they are entitled to carry out all investigations which they deem necessary for the performance of their task.[126] This duty to provide information and documents applies to all merging companies and not only to the merging company at whose request the expert prepares his or her report. The CBMD does not specify the consequences and recourses for an independent expert who is not provided with the requested information and documents. This should be determined by each Member State. An obvious consequence is that the independent expert should refuse to issue his or her report.

(c) Content

1.65 The independent expert report must include at least the particulars provided for by Article 10(2) Domestic Merger Directive,[127]that is it must:

- indicate whether or not, in the expert's opinion, the proposed share exchange ratio is fair and reasonable;
- indicate the method or methods used to arrive at the proposed share exchange ratio;
- state whether or not these methods are appropriate to the case in question;
- indicate the values resulting from each of these methods;
- give an opinion regarding the relative importance attributed to each method in arriving at the value decided on; and
- describe any special valuation difficulties which have arisen.

(d) Exceptions

1.66 There are three compulsory exceptions and one optional exception to the obligation to provide an independent expert report for each merging company.

1.67 In principle, each of the merging companies must have its own independent expert's review and report. However, the merging companies may jointly request the competent judicial or administrative authorities to authorize the review to be performed (and a single report to be prepared) by one or more independent experts for all the companies involved in the merger.[128] Such approval can be obtained from the competent authority of any Member State where one of the merging companies is established. This option is designed to limit the

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[124] Art 8(1) CBMD; Beutel, see n 2, 188.
[125] Although Art 7 CBMD only refers to the right of the independent experts to secure 'all information they consider necessary for the discharge of their duties', this shall also include the right to request documents. See Behrens, n 18, 113–14; Bernard, see n 36, 37; Beutel, see n 2, 190.
[126] Art 8(3) CBMD.
[127] Art 8(2) CBMD.
[128] Ibid.

experts' costs connected with the merger.[129] The requirements imposed by the Member States concerned shall be applied cumulatively, ie the strictest requirements shall be complied with by the joint independent expert(s).[130] As a result, the joint independent expert(s) shall review and include in his or her or their report all the matters imposed by the law of each of the Member States concerned.

1.68 The shareholders of all merging companies may also unanimously decide that independent expert reports are not required.[131]

1.69 Independent expert reports are not required in the event of a merger by acquisition of a wholly owned subsidiary (simplified merger procedure).[132]

1.70 Finally, the Member States have the option of waiving the obligation to prepare a report in the case of a merger by acquisition carried out by a company holding 90% or more (but not all) of the shares and other securities conferring the right to vote at the general assembly of shareholders of the subsidiary being acquired.[133] However, a report is required if not all the relevant Member States have made use of this option.

(e) Report in view of a contribution in kind

1.70a Mergers usually involve a capital increase at the level of the existing acquiring company (merger by acquisition) or the incorporation of a new company (merger by the formation of a new company). In both cases, the acquiring company issues new shares in exchange for the assets and liabilities of the companies being acquired. This contribution of assets and liabilities can be qualified as a contribution in kind to which the reporting obligations of the Second Council Directive[133a] should apply if the acquiring company is a public limited liability company (or another legal form to which national law applies the rules harmonized by the Second Council Directive). However, Member States may decide that, if an independent expert report is prepared, the report of the expert in view of the contribution in kind is not required.[133b] This exception does not apply if the shareholders of all merging companies unanimously decided that independent expert reports are not required. Member States may also decide that the independent expert report and the expert report in view of the contribution in kind may be drawn by the same expert(s).[133c]

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(6) Informing shareholders and employees

1.71 As described under paragraphs 1.48, 1.56, and 1.62, the shareholders of each merging company[134] must have access to the following documents at least one month before the meeting

[129] Sixth recital to the CBMD.
[130] Beutel, see n 2, 189.
[131] Art 8(4) CBMD.
[132] Art 15(1) CBMD.
[133] Art 15(2) CBMD.
[133a] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.
[133b] Arts 10(5) and 27(3) Second Council Directive introduced by Art 1 Reporting and Documentation Directive.
[133c] Ibid.
[134] In the context of a merger by the formation of a new company, this does not include the new company to be formed for the purpose of being the acquiring company. See the definition of 'a merging company' in para 1.11.

of the general assembly of shareholders convened to approve the merger: the common draft terms of merger,[135] the report of the company's management or administrative organ, and, if applicable, the report of the independent expert(s).

1.72 Provided the companies involved in the cross-border merger apply merger rules harmonized by the Domestic Merger Directive, the shareholders of the merging companies must also receive access to the annual accounts of all the merging companies for the last three financial years[136] (including the annual reports of the management or administrative organs and the statutory auditors for these years) and, if the last annual accounts available relate to a financial year that ended more than six months before the date of the common draft terms of merger, an interim accounting statement as at a date not more than three months before the date of the common draft terms of merger.[137] Once Article 2 Reporting and Documentation Directive amending Article 11 Domestic Merger Directive is implemented, companies should have the possibility to replace the access requirements at the registered office of the merging companies as described in paragraphs 1.71 and 1.72 by a publication on the company's website (see also paragraph 1.51).[137a]

1.73 For companies involved whose merger rules are harmonized by the Domestic Merger Directive, all shareholders must be provided, on their request, free of charge, with a copy of the documents referred to in paragraphs 1.71 and 1.72.[138] Once Article 2 Reporting and Documentation Directive amending Article 11 Domestic Merger Directive is implemented, these documents can be provided by electronic mail provided the shareholder concerned has given its consent.[138a] The company concerned should also have the option to replace this by the publication of these documents on the company's website (see paragraphs 1.51) provided these documents can be downloaded and printed from the website. However, in that case, Member States may still provide that the company concerned must make those documents available at its registered office for consultation by the shareholders.[138b]

1.74 As mentioned under paragraph 1.56, the report of the company's management or administrative organ must be made available to the representatives of the employees of the merging companies or, if there are no such employee representatives, to the employees themselves, not less than one month before the meeting of the general assembly of shareholders convened to approve the merger.

1.74a If a merging company is a public limited liability company (or another company to which national rules implementing the Domestic Merger Directive apply), the management or administrative organs must inform the general assembly of shareholders of their company and the management or administrative organs of the other merging companies so that the

[135] It is not required for the merging companies to make the common draft terms of merger available to the shareholders at their registered office, unless they are companies harmonized by the Domestic Merger Directive (Art 11(1)(a)) or unless provided otherwise under national law.

[136] Art 11(1)(b) Domestic Merger Directive.

[137] Art 11(1)(c) Domestic Merger Directive.

[137a] Art 11(4), first subparagraph Domestic Merger Directive introduced by Art 2 Reporting and Documentation Directive.

[138] Art 11(3) Domestic Merger Directive.

[138a] Art 11(3), second subparagraph Domestic Merger Directive introduced by Art 2 Reporting and Documentation Directive.

[138b] Art 11(4), second subparagraph Domestic Merger Directive introduced by Art 2 Reporting and Documentation Directive.

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latter may inform their own respective general assemblies of shareholders of any material change in the assets and liabilities between the date of preparation of the common draft terms of merger and the date of the meetings of the general assemblies of shareholders to decide on the proposed merger.[138c] However, Member States may provide that this is not required if all the shareholders and the holders of other securities conferring the right to vote of each of the merging companies have so agreed.[138d]

1.75 A cross-border merger involving the public offering of shares and other securities to 150 persons or more may qualify as a public offering and require the publication of a prospectus under the Prospectus Directive.[139] However, Articles 4(1)(c) and 4(2)(d) Prospectus Directive provide exemptions from the prospectus obligation if securities are offered or allotted to the public or admitted to trading on a regulated market as a result of a merger, provided that a document is available containing information which the competent authorities consider equivalent to that of the prospectus. This exemption is subject to confirmation of the equivalence of the document by the competent supervisory authority of each Member State where securities are offered or allocated. A prospectus will be required in any relevant Member State whose supervisory authority decides that the proposed document is not equivalent to that of a prospectus.

(7) Approval of the merger

(a) Principle and exceptions

1.76 **(i) Principle** In principle, the decision to approve the merger at the level of each merging company[140] is taken at a meeting of the general assembly of shareholders.[141]

1.77 **(ii) Approval by a wholly owned subsidiary** However, in the case of a merger with a wholly owned subsidiary, the approval by the general assembly of shareholders of the wholly owned subsidiary being acquired is not required.[142] This is a welcome exception because of the lack of added value and the purely formalistic nature of a decision by a general assembly of shareholders of a company which is entirely controlled by the acquiring company.

1.78 Unfortunately, the CBMD does not specify whether or not the merger must be approved or formalized in another way at the level of the wholly owned subsidiary being acquired and, if it does, how this must be done. In our opinion, any other kind of approval would be as formalistic and artificial as the formal approval by the general assembly of shareholders. The *ratio legis* of this exception is that no (other) approval or formality should replace the approval by the general assembly of shareholders of the companies being acquired. Nevertheless, Member States could invoke Article 4(1)(b) CBMD and the lack of specific provisions governing this issue in the CBMD, to decide to replace the approval by the general assembly of shareholders of the companies being acquired by other approvals or formalities.

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[138c] Art 9(2) Domestic Merger Directive introduced by Art 2 Reporting and Documentation Directive.

[138d] Art 9(3) Domestic Merger Directive introduced by Art 2 Reporting and Documentation Directive.

[139] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (text with EEA relevance).

[140] In the context of a merger by the formation of a new company, no approval is required at the level of the new company to be formed for the purpose of being the acquiring company. See the definition of 'a merging company' in para 1.11.

[141] Sixth recital to the CBMD and Art 9 CBMD.

[142] Art 15(1) CBMD.

1.79 The CBMD also fails to indicate which other reference date, instead of the date of the general assembly of shareholders, should be used for calculating the one-month period (unless a longer period is imposed under national law) as from the publication of the common draft terms of merger and having informed shareholders and employees of the wholly owned subsidiary.[143] If the Member State concerned replaced the approval by the general assembly of shareholders by another approval,[144] this should be used as the reference date. If no other approval replaces the decision by the general assembly of shareholders, the reference date is the date at which the competent national authority scrutinizes the legality of the merger at the level of the wholly owned subsidiary with a view to delivering a pre-merger certificate.[145] This is indeed the deadline by which all rules and formalities, including the timing requirements, must have been complied with by the wholly owned subsidiary being acquired.

1.80 **(iii) Approval by the acquiring company** The Member States have the option not to require the approval of the general assembly of shareholders of the acquiring company if the conditions laid out in Article 8 Domestic Merger Directive are fulfilled.[146] These conditions are:

(a) the common draft terms of merger must have been published by the acquiring company at least one month before the date fixed for the meeting of the general assembly of shareholders of the companies being acquired convened to approve the merger; this publication must take place as provided for under Article 6 CBMD and Article 6 Domestic Merger Directive (the wording of both provisions is almost identical);[147]

(b) at least one month before the date fixed for the meeting of the general assembly of shareholders of the companies convened to approve the merger, the shareholders of the acquiring company must be entitled to inspect the documents listed under Article 11(1) Domestic Merger Directive[148] at the registered office of the acquiring company; these documents shall be prepared and made available in the manner described in Article 11(2), (3), and (4) Domestic Merger Directive; and

(c) one or more shareholders holding a minimum percentage of the subscribed capital of the acquiring company must be entitled to require that a meeting of the general assembly of shareholders of the acquiring company be called to approve the merger. Each Member State may decide about the minimum percentage that is required in order to require such meeting to be called. However, such minimum percentage may not be fixed at more than 5% of the subscribed capital. The Member State may provide for the exclusion of non-voting shares for the purpose of this calculation.

1.81 The exception described under paragraph 1.80 is, of course, again designed to simplify the approval procedure. Unfortunately, neither the CBMD nor the Domestic Merger Directive

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143 See paras 1.48 and 1.71–1.74.
144 See para 1.78.
145 See paras 1.96–1.100.
146 Art 9(3) CBMD.
147 See paras 1.48–1.53.
148 ie (i) the common draft terms of merger; (ii) the report of the company's management or administrative organ; (iii) if applicable the report of the independent expert(s); (iv) the annual accounts of all the merging companies for the last three financial years (including the annual reports of the management or administrative organs and the statutory auditors for these years); and (v) if the last annual accounts available relate to a financial year that ended more than six months before the date of the common draft terms of merger, an interim accounting statement as at a date not more than three months before the date of the common draft terms of merger.

specifies whether or not the merger must be approved and formalized in another manner at the level of the acquiring company and, if so, how this must be done. Again, in our opinion the *ratio legis* of this exception is that no (other) approval or formality should replace the approval by the general assembly of shareholders of the acquiring company. Nevertheless, Member States could again invoke Article 4(1)(b) CBMD and the lack of specific provision governing this issue in the CBMD to decide to replace the approval by the general assembly of shareholders of the acquiring company by other approvals or formalities.

1.82 **(iv) Combined application of the exceptions** As mentioned under paragraph 1.81, Article 8 Domestic Merger Directive uses the date of the general assembly of shareholders of the companies being acquired as the reference date for calculating the deadline for the publication of the common draft terms of merger and informing shareholders and employees at the level of the acquiring company. However, a combined application of (i) the exception applicable to mergers with a wholly owned subsidiary which does not require approval by the general assembly of shareholders of the company being acquired;[149] and (ii) the exception of Article 9(3) CBMD in conjunction with Article 8 Domestic Merger Directive[150] enables a merger without any approval by a general assembly of shareholders. This, of course, creates a practical difficulty because of the lack of a reference date as provided for under Article 8 Domestic Merger Directive.

1.83 Based on an application by analogy of Article 25 Domestic Merger Directive, arguably the date of the entry into effect of the merger should be used as the reference date.[151] However, the entry into effect of the merger may be at a later date than the date of the second verification of the legality of the merger.[152] As the authority scrutinizing the legality of the merger must verify and conclusively confirm compliance by the acquiring company with all rules and formalities, the date of the scrutiny at the level of the acquiring company (ie in principle the date of the second verification as described under paragraph 1.102) is a more appropriate reference date than the date of the merger's entry into effect.

(b) Timing

1.84 The meeting of the general assembly of shareholders convened to approve the merger cannot take place less than one month after the required common draft terms of merger, report(s), and information were published or made available to the shareholders and the employees.[153] The meeting shall decide whether or not to approve the merger 'after taking note of the reports' of the management or administrative organ and of the independent expert(s).[154]

(c) Form, quorum, and majority

1.85 The CBMD does not impose any rule regarding the required legal form (eg notarized deed), quorum, and majority for the approval of the merger by the general assembly of shareholders of each merging company. These are therefore determined by the national rules applicable to each merging company.[155] Member States are not authorized to impose stricter legal form,

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149 See paras 1.77–1.79.
150 See paras 1.80 and 1.81.
151 Beutel, see n 2, 197; Bernard, see n 36, 39.
152 See para 1.107.
153 See paras 1.48, 1.56, 1.62, and 1.71–1.74.
154 Art 9(1) CBMD.
155 Art 4(2) CBMD.

quorum, or majority requirements than in the context of a domestic merger.[156] This would be discrimination contrary to the freedom of establishment as interpreted in *Sevic*.

1.86 If the companies involved in the cross-border merger must apply merger rules harmonized by the Domestic Merger Directive, in principle the required majority approving the merger imposed by the Member States shall not be lower than two-thirds of the votes attaching either to the shares or to the subscribed capital represented.[157]

1.87 The CBMD does not deal either with the issue of the decision-making process in merging companies with several classes of shares. Again, the applicable rules shall be determined by a distributive application of the legal provisions of each Member States concerned,[158] on condition that they are not stricter than those applicable to domestic mergers. If the companies concerned are public limited liability companies, the decision concerning a merger shall be subject to a separate vote by at least each class of shareholders whose rights are affected by the transaction.[159]

(d) Content of the approval

1.88 In order for the merger to become effective, the general assembly of shareholders of each merging company[160] must approve the merger on the terms described in the common draft terms of merger.[161] It is unclear whether or not Article 9(1) CBMD enables the general assembly of shareholders to deviate from the common draft terms of merger. A literal interpretation of this provision seems to indicate that the general assembly of shareholders only has the choice between approving and rejecting the common draft terms of merger. This interpretation prevails in some Member States.[162] However, there are good arguments for defending the right of the general assembly of shareholders to validly decide to approve a merger on terms other than those proposed in the common draft terms of merger, provided that the merger will then only become effective if identical (amended) terms are also approved by all the other merging companies.[163] First, the common draft terms of merger is a proposal by the management or administrative organs of the merging companies to the general assemblies of shareholders. Considering that the general assemblies of shareholders of the merging companies are entitled to reject such a proposal, they should also be entitled to take a less drastic decision and amend its terms. Secondly, prohibiting the general assemblies of shareholders from approving a merger on different terms than provided under the common draft terms of merger would lead to the absurd situation that the burdensome merger procedure would have to be repeated in order to be able to approve a merger on different terms. This would be a very rigid and impractical way of handling changing circumstances,[164] especially

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[156] H De Wulf, *Grensoverschrijdende fusies na Sevic en de Tiende Richtlijn*, Working Paper Series—Financial Law Institute, Universiteit Gent, 2006, 13–14; Evrard and Van Der Vaeren, see n 2, 116.

[157] Art 7 Domestic Merger Directive which also provides for some exceptions.

[158] Bernard, see n 36, 38.

[159] Art 7(2) Domestic Merger Directive.

[160] With the exceptions described in paras 1.77–1.83.

[161] Art 9(1) CBMD.

[162] eg the Netherlands and Spain (see paras 13.73 and 15.67).

[163] M Wyckaert, 'Grensoverschrijdende fusies—De procedurele kant', in *Grensoverschrijdende fusies zijn een feit*, (Brussels, Vormingsinstituut Nederlandse Orde Advocaten Balie Brussel, 2009) 58 and 70; A Brohez and others, *Les réorganisations transfrontalières—Evolutions législatives récentes en droit des sociétés, droit social et droit fiscal*, (Waterloo, Kluwer, 2009) 46.

[164] These changing circumstances may, eg have an impact on the value of each merging company and, as a result, on the share exchange ratio which should be applied to the merger.

in view of the fact that the merger procedure may be very long, in particular if the employee participation procedure is applicable.[165] This interpretation prevails in several Member States.[166] However, it can only be applied provided that the laws of all Member States concerned accept this interpretation.

1.89 The general assembly of shareholders of each merging company may decide that the approval of the merger is under the condition precedent of the express ratification by it of the arrangements to be agreed with respect to the participation of employees[167] in the company resulting from the merger.[168]

(8) Employee participation

1.90 We refer to paragraphs 4.02 to 4.57 for a description of the employee participation procedure. The employee participation procedure must be completed before the merger can take effect.[169] We also refer to paragraph 1.89.

1.91 The CBMD is without prejudice to employees' rights other than rights of participation, in particular national rules relating to employees' rights harmonized by EU law.[170]

1.92 Member States have the option to provide that, if the existing provisions of the acquiring company's statutes conflict with employee participation arrangements agreed during the employee participation procedure, the management organ of the company concerned is authorized to amend them without the approval of the general assembly of shareholders.[171]

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(9) Verification of the legality of the merger

(a) Verification in two stages

1.93 As a result of the distributive application of national rules, it was not appropriate to delegate the full control of the legality of cross-border mergers to an international authority or to a national authority of one of the merging companies. Such authority would have to verify the legality of the application of national rules with which it is not familiar.

1.94 Therefore the European legislator organized the verification of the legality of the merger in two steps. The first verification is performed at the level of each merging company by the designated national authority. This first verification relates to that part of the procedure which concerns the merging company subject to its national law.[172] After the first verification has been successfully performed at the level of each merging company, the second verification can be performed by the designated national authority of the company resulting from the merger. This second verification must confirm that the merger has been duly completed,

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[165] Such obligation to repeat the whole procedure seems only justified if the changes to the terms of the merger are of such nature that the position of third parties (ie employees and creditors) is affected. In these circumstances, it seems justified to have to repeat the procedure as it is also designed to protect employees and creditors (and not only the shareholders).
[166] eg Belgium, France, Luxembourg, and Italy (with some limitations) (see paras 5.65, 7.61, and 11.76).
[167] See paras 4.02–4.57.
[168] Art 9(2) CBMD.
[169] Art 11(1) CBMD.
[170] Twelfth recital to the CBMD.
[171] Art 12(4) SE Regulation in conjunction with Art 16(3) CBMD.
[172] Seventh recital to the CBMD and Art 10(1) CBMD.

that is it has been approved under the same terms by all merging companies, and, if required, the employee participation procedure has been complied with.[173]

1.95 We will examine both verification stages in turn.

(b) Pre-merger verification

1.96 Each Member State shall designate the court, notary, or another competent authority who shall examine whether or not the merging companies which are subject to its national law complied with the national rules of procedure applicable to cross-border mergers.[174]

1.97 The competent national authority must verify the existence and the legality of all (pre-merger) acts and formalities to be fulfilled by the merging companies for which it must perform its pre-merger verification. Unfortunately, the CBMD does not specify whether this verification should be purely formal or whether it must also include a verification of the intrinsic legality of these acts and formalities. Undoubtedly, the competent authority must verify the external legality of the acts and formalities, ie whether or not all the formal requirements have been complied with.[175] It is less clear whether or not the designated authority should also verify the internal legality of the acts and formalities undertaken by the merging company concerned, ie whether all acts and formalities intrinsically comply with the legal requirements.[176] [177] If the competent authorities must verify the internal legality of acts and formalities, such verification will have to be limited. Indeed, to comprehensively verify the internal legality of acts and formalities would require very far-reaching investigations, including examining the true intentions of the parties. This is almost impossible for a third party to do. Therefore, if applicable, the verification of the internal legality by the authorities shall be limited to a prima facie verification which should not result in an irrefutable presumption of the internal legality of the acts and formalities.

1.98 Provided all those acts and formalities have been correctly fulfilled, the national authority must issue a so-called 'pre-merger certificate' attesting to the proper completion of the pre-merger acts and formalities.[178] Within six months of its issuance, the pre-merger certificate must be forwarded by each merging company to the competent authorities of the Member State where the company resulting from the merger is located.[179] If not all the acts and formalities have been correctly fulfilled, the designated national authority must refuse to issue a pre-merger certificate.

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1.99 However, no pre-merger certificate must be issued in relation to the company resulting from the merger as its decision-making process will be reviewed by the authority entrusted with the verification of the completion of the merger,[180] unless the meeting of the general assembly of

[173] Seventh recital to the CBMD and Art 11(1) CBMD.
[174] Seventh recital to the CBMD and Art 10(1) CBMD.
[175] eg to verify that the common draft terms of merger contains the required information and was duly approved and published, that the required reports were prepared and duly made available, that the timing requirements were complied with, that the meetings were validly convened, and that the decisions were taken with the required quorum and majority etc.
[176] eg to verify that no decision was taken through fraud or through an abuse of majority.
[177] According to Behrens (see n 18, 136), only a formal legality verification should be required under the CBMD. However, at least one Member State (Belgium) requires both external and internal legality verifications (see para 5.73).
[178] Art 10(2) CBMD.
[179] Art 11(2) CBMD.
[180] See paras 1.101–1.104.

shareholders decides upon the merger before the completion of the merger is verified by the authority.[181]

1.100 If the law of a Member State applicable to one of the merging companies has a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares, or to compensate minority shareholders, without preventing the registration of the merger, such procedure shall only apply if the other merging companies situated in other Member States which do not provide such a procedure, explicitly accept the possibility for the shareholders of that merging company to have recourse to such a procedure, to be initiated before the court having jurisdiction over that merging company.[182] The decision to allow recourse to such a procedure must be taken at the meeting of the general assembly of each merging company convened to approve the merger which is situated in a Member State which does not organize such a procedure. In these cases, the national authority which must perform the pre-merger verification may issue a pre-merger certificate even if such a procedure has commenced. The pre-merger certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the company resulting from the merger and all its shareholders. As a result of Article 10(3) CBMD, procedures to scrutinize and amend the ratio applicable to the exchange of securities or shares, or procedures to compensate minority shareholders can affect merging companies of Member States which have not introduced such procedures. In the case of a refusal by the general assembly of shareholders of such a merging company to recognize (the results of) such procedure when approving the merger, the competent authority of the Member State concerned in which such a procedure exists will probably refuse to deliver its pre-merger certificate as long as the procedure is pending. As a result, such refusal may have a significant impact on the timing of the merger.

(c) Second verification

1.101 As for the pre-merger verification, each Member State shall designate the court, notary, or other competent authority that shall scrutinize the legality of the completion of cross-border mergers.[183]

1.102 The second verification is performed by the designated national authority of the company resulting from the merger after all the pre-merger acts and formalities have been accomplished in each of the companies involved in the merger and after pre-merger certificates have been issued in relation to all merging companies (in some cases, except in relation to the acquring companies; see para 1.33).[184] The designated authority must scrutinize the legality of the completion procedure of the cross-border merger and, if applicable, the formation of the new company resulting from the merger.[185] In particular, it must check that all the merging companies have approved the common draft terms of merger in the same terms (or, if applicable and authorized, the same amended terms) and that, if applicable, the arrangements

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[181] Van Gerven, see n 19, 19.
[182] Art 10(3) CBMD.
[183] Seventh recital to the CBMD and Art 11(1) CBMD.
[184] Art 11(1) CBMD.
[185] The questions and comments in para 1.97 concerning the nature of the control also apply in relation to the second verification.

relating to the participation of employees[186] have been determined in conformity with (the national rules implementing) Article 16 CBMD.

1.103 Before performing the second verification, the competent authority must receive the pre-merger certificates delivered by the competent authorities of the Member States where the (other) merging companies are located and the common draft terms of merger approved by the general assembly of shareholders (with the exceptions described under paragraphs 1.77 to 1.81) of each merging company.[187]

1.104 Provided the second verification is affirmative, the national authority who performed it must acknowledge the completion of the cross-border merger in the manner imposed by its national law.

(10) Language requirements

1.105 The CBMD does not impose any specific rules regarding the use of language in the context of a cross-border merger. As a result, any language requirements are governed by the national law of each merging company. However, the language requirements imposed by the national authorities may not be stricter than for domestic mergers.

D. Entry into Effect and Consequences of the Merger

(1) Entry into effect

1.106 The merging companies may determine the date as from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the merger.[188] This is the merger date from an accounting point of view only and not from a legal point of view. Of course, the merger from an accounting point of view is subject to the merger effectively being completed and taking effect from a legal point of view.

1.107 The law of the Member State of the company resulting from the merger determines the date on which the cross-border merger takes effect from a legal point of view. This must not be earlier than the date of the second verification (provided it is conclusive) by the competent authority of the *lex societatis* of the company resulting from the merger.[189]

(2) Consequences of the merger

1.108 The entry into force of the merger has the following consequences:

- all the assets, rights, obligations, and liabilities of the companies being acquired are transferred by the operation of the law to the company resulting from the merger;[190] although this transfer is in principle effective against third parties, the laws of the Member States may require the completion of special formalities before the transfer of certain assets,

[186] For a description of the rules regarding employee participation, see paras 4.02–4.57.
[187] Art 11(2) CBMD.
[188] Art 5(f) CBMD.
[189] Seventh recital to the CBMD and Art 12 CBMD.
[190] Art 14(1)(a) and (2)(a) CBMD.

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rights, and obligations becomes effective against third parties; these special formalities must be accomplished by the company resulting from the merger;[191]

- unless in the context of a merger with a wholly owned subsidiary, the shareholders of the company being acquired become shareholders of the company resulting from the merger;[192]
- the companies being acquired cease to exist,[193] ie they are dissolved without liquidation by the operation of the law;
- the existing rights and obligations of the merging companies arising from employment contracts or relationships are transferred to the company resulting from the merger; the formalities relating to the transfer of the employees must be accomplished by the company resulting from the merger;[194]
- although this is not expressly confirmed by the CBMD, obviously a new company is formed if the merger is a merger by the formation of a new company; and
- although this is not dealt with by the CBMD, the dissolution of the companies being acquired may result in the creation of branches of the company resulting from the merger in the Member States where the companies being acquired were located.[195]

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E. Simplified Merger Procedures

(1) Merger with a wholly owned subsidiary

1.109 A simplified merger procedure applies in the case of a merger between a company and another company in which it holds all the shares and other securities conferring the right to vote at meetings of the general assembly of shareholders of the company being acquired (ie a so-called 'wholly owned subsidiary').[196]

1.110 As all shares and securities in the company being acquired are owned by the acquiring company, the latter cannot issue shares in the context of their merger because this would entail the issuance of shares and securities in its own favour. The lack of issuance of new shares by the company resulting from the merger enables a simplification of the procedure.

1.111 The simplified merger procedure applicable in the case of a merger with a wholly owned subsidiary includes the following differences compared with the standard merger procedure:

- the common draft terms of merger must not include (i) the ratio applicable to the exchange of securities or shares and the amount of any cash payment, (ii) the terms of the allotment of these securities or shares, and (iii) the date from which the holding of such securities or shares will entitle their holders to share in profits;[197]

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[191] Art 14(3) CBMD.
[192] Art 14(1)(b) and (2)(b) CBMD; note the exceptions described in paras 1.116 and 1.117.
[193] Art 14(1)(c) and (2)(c) CBMD.
[194] Art 14(4) CBMD in fact merely confirms the rules provided for in Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
[195] See paras 1.118 and 1.119.
[196] Arts 2(2)(c) and 15(1) CBMD.
[197] See para 1.45.

- no independent expert report is required;[198]
- no meeting of the general assembly of shareholders of the wholly owned subsidiary being acquired is required to approve the merger;[199] and
- no shares shall be issued by the acquiring company and the shareholder of the wholly owned subsidiary being acquired (ie the acquiring company itself) shall not become a shareholder of the acquiring company.[200]

(2) **Merger with a 90% subsidiary**

1.112 Member States have the option of providing that, in the case of a merger between a company and a company in which the latter owns at least 90% but less than 100% of the shares and other securities conferring the right to vote at meetings of the general assembly of shareholders, an independent expert report[201] and the 'documents necessary for scrutiny' shall not be required.[202] The precise meaning of the 'documents necessary for scrutiny' is unclear. The word 'scrutiny' most probably refers to the scrutiny of the legality of the merger.[203] [204] The 'documents necessary for scrutiny' are therefore the documents which must be provided by the merging companies to the competent authorities in order for them to scrutinize the legality of the merger. At first sight, for companies which are within the scope of domestic merger rules harmonized by the Domestic Merger Directive, this should at least include the documents referred to under Article 24 Domestic Merger Directive, that is the management report and the independent expert report.[205] However, as indicated in paragraph 1.58 and footnote 115, a management report must also be drafted in the context of a simplified merger. Arguably, the 'documents necessary for scrutiny' may additionally include the annual accounts and the annual management reports of the merging companies for the three preceding financial years as well as the interim accounting statement as referred to under Article 28 Domestic Merger Directive in conjunction with Article 11 Domestic Merger Directive. However, this is uncertain unless the conditions imposed by Article 28 Domestic Merger Directive are fulfilled (although this is not specified in Article 15(2) CBMD). Therefore, the expression 'documents necessary for scrutiny' should refer (i) to the independent expert report; (ii) to the annual accounts and the annual management reports of the merging companies for the three preceding financial years as well as the interim accounting statement, provided the conditions imposed by Article 28 Domestic Merger Directive are fulfilled; and (iii) to any document which national law (but not the CBMD or the Domestic Merger Directive) would impose to file with the competent authorities in order for them to scrutinize the legality of the merger. Moreover, this does not entitle Member States to exclude the pre-merger certificate or the documents required in order to verify the proper completion of the merger and which are required in the context of the second verification.[206] This exception only applies if all the Member States concerned have opted to apply it. To the extent that any of the Member States governing the merging companies has not decided that an

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[198] See para 1.69.
[199] See para 1.77.
[200] See para 1.108.
[201] See para 1.70.
[202] Art 15(2) CBMD.
[203] See paras 1.93–1.104.
[204] Van Gerven, see n 19, 24.
[205] Art 15(2) CBMD expressly confirms that the independent expert report is not required.
[206] Van Gerven, see n 19, 24.

independent expert report or the 'documents necessary for scrutiny' are not required in the context of such merger, they are required.

1.112a In addition, in relation to public limited liability companies (and other companies to which the national rules implementing the Domestic Merger Directive apply), Member States are no longer entitled to require the approval of the merger by the general assembly of shareholders of the acquiring company if (almost) identical conditions as those laid out in Article 8 Domestic Merger Directive are fulfilled (see paragraph 1.80).[206a] While the implementation of Article 8 Domestic Merger Directive remains optional for Member States, the waiver of the approval is not optional in the context of a merger with a 90% subsidiary, provided the conditions are fulfilled.

F. Post-Merger Formalities

(1) Publications and deregistration

1.113 Each Member State shall determine how the completion of the merger shall be publicized in its jurisdiction, provided that this is in accordance with Article 3 Publicity Directive.[207] This applies to both the Member State where the company resulting from the merger is situated and the Member States where the companies being acquired were situated.

1.114 The registry responsible for the registration of the company resulting from the merger must notify without delay the registry in which each of the companies being acquired was required to file documents that the merger has taken effect. Deletion of the old registration, if applicable, must not take place before receipt of that notification.[208] These provisions clearly indicate that the registry of the companies being acquired shall be directly informed about the completion of the merger by the registry of the company resulting from the merger and shall act accordingly thereafter. Member States should not require any of their own national authorities to (re)confirm completion of the merger before the registry can register such completion and deregister companies being acquired.

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(2) Issuance of shares

1.115 Unless in the context of a merger with a wholly owned subsidiary, the company resulting from the merger must issue shares in favour of the former shareholders of the company being acquired. National law shall determine in which manner the shares issued by the company resulting from the merger are allocated between the shareholders of the companies being acquired and which company organ shall be responsible for performing this allocation.

1.116 No shares of the company resulting from the merger shall be granted in exchange for shares in the company being acquired which are held either:

- by the company resulting from the merger itself or through a person acting in his or her own name but on its behalf; or
- by the company being acquired itself or through a person acting in his or her own name but on its behalf.[209]

[206a] Art 27 Domestic Merger Directive as amended by Art 2 Reporting and Documentation Directive.
[207] Art 13(1) CBMD.
[208] Art 13(2) CBMD.
[209] Art 14(5) CBMD.

1.117 The purpose of these limitations is to avoid the acquisition by a company of its own shares without complying with the rules and limitations of Articles 19 *et seq* of the Second Council Directive.

(3) **Opening of branch offices**

1.118 As a result of the transfer of all assets and liabilities of the companies being acquired to the company resulting from the merger, the latter will often have a 'presence' in the Member State(s) where the companies being acquired were situated.

1.119 Such 'presence' in other Member States may have to be made official through the formal opening and registration of branch offices in these Member States.

G. Protection of Minority Shareholders

1.120 The Member States have the option of adopting provisions specifically designed to ensure appropriate protection for any minority shareholders who oppose a cross-border merger.[210] This protection should not be stronger than in the context of a domestic merger.[211]

1.121 If arrangements for the exercise of the rights of the minority shareholders of any merging company exist, these arrangements and the address at which complete information on these arrangements may be obtained free of charge must be published in the national gazettes of the Member States concerned.[212]

1.122 Such arrangements to protect minority shareholders may, for example, include a procedure to scrutinize and amend the ratio applicable to the exchange of securities or shares or a procedure to compensate minority shareholders.[213] We refer to paragraph 1.100 for a description of the voluntary submission to such foreign procedures for the protection of minority shareholders and the impact on the timing of the merger of a refusal to do so.

H. Protection of Creditors

1.123 The Member States also have the option of adopting provisions for the protection of the creditors, debenture holders, and holders, of non-equity securities of the merging companies.[214] Member States are not entitled to adopt provisions for the protection of the creditors, debenture holders, and holders of non-equity securities which are more protective than in the context of domestic mergers.[215]

1.124 If arrangements are made for the exercise of the rights of creditors of any merging company, these arrangements and the address at which complete information on these arrangements may be obtained free of charge must be published.[216] If measures are proposed or rights are conferred by the company resulting from the merger to debenture holders or holders of

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[210] Art 4(2) CBMD.
[211] Behrens, see n 18, 165.
[212] Art 6(2)(c) CBMD; see para 1.52.
[213] Art 10(3) CBMD.
[214] Art 4(2) CBMD.
[215] Bayer and Schmidt, see n 44, 405; Behrens, see n 18, 174–6; Bernard, see n 36, 51–2.
[216] Art 6(2)(c) CBMD; see para 1.52.

non-equity securities, these measures or rights must be specified in the common draft terms of merger.[217]

1.125 Specific protection must in any case be provided for the creditors and debenture holders of public limited liability companies and any other companies in relation to which the relevant Member States decided to harmonize domestic mergers as provided under the Domestic Merger Directive.[218] These safeguards are only to be granted to creditors whose claims predate the publication of the common draft terms of merger and have not fallen due at the time of such publication. These protections may be different for the creditors of the acquiring company and for those of the company being acquired.[219] No protection shall apply in relation to debenture holders if the merger has been approved by a meeting of debenture holders, if such meeting is provided for under national law, or by the debenture holders individually.[220]

1.126 The CBMD does not include any provision regarding the protection of holders of securities, other than shares, to which special rights are attached.[221] Member States may introduce provisions in their national law in this respect. Holders of securities in companies which are subject to the Domestic Merger Directive must be given rights in the company resulting from the merger which are at least equivalent to those possessed in the company being acquired. This is unless the alteration of those rights has been approved by a meeting of the holders of such securities, if such meeting is provided for under national law, or by the holders of securities individually, or unless the holders are entitled to have their securities repurchased by the company resulting from the merger.[222]

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I. Nullity, Liabilities, and Criminal Sanctions

(1) Nullity

1.127 A cross-border merger which has taken effect cannot be declared null and void.[223] This is in the interest of legal certainty.[224] However this should not preclude starting, before the merger takes effect, legal proceedings against acts accomplished in the preparation of the merger.

(2) Liabilities

1.128 In the case of breaches of the law or the provisions of a merging company's statutes in the context of a cross-border merger which has taken effect, the injured parties have no other recourse than claiming damages from the company resulting from the merger, the directors of the merging companies, the independent experts or the relevant authorities which scrutinized the legality of the merger. The CBMD does not deal with any liability issues in relation to cross-border mergers. Therefore these issues must be dealt with by the Member States.

[217] Art 5(g) CBMD.
[218] Arts 13 and 14 Domestic Merger Directive.
[219] Art 13(3) Domestic Merger Directive.
[220] Art 14 Domestic Merger Directive.
[221] eg holders of warrants.
[222] Art 15 Domestic Merger Directive.
[223] Art 17 CBMD; this is a major difference with Art 22 Domestic Merger Directive which enables domestic mergers to be declared null and void under certain conditions.
[224] Eighth recital to the CBMD.

1.129 Article 20 Domestic Merger Directive expressly compels the Member States to lay down rules governing the civil liability towards the shareholders of the company being acquired of the members of the management or administrative organs of that company in respect of misconduct on the part of these members in preparing and implementing the merger. Likewise, Article 21 Domestic Merger Directive provides that the Member States must lay down rules governing the civil liability towards the shareholders of the company being acquired of the experts responsible for drawing up the expert report for that company in respect of misconduct on the part of the experts in the performance of their duties. Unless a Member State has introduced specific civil liability rules in the context of cross-border mergers, the national legal provisions implementing Articles 20 and 21 Domestic Merger Directive should apply in the context of cross-border mergers under the CBMD involving public limited liability companies.

(3) **Criminal sanctions**

1.130 The CBMD does not include any provision regarding criminal sanctions. However, Member States are free to impose criminal sanctions in the case of breaches of their national rules implementing the CBMD or the Domestic Merger Directive.

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